UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic BRIAN M. BAIRD
United States Air Force

ACM 35950

28 February 2006

Sentence adjudged 25 March 2004 by GCM convened at Eglin Air Force Base, Florida. Military Judge: Daryl E. Trawick (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 48 months, and forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Lieutenant Colonel Mark R. Strickland, Major Sandra K. Whittington, Major Imelda Paredes, and Captain David P. Bennett.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Carrie E. Wolf.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

OPINION OF THE COURT

FINCHER, Judge:

We have examined the record of trial, the assignment of error, and the government's answer. The appellant pled guilty to disobeying a no-contact order, dereliction of duty, numerous drug offenses, and obstruction of justice, in violation of Articles 90, 92, 112a, and 134, UCMJ, 10 U.S.C. §§ 890, 892, 912a, 934. The convening authority approved the findings and only so much of the adjudged sentence as a bad-conduct discharge, confinement for 48 months, and forfeiture of all pay and allowances. The appellant now contends his guilty plea to Additional Charge II and its Specification,

the dereliction of duty offense, was improvident. We agree, dismiss the finding of guilty, and reassess the sentence.

During his providency inquiry, the appellant admitted that on 7 March 2002, at about 1930 hours, he and Ms. S, a civilian, were in his dormitory room on Eglin Air Force Base (AFB). The appellant took a shower, got dressed, and then got into an argument with Ms. S that lasted for 10 to 15 minutes. When the argument ended, Ms. S sat down on the floor and started to write what turned out to be a suicide note. After a couple of minutes, the appellant noticed that something was wrong with Ms. S. She was not unconscious, but her eyes had rolled back into her head and she was not coherent. The appellant then contacted some of his friends to see if they could come over and help him revive her.

While he was waiting for his friends to arrive, the appellant searched Ms. S for drugs and found some pills in her pants pocket and in her purse. He hid the pills because he did not want her to get in trouble for having them. He thought the pills were Percocet or Xanax. Ms. S had told him previously that she had those two drugs and did not have a prescription for them. When the appellant's friends arrived, they tried to induce vomiting but failed. Finally, they transported Ms. S to the hospital. Ms. S first showed signs of overdosing between 2000 and 2030 hours. She arrived at the hospital at 2100 hours.

The appellant pled guilty to dereliction of duty, in violation of Article 92, UCMJ, for willfully failing to "obtain immediate medical treatment" for Ms. S. In the stipulation of fact, the appellant admitted he had a duty to seek immediate medical treatment for Ms. S because: (1) She was in his dormitory room, in a place where no other person could discover her and obtain medical treatment for her; (2) She was not physically able to obtain medical treatment for herself; and (3) He was the one who had signed her on to Eglin AFB.

Manual for Courts-Martial, United States (MCM), Part IV, ¶ 16c(3)(a) (2005 ed.) states, "A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service."[1] The problem with the military judge's providency inquiry is that it failed to identify a duty that would impose criminal liability in this situation. The recitation in the stipulation of fact was likewise insufficient to establish the factual predicate for the purported duty that would satisfy this element of the offense. *See United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980).

Accordingly, we dismiss Additional Charge II and its Specification. Because we have modified the findings, we must now determine whether we can reassess the sentence in accordance with the criteria set forth in *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986). Having determined that reassessment is appropriate, we are convinced

[1] This provision is unchanged from the 2002 edition that was in effect at the time of the appellant's trial.

beyond a reasonable doubt that, even absent the error, the military judge would have sentenced the appellant to at least a bad-conduct discharge, confinement for 45 months and forfeiture of all pay and allowances.

The approved 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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). However, we affirm only so much of the sentence as includes a bad-conduct discharge, confinement for 45 months, and forfeiture of all pay and allowances. Accordingly, the findings, as modified, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator