UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic JUSTIN M. ROSADO
United States Air Force

ACM S31555

09 June 2009

Sentence adjudged 17 June 2008 by SPCM convened at United States Air Force Academy, Colorado. Military Judge: Ronald A. Gregory (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of two-thirds pay per month for 6 months, and $1000.00 fine.

Appellate Counsel for the Appellant: Major Michael A. Burnat, Major Lance J. Wood, and Captain Phillip Korman.

Appellate Counsel for the United States: Major Jeremy S. Weber, Major Kimani R. Eason, and Gerald R. Bruce, Esquire.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with his pleas, the appellant was found guilty of one specification of violating a lawful order, one specification of dereliction of duty, four specifications of making a false official statement, seven specifications of larceny,[1] and one specification of soliciting another to commit an offense, in violation of Articles 92, 107, 121 and 134,

[1] The appellant pled guilty by exceptions and substitutions to two of the seven specifications of larceny under Charge III. He did not plead guilty to stealing all of the alleged items. However, the government put on evidence to prove that the appellant stole all of the items charged. The appellant was found guilty by the military judge of stealing all but one of the items alleged in Specification 6 of Charge III and all of the items alleged in Specification 7 of Charge III.

UCMJ, 10 U.S.C. §§ 892, 907, 921, 934. Contrary to his pleas, the appellant was found guilty of two additional specifications of making a false official statement, in violation of Article 107, UCMJ. The approved sentence consists of a bad-conduct discharge, confinement for six months, forfeiture of two-thirds pay per month for six months, and a fine of $1,000.00.[2]

The issue on appeal, raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), is whether the portion of the appellant's sentence which includes a bad-conduct discharge is inappropriately severe.[3]

Background

On 29 March 2008, the appellant informed Airman First Class (A1C) DB, a member of the 10th Security Forces Squadron (10 SFS), United States Air Force Academy (USAFA), Colorado, that he had stolen gasoline from the transportation fuel yard at USAFA on two previous occasions. In response, A1C DB informed his supervisor and Investigator KC of 10 SFS. A1C DB then assisted in the investigation of the gasoline theft by calling the appellant and asking him to meet at the transportation fuel yard that night.

The appellant met A1C DB at the fuel yard and they began to open the gate to the yard using a remote controlled gate opener. The appellant had his privately-owned vehicle with him. While the gate was opening, it became stuck and a siren sounded. The appellant drove away while A1C DB informed his supervisor that the gate was stuck. When A1C DB returned to the fuel yard, the appellant was waiting at the entrance attempting to physically open the gate. Eventually, the gate opened enough so that the appellant could drive his vehicle through the gate. The appellant drove to one of the pumps and began dispensing fuel into his vehicle. After he finished pumping gas, the appellant and A1C DB, who was in a government-owned vehicle, exited the fuel yard, where they were apprehended and placed in the back seat of a Security Forces patrol vehicle. While sitting in the back seat, the appellant solicited A1C DB to tell the investigators that he was "only helping A1C [DB] open the gate and that's it."

When the appellant was apprehended on 29 March 2008, he was wearing a pair of Nike sunglasses. Upon being questioned about where he purchased the sunglasses, the appellant admitted that he had stolen them from the Lackland Air Force Base (AFB) Base Exchange (BX). Investigator KC obtained consent to search the appellant's dorm room and vehicle. Upon searching the appellant's dorm room, Investigator KC and the

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[2] The military judge also awarded the appellant 80 days of credit for restriction tantamount to confinement, pursuant to *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985).

[3] We note that the court-martial order (CMO), dated 22 September 2008, incorrectly states the sentence to include "forfeiture of $898.00 for 6 months." The adjudged forfeitures were actually two-thirds of his pay for 6 months. We order the promulgation of a corrected CMO.

appellant went through every item in his room to determine which items had been stolen. All of the stolen items were placed in suitcases that the appellant had also stolen.

The investigation revealed how and where the appellant acquired the stolen items. He was at Basic Military Training and Security Forces Technical School at Lackland AFB from 14 August 2007 to 25 January 2008. During this period, he stole approximately 40 items from the Lackland AFB BX. The appellant also stole numerous items from the Lackland AFB Shoppette. The appellant further pled guilty to stealing a few items from the Lackland AFB Military Clothing Sales store and a pair of ABU boots at the Kel-Lac Uniform store just outside Lackland AFB.

The appellant arrived at USAFA in January 2008. Between 25 January 2008 and 29 March 2008, the appellant stole a few small items from a local Wal-Mart store and a pair of gloves from Dick's Sporting Goods. He also stole the gas mentioned above from the USAFA transportation fuel yard. In total, the appellant stole approximately 70 items of merchandise.

The false official statement charges stem from statements the appellant made to Investigator KC on the evening of 29 March 2008. After conducting a search of the appellant's dorm room, Investigator KC began to question the appellant about some items found in his dormitory room. The appellant told Investigator KC that he had purchased or received as gifts certain items that he had actually stolen. Additionally, he told Investigator KC that he was only trying to help A1C DB through the gate at the fuel yard because it was not working and that he did not intend to steal gas before arriving at the fuel yard, which was untrue. The appellant also stated that he had only stolen gas once before, when in fact he had stolen gas on two previous occasions.

The appellant also violated an order from his commander not to wear his Security Forces beret. On 28 February 2008, the appellant was relieved of his duties and, as a result, instructed by his commander not to wear his beret.[4] On 28 March 2008, the appellant was in his dormitory and decided to wear his beret. Additionally, during the search of his room, the investigators found a bottle of rum. At the time of the search, the appellant was under the age of 21 and did not have authority to possess the alcohol.

Inappropriately Severe Sentence

The appellant asserts that the portion of his sentence which includes a bad-conduct discharge is inappropriately severe. We disagree.

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[4] The appellant was relieved of duty pursuant to a standing policy when, on 28 February 2008, he received nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, for additional thefts from the United States Air Force Academy Base Exchage.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006) (citing *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *Healy*, 26 M.J. at 395-96.

The maximum punishment in this case was the jurisdictional limit for a special court-martial, which includes a maximum of 12 months confinement and a bad-conduct discharge. The appellant's approved sentence was a bad-conduct discharge, confinement for six months, forfeiture of two-thirds pay per month for six months, and a fine of $1,000. Having given individualized consideration to this particular appellant, the nature of the offenses, which includes larceny of approximately 70 items of merchandise, the appellant's record of service, and all other matters in the record of trial, we hold that the approved sentence, which includes a bad-conduct discharge, is not inappropriately severe.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court