UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant ERICA N. PERRY
United States Air Force

ACM 37676 (f rev)

07 December 2012

Sentence adjudged 12 March 2010 by GCM convened at Charleston Air Force Base, South Carolina. Military Judge: Terry A. O'Brien (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Nicholas W. McCue; Captain Shane A. McCammon; Captain Zaven T. Saroyan; and Frank J. Spinner, Esquire (civilian counsel).

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Naomi N. Porterfield; Major Charles G. Warren; and Gerald R. Bruce, Esquire.

Before

ROAN, WEISS, and CHERRY
Appellate Military Judges

UPON FURTHER REVIEW

PER CURIAM:

This case is before us again for the fourth time after a long and tortured journey. The appellant was initially tried before a military judge sitting alone at a general court-martial on 9-12 March 2010. Contrary to her pleas, she was found guilty of two specifications of making a false official statement and one specification of larceny, in violation of Articles 107 and 121, UCMJ, 10 U.S.C. §§ 907, 921. The appellant was

sentenced to a bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and a reduction to the lowest enlisted grade.

In an unpublished opinion, we affirmed the appellant's conviction for making false official statements but found the appellant's conviction on the larceny charge was factually insufficient and set aside the corresponding charge and specification. *United States v. Perry*, ACM 37676 (A.F. Ct. Crim. App. 3 February 2011) (unpub. op.). We also set aside the sentence and returned the record to the Judge Advocate General for remand to the convening authority with the instruction that he or she may "order a rehearing to determine an appropriate sentence for the affirmed findings of guilty. If the convening authority determines that a rehearing on the sentence is impracticable, the convening authority may approve a sentence of 'no punishment' or dismiss the charges." *Perry*, unpub. op. at 8-9.

On 7 April 2011, the convening authority approved a sentence of "no punishment" and we affirmed the action on 4 August 2011. *United States v. Perry*, ACM 37676 (f rev) (A.F. Ct. Crim. App. 4 August 2011) (unpub. op.), *rev'd*, 71 M.J. 94 (C.A.A.F. 2012) (mem.). On 5 January 2012, the Court of Appeals for the Armed Forces set aside our decision and remanded the case for submission to an appropriate convening authority because a staff judge advocate recommendation had not been drafted and the appellant was not given an opportunity to submit matters prior to the convening authority taking action. *Perry*, 71 M.J. at 95. The convening authority approved a new action on 21 March 2012 that we again affirmed on 23 April 2012, but we subsequently set aside that decision as premature on 7 May 2012. *United States v. Perry*, ACM 37676 (rem) (A.F. Ct. Crim. App. 23 April 2012) (unpub. op.) (vacated by order granting motion to vacate, dated 7 May 2012).

The appellant is once again before us, making two arguments:

1) Because this Court set aside the appellant's conviction for larceny, the "preferral landscape" was substantially different from what the commander originally believed, thereby necessitating a new trial and initial disposition decision pursuant to Rule for Courts-Martial (R.C.M.) 306; and

2) The appellant is entitled to a new trial pursuant to Article 73, UCMJ, 10 U.S.C. § 873, after new evidence came to light following her court-martial.

Initial Disposition Decision

The appellant argues that this Court should set aside her findings of guilty to making two false official statements because the "preferral landscape" significantly changed after we set aside her larceny conviction. Specifically, the appellant contends that if the squadron commander had known at the time of the original preferral that this

Court was going to set aside the larceny allegation, it was likely he would not have preferred the false official statement charges. The appellant requests a new trial to permit the squadron commander to make a new R.C.M. 306 disposition decision.

While the appellant's argument is novel, she does not provide any legal basis or case law to support her contention that we have the authority to set aside findings of guilt that are lawfully and factually sufficient. Article 66, UCMJ, 10 U.S.C. § 866. As our superior court made clear in *United States v. Nerad*, 69 M.J. 138, 140 (C.A.A.F. 2010), the authority of a military court of criminal appeals to disapprove a finding must be exercised in the context of legal – not equitable – standards. Instead, Article 60, UCMJ, 10 U.S.C. § 860, provides the appellant with the means to seek the relief she is requesting from this Court. The convening authority may disapprove a finding based on purely equitable grounds. In our initial opinion, we specifically provided the convening authority with several options, to include dismissing the remaining charges rather than ordering a sentence rehearing. Despite the appellant's pleas to the contrary, the convening authority chose not to dismiss the remaining charges – a decision which is his sole prerogative, not this Court's, and we see no legal basis to overturn his decision. *See Nerad*, 69 M.J. at 140.

The squadron commander's decision to prefer charges against the appellant appears valid on its face and, absent evidence to the contrary, we will not overturn it. We cannot disregard a lawful finding of the court-martial on the supposition that, had the commander known the outcome of the trial, he might have made a different decision on whether to prefer charges in the first place. The same argument could be made anytime an accused was acquitted of a charge or specification. We decline to go down that road.

We have considered the appellant's remaining assignment of error and find it to be without merit. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987) (there is no requirement to specifically address each assigned error so long as each error is considered).

Conclusion

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). Accordingly, the findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court