UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman RYAN D. HUMPHRIES
United States Air Force

ACM 37491 (f rev)

06 December 2012

Sentence adjudged 1 May 2009 by GCM convened at Dyess Air Force Base, Texas. Military Judge: Grant L. Kratz.

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Shannon A. Bennett; Major Michael S. Kerr; Major Nicholas W. McCue; Major Anthony D. Ortiz; Captain Travis K. Ausland; and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Colonel Douglas P. Cordova; Lieutenant Colonel Jeremy S. Weber; Major Coretta E. Gray; Major Joseph J. Kubler; Captain Tyson D. Kindness; and Gerald R. Bruce, Esquire.

Before

STONE, GREGORY, and HARNEY
Appellate Military Judges

OPINION OF THE COURT
UPON REMAND

This opinion is subject to editorial correction before final release.

GREGORY, Senior Judge:

This case is again before the Court following a second remand from our superior court. In May 2009, a general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of one specification of adultery and one specification of sodomy on divers occasions, in violation of Articles 134 and 125, UCMJ,

10 U.S.C. §§ 934, 925. The court sentenced the appellant to a bad-conduct discharge and reduction to the grade of E-1. The convening authority approved the sentence adjudged.

The first decision of this Court found the findings correct in law and fact but concluded that an unsuspended punitive discharge was inappropriately severe in light of "all the facts and circumstances surrounding the offenses of which the appellant was found guilty." *United States v. Humphries (hereinafter Humphries I)*, ACM 37491, unpub. op. at 4 (A.F. Ct. Crim. App. 24 May 2010). We did not approve the findings or sentence and returned the case to The Judge Advocate General (TJAG) for remand to the convening authority for "reconsideration of the sentence 'with full knowledge as to the upper limit on appropriateness.'" *Id*. at 5 (citing *United States v. Clark*, 16 M.J. 239, 243 (C.M.A. 1983) (Everett, C.J., concurring)). In effect, this Court limited the convening authority to approving a sentence "no greater than one including a suspended bad-conduct discharge." *Id*. Pursuant to Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2), TJAG certified to our superior court the issue of whether the decision was an impermissible exercise of appellate clemency.

Our superior court remanded the case without action on the certified issue because we had "acted on the sentence without acting on the findings" and directed "further action consistent with [their] order." *United States v. Humphries*, 69 M.J. 491 (C.A.A.F. 2011) (order remanding case for further review). On remand, the Government asked us to "correct the prior panel's erroneous decision" by affirming the approved findings and sentence. Because the Government's request for reconsideration concerned the appellant's sentence in addition to the findings, we denied the Government's request as exceeding the scope of the remand. *United States v. Humphries (hereinafter Humphries II)*, ACM 37491(rem), unpub. op. at 4 (A.F. Ct. Crim. App. 3 August 2011), *rev'd*, 71 M.J. 209 (C.A.A.F. 2012); *see also United States v. Montesinos*, 28 M.J. 38, 44 (C.M.A. 1989), *quoted in United States v. Riley*, 55 M.J. 185, 188 (C.A.A.F. 2001) (On remand, this Court "can only take action that conforms to the limitations and conditions prescribed by the remand."). We affirmed the findings and again returned the record of trial to TJAG "for remand to the convening authority for reconsideration of the sentence 'with full knowledge as to the upper limit on appropriateness.'" *Humphries II*, unpub. op. at 4 (quoting *Clark*, 16 M.J. at 243).

TJAG again certified the issue of whether our initial decision was an impermissible exercise of appellate clemency. Again, without reaching the certified issue, our superior court found plain error in the failure to allege the terminal element of the Article 134, UCMJ, adultery offense and that the error materially prejudiced the appellant's substantial right to notice. *Humphries*, 71 M.J. at 216-17. The Court reversed "[t]hat portion" of our decision affirming the findings of guilty of the Article 134, UCMJ, charge and specification; set aside and dismissed that charge and specification; and remanded the case "for reassessment of the sentence, or, if necessary, for ordering a rehearing on the sentence." *Id.* at 217.

The two dissenting opinions provide expanded and alternative views of our reassessment options on remand. Chief Judge Baker questions the basis of our original remand to the convening authority and would require any reassessment that disapproves a punitive discharge on the basis of sentence appropriateness to "indicate why such action does not amount to a miscarriage of justice in a case where the accused received far less than the maximum allowable sentence and where *all* of the factors relevant to sentence appropriateness for this act of adultery appear to be aggravating factors." *Id*. at 219. Judge Stucky noted, as did Chief Judge Baker, that the Courts of Criminal Appeals (CCA) do not have the power to suspend a sentence and that the original remand attempted to impermissibly accomplish that end. *Id*. at 223-24. But, given our previous determination of sentence appropriateness, Judge Stucky would remand "with direction to affirm a sentence that does not include a punitive discharge." *Id.* at 224. The remand ordered by the majority simply provides for "reassessment of the sentence, or, if necessary, for ordering a rehearing on the sentence." *Id*. at 217.

Before reassessing a sentence, we 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'" lessens 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), *aff'd*, 36 M.J. 43 (C.M.A. 1992) (mem.). If we cannot determine that the sentence would have been at least of a certain magnitude, we must order a rehearing. *Id*. The dismissal of the adultery charge does not dramatically alter the penalty landscape, it only reduces the maximum confinement from six to five years. Applying the criteria set forth in *Sales*, we conclude that we can determine what sentence would have been imposed based on modified findings.

In his original decision, Judge Jackson explained this Court's sentence appropriateness determination for the offenses of adultery and consensual sodomy:

> After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses of which the appellant was found guilty, we find that portion of the appellant's sentence which provides for an unsuspended bad-conduct discharge inappropriately severe. So as to be clear, this Court does not condone the appellant's crimes—crimes aggravated by the fact that they were committed: (1) in base housing; (2) with the spouse of a deployed service member; and (3) at a time when he was married and the father of three minor children. Nor should our findings on this issue be misconstrued as a grant of clemency—an act which we recognize is solely within the bailiwick of the convening authority, The Judge Advocate General, and the Secretary of the Air Force. *See [United States v. Healy*,

> 26 M.J. 394, 395-96 (C.M.A. 1988)] (noting the distinction between a sentence appropriateness determination and clemency). Put simply, the appellant's crimes are unacceptable and undermine his standing as a military member. He deserves punishment but given the consensual nature of his crimes, an unsuspended punitive discharge is inappropriately severe.

Humphries I, unpub. op. at 4. With due respect to the Chief Judge's dissenting view, we find this determination entirely consistent with the principles of evaluating sentence appropriateness. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Having determined that an unsuspended punitive discharge is inappropriately severe for the charged offenses of which the appellant was convicted and recognizing that we do not have the power to suspend a punitive discharge, we reassess the sentence for the single remaining offense and approve only so much of the adjudged sentence as provides for reduction to the grade of E-1.

Having previously affirmed the only remaining finding of guilty, consensual sodomy in violation of Article 125, UCMJ, we find that the sentence, as reassessed, is 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 sentence, as reassessed, is

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court