UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic TYRONE E. B. FULLER JR.
United States Air Force

ACM S30915

31 January 2007

Sentence adjudged 27 April 2005 by SPCM convened at Incirlik Air Base, Turkey. Military Judge: Adam Oler.

Approved sentence: Bad-conduct discharge, confinement for 12 months, and forfeiture of $823.00 pay per month for 12 months.

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 Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Kimani R. Eason.

Before

BROWN, JACOBSON, and BECHTOLD
Appellate Military Judges

OPINION OF THE COURT

PER CURIAM:

The appellant was convicted, in accordance with his pleas, of four specifications of larceny, in violation of Article 121, UCMJ, 10 U.S.C. § 921. Contrary to his pleas, he was also convicted of one specification of dishonorably failing to maintain sufficient funds to cover 31 bad checks totaling close to $7,000.00, in violation of Article 134, UCMJ, 10 U.S.C. § 934[1], and one specification of failure to go in violation of Article 86,

[1] We note that Special Court-Martial Order, No. 4, incorrectly states that the appellant pled guilty to the Specification of Charge II, vice the correct plea of not guilty. Although this error does not prejudice a substantial right of the appellant, we order that a new court-martial order be executed to accurately reflect the result of trial.

UCMJ, 10 U.S.C. § 886. He was sentenced by officer members to a bad-conduct discharge, confinement for 12 months, and forfeiture of $823.00 pay per month for 12 months. The convening authority approved the findings and sentence as adjudged.

The appellant does not challenge the findings of his court-martial, and we find them correct in both law and fact. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Instead, the appellant alleges error during the sentencing portion of the proceeding when the trial counsel was allowed to elicit testimony regarding aggravation that was not directly related to or resulting from the charged offenses. Specifically, the appellant's previous supervisor testified regarding unit impact resulting from the appellant being relieved of duty. However, the appellant was not relieved of duty as a result of any of the charged offenses; he was relieved of his duties for leaving his post, an infraction for which he received a letter of reprimand (LOR). Defense counsel did not object to this testimony at trial. The appellant now contends that the testimony constitutes plain error and requests that we set aside his sentence and order a rehearing. In its answer to the assignment of error, the government contends that the testimony does not constitute plain error and that any erroneous testimony was harmless.

In *United States v. Powell,* 49 M.J. 460, 463-64 (C.A.A.F. 1998); our superior court, citing *Johnson v. United States,* 520 U.S. 461 (1997) and *United States v. Olano,* 507 U.S. 725 (1993), clarified the plain error analysis for Courts of Criminal Appeals for whom independent review is non-discretionary. In addition to meeting the three prongs required by *Olano*[2]*, Powell* imposes an additional requirement that limits a court from reversing a sentence for legal error unless "the error materially prejudices the substantial rights of the accused" citing Article 59a, UCMJ, 10 U.S.C. § 859a. *Powell,* 49 M.J. at 465.

In the instant case, it is clear that the first three prongs are met. The admission of testimony regarding aggravation unrelated to the offenses for which the appellant was convicted is plainly erroneous. The testimony was clearly impermissible under Rules for Courts-Martial 1001(b)(4) and 1001(b)(5), Discussion. The ultimate question is whether the appellant was actually prejudiced. The instance of misconduct was already admitted through the LOR. Additionally, the prosecution introduced other aggravating circumstances. However, it is impossible to conclude that the appellant was not prejudiced by lengthy testimony regarding the effect his prior misconduct had on the unit. The appellant is entitled to be punished only for those offenses for which he stands convicted. Accordingly, we agree with the appellant that he was prejudiced by the impermissible testimony and should receive relief.

[2] According to *Olano*, there must be: 1) error, (2) that is "plain" or "obvious", and (3) that error must "affect[t] substantial rights." *Olano,* 507 U.S. at 735.

Although the appellant has requested a rehearing on sentencing, we do not believe 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 can make such a determination here. After carefully reviewing the record of trial, we are convinced beyond a reasonable doubt that by disapproving any confinement and forfeiture in excess of 11 months, 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 out in *Sales*, we reassess the sentence as follows: bad-conduct discharge, confinement for 11 months, and forfeiture of $828.00 pay per month for 11 months. Further, we find this sentence to be appropriate for the appellant and his crimes. *United States v. Peoples,* 29 M.J. 426, 427-28 (C.M.A. 1990); *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982).

The findings 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), UCMJ; *Reed*, 54 M.J. at 41. Accordingly, the findings and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator