UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JEREMY E. WINGNESS
United States Air Force

ACM 36186

16 June 2006

Sentence adjudged 22 October 2004 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: Jack L. Anderson.

Approved sentence: Bad-conduct discharge, confinement for 12 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Lieutenant Colonel Andrew S. Williams and Captain Kimberly A. Quedensley.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Steven R. Kaufman.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

JACOBSON, Judge:

The appellant was convicted, contrary to his pleas, of conspiring to commit the crimes of forgery and larceny, disobeying a lawful order, making false official statements, larceny, forgery with intent to defraud, and perjury, in violation of Articles 81, 90, 107, 121, 123, and 131, UCMJ, 10 U.S.C. §§ 881, 890, 907, 921, 923, 931. A general court-martial composed of officer members sentenced the appellant to a bad-conduct discharge, confinement for 12 months, and reduction to E-1. The convening authority approved the findings and sentence as adjudged. On appeal, the appellant raises one error, averring that the trial counsel erred by improperly using the appellant's duty

status as an aggravating factor during sentencing argument. Finding error, we reassess the appellant's sentence.

Background

On 1 August 2003, the appellant and his friend, Airman First Class (A1C) Chase Diebel, came into possession of an Automated Teller Machine (ATM) card that was not their own. They then conspired to fraudulently purchase merchandise using the card. After making their initial purchase, the two were quickly apprehended by Air Force Security Forces personnel. Even more quickly, the appellant denied all knowledge of any wrongdoing and attempted to cast all blame on A1C Diebel. His attempt to escape responsibility for his part in the conspiracy was unsuccessful in that it eventually led to convictions for not only conspiracy, forgery, and larceny, but for his false statements to investigators and prosecutors, and for his perjured testimony during the trial of A1C Diebel.

The appellant was assigned to the 341st Missile Security Forces Squadron at Malmstrom Air Force Base, Montana, and possessed the duty title of "Response Force Member," during the course of all the above-described events. However, the record reflects that approximately five months prior to 1 August 2003, the appellant had been placed in "X-Ray Flight," a subunit of the squadron reserved for members facing discharge or other adverse actions. In fact, the evidence showed that the appellant and A1C Diebel were taking a break from their X-Ray Flight responsibilities when they came upon the ATM card and committed their initial crimes that day. There is no indication in the record that the appellant used his status as a security forces member to further the commission of the crime. In fact, the appellant and A1C Diebel removed their Battle Dress Uniform blouses prior to entering the store from which they made their fraudulent purchase, apparently so they could not be identified by the proprietor. Thus, any uniform designations indicating the appellant's status as a security forces member were absent during the commission of the offense.

Despite the appellant's tenuous attachment to status as a security forces member, the trial counsel, during sentencing argument, grasped at this link in an effort to argue aggravating circumstances of the appellant's crime. Referring to the appellant's enlisted performance report (EPR), the trial counsel pointed out the appellant's duties and responsibilities as a "missile cop," and argued that "the fact that he's a cop makes it all the more aggravating." Besides the EPR, a document required to be submitted under Rule for Courts-Martial 1001(a)(1)(A)(ii), no evidence had been presented that the appellant's offenses affected his duty performance as a missile security forces Response Force Member nor was there any evidence that the appellant used his duty position in the commission of the offenses for which he had been found guilty. The trial defense counsel did not object to the trial counsel's argument.

Discussion

This Court has repeatedly held that an accused's duty position, without more, cannot be considered as a matter in aggravation to increase a sentence. *See, e.g., United States v. Bobby*, 61 M.J. 750 (A. F. Ct. Crim. App. 2005), *rev. denied*, 62 M.J. 380 (C.A.A.F. 2005); *United States v. Collins*, 3 M.J. 518 (A.F.C.M.R. 1977), *aff'd*, 6 M.J. 256 (C.M.A. 1979). In this case, the trial counsel did exactly what precedent has prohibited, despite the fact that the appellant had not even been performing security forces duties for the five months prior to the beginning of the crime spree and would never perform them again in the Air Force. It is not unreasonable to assume that the members were led to believe that they were free to consider the appellant's status as a security forces member as a matter in aggravation. Therefore, after a careful review of the entire record, we find plain error in the trial counsel's sentencing argument. *See United States v. Boyd*, 52 M.J. 758, 761 (A. F. Ct. Crim. App. 2000), *aff'd*, 55 M.J. 217 (C.A.A.F. 2001).

Having found error, we must now consider whether we can reassess the sentence or whether we must return the case to the convening authority for a sentence rehearing. In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior court summarized the required analysis:

> In *United States v. Sales*, 22 M.J. 305 (CMA 1986), this Court set out the rules for sentence reassessment by a Court of Criminal Appeals. If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *Id*. at 307. A sentence of that magnitude or less "will be free of the prejudicial effects of error." *Id.* at 308.

In this case we conclude that we can perform sentence reassessment. Applying the *Sales* analysis, and after careful consideration of the entire record, we are satisfied beyond a reasonable doubt that, in the absence of error the members would have adjudged a sentence of no less than a bad-conduct discharge, confinement for 9 months, and reduction to E-1. *See United States v. Moffeit,* 63 M.J. 40, 41 (C.A.A.F. 2006). Moreover, we find that the sentence, as reassessed, is appropriate for this offender and his crimes. *See United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Healy,* 26 M.J. 394, 395 (C.M.A. 1988).

Conclusion

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

AFFIRMED.

OFFICIAL

THOMAS T. CRADDOCK, SSgt, USAF
Court Administrator