UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic MARCUS SPEARS
United States Air Force

ACM S31736

26 July 2010

Sentence adjudged 29 September 2009 by SPCM convened at Charleston Air Force Base, South Carolina. Military Judge: David S. Castro (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, and forfeiture of $300.00 pay per month for 7 months.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael S. Kerr, and Major Anthony D. Ortiz.

Appellate Counsel for the United States: Lieutenant Colonel Jeremy S. Weber and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and GREGORY
Appellate Military Judges

PER CURIAM:

In accordance with the appellant's pleas, a military judge sitting as a special court-martial found the appellant guilty of one specification of insubordinate conduct toward a noncommissioned officer, two specifications of wrongful use of a controlled substance, and one specification of carrying a concealed weapon, in violation of Articles 91, 112a, and 134, UCMJ, 10 U.S.C. §§ 891, 912a, 934. The military judge sentenced the appellant to a bad-conduct discharge, seven months of confinement, and forfeiture of "$300 . . . pay for 7 months." The convening authority approved the bad-conduct

discharge, six months of confinement, and forfeiture of "$300 pay *per month* for 7 months."[1] (Emphasis added). This case is before the Court on its merits.

Background

The appellant is a native of North Charleston, South Carolina, and after enlisting in the Air Force, he returned to the area when he was assigned to Charleston Air Force Base, South Carolina. Upon his return, the appellant began socializing with his childhood friends, one of whom robbed him at gunpoint. As a result, the appellant purchased a handgun for protection. In early April 2009, the appellant was offered and ingested methamphetamine while at a relative's house in the local area. On 6 April 2009, the appellant was randomly selected to provide a urine sample for drug testing. The appellant provided a urine sample, the sample was shipped to the Air Force Drug Testing Laboratory, and the sample subsequently tested positive for methamphetamine.

The appellant's misconduct continued through the summer of 2009. On 12 July 2009, the appellant was performing duties at the base fitness center and overheard his supervisor tell a co-worker not to allow the appellant to perform certain duties because the appellant was "immature and childish." Shortly thereafter, the appellant's supervisor asked to speak to the appellant about a work-related matter and the appellant, upset about what he had heard, yelled at his supervisor, refused to answer his supervisor's questions, used arm gestures in a manner as though to push his supervisor, and abruptly walked away. On about 28 August 2009, while the appellant was at his father's house in the local area he smoked marijuana he had earlier purchased from another airman.

On 5 September 2009, a Charleston Air Force Base gate guard selected the appellant's vehicle for a random vehicle inspection as the appellant attempted to leave the base. As the guard approached the appellant's vehicle, the appellant informed the guard that he had a loaded handgun in his glove compartment. The guard handcuffed the appellant and seized the handgun. The next day, the appellant consented to testing of his urine. The appellant provided a urine sample, the sample was shipped to the Air Force Drug Testing Laboratory, and the sample subsequently tested positive for tetrahydrocannabinol, a marijuana metabolite. At trial, the appellant providently pled and was found guilty of the aforementioned charges.

Erroneous Sentence Announcement

Though not raised as an issue, we note that the military judge, in announcing the forfeiture portion of the sentence, announced "Airman Basic Marcus Spears, this court sentences you . . . *[t]o forfeit $300 of your pay for 7 months*; . . . ." (Emphasis added).

[1] The appellant and the convening authority entered into a pretrial agreement wherein the appellant agreed to plead guilty to the charges and specifications in return for the convening authority's promise, inter alia, not to approve confinement in excess of six months.

On 5 November 2009, the convening authority approved, inter alia, forfeiture of "$300 pay *per month* for 7 months." (Emphasis added). "[A] sentence to forfeiture shall state the exact amount in whole dollars to be forfeited each month and the number of months the forfeitures will last." Rule for Courts-Martial 1003(b)(2); *see also United States v. Gaston*, 62 M.J. 404, 408 (C.A.A.F. 2006); *United States v. Johnson*, 32 C.M.R. 127, 128 (C.M.A. 1962).

Because the announced forfeiture amount does not include the words "per month," we find that the approved sentence is erroneous and that the forfeiture amount announced shall be the *total amount* to be forfeited. *See United States v. Walker*, 9 M.J. 892, 892-93 (A.F.C.M.R. 1980) (citing *Johnson*, 32 C.M.R. 127; *United States v. Smith*, 43 C.M.R. 660 (A.C.M.R. 1971)); *United States v. Nimmons*, 59 M.J. 550, 550 (N.M. Ct. Crim. App. 2003); *United States v. Burkett*, 57 M.J. 618, 620-21 (C.G. Ct. Crim. App. 2002).

Conclusion

We affirm the findings and only so much of the sentence as provides for a bad-conduct discharge, six months of confinement, and forfeiture of $300 pay for one month. All rights, privileges, and property of which the appellant has been deprived by virtue of the execution of the forfeiture approved by the convening authority which have not been affirmed will be restored. The findings and sentence, as modified, are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred.[2] 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 and the sentence, as modified, are

AFFIRMED.

[2] We note that the court-martial order (CMO), dated 5 November 2009, failed to list the plea and finding for the specification of Charge II, Additional Charge I, and Additional Charge II. Additionally, the announced sentence is incorrect. Preparation of a corrected CMO correctly listing the plea and finding for the aforementioned specifications and the announced sentence is hereby directed. *See United States v. Smith*, 30 M.J. 1022, 1028 (A.F.C.M.R. 1990), *aff'd in part*, 33 M.J. 114 (C.M.A. 1991); Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 10.8.2.2 (21 Dec 2007).

JACKSON, Senior Judge, participated in the decision of this Court prior to his reassignment on 15 July 2010.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court