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

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**UNITED STATES**

**v.**

**Airman Basic JOHN M. CONAWAY**
**United States Air Force**

**ACM 36300**

**29 June 2006**

Sentence adjudged 19 December 2004 by GCM convened at Francis E. Warren Air Force Base, Wyoming. Military Judge: Kurt D. Schuman.

Approved sentence: Bad-conduct discharge and confinement for 60 days.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major John N. Page III.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Kimani R. Eason.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

PER CURIAM:

A general court-martial composed of officers and enlisted members found the appellant guilty, pursuant to his pleas, of dereliction of duty for underage drinking and wrongful use of marijuana, in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892, 912a. He was acquitted of one specification of rape, in violation of Article 120, UCMJ, 10 U.S.C. § 920.

In the sentencing phase of the court-martial, the military judge included the following statement in his sentencing instructions to the members: "Military confinement facilities are corrective rather than punitive. Prisoners perform only those types of productive work which may be required of duty airmen." The members subsequently sentenced the appellant to a bad-conduct discharge and confinement for 60 days. The convening authority approved the findings and sentence as adjudged.

On appeal, the appellant claims that the military judge materially prejudiced his substantial rights when he instructed the court members in sentencing that military

confinement facilities are corrective rather than punitive. In accordance with precedent set by the Court of Appeals for the Armed Forces in *United States v. Holmes*, 61 M.J. 148, 149 (C.A.A.F. 2005), we find merit in the appellant's assignment of error. The military judge in this case committed prejudicial error when he erroneously instructed the members that confinement facilities are corrective rather than punitive. *See Holmes*, 61 M.J. at 149. Having found error, we must determine whether we can reassess the sentence or should order a sentence rehearing.

In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior court summarized the analysis required in sentence reassessment:

> In *United States v. Sales*, 22 M.J. 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. If the error at trial was of constitutional magnitude, then the court must be satisfied beyond a reasonable doubt that its reassessment cured the error. *Id.* at 307. If the court "cannot reliably determine what sentence would have been imposed at the trial level if the error had not occurred," then a sentence rehearing is required. *Id.*

After carefully reviewing the record of trial, we are convinced we can determine that, absent the sentencing instruction error, the sentence would have been at least of a certain magnitude. We are convinced beyond a reasonable doubt that by disapproving the adjudged confinement, as requested by the appellant in his prayer for relief, we will have assessed a punishment clearly no greater than the sentence the members would have imposed in the absence of error. *See Doss*, 57 M.J. at 185. Accordingly, under the criteria set forth in *Sales*, we reassess the sentence as follows: A bad-conduct discharge. We also find this sentence appropriate.

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