**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman First Class SAMULE R. BLEVINS**
**United States Air Force**

**ACM 35630**

**28 March 2005**

Sentence adjudged 20 May 2003 by GCM convened at Charleston Air Force Base, South Carolina. Military Judge: Thomas G. Crossan, Jr. (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 54 months, forfeiture of all pay and allowances, reduction to E-1, and a fine of $3000.00, and to serve additional confinement for 6 months if the fine is not paid.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major John C. Johnson.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT



MOODY, Judge:

The appellant was convicted, in accordance with his pleas, of one specification of attempted larceny, one specification of violating a lawful general regulation, one specification of false official statement, two specifications of larceny, one specification of counterfeiting, and one specification of passing a counterfeit bill, in violation of Articles 80, 92, 107, 121, and 134, UCMJ, 10 U.S.C. §§ 880, 892, 907, 921, 934. He was convicted, contrary to his plea, of another specification of larceny, in violation of Article

121, UCMJ. The general court-martial, consisting of a military judge sitting alone, sentenced the appellant to a dishonorable discharge, confinement for 54 months, forfeiture of all pay and allowances, reduction to E-1, a fine in the amount of $3000, and to serve additional confinement for 6 months if the fine is not paid. The convening authority approved the sentence adjudged.

The appellant has submitted six assignments of error: (1) Whether the military judge abused his discretion by admitting a post-referral letter of reprimand (LOR); (2) Whether the military judge erred by admitting uncharged misconduct during sentencing; (3) Whether the military judge erred by admitting needlessly cumulative aggravation evidence; (4) Whether the fine is inappropriate to the offense; (5) Whether the sentence should be set aside under the cumulative error doctrine; and (6) Whether the action is ambiguous in that the convening authority approved the sentence of total forfeitures while at the same time waiving mandatory forfeitures, contrary to *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002). Finding error, we order corrective action.

*Background*

The evidence adduced during the *Care*[1] inquiry established that, among other things, between 1 January 2002 and 3 May 2002, the appellant used a government computer and printer to counterfeit a $50 bill. Subsequently, the appellant approached Mr. Angel, a civilian employee of the government, and exchanged the counterfeit bill for actual dollars. The appellant stated to the military judge that the bill he passed to Mr. Angel was one of seven or eight copies he had made at the same time.

During the sentencing phase of the trial, the prosecution offered an LOR, which had been issued to the appellant after his case had been referred to trial. The LOR reads in pertinent part:

> a. You stored files on your computer relating to fraudulent activities involving theft from Automatic Teller Machines (ATM), and you tried to convince a fellow airman to steal from area ATMs.
> b. You stored files on your computer relating to computer hacking.
> c. You stored terrorism type instructional materials on your computer.
> d. You misused government equipment, specifically a copy machine, by using it to copy a $20 bill given to you by a fellow airman.
> e. You failed to maintain personal financial responsibility by writing checks to a fellow airman when you did not have the funds to cover the checks.
> f. You stole a fellow airman's wallet containing his personal information and money.

[1] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

g. You stole gas from the government service station and used it in your personal vehicle, and you told a fellow airman how you were able to commit this crime.
h. You made and passed counterfeit money on about seven different occasions in South Carolina. Additionally, you asked fellow airmen to comment on whether or not the money you made looked authentic.

Trial defense counsel objected to the admission of this LOR on the ground that it had been prepared, not for a legitimate correctional purpose, but rather to enhance the appellant's punishment. The trial counsel replied that, "we have absolutely no evidence that this was prepared in anticipation of litigation or simply to make it worse for the accused at trial. . . . These things could have been proven in trial, so the fact that he got cut a break for trial doesn't mean that he should also be cut a break in regards to the letter of reprimand." No witnesses testified as to the reasons underlying the LOR.

Additionally, the prosecution called several witnesses who testified as to the appellant's having passed counterfeit bills on occasions other than the date alleged in the charge and specification. The witnesses provided evidence of other copies of the $50 bill having been passed at various locations in the state of South Carolina. In addition, witnesses testified as to the appellant having passed fake $20 bills to vendors, in an apparent effort to defraud them. Trial defense counsel objected to such testimony; the prosecution argued that it showed a continuing course of conduct as described in *United States v. Nourse*, 55 M.J. 229 (C.A.A.F. 2001).

*Admission of the LOR*

This Court reviews a military judge's decision on admission of sentencing evidence for abuse of discretion. *See United States v. Gogas*, 58 M.J. 96, 99 (C.A.A.F. 2003); *United States v. Hursey*, 55 M.J. 34, 36 (C.A.A.F. 2001). During the presentencing portion of the trial, the prosecution may offer personnel records that reflect upon the character of the appellant's service. Rule for Courts-Martial (R.C.M.) 1001(b)(2). However, to be admissible, an LOR must have been issued for a legitimate corrective purpose and not merely to aggravate an appellant's punishment. *United States v. Boles*, 11 M.J. 195, 199 (C.M.A. 1981). *See also United States v. Hill*, 13 M.J. 948 (A.F.C.M.R. 1982*); United States v. Hagy*, 12 M.J. 739 (A.F.C.M.R. 1981).

There is no evidence in the record concerning the decision to issue the LOR, although trial defense counsel asserted that the offenses listed therein were known to the appellant's unit for many months prior to trial. The trial counsel did not dispute this. Therefore, the record provides no explanation as to why the LOR was not issued well in advance of trial.

