UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

V.

Senior Airman ADAM P. PEREZ
United States Air Force

ACM 36799

12 September 2007

Sentence adjudged 20 July 2005 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Print Maggard (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 206 days, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major Chadwick A. Conn.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Captain Daniel J. Breen, and Captain Jefferson E. McBride.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

OPINION OF THE COURT

BRAND, Judge:

In accordance with his pleas, the appellant was convicted of one specification of disobeying an order, and one specification of assault consummated by battery, in violation of Articles 92 and 128, UCMJ, 10 U.S.C. §§ 892, 928. Contrary to his plea, he was also convicted of one specification of rape,[1] in violation of Article 120, UCMJ, 10

[1] The finding to the charge and its specification, in violation of Article 120, was disapproved and dismissed by the convening authority.

U.S.C. § 920. His approved sentence[2] consists of a bad-conduct discharge, confinement for 206 days,[3] and reduction to E-1.

On appeal, the appellant asserts two errors. The first is whether the convening authority abused his discretion by reassessing the appellant's sentence, as opposed to ordering a sentence rehearing, after dismissing the rape charge. The second is that the appellant's plea was improvident as to the additional charge and its specification. We have reviewed the record of trial, the assignment of errors, and the government's answer thereto. We will address the errors in reverse order.

Providence of Guilty Plea

In determining whether a guilty plea is provident, the test is whether there is a "substantial basis in law and fact for questioning the guilty plea." *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). In order to establish an adequate factual basis for a guilty plea, the military judge must elicit "factual circumstances as revealed by the accused himself [that] objectively support that plea[.]" *Jordan*, 57 M.J. at 238 (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). The providency inquiry must reflect the accused understood the nature of the prohibited conduct. *United States v. Sapp*, 53 M.J. 90, 92 (C.A.A.F. 2000). A military judge must explain the elements of the offense and ensure that a factual basis for each element exists. *United States v. Barton*, 60 M.J. 62, 64 (C.A.A.F. 2004) (citing *United States v Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996)). We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)). Further, when reviewing the providency, this court does not end its analysis at the edge of the providence inquiry, but rather looks to the entire record. *Jordan*, 57 M.J. at 239.

The appellant admitted to calling SSgt JWP in violation of a no-contact order.[4] He informed the judge that although he had not spoken with SSgt JWP, he had contacted SSgt JWP by leaving at least one message on her phone and that he had called her cell phone and home phone thereafter. Leaving a message, where the appellant stated he was in violation of the no-contact order, and calling SSgt JWP on several occasions are sufficient to support the trial judge's acceptance of the plea as provident and the trial judge did not abuse his discretion.

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[2] The military judge originally sentenced the appellant to a bad-conduct discharge, 18 months confinement, and reduction to E-1.

[3] In his recommendations issued pursuant to a post-trial Article 39(a) session, the military judged recommended releasing the appellant from confinement immediately. The convening authority ordered deferment of the remaining confinement time on 11 February 2006, after appellant had served 206 days of his adjudged sentence.

[4] The order was issued because the appellant had been calling and harassing SSgt JWP immediately after the assault. The appellant was then ordered to not have any contact or speak with SSgt JWP.

Convening Authority's Action

Turning to the appellant's first issue, whether the convening authority abused his discretion by reassessing the sentence rather than ordering a rehearing, we find this issue to be more troubling. Evidence that the alleged rape victim had recanted her story came to the attention of the legal office a few weeks after trial, and prior to the military judge's authentication the record of trial. The legal office decided to conduct an investigation into this evidence.[5] Meanwhile, the military judge, unaware of this development, authenticated the record of trial on 27 September 2005.

The action to be taken on the findings and sentence is within the sole discretion of the convening authority. Rule for Courts-Martial (R.C.M.) 1107(b)(2). The convening authority is not required to review the case for legal errors or factual sufficiency. *Id.* In this case however, the convening authority decided to resolve the issue regarding the recanted testimony.

A post-trial Article 39(a), UCMJ, session was conducted pursuant to an order by the convening authority. The order was issued on 9 January 2006. This session occurred before the convening authority took action. The convening authority specified two issues for the original trial judge: 1) Whether or not credible evidence existed that the alleged victim had recanted her in-trial testimony; and 2) Whether, if recanted, it amounted to "new evidence" which meets the R.C.M. 1210 standard for a new trial. The trial judge answered both of these in the affirmative.

At the conclusion of the post-trial Article 39(a), UCMJ, session, the trial judge stated on the record that in light of the "new evidence," he would not have found the appellant guilty of the rape charge and specification, nor would he have sentenced the appellant to a bad-conduct discharge for the remaining charges. The trial judge went further to state he would have sentenced the appellant, for the remaining offenses, to confinement for 6 months, reduction in grade, and total forfeitures.

Upon receiving this information, the convening authority had two choices, again within his sole discretion, *see* R.C.M. 1107(c): 1) Change the finding of guilty to a lesser included offense (which would not be appropriate under the facts of this case); or 2) Take corrective action by either dismissing the affected specification and charge or ordering a rehearing. R.C.M. 1107(c)(2).

