

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman Basic BRANDON T. ROSE
United States Air Force**

ACM 36508 (rem)

09 March 2011

Sentence adjudged 11 October 2005 by GCM convened at Scott Air Force Base, Illinois. Military Judge: David F. Brash (sitting alone) and Jennifer Whittier (*DuBay* hearing).

Approved sentence: Dishonorable discharge and confinement for 20 months.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford, Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Major Michael A. Burnat, Major John S. Fredland, Major Michael S. Kerr, Major Imelda L. Paredes, and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen, Colonel Douglas P. Cordova, Lieutenant Colonel Matthew S. Ward, Lieutenant Colonel Jeremy S. Weber, Major Coretta E. Gray, Major Jefferson E. McBride, Major Naomi N. Porterfield, and Gerald R. Bruce, Esquire.

En banc

**BRAND, ORR, GREGORY, ROAN and WEISS
Appellate Military Judges**

**OPINION OF THE COURT
UPON REMAND**

This opinion is subject to editorial correction before final release.

GREGORY, Senior Judge:

In our en banc decision following the first remand of this case to reconsider the issue of ineffective assistance of counsel, a majority again found ineffective assistance of counsel and set aside the findings of guilty of specifications 1, 2, and 3 of Charge V. Understanding our authority upon the first remand as limited to those specifications in Charge V, we addressed the remaining charges and specifications by summarily referring to our earlier decision in which the findings on the remaining charges were affirmed. Our superior court has clarified that we should act on the remaining charges and the sentence. *United States v. Rose*, No. 09-5003/AF (C.A.A.F. 9 Nov 2010) (mem.)

Consistent with our initial decision, we dismiss specifications 1, 2, and 3 of Charge V and affirm the remaining findings of guilty. Based on our dismissal of the three indecent assault specifications, we next analyze the case to determine whether we can reassess the sentence. See *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002). Before reassessing a sentence, this Court must be confident “that, absent any error, the sentence adjudged would have been of at least a certain severity.” *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). A “dramatic change in the ‘penalty landscape’” gravitates away from our ability to reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). Ultimately, a sentence can be reassessed only if we “confidently can discern the extent of the error’s effect on the sentencing authority’s decision.” *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991). In *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000), our superior court decided that if the appellate court “cannot determine that the sentence would have been at least of a certain magnitude,” it must order a rehearing. *Id.* (citing *United States v. Poole*, 26 M.J. 272, 274 (C.M.A. 1988)).

For the remaining affirmed findings of guilty of multiple larcenies, attempted larceny, unlawful entry to commit larceny, forgery, obstruction of justice, drunk driving, and violation of a lawful order, the appellant still faced a maximum punishment of a dishonorable discharge and confinement for 26 years. Considering the evidence in the record, we are confident that the military judge would have imposed at least a dishonorable discharge and confinement for 17 months for these remaining offenses, and we reassess the sentence accordingly. This reassessed sentence is appropriate for the affirmed findings of guilty and purges the prejudicial error. *Sales*, 22 M.J. at 307-08; see *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990) (appellate court must put itself “in the shoes” of the sentencing authority when reassessing the sentence).

Conclusion

Specifications 1, 2, and 3 of Charge V are dismissed. The remaining findings and sentence, as reassessed to a dishonorable discharge and confinement for 17 months, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant

occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the remaining findings and sentence, as reassessed, are

AFFIRMED.

Judge Roan did not participate.

OFFICIAL



A handwritten signature in blue ink, appearing to read "S. Lucas", is written over a faint, light blue circular stamp or watermark.

STEVEN LUCAS
Clerk of the Court