UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class AARON G. POLINARD
United States Air Force

ACM 35806 (f rev)

31 July 2006

Sentence adjudged 18 March 2003 by GCM convened at Fairchild Air Force Base, Washington. Military Judge: Timothy D. Wilson.

Approved sentence: Bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Terry L. McElyea, Major Sandra K. Whittington, Major L. Martin Powell, and Major N. Anniece Barber.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major John C. Johnson, Major C. Taylor Smith, and Major Steven R. Kaufman.

Before

BROWN, MOODY, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

MOODY, Senior Judge:

On 24 March 2006 this Court issued its original opinion in this case. *United States v. Polinard*, ACM 35806 (A.F. Ct. Crim. App. 24 Mar 2006) (unpub. op.). In that opinion we addressed one of the five assignments of error: that the military judge erred by permitting the trial counsel to present evidence that the appellant had invoked his right

to counsel during an interrogation. Specifically, according to the record of trial (ROT) the appellant gave an interview to the Air Force Office of Special Investigations (AFOSI) concerning his alleged involvement in the use, distribution, and introduction of illegal drugs onto Fairchild Air Force Base, Washington. The AFOSI agent's deposition contained the following:

> [H]e said, "Well, I'm in a bad situation. What can I deal?" I told him right away that there was nothing, "I can't make any deals on behalf of the government." And he requested legal counsel.

Because the agent in question was not available for trial, the military judge permitted his deposition to be read to the members.

As would be expected, the trial defense counsel objected to the members being apprised of the appellant's invocation of his right to counsel. The government agreed not to read that sentence to the members. Nevertheless, the ROT depicts the trial counsel as doing just that, not once but twice. For reasons set forth in our prior opinion, we held this to be harmful error and we set aside the findings and sentence.

On 31 May 2006, the government submitted three motions to this Court. One was a petition for reconsideration, one was a motion to file a certificate of correction, and one was a motion for extraordinary relief in the nature of a writ of error coram nobis. The facts underlying the three motions were that the offending sentence referenced above was not, in fact, read to the panel but appeared in the ROT due to a transcription error. The appellant did not oppose these motions. By an order dated 12 June 2006, we denied the motion for extraordinary relief, a writ of coram nobis being a means of correcting errors suffered by an accused rather than by the prosecution. *See, e.g.*, *Loving v. United States*, 62 M.J. 235, 251-57 (C.A.A.F. 2005). However, we granted the other two motions, vacating our previous opinion.

Filings submitted by the government include an affidavit from the court reporter, stating that

> The corrections need to be made because the assistant trial counsel . . . did not say [that the appellant invoked his right to counsel] when he read [the deposition] to the court members. However, in preparing the transcript, I did "cut and paste" portions of [the] deposition into the transcript without deleting those lines that were not read into the record.

Despite the fact that the transcript did not accurately reflect the proceedings on a crucial matter, the original ROT contains a certification of the accuracy of the record, both from Captain Clayton Richter, assistant trial counsel, and from Colonel Timothy D.

Wilson, the military judge. The staff judge advocate recommendation asserts that the staff judge advocate, Colonel Fraser B. Jones, read the ROT; however, it made no reference to this apparent error. Furthermore, attorneys representing the United States on appeal conceded that that the prosecutor had improperly advised the panel that the appellant invoked his right to counsel, arguing only that this did not constitute harmful error.

This was a lengthy ROT, the transcript alone comprising 2,133 pages. It is to be expected that errors will occasionally creep into a record. However, the transcription error in this case was not a mere misspelling or some other relatively trivial matter. To the contrary, the original, uncorrected ROT created the impression that the prosecutors caused reversible error and the military judge did nothing to correct it. That the assistant trial counsel and military judge certified the record as accurate, and that attorneys for the appellee conceded that accuracy as well, rather than to make minimal inquiries as to whether the record correctly depicted the proceedings, resulted in this Court granting relief predicated upon facts which all parties now acknowledge were untrue. No matter how lengthy a record or soporific its contents, trial participants must read it carefully to ensure its accuracy. They must do so in order to avoid, among other things, appellate counsel misrepresenting facts to this Court and this Court issuing opinions based on such misrepresentations.

Having set aside the previous opinion, we now perform our appellate review of the corrected record. We examined this record, the assignment of errors, and the government's answer thereto. The appellant has alleged that his conviction for knowingly introducing psilocin mushrooms onto Fairchild Air Force Base is both legally and factually insufficient. Specifically, he alleges that the evidence is insufficient to establish he knew the package in question, apparently mailed to him by his father, contained contraband. After weighing the evidence and making allowances for not having observed the witnesses, this Court is not convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). As a consequence, we dismiss Specification 5 of Charge I. We resolve the remaining assignments of error adversely to the appellant.

Having found error we must now determine if we can perform sentence reassessment or whether we must return the case for a 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 (C.M.A. 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 . . . A sentence of that magnitude or less will be free of the prejudicial effects of error.

Sales, 22 M.J. at 307-08.

Applying this criteria, we conclude that we can perform sentence reassessment. The remaining convictions are for possession, distribution, and introduction of ecstasy and for wrongfully endeavoring to impede a trial by court-martial. We conclude that the seriousness of these offenses is not so substantially diminished by the loss of the specification regarding psilocin mushrooms as to require us to send the case back for a rehearing. Accordingly, we reassess the sentence as follows: a bad-conduct discharge, confinement for 10 months, forfeiture of all pay and allowances, and reduction to E-1.

The approved findings, as modified, 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 approved findings, as modified, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator