UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ANTHONY J. CRENSHAW
United States Air Force

ACM S31653

25 January 2010

Sentence adjudged 22 April 2009 by SPCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Stephen R. Woody (sitting alone).

Approved sentence: Confinement for 4 months and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Raymond J. Hardy, Jr., Major Shannon A. Bennett, and Major Michael A. Burnat.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain Megan E. Middleton, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

PER CURIAM:

A special court-martial composed of military judge alone convicted the appellant in accordance with his pleas of wrongful use of marijuana on divers occasions and wrongful use of ecstasy, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The court-martial sentenced the appellant to reduction to the grade of E-1, confinement for five months, and a bad-conduct discharge. A pretrial agreement capped confinement at four months if a bad-conduct discharge was adjudged. In accordance with this agreement, the convening authority approved confinement for four months instead of the adjudged five and, though not expressly approving the bad-conduct discharge, ordered the sentence executed "except for the bad conduct discharge."

The appellant raises two issues on appeal: (1) whether the action of the convening authority prevents approval of the bad-conduct discharge and (2) whether the sentence is inappropriately severe.[1] For now, we address only the first issue since our jurisdiction depends on whether the bad conduct discharge is actually approved.

The Convening Authority's Action

The action reads: ". . . only so much of the sentence as provides for reduction to E-1 and confinement for 4 months is approved and, except for the bad conduct discharge, will be executed." The appellant argues this language clearly intends to disapprove the bad-conduct discharge. The government, on the other hand, argues that the language is unclear and requires a corrected action to remove the ambiguity.

The appellant correctly notes that, given the broad discretion vested in a convening authority, an action must be given effect when it is complete and unambiguous. *United States v. Wilson*, 65 M.J. 140, 141 (C.A.A.F. 2007). In *Wilson*, our superior court considered the intent of an action which stated, in part, "that part of the sentence extending to confinement in excess of 3 years and 3 months is disapproved. *The remainder of the sentence, with the exception of the Dishonorable Discharge, is approved* and will be executed." *Id*. at 141-42 (emphasis added). The Court found this language to be a "facially clear and unambiguous" disapproval of the punitive discharge: the action clearly excludes the dishonorable discharge from the sentence which "*is approved*." *Id*. (emphasis added).

In the present case, the action does not expressly exclude the punitive discharge from the approved sentence as in *Wilson*; rather, the action is, at least on the surface, unclear. The convening authority acted in accordance with a pretrial agreement that capped confinement at four months *if* a punitive discharge were adjudged, then ordered the sentence executed except for the punitive discharge. This arguably shows intent to approve rather than disapprove the punitive discharge. First, the reduction in approved confinement correlates with the understanding of the parties expressed in a pretrial agreement, specifically that the appellant would receive no more than four months of confinement if he also received a punitive discharge. Second, the action excludes a punitive discharge from *execution* (not *approval*) which indicates the convening authority intended to approve the punitive discharge since it makes no sense to exclude something from execution that has not been approved in the first place. *See United States v. Otero*, 26 M.J. 546, 548-49 (A.F.C.M.R. 1988). But we will not assume intent from the facially unclear and ambiguous language of this action.

Because our jurisdiction to review this case depends on the corrected action, we will not address the remaining issues until such time as a corrected action clearly shows

[1] The second issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

whether we have jurisdiction of this case. The record of trial is returned to The Judge Advocate General for remand to the convening authority for withdrawal of the ambiguous action and substitution of a corrected action along with a corrected promulgating order.[2] Rule for Courts-Martial 1107(g). If the bad-conduct discharge is approved, Article 66, UCMJ, 10 U.S.C. § 866, shall apply.

OFFICIAL

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

[2] The court-martial order (CMO), dated 20 May 2009, incorrectly states Specification 2 of the Charge as an *attempt* to wrongfully use ecstasy. The CMO should list the specification as wrongful use of ecstasy. The Court orders this change be made in the corrected CMO.