**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman Basic TYSON J. METZGER**
**United States Air Force**

**ACM S30547**

**20 December 2004**

Sentence adjudged 5 December 2003 by SPCM convened at Buckley Air Force Base, Colorado. Military Judge: Steven B. Thompson.

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of $767.00 pay per month for 6 months, and a reprimand.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, Captain Jennifer K. Martwick, and Captain David P. Bennett.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer.

Before

STONE, GENT, and SMITH
Appellate Military Judges

PER CURIAM:

The appellant has alleged no error in the court-martial proceedings, but three matters warrant brief comment.

First, the staff judge advocate's recommendation (SJAR) to the convening authority stated the primary evidence against the appellant was a positive urinalysis "and the accused's unsworn statement during the trial." That was a clear error, in that the appellant's presentencing statement was not considered on the merits by the members and, in any event, an unsworn statement is not evidence. *United States v. Provost*, 32 M.J. 98, 99 (C.M.A. 1991); *United States v. Friedmann*, 53 M.J. 800, 803 (A.F. Ct. Crim. App. 2000). The appellant did not object in his response to the SJAR. Reviewing for plain error, we conclude the error did not materially prejudice the substantial rights of the appellant. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

Second, the sentence adjudged by officer and enlisted members included a reprimand. The convening authority approved the sentence as adjudged, but there is no reprimand language in the action or the promulgating order. A reprimand, if approved, must be issued in the action by the convening authority. Rules for Courts-Martial (R.C.M.) 1003(b)(1); R.C.M. 1107(f)(4)(G). Nothing in the record reflects the convening authority's intention to reprimand the appellant. We could offer both sides the opportunity to comment on the status of that part of the sentence, but decide instead to approve only that portion of the sentence consisting of a bad-conduct discharge, confinement for 6 months, and forfeiture of $767.00 pay per month for 6 months. *United States v. Casey*, 32 M.J. 1023 (A.F.C.M.R. 1991).

Finally, the military judge did not formally announce the assembly of the court-martial as required by R.C.M. 911. There are no issues with respect to substitution of members or forum selection, and we are convinced the failure to announce assembly was simply an oversight. We consider the court to have been assembled immediately after the oath was administered to the members and before voir dire. *United States v. Dixon*, 18 M.J. 310 (C.M.A. 1984). Reviewing for plain error, we conclude the error did not materially prejudice the substantial rights of the appellant. Article 59(a), UCMJ.

The approved findings and sentence, as modified, 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 approved findings and sentence, as modified, are

AFFIRMED.

Judge GENT did not participate.

OFFICIAL

ANGELA M. BRICE
Clerk of Court