UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CURTIS J. FEHR
United States Air Force

ACM 36635

17 October 2006

Sentence adjudged 14 December 2005 by GCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: W. Thomas Cumbie (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 14 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gary F. Spencer and Lieutenant Colonel Robert V. Combs.

Before

BROWN, JACOBSON, and SCHOLZ
Appellate Military Judges

PER CURIAM:

A military judge sitting alone as a general court-martial found the appellant guilty, pursuant to his pleas, of distributing Vicodin and Tylenol III, larceny of Azithromax on divers occasions, larceny of Zyban, and larceny of Vicodin, in violation of Articles 112a and 121, UCMJ, 10 U.S.C. §§ 912a, 921.

On appeal, the appellant claims that he is entitled to a new staff judge advocate recommendation (SJAR) and convening authority action because the staff judge advocate (SJA) misstated the findings in regard to Specification 4 of Charge II, alleging theft of Zyban. Finding merit in the appellant's assignment of error, we dismiss the Specification and reassess the sentence.

The appellant was a pharmacy technician at the Seymour Johnson Air Force Base medical facility and took advantage of his position to steal various prescription drugs. In the Specification at issue before this Court, he was originally charged with stealing Zyban, a smoking-cessation drug, on divers occasions. Sometime after charges were preferred, but before trial, a pen-and-ink change was made to the charge sheet, deleting the words "on divers occasions." This change was discussed on the record. During the guilty plea inquiry, the appellant pled guilty to stealing approximately 49 Zyban pills on one occasion. Nonetheless, in the SJAR, and subsequently in the promulgating order, the specification regained the "on divers occasions" language. Although there was no question in regard to the amount of drug stolen, the mischaracterization of the number of criminal acts on the part of the appellant potentially misled the convening authority during the clemency process. The appellant did not challenge the SJAR during clemency, but now claims the SJAR contained plain error. Government appellate counsel concedes that plain error occurred, and we agree.

As our superior court pointed out in *United States v. Diaz*, 40 M.J. 335 (C.M.A. 1994),

> [I]n the absence of contrary evidence, a convening authority who does not expressly address findings in the action impliedly acts in reliance on the statutorily required recommendation of the SJA, *see* Art. 60(d)(1983), and thus effectively purports to approve implicitly the findings as reported to the convening authority by the SJA. Accordingly, to the extent that that recommendation misstates the findings adjudged, the action taken in reliance thereon is in error; and the ensuing review by the Court of Military Review as to any affected specification is a nullity.

Id. at 337, (citation omitted).

While we find error, we do not find it necessary to return the case to the convening authority for a new SJAR and action. Instead, we find it more appropriate to follow the path our superior court took in *Diaz*, and the Army Court of Criminal Appeals took in *United States v. Henderson*, 56 M.J. 911 (Army Ct. Crim. App. 2002). In both cases, the Courts resolved the ambiguity in the SJAR by dismissing the affected specification(s) and reassessing the appellant's sentence in light of that dismissal. We likewise dismiss the finding of guilty to Specification 4 of Charge II. Charge I and its Specifications are affirmed, as is Charge II and its remaining Specifications.

In light of our dismissal of the Specification, we will reassess the appellant's sentence. After reviewing the record of trial and applying the principals of *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), and *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986) in a slightly different context, we are convinced we can determine that, absent the finding of guilty to the dismissed Specification, the sentence would have been at least of a certain magnitude. While the dismissed Specification alleged a serious offense, it was only one of several serious offenses committed by the appellant. His crimes included theft and distribution of a significant amount of Vicodin, distribution of Tylenol III, and theft of Azithromax on more than one occasion. The appellant committed these crimes by abusing his position of trust in the pharmacy, and not only impacted himself, but also his coworkers, unit, and pharmacy customers. In this light, we are convinced beyond a reasonable doubt that by disapproving two months of the adjudged confinement, we will have clearly assessed a punishment no greater than the sentence the military judge would have imposed and the convening authority would have approved, in the absence of the dismissed Specification.

Accordingly, under the criteria set out in *Sales*, we reassess the sentence as follows: a bad-conduct discharge, confinement for 12 months, and reduction to the grade of E-1. We further find this reassessed sentence to be appropriate.

Conclusion

The approved findings, as modified, and the sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), 10 U.S.C. § 866(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings, as modified, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

JEFFREY L. NESTER
Clerk of Court