UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CHAD R. GRACIE
United States Air Force

ACM 36269

8 June 2006

Sentence adjudged 1 March 2005 by GCM convened at Barksdale Air Force Base, Louisiana. Military Judge: Mary M. Boone.

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

Appellate Counsel for Appellant: Lieutenant Colonel Mark R. Strickland, Major Sandra K. Whittington, Captain John S. Fredland, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gary F. Spencer.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

PER CURIAM:

This case was submitted to us on its merits. However, we conclude the military judge erred by instructing the members in the presentencing phase that confinement is "corrective rather than punitive." *See United States v. Holmes*, 61 M.J. 148, 149 (C.A.A.F. 2005).

The appellant was convicted, according to his pleas, of a number of offenses related to his use and distribution of cocaine.[1] A panel of officer members sentenced him to a bad-conduct discharge, confinement for one year, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the adjudged sentence, except for the forfeiture of pay and allowances.

[1] The appellant was convicted of conspiracy to use cocaine, in violation of Article 81, UCMJ, 10 U.S.C. § 881, and the wrongful use, distribution, and introduction of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.

The military judge improperly instructed the members that "[m]ilitary confinement facilities are corrective rather than punitive." Given that instructional error, the question is whether we must order a rehearing on the sentence. If we can determine whether, "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 are confident we can reassess the sentence in accordance with the established criteria.

The appellant admitted to using cocaine about 25 times, to include at least one use after he knew he was under investigation. On a number of occasions, he brought cocaine onto Barksdale Air Force Base and distributed it to two fellow airmen. The trial counsel recommended 4 years and the maximum the appellant faced was 40 years. The members adjudged a period of confinement more in line with the trial defense counsel's argument for a "small portion of confinement" which seemed to correspond to the projected birth of the appellant's child some five months after trial. The trial counsel referred to treatment programs the appellant would have access to in confinement, but the thrust of his sentencing argument was that a lengthy period of confinement was warranted for punishment and deterrence.

We are certain that, absent the instructional error, the sentence would not have been less than a bad-conduct discharge, confinement for one year, and reduction to E-1. We also conclude the sentence, as reassessed, is appropriate. Article 66(c), UCMJ, 10 U.S.C. 866(c).

The approved 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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

THOMAS T. CRADDOCK, SSgt, USAF
Court Administrator