

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman GREGORY A. SMIALEK
United States Air Force**

ACM S30728

20 June 2006

Sentence adjudged 22 July 2004 by SPCM convened at Kadena Air Base, Japan. Military Judge: Dawn R. Eflein.

Approved sentence: Bad-conduct discharge, confinement for 8 months, forfeiture of \$795.00 pay per month for 8 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Christopher S. Morgan.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Kimani R. Eason.

Before

**BROWN, MOODY, and JACOBSON
Appellate Military Judges**

PER CURIAM:

We have examined the record of trial, the assignment of errors, and the government's answer thereto. The appellant was convicted, in accordance with his pleas, of one specification of disobeying a lawful order (Charge I), in violation of Article 92, UCMJ, 10 U.S.C. § 892. He was convicted, contrary to his pleas, of one specification each of driving while intoxicated (DWI) (Charge II), and physically controlling a vehicle while drunk (Additional Charge), both in violation of Article 111, UCMJ, 10 U.S.C. § 911.

The same set of facts underlay Charge II and the Additional Charge. The government pled them alternatively in order to meet the exigencies of proof. Applying the criteria set forth in *United States v. Quiroz*, 55 M.J. 334, 338-39 (C.A.A.F. 2001), we conclude that these convictions constitute an unreasonable multiplication of charges.

Therefore, we conditionally dismiss Charge II and its Specification. *See United States v. Britton*, 47 M.J. 195, 204 (C.A.A.F. 1997) (Effron, J., concurring).

We have considered the arguments by trial counsel during the sentencing phase of the trial which the appellant alleges were improper. We conclude that the trial defense counsel's failure to object waived any error. *See* Rule for Courts-Martial 1001(g); *United States v. Sherman*, 32 M.J. 449, 452 (C.M.A. 1991). In any event, even if improper, the arguments did not materially prejudice the substantial rights of the appellant. *See United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000).

The appellant also alleges he received ineffective assistance of counsel. We have applied the criteria set forth in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), and conclude that we can resolve this issue without additional fact finding. Examining the appellate filings and the record as a whole we hold that the appellant was not denied effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). We resolve the remaining assignments of error adversely to the appellant. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

Having dismissed Charge II and its Specification, we must now determine if we can perform sentence reassessment. Applying the criteria in *United States v. Sales*, 22 M.J. 305, 308-09 (C.M.A. 1986), we conclude that we can reassess the sentence rather than send the case back to the convening authority for a rehearing. Although both DWI charges were presented to the members for their determination on sentence, the military judge instructed them to consider them as only one offense. Therefore, we conclude that, even without the dismissed charge and specification, the members would have imposed the same sentence. We therefore reassess the sentence to the one actually adjudged by the members: A bad-conduct discharge, confinement for 8 months, forfeiture of \$795.00 pay per month for 8 months, and a reduction to E-1. We also find this sentence appropriate.

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

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator