UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant CLIFFORD MASON
United States Air Force

ACM 34677 (f rev)

8 December 2003

Sentence adjudged 5 May 2001 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Steven A. Hatfield.

Approved sentence: Dishonorable discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Jennifer R. Rider.

Before

STONE, GENT, and JOHNSON-WRIGHT
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

STONE, Senior Judge:

The appellant was a training instructor at Lackland Air Force Base, Texas. At trial, he faced four specifications of violating a lawful general regulation, Article 92, UCMJ, 10 U.S.C. § 892. Each specification alleged an improper personal or sexual relationship with a different female trainee under his supervision.

Contrary to his pleas, court members found the appellant guilty of three of the four specifications and sentenced him to a dishonorable discharge, confinement for 3 years, total forfeiture of pay and allowances, and reduction to the grade of E-1. Without

modifying, suspending, or disapproving the adjudged forfeitures, the convening authority waived mandatory forfeitures pursuant to Article 58b, UCMJ, 10 U.S.C. § 858b, thereby allowing the appellant's dependents to receive $330.00 per month for six months.

This Court affirmed the findings and sentence on 16 October 2002. On 16 September 2003, our superior court dismissed one of the three remaining specifications because it was vague and ambiguous, citing *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003), a case decided several months earlier. Our superior court affirmed this Court's decision in all other respects, including the findings on the two remaining specifications. The case has been remanded to this Court to determine whether to (1) reassess the sentence based on the affirmed findings of guilty or (2) set aside and order a rehearing on the sentence. Once we resolve this issue, the remand requires us to ensure the sentence complies with *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002).

I. Sentence Reassessment

In accordance with the principles of *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), we have decided to reassess the sentence rather than return the case for a rehearing. In *Sales*, our superior court concluded that a court of criminal appeals may reassess a sentence and cure the prejudicial impact of error if the court can determine that, absent the error, "the accused's sentence would have been at least of a certain magnitude." *Id*. at 307. In doing so, we must be mindful of the distinction between our duty to determine sentence appropriateness pursuant to Article 66(c), 10 U.S.C. § 866(c), and our ability to "purge the prejudicial impact of error" pursuant to Article 59(a), 10 U.S.C. § 859(a). Our superior court has repeatedly emphasized:

> [W]hen a Court of Military Review reassesses a sentence because of prejudicial error, its task differs from that which it performs in the ordinary review of a case. Under Article 66, . . . the Court of Military Review must assure that the sentence adjudged is appropriate for the offenses of which the accused has been convicted; and, if the sentence is excessive, it must reduce the sentence to make it appropriate. However, when prejudicial error has occurred in a trial, not only must the Court of Military Review assure that the sentence is appropriate in relation to the affirmed findings of guilty, but also it must 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). *See also United States v. Doss*, 57 M.J. 182, 186 (C.A.A.F. 2002) (Court of Criminal Appeals cannot co-mingle the concepts of sentence reassessment and sentence appropriateness) (Crawford, C.J., concurring in part and dissenting in part).

In reassessing a sentence, we must be reasonably satisfied that the reassessed sentence is no "higher than that which would have been adjudged absent error." *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000). We accomplish this task by "putting ourselves in the shoes of the sentencing authority" and discerning "the extent of the error's effect on the sentencing authority's decision." *United States v. King*, 50 M.J. 686, 688 (A.F. Ct. Crim. App. 1999) (en banc) (citing *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991)). "To do so, we [may] only consider the evidence that was [properly] before the sentencing authority at trial." *Id.* After we reassess the sentence, we must consider the entire record and the allied papers to determine whether the sentence is appropriate. *United States v. Peoples,* 29 M.J. 426, 428 (C.M.A. 1990).

We are confident we can reliably determine a sentence no higher than what would have been imposed at the trial level, absent the prejudicial error. In making this determination, we recognize that the sentencing authority consisted of a panel of members assigned to Lackland Air Force Base and ostensibly exposed to the unique needs of a training environment involving newly minted airmen. We further note that even though the maximum confinement for the remaining offenses is 4 years rather than 6 years, this difference is not so vastly disparate that it significantly altered the penalty landscape placed before the panel members.

Even in the absence of one of the three specifications, the panel members would have likely considered much the same evidence in extenuation and mitigation because the dismissal of the defective specification would have had minimal impact on the appellant's tactical decisions. The appellant's sentencing case highlighted his outstanding duty performance and his concerns for his family. It included an unsworn statement wherein he accepted responsibility for his actions, apologized to each of the victims, and acknowledged the discredit he brought to his position as a training instructor. Given this approach, the appellant would have likely presented substantially the same evidence in mitigation and extenuation.

Similarly, the government's sentencing evidence would not have been significantly affected by the purging of the defective specification. The impact of the appellant's conduct on good order and discipline was an aggravating circumstance of considerable weight and magnitude. As a result of the allegations raised by the charges, the appellant and the other two instructors were removed from training duties--an administrative action which would have been necessary even in the absence of the defective specification. The removal of the three instructors came at a time when the school was experiencing a surge in students and a revision in the school's curriculum. These events led to the temporary closure of the school's warehouse training facility, significant training deficiencies for many students, and damage to the school's reputation.

Another important consideration is the victim impact evidence. The government presented no victim impact evidence concerning the trainee named in the dismissed

specification. The court members did hear considerable victim impact evidence concerning one of the two remaining trainees. The significant negative emotional impact on this victim was clearly corroborated at trial.

The dissent suggests that the trial counsel's case theory may have played an unfair role in the court member's sentencing decision. We are not convinced the court members' judgment was overly influenced by the trial counsel's argument in findings or sentencing. In fact, the trial counsel repeatedly downplayed the impact on the victim named in the dismissed specification. Rather, the thrust of the government's case throughout the trial tended to focus on the victim who testified in sentencing. *See also* S. Rep. No. 98-53, 98th Cong., 1st sess. 21 (1983). ("If there is an objection to an error that is deemed prejudicial under Article 59 during appellate review, it is the Committee's intent that the appropriate corrective action be taken by appellate authorities without returning the case for further action by a convening authority.")

We therefore approve only so much of the sentence as provides for a dishonorable discharge, confinement for 30 months, forfeiture of all pay and allowances, and reduction to E-1. We are reasonably satisfied that the reassessed sentence is no higher than that which would have been adjudged absent the error. Article 59(a), UCMJ. We further hold that the sentence, as reassessed, is appropriate. Article 66(c), UCMJ.

II. Waiver of Mandatory Forfeitures

Subsequent to the convening authority's action in this case, our superior court issued *Emminizer*, 56 M.J. at 441. The convening authority in *Emminizer* denied the accused's request for waiver of mandatory forfeitures based upon incomplete advice from his staff judge advocate. Our superior court concluded that the incomplete advice might have led the convening authority to believe he had to disapprove forfeitures for the entire 18-month period of the accused's confinement in order to grant a waiver request for 6 months. *Id*. at 445. *Emminizer* also resolved a conflict among the various service courts as to whether the convening authority must first disapprove adjudged forfeitures in order to effect a decision to waive mandatory forfeitures. Based upon the language in Article 58b(b), UCMJ, our superior court concluded that mandatory forfeitures would be triggered only if the member is otherwise entitled to pay, and if mandatory forfeitures were not triggered because adjudged forfeitures were in effect, then no funds would be available to waive for the benefit of dependents. *Id*. at 444-45.

In *United States v. Medina*, 59 M.J. 571 (A.F. Ct. Crim. App. 2003), we held it was not necessary for this Court "to disapprove the appellant's adjudged forfeitures where the convening authority clearly intended to waive the mandatory forfeitures, the action carried out such waiver in a manner compliant with the understanding of Article 58b, UCMJ, at the time, and the appellant's [dependents] received the pay at issue." *Id*. at 572.

In the present case, the defense accounting and finance system implemented the waiver of mandatory forfeitures despite the failure of the convening authority to first disapprove, modify, or suspend the adjudged forfeitures. This administrative compliance with the convening authority's clear intention ensured that "pay" was indeed made available. In this regard, we believe there has been compliance with the logic expressed in *Emminizer*—that for there to be a waiver of mandatory forfeitures, "pay" must be available for that purpose.

