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

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**UNITED STATES**

**v.**

**Technical Sergeant KIRK V. BRIGGS**
**United States Air Force**

**ACM 35123 (f rev)**

**13 June 2008**

Sentence adjudged 21 June 2007 by GCM convened at Travis Air Force Base, California. Military Judge: Nancy J. Paul.

Approved sentence: Dishonorable discharge and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Timothy M. Cox.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Coretta E. Gray.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges



PER CURIAM:

After a rehearing on both findings and sentence, the appellant was again convicted, contrary to his pleas, of four specifications of selling military property and one specification of larceny of military property, in violation of Articles 108 and 121, UCMJ, 10 U.S.C. §§ 908, 921. The general court-martial, consisting of officer and enlisted members[1], sentenced the appellant to a dishonorable discharge and reduction to E-1. The convening authority approved the sentence as adjudged. At his first trial, five years earlier, the appellant's sentence included five years confinement.

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[1] The Court-Martial Promulgating Order states that the appellant was sentenced by officer members; the appellant was sentenced by both officer and enlisted members.

The appellant has submitted two assignments of error: (1) the appellant is entitled to relief against his reduction and punitive discharge for having served two years confinement and almost three years on supervised probation as part of a sentence which was later set aside and where a subsequent sentence did not include confinement; and (2) a panel member failed to disclose that he was a pilot and thus unable to be impartial in sentencing appellant for stealing and selling survival equipment flight crews would use. Both assignments of error are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

*Background*

The appellant was an electronic environmental technician with the 60th Aircraft Generation Squadron at Travis Air Force Base, California with 16 years of service at the time of his first trial. The appellant's duties gave him unrestrained access to C-5 aircraft. During the times alleged, the appellant, who was experiencing financial difficulty, sold numerous items of military property—survival vests and body armor—to a civilian accomplice who subsequently assisted in the investigation of the case. The items of property were taken from C-5 aircraft and were used for the safety of flight crews. These acts form the basis for the charges and specifications.

*Sentence Relief*

The appellant is asking that "credit" for the confinement and supervised probation already completed after his first trial be applied against the punitive discharge and the reductions in rank he received in his second trial. At the time of his rehearing, the appellant had already served two years in confinement and almost three years of probation from the sentence of his first trial.

The United States Supreme Court has held that if a person is subsequently re-convicted of an offense for which he has already served time in confinement, that time must be credited towards the new sentence imposed. *North Carolina v. Pearce*, 395 U.S. 711 (1969). Rule for Courts-Martial (R.C.M.) 1107(f)(5)(A) states that after a rehearing, an "accused shall be credited with any kind or amount of the former sentence included within the new sentence that was served or executed before the time it was disapproved or set aside." Our superior court has found that R.C.M. 305(k) has established certain equivalencies for improper pretrial confinement, and by extension "application of credits for punishment imposed at an earlier court-martial for purposes of addressing former-jeopardy concerns." *United States v. Rosendahl*, 53 M.J. 344, 347-48 (C.A.A.F. 2000). However, R.C.M. 305(k) does not authorize application of the credit against two types of punishment -- reduction and punitive separation. *See* R.C.M. 305(k); Drafter's Analysis, *Manual for Courts-Martial, United States (MCM)*, A21-21(2008 ed.); *Rosendahl*, 53 M.J. at 347.

While the appellant acknowledges the authorities noted above, he states that our superior court in *Rosendahl* left open credit for these unique military punishments if a case involved lengthy confinement. *Id.* at 348. The appellant states that two years in confinement is such lengthy confinement. The appellant's argument ignores the fact that our superior court addressed an almost identical claim for relief in *United States v. Josey*, 58 M.J. 105 (C.A.A.F. 2003). In *Josey*, the appellant was seeking credit against his reduction in rank for serving 30 months and 28 days of post-trial confinement as part of a sentence that was later set aside when his new sentence did not include confinement. Citing the authorities mentioned above, our superior court concluded that "reprimands, reduction in rank, and punitive separations are so qualitatively different from other punishments that conversion is not required as a matter of law." *Josey*, 58 M.J. at 108.

*Rosendahl* and *Josey* are dispositive of the issue. The appellant is not entitled, as a matter of law, to receive credit for confinement imposed at an earlier court-martial to offset a punitive discharge or a reduction in grade imposed at a subsequent court-martial. We are also not inclined to grant such credit for any other reason authorized by this Court.

*Member Challenge*

The appellant alleged to the convening authority and again on appeal that he is entitled to a new sentencing hearing because he was unaware that a member, Lt Col O, was a pilot. The appellant asserts that in light of the crime, stealing safety and survival gear off an aircraft, this member could not have been impartial.

While trial defense counsel never asked the member if he was a pilot, Lt Col O told the Court that he worked "directly" with C-5s and "contingency equipment," and that he was the "operations officer" for the C-5 squadron. Lt Col O stated that he could be impartial. Trial defense counsel asked no questions in individual voir dire and did not challenge Lt Col O.

The United States Supreme Court has held that for an accused to be entitled to a new trial due to an incorrect voir dire response the "party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984). Our superior court, adopting a test set out by the First and Ninth Circuits, found a party is entitled to an evidentiary hearing for resolving claims of juror dishonesty if they make a colorable claim of juror bias. *See United States v. Sonego*, 61 M.J. 1, 4 (C.A.A.F. 2005).

The appellant's claim fails. First, Lt Col O did not fail to honestly answer a material question on voir dire. The member truthfully stated that he was the operations

officer for a flying squadron who worked directly with the C-5 aircraft. Even in the highly unlikely scenario that the appellant, with his years and background in the Air Force, did not understand that the member was a pilot, there is no evidence that the member failed to honestly answer a material question by not stating the obvious. Second, even if the member had affirmatively stated he was a pilot it would not have provided a valid basis for a challenge for cause. The member was sufficiently probed for bias based on the fact that he was the operations officer for a C-5 squadron, and the fact that the appellant was charged with stealing military equipment from or related to C-5 aircraft. Based upon his answers to these questions, it is clear no "colorable claim" of bias exists. Therefore, we deny the appellant any relief on this claim and further conclude an evidentiary hearing for resolving claims is not necessary.

*Conclusion*

The approved findings and sentence 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). Further, we order the promulgation of a corrected Court-Martial Order, reflecting that the sentence was adjudged by officer and enlisted members. Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL


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