UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class SAMANTHA M. ROGERS
United States Air Force

ACM S31605

16 March 2010

Sentence adjudged 15 October 2008 by SPCM convened at McChord Air Force Base, Washington. Military Judge: Don M. Christensen (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 9 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, and Major Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, and Captain Naomi N. Porterfield.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

PER CURIAM:

In accordance with her pleas, a military judge sitting as a special court-martial convicted the appellant of one specification of forgery, six specifications of larceny, four specifications of obtaining services under false pretenses, and one specification of being absent without leave, in violation of Articles 123, 121, 134, and 86, UCMJ, 10 U.S.C. §§ 923, 921, 934, 886.[1] The adjudged and approved sentence consists of a bad-conduct discharge, nine months of confinement, and reduction to the grade of E-1.

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[1] The appellant and the convening authority entered into a pretrial agreement wherein the appellant agreed to plead guilty to the charges and specifications in return for the convening authority's promise to refer the charges and

On appeal, the appellant asks this Court to modify the findings of guilt on five of the larceny specifications by excepting the language "United States" and to set aside her bad-conduct discharge or grant other appropriate relief. As the basis for her request, she opines that: (1) the military judge abused his discretion by accepting her plea to stealing United States goods as there was no evidence presented that the property belonged to the United States and (2) her sentence to a bad-conduct discharge is inappropriately severe.[2] Finding that the military judge abused his discretion, albeit inadvertently,[3] in finding the appellant guilty of stealing United States property, we modify the findings of guilt on Specifications 1-5 of Charge II by excepting the language "United States," affirm the remaining findings, and reassess the sentence.

Background

On 11 April 2007, the appellant opened a credit card account in the name of Staff Sergeant (SSgt) KS, her co-worker. As a result, the appellant received a credit card and convenience checks in SSgt KS's name. On 17 April 2007, the appellant forged a check in the amount of $1,000 to herself from SSgt KS. On three occasions in April–May 2007, the appellant used the credit card to purchase goods from several local businesses and to obtain cash from a local bank. During the same time period, the appellant also used the credit card to pay for hotel rooms and manicures. On two occasions in June 2008, the appellant used money from the bank account of Airman First Class SH, her best friend, to obtain cell phone service without her friend's permission.

On 26 June 2008, the appellant was scheduled to be court-martialed for the aforementioned crimes. Anxious, she departed the base and remained away until she turned herself in a day later. At trial, the appellant pled guilty to the charges and specifications. In finding the appellant guilty of Specifications 1-5 of Charge II, the military judge excepted the language "currency and/or" but inadvertently left in the language "United States."

Providency of Plea to Specifications 1-5 of Charge II

"A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion." *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). An accused may not plead guilty unless the plea is consistent with the actual facts of her case. *United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977); *United States v. Logan*, 47 C.M.R. 1, 3 (C.M.A. 1973). An accused may not simply assert her guilt; the military judge must

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specifications to a special court-martial. The military judge found the appellant guilty of the larceny specifications by exceptions.

[2] The second issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[3] We realize that the military judge made a clerical error in the language he redacted in his findings on Specifications 1-5 of Charge II. However, the military judge does not bear the sole responsibility for this error. Counsel for both sides were remiss in not identifying this error at trial.

elicit facts as revealed by the accused herself to support the plea of guilty. *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)); *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996).

In the case sub judice, the government counsel acknowledges that no evidence exists that the property proscribed in Specifications 1-5 of Charge II was United States property. We find that the military judge abused his discretion by finding that the property proscribed in Specifications 1-5 of Charge II was United States property. However, we need not set aside the findings of guilt on the specifications. The appellant's pleas to the remaining portions of the specifications are provident. Accordingly, we modify the findings of guilt on Specifications 1-5 of Charge II by excepting the language "United States."

Because we modified the findings, we must determine whether to reassess the sentence or remand the case for a sentencing rehearing. 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). 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. Reed*, 33 M.J. 98, 99 (C.M.A. 1991). "If [we] cannot determine that the sentence would have been at least of a certain magnitude absent the error, [we] must order a rehearing." *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000) (citing *United States v. Poole*, 26 M.J. 272, 274 (C.M.A. 1988)).

After modifying the findings, the maximum sentence in this case remains the same, that which is within the jurisdictional limit of a special court-martial—a bad-conduct discharge, 12 months of confinement, forfeiture of two-thirds pay per month for 12 months, and reduction to the grade of E-1. Thus, the penalty landscape remains the same. Applying the criteria set forth in *Sales*, we conclude that we are able to determine what sentence would have been imposed based on modified findings. Considering only the evidence presented at trial, we are convinced beyond a reasonable doubt that the military judge would have awarded a sentence of at least a bad-conduct discharge, nine months of confinement, and reduction to the grade of E-1. *See United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990). We reassess the sentence accordingly. Furthermore, for the reasons highlighted below, we find the sentence, as reassessed, to be appropriate. *See id.*

Inappropriately Severe Sentence

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the

offender, the nature and seriousness of her offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007).

Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

In the case at hand, the appellant seriously undermined her status as a military member. Moreover, her crimes are further aggravated by the number of victims and the fact that one of her victims was her best friend. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses of which the appellant was found guilty, we do not find the appellant's sentence, one which includes a bad-conduct discharge, inappropriately severe.

Conclusion

The approved findings, as modified, and the 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 approved findings, as modified, and the sentence, as reassessed are

AFFIRMED.

OFFICIAL

CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court