UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

First Lieutenant MINDY A. WALSH
United States Air Force

ACM 36330

30 November 2006

Sentence adjudged 8 March 2005 by GCM convened at Andrews Air Force Base, Maryland, and Bolling Air Force Base, District of Columbia. Military Judge: Jeri K. Somers.

Approved sentence: Dismissal and confinement for 9 months.

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

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, and Lieutenant Colonel Robert V. Combs.

Before

BROWN, FRANCIS, and SOYBEL
Appellate Military Judges

PER CURIAM:

The appellant was tried by court members sitting as a general court-martial at Andrews Air Force Base (AFB), Maryland, and Bolling AFB, District of Columbia. Pursuant to her pleas, she was found guilty of wrongfully possessing approximately 105mg of oxycodone[1] on or about 5 December 2002; wrongful possession of approximately 10mg of oxycodone between on or about 1 October 2003 and on or about 31 October 2003; wrongful use of Percocet between on or about 1 October 2003 and on or about 11 April 2004; and stealing five items of Estee Lauder cosmetics of a value of approximately $208.00, in violation of Articles 112a and 121, UCMJ, 10 U.S.C. §§ 912a, 921. Contrary to her pleas, she was also convicted of assaulting a security forces officer while that officer was in

[1] Oxycodone is the active ingredient in Percocet and is a Schedule II controlled substance.

the execution of his law enforcement duties; and resisting apprehension by four security forces officers who were authorized to apprehend her, in violation of Articles 128 and 95, UCMJ, 10 U.S.C. §§ 928, 895. The members sentenced the appellant to a dismissal and confinement for 9 months. The convening authority approved the findings and the sentence as adjudged.

Background

At trial, the parties stipulated that on 12 October 2003, the appellant, then assigned as a nurse at Andrews AFB, wrongfully took two Percocet pills from the PYXIS - the secured system that disburses medications - and later ingested those same pills while she was on duty. During her guilty plea inquiry, the appellant explained that after she removed the two Percocet pills from the PYXIS, she immediately walked a distance of three feet to a nearby desk where she retrieved her bottle of water and used it to swallow both pills. This was the evidence upon which the military judge found the appellant guilty of both wrongful possession of 10mg of oxycodone between on or about 1 October and on or about 31 October 2003 (Specification 2 of Charge I) and wrongful use of Percocet between on or about 1 October 2003 and on or about 11 April 2004 (Specification 3 of Charge I).

The Appellant now contends that her conviction for both possession of oxycodone and use of Percocet under these circumstances constitutes an unreasonable multiplication of charges. Considering all of the factors set forth in *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001), we hold that Specifications 2 and 3 of Charge I constitute an unreasonable multiplication of charges. We therefore dismiss Specification 2 of Charge I.

Having dismissed Specification 2 of Charge I, we must determine whether we can reassess the sentence or order a rehearing. In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior court summarized the analysis required in sentence reassessment:

> In *United States v. Sales*, 22 MJ 305 (CMA 1986), this Court set out the rules for sentence reassessment by a Court of Criminal Appeals. If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *Id.* at 307. A sentence of that magnitude or less "will be free of the prejudicial effects of error." *Id.* at 308. If the error at trial was of constitutional magnitude, then the court must be satisfied beyond a reasonable doubt that its reassessment cured the error. *Id.* at 307. If the court "cannot reliably determine what

sentence would have been imposed at the trial level if the error had not occurred," then a sentence rehearing is required. *Id.*

After carefully reviewing the record, we are convinced that, absent the error, the sentence would have been at least of a certain magnitude. By dismissing Specification 2 of Charge I, the appellant's maximum period of confinement is reduced from 18 years and 6 months to 13 years and 6 months. However, the trial counsel argued for 12 to 18 months confinement and the members sentenced the appellant to 9 months confinement. The underlying facts concerning the affected specifications were stipulated to by the parties and would have been before the members even if the trial judge had dismissed Specification 2 of Charge I prior to instructions on sentencing. Moreover, the appellant's service record contained one referral officer performance report, a letter of admonition, four letters of reprimand, and non-judicial punishment under Article 15, UCMJ, 10 U.S.C. § 815. Reassessing the sentence, we are convinced beyond a reasonable doubt that, absent the error, the court members would have awarded the same sentence as they did at trial. *See Doss*, 57 M.J. at 185; *Sales*, 22 M.J. at 307. Furthermore, we find the sentence to be appropriate. *See United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990).

Conclusion

Specification 2 of Charge I is dismissed. The remaining findings 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).[2] Accordingly, the remaining findings and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

JEFFREY L. NESTER
Clerk of Court

[2] The Court-Martial Order erroneously reports the findings for Specifications 1, 2, and 3 of Charge I, and of the Specification of Charge II. In light of the Court's dismissal of Specification 2 of Charge I, the error as to this specification is moot. The Court orders a new Court-Martial Order be issued which properly reflects the findings of Specifications 1 and 3 of Charge I and the Specification of Charge II.