

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman First Class JOSHUA RODRIGUEZ
United States Air Force**

ACM 37454

19 January 2010

Sentence adjudged 06 April 2009 by GCM convened at Hurlburt Field, Florida. Military Judge: W. Thomas Cumbie (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 60 days, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Raymond J. Hardy, Jr., Major Shannon A. Bennett, and Major Michael A. Burnat.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain Michael T. Rakowski, and Gerald R. Bruce, Esquire.

Before

**BRAND, HELGET, and GREGORY
Appellate Military Judges**

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with his pleas, the appellant was found guilty of one charge and specification of wrongfully and knowingly possessing on divers occasions one or more visual depictions of what appears to be a minor engaging in sexually explicit conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The approved sentence consists of a bad-conduct discharge, confinement for 60 days, and reduction to E-1.

The issue on appeal is whether the convening authority's Action erroneously ordered execution of the bad-conduct discharge.

Convening Authority's Action

The appellant asserts that the Action should be returned to the convening authority because it erroneously ordered the execution of the bad-conduct discharge. We concur. The convening authority's Action states in relevant part, "the sentence is approved and will be executed." However, a bad-conduct discharge cannot be ordered executed until appellate review is completed. Article 71(c)(1), UCMJ, 10 U.S.C. § 871(c)(1). Accordingly, pursuant to Rule for Courts-Martial 1107(g), we order the withdrawal of the erroneous Action and the substitution of a corrected Action.

Conclusion

We conclude the approved findings 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, 40 (C.A.A.F. 2000). Therefore, on the basis of the entire record, the findings are AFFIRMED. However, because the Action erroneously executed the bad-conduct discharge, we return the record of trial to the Judge Advocate General for remand to the convening authority to withdraw the erroneous Action and substitute a corrected Action. Further, we order the promulgation of a corrected court-martial order reflecting the corrected Action. Thereafter, Article 66, UCMJ, shall apply.

OFFICIAL



A handwritten signature in blue ink, appearing to read "STEVEN LUCAS", is written over a horizontal line.

STEVEN LUCAS, YA-02, DAF
Clerk of the Court