

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

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**UNITED STATES**

**v.**

**Airman First Class KENNETH A. GARCIA**  
**United States Air Force**

**ACM 36090 (f rev)**

**30 May 2007**

Sentence adjudged 31 July 2006 by GCM convened at Shaw Air Force Base, South Carolina. Military Judges: Ronald A. Gregory and Donald A. Plude.

Approved sentence: Confinement for 6 months, forfeiture of \$500.00 pay per month for 6 months, and reduction to E-1.

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

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Michelle M. McCluer, Major Matthew S. Ward, and Major Kimani R. Eason.

Before

**BROWN, BECHTOLD, and WISE**  
Appellate Military Judges

**UPON FURTHER REVIEW**

**PER CURIAM:**

On 19 August 2004, the appellant was tried by officer members sitting as a general court-martial at Shaw Air Force Base (AFB), South Carolina. Pursuant to his pleas of guilty, he was convicted of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The appellant was sentenced to a bad-conduct discharge, hard labor without confinement for 30 days, restriction to Shaw AFB for 30 days, and reduction to the grade of E-1. The convening authority approved the findings and sentence as adjudged.

On 29 March 2006, this Court affirmed the findings of guilty of wrongful use of cocaine, but set aside the appellant's sentence and authorized a rehearing on sentence. *United States v. Garcia*, ACM 36090 (A.F. Ct. Crim. App. 29 Mar 2006) (unpub. op.). On 31 July 2006, a rehearing on the sentence took place at Shaw AFB before a general court-martial composed of officer members. The members sentenced the appellant to confinement for 6 months, hard labor without confinement for 3 months, restriction to Shaw AFB for two months, forfeiture of \$500.00 pay per month for 6 months, and reduction to the grade of E-1. On 3 November 2006, the convening authority took action and approved only so much of the sentence as provided for confinement for 6 months, forfeiture of \$500.00 pay per month for 6 months, and reduction to E-1.

This case is once again before our Court for further review. The appellant contends the convening authority abused his discretion when, contrary to Article 63, UCMJ, 10 U.S.C § 863, he approved the component of the appellant's sentence calling for confinement for six months, a component in excess of and more severe than the appellant's original sentence that included no confinement. We examined the record of trial, the assignment of error, and the government's reply thereto. We hold that under the facts and circumstances of this case, the sentence approved by the convening authority at the rehearing *was not* in excess of, or more severe than, the appellant's original approved sentence. See Article 63, UCMJ; Rule for Courts-Martial 810(d); *United States v. Hodges*, 22 M.J. 260, 262 (C.M.A. 1986); *United States v. Brown*, 32 C.M.R. 333 (C.M.A. 1962); *United States v. Turner*, 34 M.J. 1123 (A.F.C.M.R. 1992); *United States v. Jones*, 31 M.J. 908 (A.F.C.M.R. 1990). The convening authority did not abuse his discretion when he approved confinement for 6 months.<sup>1</sup>

The approved findings and sentence 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 are

AFFIRMED.

OFFICIAL

MARTHA E. COBLE-BEACH, TSgt, USAF  
Court Administrator

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<sup>1</sup> The appellant relies primarily upon *Waller v. Swift*, 30 M.J. 139 (C.M.A. 1990), to argue the convening authority abused his discretion. This case is distinguishable from *Waller*. Unlike *Waller*, the appellant, at his court-martial, did not have an honorable discharge from a previous enlistment. Second, *Waller* asked the court members to adjudge a punitive discharge; however, the appellant specifically asked them *not* to adjudge a bad-conduct discharge with its lifetime stigma. In addition, *Waller's* bad-conduct discharge was "commuted" by the convening authority to 12 months confinement over his objection. The appellant was sentenced to 6 months confinement after asking the members *not* to sentence him to a bad-conduct discharge.