

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Senior Airman JOHN W. HOLMES
United States Air Force**

ACM 35411 (f rev)

31 August 2005

Sentence adjudged 4 October 2002 by GCM convened at Pope Air Force Base, North Carolina. Military Judge: Ann D. Shane.

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Colonel Carlos L. McDade, Major Terry L. McElyea, Major Andrew S. Williams, and Major Sandra K. Whittington.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Lieutenant Colonel Michael E. Savage, and Major Kevin P. Stiens.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

**OPINION OF THE COURT
UPON FURTHER REVIEW**

This opinion is subject to editorial correction before final release.

JOHNSON, Judge:

In accordance with his pleas, the appellant was convicted of one specification of dereliction of duty, five specifications of illegal drug use, three specifications of larceny, and two specifications of forgery in violation of Articles 92, 112a, 121, and 123, UCMJ, 10 U.S.C. §§ 892, 912a, 921, 923. A panel of officer and enlisted members sentenced the appellant to a bad-conduct discharge, confinement for 4 months, and reduction to E-1.

The convening authority approved the sentence adjudged. On appeal, this Court affirmed the findings and the sentence in an unpublished opinion. *United States v. Holmes*, ACM 35411 (A.F. Ct. Crim. App. 28 Sep 2004) (unpub. op.). Thereafter, our superior court considered the case and held that the sentencing instruction was erroneous. Accordingly, the Court affirmed the findings, but reversed as to the sentence. *United States v. Holmes*, 61 M.J. 148 (C.A.A.F. 2005) (mem.).

The case comes before us now on remand from our superior court so that we may either reassess the sentence or order a sentence rehearing. *Id.* In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior court summarized the analysis required in evaluating sentence reassessment:

“In *United States v. Sales*, 22 MJ 305 (CMA 1986), this Court set out the rules for sentence reassessment by a Court of Criminal Appeals. If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *Id.* at 307. A sentence of that magnitude or less “will be free of the prejudicial effects of error.” *Id.* at 308. If the error at trial was of constitutional magnitude, then the court must be satisfied beyond a reasonable doubt that its reassessment cured the error. *Id.* at 307. If the court “cannot reliably determine what sentence would have been imposed at the trial level if the error had not occurred,” then a sentence rehearing is required.” *Id.*

The appellant requests this Court set aside the bad-conduct discharge or, in the alternative, order a rehearing on sentence. The appellee urges this Court to reassess the sentence, to include a bad-conduct discharge, rather than order a rehearing.

After a review of the record, we are convinced we can determine that, absent the sentencing instruction error, the sentence would have been at least of a certain magnitude. Although we believe the members would have adjudged the same sentence absent the sentencing instruction error, we are firmly convinced that by disapproving confinement for four months we will have assessed a punishment clearly no greater than the sentence the original court-martial would have imposed in the absence of error. *Doss*, 57 M.J. at 185. After reassessing the sentence under the criteria set forth in *Sales*, we find that the appropriate sentence is a bad-conduct discharge and reduction to E-1.

The findings and sentence, as reassessed, are correct in law and fact, and no error prejudicial to the appellant's rights 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, as reassessed, are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court