

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman Basic LEVI S. LADWIG
United States Air Force**

ACM S30299

8 February 2005

Sentence adjudged 18 December 2002 by SPCM convened at Misawa Air Base, Japan. Military Judge: David F. Brash (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, a fine of \$2,000.00, and to be further confined until such fine is paid, but not for more than 2 months in addition to the 5 months already adjudged.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Andrew S. Williams, and Major Rachel E. VanLandingham.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Lieutenant Colonel David N. Cooper.

Before

ORR, MOODY, and CONNELLY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

CONNELLY, Judge:

The appellant pled guilty to conspiracy, destruction of property other than military property, and larceny, in violation of Articles 81, 109, and 121, UCMJ, 10 U.S.C. §§ 881, 909, 921. A military judge sitting alone as a special court-martial accepted the appellant's pleas and sentenced him to a bad-conduct discharge, confinement for 5 months, and a fine of \$2,000.00, and to serve further confinement until such fine is paid, but not for more than 2 months in addition to the 5 months already adjudged. The convening authority approved the adjudged findings and sentence.

On appeal, the appellant contends that his sentence is inappropriately severe. Specifically, the appellant alleges the \$2,000.00 fine is inappropriate because: (1) there was no evidence of unjust enrichment; (2) the fine violates congressional intent of not depriving a service member sentenced in a special court-martial of more than two-thirds pay per month; and (3) the appellant suffered actual harm when the fine was satisfied through involuntary government withholding action of the appellant's pay while he was in confinement.

The appellant was the ringleader in an action to steal electronic equipment from a vehicle located at an auto dealership in Misawa City, Japan. Two other airmen assisted the appellant. The three stole electronic components worth approximately \$4,500 and caused approximately \$3,000 in damage to the vehicle. The appellant was found in possession of some of the electronic components shortly after the theft. One of the other co-conspirators paid the auto dealership \$7,000 as restitution. The appellant paid nothing to the auto dealership, nor did he contribute any money to the co-conspirator's restitution.

The appellant argues that no fine should be imposed, as he was not unjustly enriched as a result of his crime. The Discussion to Rule for Courts-Martial (R.C.M.) 1003(b)(3) suggests, "A fine normally should not be adjudged against a member of the armed forces unless the accused was unjustly enriched as a result of the offense of which convicted." However, in *United States v. Cuen*, 26 C.M.R. 112, 117 n.5 (C.M.A. 1958), our superior court noted that the language in the Discussion set forth above "is directory rather than mandatory" and the use of the term "ordinarily" contemplated the imposition of a fine even where there was no unjust enrichment. In this case, the appellant had the use of some of the electronic components for a short period of time and his actions caused significant financial damage to the victim. The appellant made no effort to recompense the victim. He had a history of bringing discredit on the military as reflected by his two nonjudicial punishments. His military record was less than satisfactory. Under these circumstances, we cannot say that the appellant's fine was inappropriate.

Article 19, UCMJ, 10 U.S.C. § 819, limits the sentencing authority of a special court-martial to, inter alia, forfeiture of two-thirds pay per month for 12 months. The appellant submits this limitation evidences a congressional intent to cap the amount of money lost by an enlisted member in a special court-martial to two-thirds pay per month for 12 months.

Since the appellant received a punitive discharge, Article 58b, UCMJ, 10 U.S.C. § 858b, mandates forfeiture of two-thirds pay which in this case went into effect 14 days after the sentence was adjudged. The appellant argues that, in order to avoid the contingent confinement, he was required to use his remaining one-third pay to satisfy the fine. Thus, the appellant was deprived of all of his pay while confined in violation of Article 19, UCMJ.

The appellant's analysis is incorrect. Article 19, UCMJ, limits only the amount of pay that can be forfeited. It contains no limitation on the amount of any fine. R.C.M. 1003(b)(3) and 1107(d)(5) cap the total amount of forfeitures and fine that can be adjudged and approved by a special court-martial and by a special court-martial convening authority at the "jurisdictional maximum dollar amount of forfeitures that may be adjudged at that court-martial." The mandatory forfeitures and fine adjudged and approved in this case do not exceed this maximum (12 times the two-thirds pay of an E-1).

The appellant's analysis is also faulty as it assumes that a service member will use the remaining one-third of his pay to satisfy the fine. While that may have occurred in the instant case, other service members may satisfy a fine through the use of savings, selling an asset, obtaining a loan, or serving contingent confinement. Thus, if one accepted the appellant's analysis, the legality and appropriateness of a fine imposed in a special court-martial would vary according to the manner in which the fine was paid. A fine paid from savings accounts, loan proceeds, sales of assets, or satisfied through serving contingent confinement would pass muster, while a fine paid from the remaining one-third of pay after mandatory forfeitures were deducted would fail. Congress did not intend such an outcome.

The appellant also asserts that, during his confinement, the government involuntarily withheld from his pay money to satisfy the fine, despite the restrictions contained in 37 U.S.C. § 1007(c) against the government involuntarily withholding more than two-thirds pay for a fine's general indebtedness. Assuming this occurred, the appellant's redress for his grievance lies not with this Court, but rather through administrative action with the appropriate accounting and finance office.

The 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

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator