UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant JEFFREY D. MCKINNEY
United States Air Force

ACM 37559

17 December 2010

Sentence adjudged 26 August 2009 by GCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Michael E. Savage (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 30 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford, Major Shannon A. Bennett, Major Darrin K. Johns, Major Michael S. Kerr, Major David P. Bennett, and Major Tiwana L. Wright.

Appellate Counsel for the United States: Lieutenant Colonel Jeremy S. Weber, Major Deanna Daly, Major Coretta E. Gray, and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and ROAN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

GREGORY, Senior Judge:

A general court-martial composed of a military judge sitting alone convicted the appellant in accordance with his pleas of (1) one specification of stealing money on divers occasions of a value greater than $500.00,[1] (2) one specification of stealing

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[1] The actual amount stolen was over $10,000.

military property of a value greater than $500.00,[2] (3) two specifications of interstate wire fraud, and (4) one specification of identity theft in violation of Articles 121 and 134, UCMJ, 10 U.S.C. §§ 921, 934.[3] The court sentenced him to a bad-conduct discharge, confinement for 30 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence adjudged,[4] but waived automatic forfeitures for the benefit of the appellant's wife. The appellant assigns two errors: (1) whether his sentence is inappropriately severe and (2) whether the action of the convening authority requires correction.

Background

Using the identity of his ex-wife without her knowledge or consent, the appellant applied for and received a credit card from Citibank and proceeded to charge over $10,000 in merchandise and services which was paid for by Citibank. He applied for a second credit card, again using his ex-wife's identity, but the application was rejected on the basis of suspected fraud. During the guilty plea inquiry the appellant explained to the military judge that he decided to use his ex-wife's identity to apply for credit cards after he and his second wife were refused credit based on delinquent accounts. The appellant also stole flooring tiles from his workplace valued at over $1,000 which he planned to use to repair flooring in his home.

Sentence Appropriateness

Citing a difficult childhood, his current wife's medical problems, his alcoholism, his financial problems, and his service record of 15 years, the appellant argues that his sentence is too severe.[5] We review sentence appropriateness de novo. *See United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The appellant's criminal actions spanned approximately nine months, during which time he repeatedly used his fraudulently obtained credit card to purchase a wide

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[2] Ceramic floor tiles worth approximately $1,000.

[3] The two specifications of wire fraud are charged as a violation of 18 U.S.C. § 1343, and the identity theft is charged as a violation of 18 U.S.C. § 1028A(a)(1), both under clause three of Article 134.

[4] The Court notes that the Court-Martial Order (CMO), dated 2 October 2009, incorrectly states the adjudged confinement as 2 years and 6 months. The CMO should be corrected to reflect the sentence as announced in court, which included confinement for 30 months. The Court orders promulgation of a corrected CMO.

[5] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

range of goods and services that included multiple transactions at Wal-Mart, purchases of movie tickets, and even an entrance fee to tour the Battleship North Carolina – obviously not the case of a Jean Valjean stealing bread for his starving family. Meanwhile, his ex-wife, an active duty noncommissioned officer serving overseas at the time of the fraud, spent months dealing with collection agencies and banks trying to sort out the myriad financial problems caused by her ex-husband's misconduct. Nor was the fraudulent credit enough for the appellant; despite multiple credit charges to various home improvement stores, the appellant also stole over $1,000 in floor tiles from his work center to repair his kitchen floor. Having considered the sentence de novo in light of the character of this offender, the nature and seriousness of his offenses, and the entire record of trial, we find the appellant's sentence appropriate.

The Action of the Convening Authority

Both the appellant and government counsel agree that the convening authority's action is in error by waiving automatic forfeitures for the benefit of the appellant's spouse while fully approving the adjudged total forfeitures. When acting on a sentence which includes forfeitures, a convening authority may reduce, suspend, or disapprove adjudged forfeitures thereby making mandatory forfeitures available for waiver to benefit the service member's dependents under Article 58(b), UCMJ, 10 U.S.C. § 858(b). Here, the convening authority clearly intended to waive mandatory forfeitures for the benefit of the appellant's spouse, but by approving the adjudged forfeitures the spouse has technically received compensation to which she was not entitled. In this event, we need not return the record to the convening authority for corrective action but may correct the error by disapproving the adjudged forfeitures. *United States v. Johnson*, 62 M.J. 31, 38 (C.A.A.F. 2005) (citing *United States v. Emminizer*, 56 M.J. 441, 445 (C.A.A.F. 2002)).

Conclusion

Accordingly, we conclude 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). However, to ensure the convening authority's intent is satisfied in regard to financial support for the appellant's spouse, we affirm only so much of the sentence as includes a bad-conduct discharge, confinement for 30 months, and reduction to the grade of E-1.

Accordingly, the findings and the sentence, as modified, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court