UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman LEON A. SWAN
United States Air Force

ACM 36634

15 February 2008

Sentence adjudged 15 December 2005 by GCM convened at Mountain Home Air Force Base, Idaho. Military Judge: Print Maggard

Approved sentence: Bad-conduct discharge, confinement for 13 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Anniece Barber, and Major Chadwick A. Conn.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Brendon K. Tukey, and Captain Jamie L. Mendelson.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

PER CURIAM:

Contrary to his pleas, the appellant was convicted of one specification of disrespect toward a superior commissioned officer, three specifications of disrespect toward a superior non-commissioned officer, three specifications of disobeying a lawful order, one specification of dereliction of duty, one specification of willfully damaging government property, one specification of assault consummated by battery, four specifications of communicating a threat, and three specifications of communicating indecent language, in violation of Articles 89, 91, 92, 108, 128 and 134, UCMJ, 10

U.S.C. §§ 889, 891, 892, 908, 928, 934. The approved sentence consists of a bad-conduct discharge, confinement for 13 months, and reduction to E-1.

The issues on appeal are whether the evidence was legally and factually sufficient to sustain the appellant's conviction for violating a no-contact order[1] and the appellant's conviction for communicating a threat.[2] Additionally, the appellant avers the portion of his sentence that includes a bad-conduct discharge is inappropriately severe.[3]

Background

On 24 Jun 2005, the appellant was issued a no-contact order which stated the appellant was not allowed to come within 100 yards of A1C KM's residence. On or about 16 Jul 2005, the appellant was observed 5 to 10 feet away from dormitory, Building 2320, where A1C KM resided.

On or about 21 Aug 2005, the appellant was at the chow hall with SSgt MS, his escort.[4] The appellant became agitated and disrespectful with SSgt MS. During this period, while he had a fork in his hand, the appellant told SSgt MS "Security Forces won't get here in time to save you" or words to that effect. At trial, the defense made a motion to dismiss this specification as it failed to state an offense. Although the military judge dismissed a number of other specifications for failure to state an offense, he declined to do so as to this specification.

Discussion

The test for factual sufficiency is whether this Court is convinced beyond a reasonable doubt of the appellant's guilt, after weighing all the evidence and making allowances for not having personally observed the witnesses. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, any reasonable factfinder could have found all of the essential elements beyond a reasonable doubt. *Id.* at 324. In resolving questions of legal sufficiency, we must "draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted).

After reviewing the record of trial, it is clear the appellant violated a lawful order when he was seen within 5 to 10 feet of A1C KM's residence. Regardless of whether the residence is the dormitory building or the dormitory room, the appellant was within 100 yards of A1C KM's residence. This issue is without merit.

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[1] Specification 3 of Charge III.
[2] Specification 1 of Additional Charge V.
[3] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[4] The appellant had been placed in pretrial confinement on 27 Jul 2005.

"[T]he existence of a threat required consideration of both the language of the communication and all the circumstances surrounding it." *United States v. Phillips*, 42 M.J. 127, 129 (C.A.A.F. 1995); *see also United States v. Brown*, 65 M.J. 227 (C.A.A.F. 2007). The military judge found the words, along with the surrounding circumstances, the appellant directed at SSgt MS were a threat. We agree. These words expressly or impliedly allege essential words of criminality. *United States v. Saintaude*, 56 M.J. 888, 891 (Army Ct. Crim. App. 2002).

We "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982).

After a careful review of the record of trial, to include the appellant's post-trial submissions, we conclude the appellant's sentence to a bad-conduct discharge is not inappropriately severe.

Conclusion

The findings and the sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings, and sentence, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court