UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic ANTWON L. OWENS
United States Air Force

ACM S30715

24 February 2006

Sentence adjudged 12 August 2004 by SPCM convened at Ramstein Air Base, Germany. Military Judge: Kurt D. Schuman.

Approved sentence: Bad-conduct discharge, confinement for 6 months, and forfeiture of $795.00 pay per month for 6 months.

Appellate Counsel for Appellant: Lieutenant Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Sandra K. Whittington, and Major L. Martin Powell.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Jefferson E. McBride.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

PER CURIAM:

The appellant was tried by officer members sitting as a special court-martial at Little Rock Air Force Base, Arkansas. He was convicted, contrary to his pleas, of willfully damaging non-military property, in violation of Article 109, UCMJ, 10 U.S.C. § 909. In accordance with his pleas, he was convicted of wrongful use of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The members sentenced him to a bad-conduct discharge, confinement for 8 months, and forfeiture of $795.00 pay per month for 8 months. The convening authority approved only so much of the sentence as provided for a bad-conduct discharge, confinement for 6 months, and forfeiture of $795.00 pay per month for 6 months. On appeal, the appellant claims that the military judge materially prejudiced his substantial rights when he instructed the court members in

sentencing that military confinement facilities are corrective rather than punitive. In accordance with precedent set by our superior court in *United States v. Holmes*, 61 M.J. 148, 149 (C.A.A.F. 2005) (mem.), we find merit in the appellant's assignment of error.

The military judge orally and in writing properly instructed the members that confinement is a form of authorized punishment. *See* Article 58(a), UCMJ, 10 U.S.C. § 858(a). However, he also orally and in writing instructed the court members that military confinement facilities are corrective rather than punitive. The trial defense counsel did not object to either instruction. In *Holmes*, our superior court held it was prejudicial error for the military judge to instruct the court members that military confinement facilities are corrective rather than punitive. Accordingly, the court affirmed the findings, but set aside the sentence and remanded the case back to this Court for either a sentence reassessment or a sentence rehearing. We find the military judge in this case committed prejudicial error when he erroneously instructed the members that confinement facilities are corrective rather than punitive. *See Holmes*, 61 M.J. at 149. Having found error, we must determine whether we can reassess the sentence or should order a sentence rehearing.

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

> 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.*

After carefully reviewing the record of trial, we are convinced we can determine that, absent the sentencing instruction error, the sentence would have been at least of a certain magnitude. We are convinced beyond a reasonable doubt that by disapproving any confinement in excess of four months we will have assessed a punishment clearly no greater than the sentence the members would have imposed in the absence of error. *See Doss,* 57 M.J. at 185. Accordingly, under the criteria set out in *Sales*, we reassess the sentence as follows: Bad-conduct discharge, confinement for 4 months, and forfeiture of $795.00 pay per month for 4 months.

The findings and sentence, as reassessed, 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, as reassessed, are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court