

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Technical Sergeant DAVID K. CRAVEN
United States Air Force**

ACM 34974

21 January 2004

Sentence adjudged 14 November 2001 by GCM convened at Schriever Air Force Base, Colorado. Military Judge: Steven B. Thompson.

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Kyle R. Jacobson, and Major Terry L. McElyea.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Matthew J. Mulbarger.

Before

PRATT, GRANT, and CONNELLY
Appellate Military Judges

OPINION OF THE COURT

CONNELLY, Judge:

The appellant was charged with one specification of wrongful use of marijuana on divers occasions and one specification of wrongful use of cocaine on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Consistent with his pleas, the appellant was found guilty of both specifications. A general court-martial comprised of members sentenced the appellant to a bad-conduct discharge, confinement for 6 months, forfeiture of all pay and allowances and reduction to airman basic. The adjudged sentence was approved.

The appellant requested a court-martial assembled with at least one-third enlisted members as provided for under Article 25(c)(1), UCMJ, 10 U.S.C. § 825(c)(1). The

convening authority appointed six officers and four enlisted members to the court-martial. Following a challenge for cause and peremptory strikes, five officers and two enlisted members remained. Enlisted members constituted 28.6% of the total membership of the court. The appellant contends that a court-martial assembled with less than one-third enlisted members is not permissible.

The interpretation of a statute and its legislative history is a question of law to be reviewed de novo. *United States v. Falk*, 50 M.J. 385, 390 (1999). Article 25(c)(1), UCMJ, provides, in part:

After such a request [for one third enlisted membership], the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies.

We agree with both the appellant and government's counsel, that the appellant's court-martial panel fell below the required officer-enlisted ratio and that it was not properly formed under Article 25, UCMJ. *See United States v. Rendon*, 27 C.M.R. 844 (N.M.B.R. 1958).

Although not raised as an issue by either party, we note that at trial the appellant purported to affirmatively waive his right to a court-martial comprised of enlisted members. Rule for Courts-Martial 903. However, we find it unnecessary to resolve this issue in the present case. For, even if an affirmative waiver of this right were possible, it would have to be knowing and voluntary. In this case, the flaw in the officer-enlisted ratio was not noticed and addressed until the panel members had heard all of the evidence, arguments, and instructions and were in deliberations. At that time, in an Article 39(a), UCMJ, 10 U.S.C. § 839(a), the military judge advised the appellant that his only options were to proceed with the existing panel or to add members to the court-martial and present the evidence anew; he did not advise the appellant of the obvious option of a completely new sentencing hearing. Under the circumstances and as the government concedes, we find that a new hearing on sentence is necessary and appropriate.

The approved findings are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred as to findings. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37,41 (C.A.A.F. 2000). The approved findings are therefore affirmed. The sentence of the appellant is set aside. The record of trial is returned to The Judge Advocate General for a new hearing on sentence.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator