UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman HERBERT E. BLODGETT III
United States Air Force

ACM 35267

30 July 2004

Sentence adjudged 21 May 2002 by GCM convened at Kadena Air Base, Japan. Military Judge: David F. Brash (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 9 months, forfeiture of $800.00 pay per month for 15 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Major Tracey L. Printer, and Captain Matthew J. Mulbarger.

Before

STONE, GENT, and MOODY
Appellate Military Judges

PER CURIAM:

We examined the record of trial, the assignment of errors, the government's reply thereto, and the appellant's declaration. Six days before the appellant's trial, Executive Order 13262 [1] reduced the penalties for larceny and bad checks, two of the four offenses of which the appellant was charged and pled guilty. At the time of the appellant's trial, the maximum penalty for all of the charges to which the appellant pled guilty was, among other things, a bad-conduct discharge and 6 years and 6 months of confinement, rather than a dishonorable discharge and 56 years of confinement provided for under the previously applicable Uniform Code of Military Justice provisions. This appeal results

[1] Exec. Order No. 13262, 67 Fed. Reg. 18773, 18779 (11 Apr 2002) ("These amendments shall take effect on May 15, 2002"). The executive order implemented changes in federal law authorized by the Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 577, 113 Stat. 625 (codified at 10 U.S.C. § 819) (5 Oct 1999).

from the fact that trial counsel, defense counsel, and the military judge were unaware of this change. The reduction in penalties also went unnoticed by the defense counsel, staff judge advocate, and convening authority during the post-trial processing of the case.

The appellant assigns three errors for our consideration. He first argues that his pleas were improvident because the military judge incorrectly advised the appellant concerning the maximum punishment the court could adjudge. The appellant asserts that had he known the correct maximum punishment, he would have sought a more favorable pretrial agreement. He did not say he would have changed his plea. After taking into account all the circumstances of the case, we find that the appellant's misapprehension of the maximum sentence was not a substantial factor in his decision to plead guilty and therefore did not affect the providence of his guilty plea. *See United States v. Mincey*, 42 M.J. 376 (C.A.A.F. 1995); *United States v. Hemingway*, 36 M.J. 349 (C.M.A. 1993); *United States v. Poole*, 26 M.J. 272 (C.M.A. 1988); *United States v. Hunt*, 10 M.J. 328 (C.M.A. 1981); *United States v. McDuffie*, 43 M.J. 646 (A.F. Ct. Crim. App. 1995), *pet. denied*, 44 M.J. 48 (C.A.A.F. 1996).

The appellant next claims the military judge erred by considering an incorrect maximum punishment. We agree that this was prejudicial error. *United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998); *Poole*, 26 M.J. at 274. Given the record before us, we are confident that we can reassess the sentence. *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). Having done so, we find the adjudged sentence would have been at least as severe as the approved sentence, such that the approved sentence is no greater than that which would have been imposed had the error not been committed. *Sales*, 22 M.J. at 308; Article 59(a), UCMJ, 10 U.S.C. § 859(a).

The appellant's last assignment of error contends that the staff judge advocate erred by stating in the staff judge advocate's recommendation (SJAR) that the maximum punishment included a dishonorable discharge and 56 years of confinement. We agree that the incorrect statement about the maximum penalty was plain error. *Powell*, 49 M.J. at 460. We will not speculate on what the convening authority would have done if he had been presented with an SJAR that explained the changes in the maximum penalty. The appropriate remedy in this case is to return the case to the staff judge advocate for a new SJAR and action by the convening authority.

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

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court