Another difficulty with the LOR is its inartful wording. It does not advise whether the files relating to "fraudulent activities," "computer hacking," and "terrorism" were found on a computer owned by the government or one privately owned. Neither does it state why these files are objectionable; that is, there is no indication what specifically these files contained. As a consequence, it is difficult to see precisely how the appellant's possession of these files bears upon the sentencing authority's understanding of his character and service. As it is, one is left with a decidedly negative impression of an appellant, who for all one can tell, was preparing to engage in ATM fraud, intrude into the privacy of others through computer hacking, and even possibly engage in terrorism.

Other offenses are described in more explicit detail, such as counterfeiting efforts in addition to those to which the appellant pled guilty, other instances of theft, and solicitation of others to commit crimes. While we do not deny that these may legitimately be the subject of administrative reprimands, we are not satisfied that, in this instance, coming as it did so close to trial, the LOR was issued for a legitimate corrective purpose. Indeed, some of the matters referenced in the LOR could have been included in the charge sheet, a fact acknowledged by the prosecutor, raising further doubt as to its legitimacy. We conclude that the military judge abused his discretion by admitting this LOR.

Given the incendiary nature of the LOR's contents and the extent to which the prosecution relied on it in the sentencing argument, we conclude that this error operated to the material prejudice of the substantial rights of the appellant. Article 59(a), UCMJ, 10 U.S.C. § 859(a). Therefore, this was not harmless error.

*Aggravation Evidence*

This Court reviews this issue also for abuse of discretion. In the presentencing phase of the trial, the "trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." R.C.M. 1001(b)(4). Pursuant to this rule, the prosecution may present evidence of uncharged offenses that constitute "a continuous course of conduct involving the same or similar crimes, the same victims, and a similar situs within the military community." *United States v. Mullens*, 29 M.J. 398, 400 (C.M.A. 1990). "[E]vidence of this nature appropriately may be considered as an aggravating circumstance because it reflects the true impact of crimes upon the victims." *Nourse*, 55 M.J. at 231 (citing *Mullens*, 29 M.J. at 400).

As stated above, the military judge permitted prosecution witnesses to testify as to the appellant's having passed, or having attempted to pass, counterfeit bills of varying denominations to persons other than Mr. Angel, at different times and at different locations. For example, Special Agent John Buechele of the Secret Service testified that the appellant passed fake bills at various locations in South Carolina, including a Wal-

Mart, a convenience store, a Circle K, and a Pep Boys Auto Service Store. The military judge also admitted a computer printout showing these events.

Additionally, a Senior Airman Green testified as follows:

> Q: Did [the appellant] ever show you any counterfeit money?
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> . . . .
>
> A: It was probably in early 2002. . . . [H]e confronted me and handed me a $20.00 bill. As soon as I touched it, I immediately knew that it was not real because it felt just like paper.
>
> . . . .
>
> Q: Did he ever say anything about passing the money that he made?
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> A: Yes, sir. He said that he had been going up to newspaper vendors at odd street lights and giving them the $20.00 or whatever, and they gave him back whatever money he wanted to break it into. . .

Other witnesses testified to similar facts.

We conclude that the evidence does not constitute proper aggravation within the meaning of *Nourse*. In that case, and the others upon which it relies, the course of conduct involved similar offenses against the same victims referenced in the charged offenses. As such, the uncharged misconduct was a form of victim impact testimony.

In the case sub judice, however, the uncharged misconduct did not logically relate to the offenses of which the appellant was convicted, in that it did not illuminate the true impact of the crimes upon Mr. Angel. Rather, the misconduct, which could have been included in the charges and specifications, but for reasons not apparent from the record was not, went well beyond the offenses of which the appellant was found guilty. We conclude that the uncharged misconduct in question did not satisfy the criteria described in R.C.M. 1001(b)(4). We hold that the military judge abused his discretion by admitting the evidence. Insofar as the prosecution relied heavily on this evidence in fashioning its sentencing argument, we conclude that it operated to the material prejudice of the substantial rights of the appellant. Article 59(a), UCMJ.

*Post-Trial Processing*

This court reviews post-trial processing de novo. After the trial, the convening authority waived mandatory forfeitures for a period of six months and directed that the

money be paid to the appellant's spouse. The convening authority did not, however, disapprove or suspend the adjudged forfeitures, as required by *Emminizer*. In light of our superior court's holding in *United States v. Lajaunie*, 60 M.J. 280 (C.A.A.F. 2004), we conclude that this is error, requiring a new action. Finally, we resolve the remaining assignments of error adversely to the appellant.

Having found prejudicial error, we must perform sentence reassessment. 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 MJ 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.

We have considered the entire record of trial and the evidence properly admitted during presentencing. We conclude that, had the errors not occurred, the military judge would have sentenced the appellant to no less than a bad-conduct discharge, confinement for 42 months, forfeiture of all pay and allowances, reduction to E-1, and a fine in the amount of $3000.

*Conclusion*

The action of the convening authority is set aside. The record of trial is returned to the Judge Advocate General for remand to the convening authority for post-trial processing consistent with this opinion. Thereafter, Article 66(b), UCMJ, 10 U.S.C. § 866(b), will apply.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator