

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman First Class CHRISTOPHER P. MOFFEIT
United States Air Force**

ACM 35159 (f rev)

8 December 2004

Sentence adjudged 7 February 2002 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Thomas G. Crossan Jr. (sitting alone), Rodger A. Drew, and Ann D. Shane.

Approved sentence: Dishonorable discharge, confinement for 45 months, 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, Lieutenant Colonel Robert V. Combs, Lieutenant Colonel Lance B. Sigmon, Major Shannon J. Kennedy, and Major Michelle M. Lindo.

Before

STONE, MOODY, and JOHNSON
Appellate Military Judges

UPON FURTHER REVIEW

PER CURIAM:

This case is before our Court for the second time. In *United States v. Moffeit*, ACM 35159 (recon) (A.F. Ct. Crim. App. 18 Feb 2004) (unpub. op.), we affirmed the findings and sentence. On appeal, our superior court set aside the finding of guilty as to Specifications 1 and 2 of the Charge and the sentence. The case is returned to us with instructions to “either dismiss Specifications 1 and 2 of the Charge and reassess the sentence based on the affirmed guilty findings or order a rehearing.” *United States v. Moffeit*, No. 04-0442/AF (30 Sep 2004). Under the facts and circumstances of this case,

we conclude the appropriate remedy is to dismiss Specifications 1 and 2 of the Charge. We further conclude we can reassess the sentence in accordance with the established criteria.

In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior court summarized the required analysis for reassessing a sentence:

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.*

Applying this analysis, and after careful consideration of the entire record, we are satisfied beyond a reasonable doubt that, in the absence of Specifications 1 and 2 of the Charge, the military judge would have adjudged a sentence of no less than a dishonorable discharge, confinement for 33 months, forfeiture of all pay and allowances, and reduction to E-1. In addition, we find this reassessed sentence appropriate for the offenses involved. Article 66(c), UCMJ, 10 U.S.C. § 866(c).

Specifications 1 and 2 of the Charge are dismissed. The findings, as amended, and the sentence, as reassessed, are correct in law and fact and no error prejudicial to the appellant’s substantial rights occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings, as amended, and the sentence, as reassessed, are

AFFIRMED.

JOHNSON, Judge (concurring in part and dissenting in part):

I concur with the majority’s conclusion that the appropriate remedy is to dismiss Specifications 1 and 2 of the Charge. However, I am not satisfied beyond a reasonable doubt that, in the absence of Specifications 1 and 2 of the Charge, the military judge would have adjudged a sentence of no less than a dishonorable discharge, confinement

for 33 months, forfeiture of all pay and allowances, and reduction to E-1. Accordingly, I would return the case to the convening authority for a sentence rehearing.

OFFICIAL

ANGELA M. BRICE
Clerk of Court