UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic BRIAN C. HILLS
United States Air Force

ACM 35985

27 February 2006

Sentence adjudged 3 June 2004 by GCM convened at Francis E. Warren Air Force Base, Wyoming. Military Judge: Barbara G. Brand (sitting alone).

Approved sentence: Dishonorable discharge and confinement for 60 months.

Appellate Counsel for Appellant: Lieutenant Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Sandra K. Whittington, Major L. Martin Powell, Captain David L. Bennett, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Michelle M. McCluer.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

PER CURIAM:

The appellant was convicted, in accordance with his pleas, of several offenses relating to his attempted escape from confinement at Francis E. Warren Air Force Base, Wyoming. His approved sentence includes a dishonorable discharge and confinement for 60 months.

On appeal, the appellant calls to our attention Specification 1 of Charge III, which alleges the appellant committed an assault upon Senior Airman (SrA) K with a means or force likely to inflict death or grievous bodily harm by striking him on the head with a metal rod, and Specification 2 of Charge III, which alleges the appellant assaulted SrA K

while he was in the performance of security forces duties by striking him on the head with a metal rod, both in violation of Article 128, UCMJ, 10 U.S.C. § 928. The appellant, relying on *United States v. Adams*, 49 M.J. 182, 186 (C.A.A.F. 1998), claims these specifications are multiplicious because they allege the same conduct. The government concedes the error. We concur and dismiss Specification 2 of Charge III.

Because we have modified the findings, we next consider whether we can reassess the sentence. If we can determine that the sentence would have been at least of a certain magnitude even absent the error, 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); *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986). We are able to do so in this case.

Dismissing Specification 2 of Charge III does not change the factual basis on which this military judge, sitting alone, sentenced the appellant. Moreover, prior to entry of pleas, the military judge announced her intent to treat the two specifications of Charge III "as only one." Taking into account the entire record, including the appellant's prior criminal record and the extraordinarily grave nature of these offenses, we are confident that the military judge would have adjudged the same sentence absent the error. Further, we find that sentence to be appropriate for this offender and these offenses.

The findings, as modified, and 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, 10 U.S.C. § 866(c); *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

ANGELA M. BRICE
Clerk of Court