Upon reviewing the findings and conclusions of the trial judge, the convening authority disapproved the finding of guilty for the rape charge and specification. Based upon that decision, the staff judge advocate informed the convening authority he had to reassess the sentence. Prior to the disapproval of the rape finding, the appellant was

[5] The military judge specifically found the government did not attempt any type of delay tactic.

facing a maximum punishment of a dishonorable discharge, confinement for life, reduction to E-1, and total forfeitures. Upon the approved findings, he was facing a maximum punishment of a bad-conduct discharge, confinement for 12 months, reduction to E-1, and total forfeitures. The staff judge advocate disagreed with the proposed sentence by the trial judge, the sentencing authority, and recommended that the convening authority approve a sentence which included a bad-conduct discharge, confinement for 206 days, and reduction to E-1. The convening authority agreed with his staff judge advocate.

The central question in this case is whether there was legal, prejudicial error or whether the convening authority was acting within his sole discretion as the convening authority and granting clemency. In *United States v. Jordan*, 32 M.J. 672 (A.F.C.M.R. 1991), the military judge realized errors with two specifications and the convening authority reassessed the sentence. The military judge did not state the sentence he would have imposed but for the mistakes. *Id.* In *United States v. Washington*, 23 M.J. 679 (A.C.M.R. 1986), the military judge conducted a post-trial Article 39(a) session, permitted the appellant to change his plea, accepted the plea to a lesser included offense, and adjudged a new sentence. The convening authority's action merely approved the judge's findings and sentence. *Id.* Finally, in *United States v. Carroll*, 45 M.J. 604, (Army Ct. Crim. App. 1997), the convening authority dismissed a rape charge as a matter in clemency and reassessed the sentence.

In this case, although there was no error at the time of trial, thereafter new evidence was discovered. This evidence met the criteria, under R.C.M. 1210, for a new trial. Rather than ordering a rehearing on findings and sentencing or sentencing only, the convening authority decided to take other corrective action designed solely to provide an expeditious means to correct the error. *See* R.C.M. 1107(c)(2)(A), Discussion. In the case sub judice, the actions of the convening authority amount to corrective action based upon errors (new evidence) rather than action in the form of clemency.

In reassessing a sentence, the only guidance (although not on point) provided to the convening authority is found in R.C.M. 1107. That Rule, and specifically R.C.M. 1107(e)(1)(B)(iv), provides the convening authority with an avenue to forego a rehearing after a superior authority has disapproved some of the findings of guilty based upon prejudicial error. Reassessment is appropriate only when the convening authority determines that the sentence would be at least a certain magnitude had the prejudicial error not been committed and the reassessed sentence is appropriate in relation to the affirmed findings. *Id.*

Most of the case law on sentence reassessment is focused on a military appellate court's, not the convening authority's, ability to reassess a sentence. Before reassessing a sentence, this Court must be confident "that, absent any error, the sentence adjudged would have been of at least a certain severity . . . ." *United States v. Sales*, 22 M.J. 305,

308 (C.M.A. 1986). A "dramatic change in the penalty landscape" gravitates away from our ability to reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003) (citing *United States v. Harris*, 53 M.J. 86 (C.A.A.F. 2000)). Ultimately, a sentence can be reassessed only if we "confidently can discern 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) (citing *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991)). In *United States v. Harris*, 53 M.J. 86 (C.A.A.F. 2000) (citing *United States v. Poole*, 26 M.J. 272, 274 (C.M.A. 1988), our superior court decided that if the appellate court cannot determine that the sentence would have been at least of a certain magnitude, it must order a rehearing. Further, the same is true if the convening authority reassesses upon remand. *Harris,* 53 M.J. at 88.

The convening authority corrected the issue of new evidence by dismissing the charge and specification and reassessing the sentence. The convening authority had the benefit of knowing exactly what the sentencing authority would have done, but he reassessed a sentence greater than that which the sentencing authority would have imposed absent the error (new evidence). Under the unique circumstances of this case, the correct standard would have been to order a sentence rehearing or apply the above referenced standard for sentence reassessment. We are confident we can correct this error and reassess the sentence in accordance with the above authority. We approve only so much of the sentence which includes confinement for 6 months and reduction to E-1.[6]

Conclusion

The approved 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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence, as reassessed, are

AFFIRMED.

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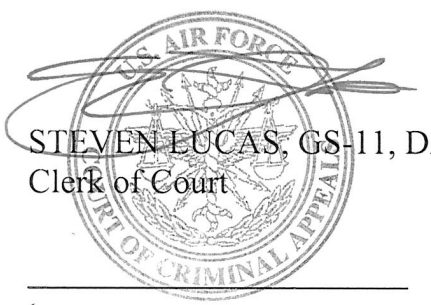

STEVEN LUCAS, GS-11, DAF
Clerk of Court

[6] The convening authority had previously deferred forfeitures.