

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman Basic DEREK S. SMIT
United States Air Force**

ACM S32040

04 October 2012

Sentence adjudged 2 March 2012 by SPCM convened at Hill Air Force Base, Utah. Military Judge: Scott E. Harding (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 10 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Scott W. Medlyn.

Appellate Counsel for the United States: Colonel Don M. Christensen.

Before

**STONE, GREGORY, and HARNEY
Appellate Military Judges**

This opinion is subject to editorial correction before final release.

PER CURIAM:

A special court-martial composed of military judge alone convicted the appellant in accordance with his pleas of (1) attempted wrongful manufacture of a Schedule I controlled substance; (2) wrongful use, introduction, and manufacture of marijuana; and (3) possession of drug paraphernalia for growing marijuana, in violation of Articles 80, 112a, and 134 UCMJ, 10 U.S.C. §§ 880, 912a, 934, respectively. The court-martial sentenced the appellant to reduction to the grade of E-1, confinement for 10 months, and a bad-conduct discharge. A pretrial agreement capped confinement at seven months with no other limitations on sentence. In accordance with the pretrial agreement, the staff judge advocate recommended approval of only seven months of confinement and the other adjudged penalties. The promulgating order, signed for the commander by the staff

judge advocate, references the pretrial agreement limitation on the sentence adjudged, but then erroneously approves the full sentence adjudged in the action.

The action of the convening authority is ambiguous at best.* We direct the convening authority to withdraw the ambiguous action and substitute a corrected one as well as publish a corrected promulgating order. Rule for Courts-Martial 1107(g). Because our jurisdiction does not depend on the corrected action as it would if the ambiguity concerned the punitive discharge we will act on the findings and sentence. In accordance with the pretrial agreement, we approve only so much of the sentence as extends to a bad-conduct discharge, confinement for seven months, and reduction to the grade of E-1.

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

AFFIRMED.

OFFICIAL



STEVEN LUCAS
Clerk of the Court

* AFLOA/JAJR confirmed that confinement officials applied the correct seven months of confinement and that the appellant had, in fact, been released.