UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant ANDREW B. CARROLL
United States Air Force

ACM 36225

16 May 2006

Sentence adjudged 9 December 2004 by GCM convened at Francis E. Warren Air Force Base, Wyoming. Military Judge: Kurt D. Schuman.

Approved sentence: Dishonorable discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major Sandra K. Whittington.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Steven R. Kaufman.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

PER CURIAM:

The appellant was convicted, in accordance with his pleas, of wrongfully using and distributing marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. He was sentenced by officer members to a dishonorable discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the findings and sentence as adjudged.

The appellant contends, *inter alia*, that the military judge erred by admitting evidence, during sentencing, that the appellant was previously acquitted of marijuana use, and by instructing the members that confinement is "corrective, rather than punitive." The government concedes both errors, and further concedes that the instructional error was prejudicial. The appellant requests that we set aside his sentence and order a rehearing; the government asks us to reassess the sentence instead.

We agree with counsel for both sides that the military judge erred, and that the errors had the effect of depriving the appellant of a fair sentencing hearing. *See* Rule for Courts-Martial 1001(b)(3); Mil. R. Evid. 403; *United States v. Holmes*, 61 M.J. 148, 149 (C.A.A.F. 2005). We do not believe, however, that a rehearing is needed. If we can determine that, "absent the error, the sentence would have been at least of a certain magnitude," then we "may cure the error by reassessing the sentence instead of ordering a sentence rehearing." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). We are able to make such a determination in this case.

During his unsworn statement, the appellant asked the members to sentence him to a bad-conduct discharge and confinement for 98 days, the period of time he had already served in pretrial confinement. His counsel echoed that request during argument on sentence, calling on the members to impose a bad-conduct discharge, confinement for 98 days, and reduction to E-1. We are confident that, absent the errors noted above, the members would have given the appellant at least what he asked for. We reassess his sentence accordingly, and further find the reassessed sentence of a bad-conduct discharge, confinement for 98 days, and reduction to E-1 to be appropriate.[*]T

The findings and 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). Accordingly, the findings and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator

[*] Because we have reassessed the sentence, we need not address the appellant's contention that the sentence previously adjudged and approved was inappropriately severe.