UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class GEOFFREY D. WELSH
United States Air Force

ACM 34964

28 May 2004

Sentence adjudged 13 October 2001 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Mark R. Ruppert.

Approved sentence: Bad-conduct discharge, confinement for 8 months, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Patricia A. McHugh, and Captain James M. Winner.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Shannon J. Kennedy.

Before

STONE, MOODY, and JOHNSON
Appellate Military Judges

OPINION OF THE COURT

STONE, Senior Judge:

The appellant was tried by a general court-martial at Nellis Air Force Base, Nevada. Contrary to his pleas, a panel of officer and enlisted members convicted him of multiple drug offenses involving 3, 4-methylenedioxymethamphetamine (commonly referred to as ecstasy), in violation of Articles 80 and 112a, UCMJ, 10 U.S.C. §§ 880, 912a. Additionally, contrary to his pleas, he was convicted of wrongfully endeavoring to impede an investigation, in violation of Article 134, UCMJ, 10 U.S.C. § 934. He was found not guilty of knowingly making a false official statement. The court members sentenced him to a bad-conduct discharge, confinement for 8 months, forfeiture of all pay and allowances, reduction to E-1, and a reprimand. The convening authority approved the adjudged sentence.

I. Factual and Legal Sufficiency

The appellant's first issue on appeal is whether the evidence is legally and factually sufficient to support his conviction on any of the offenses. We find merit to the appellant's argument only as it applies to the Specification of Charge I and Specification 3 of Charge III.

We are guided in this analysis by our statutory mandate found in Article 66(c), UCMJ, 10 U.S.C. § 866(c), and the decisions of our superior courts. We may affirm only those findings of guilty that we find are correct in law and fact and determine, on the basis of the entire record, should be approved. Article 66(c), UCMJ.

The test for legal sufficiency is whether any rational trier of fact, when viewing the evidence in the light most favorable to the government, could have found the appellant guilty of all essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

In conducting our unique appellate role of reviewing "de novo" for factual sufficiency, we may recognize that the trial court "saw and heard" the witnesses. Article 66(c), UCMJ, 10 U.S.C. § 866(c). Applying this standard and after weighing the evidence from the entire record of trial, we must ourselves be convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). In doing so, we take a fresh, impartial look at the evidence, apply neither a presumption of innocence nor a presumption of guilt, and make our own independent determination as to whether the evidence constitutes proof of each element beyond a reasonable doubt. *United States v. Washington*, 57 M.J. 394 (C.A.A.F. 2002).

The court members in this case excepted "on divers occasions" language from two of the specifications. After action was taken and briefs were submitted, our superior court decided *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003). This case addresses the concerns that arise whenever there is a general verdict. Specifically, the decision focused on cases involving a finding by exceptions that removes language alleging wrongful conduct "on divers occasions." In *Walters*, our superior court held that a military judge must instruct the members that any finding removing the "on divers occasions" language from a specification "must clearly reflect the specific instance of conduct upon which [the court members'] modified findings are based." *Id*. at 396. *See also United States v. King*, 50 M.J. 686 (A.F. Ct. Crim. App. 1999) (en banc). If, contrary to these instructions (or, as in this case, because the military judge failed to give them) the members do not reflect a specific instance of conduct in their findings, the

military judge is obligated to "secure clarification" of the findings prior to their announcement, pursuant to Rule for Courts-Martial 921(d). *Walters*, 58 M.J. at 397.

The *Walters* decision affects two of the specifications: (1) Charge I and its Specification, which alleged an attempt to distribute ecstasy to Airman First Class Gamez on divers occasions, and (2) Specification 3 of Charge III, which alleged wrongful use of ecstasy on divers occasions. The military judge did not provide a complete explanation of how to except "on divers occasions" and substitute more specific wrongful conduct. Nor did he clarify the ambiguity created by this finding. Because it is impossible to discern from the record what specific misconduct the court members found the appellant not guilty of, this Court is unable to conduct a factual sufficiency review pursuant to Article 66(c), UCMJ. Consequently, under the rationale set forth by our superior court in *Walters*, the appellant's right to a proper Article 66(c), UCMJ, review is materially prejudiced. *Id*. *See* Article 59(a), UCMJ, 10 U.S.C. § 859(a).