We find that the convening authority was not misled in any way about his authority to waive mandatory forfeitures for the benefit of the appellant's dependents. His intention to do so is evident from the action itself. *Cf. United States v. Loft*, 10 M.J. 266, 268 (C.M.A. 1981). We further find that the record establishes that the action carried out his clear and unequivocal intention, and the appellant's dependents in fact received the pay at issue. We hold the action was effective to implement the convening authority's clear intention, despite the technical deficiency. Thus, consistent with the holding of *Emminizer* and the guidance therein as to how to effectuate a waiver of mandatory forfeiture, we conclude that neither a reduction in adjudged forfeitures nor a new action are warranted.

The findings and the sentence, as reassessed, are correct in law and fact and no error prejudicial to the appellant's right occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and the sentence, as reassessed, are

AFFIRMED.

JOHNSON-WRIGHT, Judge (dissenting):

The majority states that in order to properly reassess a sentence, we must discern "the extent of the error's effect on the sentencing authority's decision" and put "ourselves in the shoes of the sentencing authority." *King*, 50 M.J. at 688. Based on the particular facts in this case, it is impossible to wear the shoes of *this* sentencing authority. Therefore, I respectfully dissent.

To understand my position, a brief discussion of the case is necessary. Specification 1 of the Charge alleged wrongful sexual activities on divers occasions with Airman Basic (AB) F. Specification 2 alleged wrongful sexual activities and seeking and accepting sexual advances and favors from Airman First Class (A1C) C. Specification 3, of which the appellant was acquitted, alleged wrongfully developing or attempting to develop a personal relationship with AB H. Specification 4 alleged wrongfully developing or attempting to develop a personal relationship with AB G.

At trial, the court members found the appellant guilty of Specification 1, except the words "on divers occasion," Specification 2, and Specification 4. Our superior court dismissed Specification 1. This court must now reassess the sentence based on the evidence that supports Specifications 2 and 4.

It is apparent that the prosecution's theory at trial was the appellant engaged in a pattern of sexual misconduct with AB F and A1C C. In fact, in the closing argument, the assistant trial counsel used the word "pattern" **10** times to highlight the appellant's sexual misconduct with both AB F and A1C C. He also frequently used other language to highlight the similarity in the appellant's conduct with AB F and A1C C ("exact same room," "same location," "same table.") Trial counsel continued the "pattern theory" in his sentencing argument.

Did the members sentence the appellant to be dishonorably discharged, to be confined for 3 years and reduced to the lowest enlisted grade, and to forfeit all pay and allowances because they were persuaded by the prosecutor's theory? Was it the pattern of sexual misconduct that was so egregious that the worst service characterization was warranted? Without a pattern of sexual misconduct with two different trainees, would the members have sentenced the appellant to be dishonorably discharged? Trial counsel suggested in his sentencing argument that a bad-conduct discharge might be appropriate if the "accused had one sexual encounter perhaps."

Instead of two instances of sexual activity with two different trainees, we are left with one specification of sexual activity and one specification of wrongfully developing or attempting to develop a personal relationship with a different trainee. How does one confidently and reliably know that the members would not have reduced the sentence of confinement by 7 months, 8 months, 9 months, 10 months . . .? Is dismissing one of the most serious crimes only worth a reduction of 6 months confinement? These questions are posed to illustrate how difficult it is to reassess sentences. Here, we do not have a road map that would suggest the appellant's sentence would have been at least of a certain magnitude. We do not know what evidence convinced the members to sentence the appellant to receive a dishonorable discharge instead of a bad-conduct discharge. We do not know what evidence convinced the members to sentence him to 3 years instead of 2 years or 1 year. If we do not know what evidence in particular convinced them to sentence him at the trial level, how can we now know, with reliable confidence, that the appellant's sentence would have been at least a dishonorable discharge, confinement for 30 months, forfeiture of all pay and allowances, and reduction to E-1? A rehearing on sentence is the fair course of action in this case.

Concerning the waiver of forfeitures issue, our superior court directed this Court to "take such steps as are necessary to ensure that the sentence complies with the requirements of *United States v. Emminizer,* 56 M.J. 441 (C.A.A.F. 2002)." *United States v. Mason*, No. 03-0141/AF (16 Sep 2003). The majority holds that the convening

authority's action was effective in spite of its technical deficiency. In my view, compliance dictates we send the action back to the convening authority for correction.

OFFICIAL

HEATHER D. LABE
Clerk of Court