UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class BRIAN R. HARGROVE
United States Air Force

ACM 36068

30 March 2006

Sentence adjudged 10 July 2004 by GCM convened at Ramstein Air Base, Germany. Military Judge: Thomas W. Pittman and Adam Oler.

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major Sandra K. Whittington.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Matthew S. Ward.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

PER CURIAM:

At a general court-martial convened at Ramstein Air Base, Germany, a panel of officer and enlisted members convicted the appellant of wrongful use of ecstasy, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. They also found him guilty of operating a passenger car in a reckless manner, in violation of Article 111, UCMJ, 10 U.S.C. § 911. His sentence consisted of a bad-conduct discharge and reduction to the grade of E-1. The convening authority approved the findings and sentence as adjudged.

On appeal, the appellant challenges the legal and factual sufficiency of the reckless driving offense. The government's theory of liability was that the appellant's decision to operate a vehicle after wrongfully taking ecstasy was per se reckless. The government offered no evidence whatsoever of the appellant operating the vehicle in an

unsafe manner. The government concedes error, noting "neither the statutory language [of Article 111, UCMJ], the case law, nor the facts support the conviction for operating a vehicle in a reckless manner." We concur.

We next determine whether to reassess the sentence or return the case for a rehearing. When reassessing a sentence, this Court must "assure that the sentence is appropriate in relation to the affirmed findings of guilty, but also . . . assure that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed." *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985). We are guided in this endeavor by the principles announced in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) and its progeny. This Court may reassess the sentence instead of ordering a rehearing if we are convinced the sentence "would have been at least of a certain magnitude" in the absence of the error—in this case, in the absence of Charge II and its Specification. *See Id.* at 307. "The standard for reassessment is not what would be imposed at a rehearing but what would have been imposed at the original trial absent the error." *United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997).

In making this determination we note that dismissal of the reckless driving offense reduced the maximum confinement from 66 months to 60 months. Moreover, it would have been permissible for the court members to consider the propriety of the appellant's decision to operate a vehicle after ingesting a controlled substance as an aggravating circumstance. We are confident the court members would have imposed the same sentence absent the defective charge and specification. In addition, we find this reassessed sentence appropriate for the remaining offense. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c).

Charge II and its Specification are set aside and dismissed. The findings, as amended, 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 findings, as amended, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court