Accordingly, Charge I and its Specification and Specification 3 of Charge III are set aside. Additionally, we hold that under the circumstances of this case, Charge I and its Specification and Specification 3 of Charge III should be dismissed rather than be sent back for proceedings in revision. The findings are affirmed in all other respects. We now consider the matter of whether we should reassess the sentence or order a rehearing on sentence. *See Jackson v. Taylor*, 353 U.S. 569 (1957); *United States v. Mason*, 59 M.J. 139 (C.A.A.F. 2003). We are confident we can reassess the sentence without need to order a rehearing.

We accomplish sentence reassessment by "putting ourselves in the shoes of the sentencing authority" and discerning "the extent of the error's effect on the sentencing authority's decision." *King*, 50 M.J. at 688 (citing *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991)). "To do so, we [may] only consider the evidence that was [properly] before the sentencing authority at trial." *Id*. After we reassess the sentence, we must consider the entire record and the allied papers to determine whether the sentence is appropriate. *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990).

The affirmed findings include distribution of ecstasy on one occasion to an undercover agent, possession of ecstasy on divers occasions, and endeavoring to impede an investigation. Based upon the remaining offenses, we are confident we can reliably determine a sentence that is no higher than what would have been imposed at the trial level, absent the prejudicial error. *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000).

In exercising our Article 66(c), UCMJ, authority, we find the record is adequate to permit a reliable reassessment. *Cf. United States v. Doss*, 57 M.J. 182 (C.A.A.F. 2002). In this regard, we note that even in the absence of two of the drug specifications, the appellant would have been motivated to present substantially the same evidence in

mitigation and extenuation. Similarly, the purging of the defective specifications would not have significantly affected the government's sentencing case. Finally, we note that even though the maximum confinement for the remaining offenses is 25 years rather than 45 years, this difference is not so vastly disparate that it significantly altered the penalty landscape placed before the panel members.

We are confident that absent the error, the court members would have imposed a punitive discharge, confinement, and reduction in grade. Nonetheless, in an abundance of caution, we approve only so much of the sentence as provides for a bad-conduct discharge and reduction to E-1. We hold that the reassessed sentence is no higher than that which would have been adjudged absent the error. Article 59(a), UCMJ. We further hold that the sentence, as reassessed, is appropriate. Article 66(c), UCMJ.

II. Improper Testimony

We have considered the appellant's remaining assignment of error and find it to be without merit. To the extent the trial counsel elicited improper testimony commenting on the credibility of the appellant, the military judge cured the error by promptly instructing the court members to disregard it. The court members' finding that the appellant was not guilty of making a false official statement strongly suggests that they followed the military judge's instruction. We are further convinced that this testimony posed no reasonable risk of spillover to the remaining offenses.

III. Conclusion

The findings, as modified, and the sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *Reed*, 54 M.J. at 41. Accordingly, the approved findings and sentence are

AFFIRMED.

JOHNSON, Judge (concurring in part and dissenting in part):

I concur with the majority's decision and rationale to dismiss Charge I and its Specification and Specification 3 of Charge III. Furthermore, I agree that the appellant's second assignment of error concerning the "human lie detector" testimony is without merit. Finally, although I agree that a sentence reassessment is now proper, I believe a sentence rehearing is most appropriate. Accordingly, I must dissent.

To properly reassess a sentence, we must confidently discern "the extent of the error's effect on the sentencing authority's decision" and put "ourselves in the shoes of the sentencing authority." *King*, 50 M.J. at 688. Furthermore, we must assure that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed. *Sales*, 22 M.J. at 307. In light of the facts in this case, it is difficult to know how the dismissal of two drug specifications would have affected the officer and enlisted members' decision concerning this appellant's sentence.

OFFICIAL

LAQUITTA J. SMITH
Documents Examiner