

# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before  
TOOMEY, TRANT, and CARTER  
Appellate Military Judges

UNITED STATES, Appellee  
v.  
Corporal CLEVELL S. ROSEBORO II  
United States Army, Appellant

ARMY 9600788

1st Infantry Division  
F. Kennedy III (arraignment) and W. G. Jewell (trial), Military Judges

For Appellant: Captain T. Michael Guiffre, JA (argued); Lieutenant Colonel Michael L. Walters, JA; Major Holly S.G. Coffey, JA (on brief).

For Appellee: Lieutenant Colonel Frederic L. Borch III, JA (argued); Colonel Joseph E. Ross, JA (on brief).

3 February 1998

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MEMORANDUM OPINION  
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CARTER, Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of absence without leave, wrongful appropriation of an automobile, and making or uttering checks without sufficient funds (thirty-five specifications), in violation of Articles 86, 121, and 123a, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 921, and 923a (1988)[hereinafter UCMJ]. The convening authority approved the adjudged sentence to a dishonorable discharge, confinement for three years, forfeiture of all pay and allowances, reduction to Private E1, a fine of \$10,000.00, and further confinement, not to exceed an additional three years, until the fine is paid.

The case is before the court for automatic review under Article 66, UCMJ. In one of his assignments of error, appellant asks this court to set aside his fine because

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the military judge improperly considered the ability of appellant's father to pay a fine in determining an appropriate sentence. We agree.<sup>1</sup>

At trial, the defense called appellant's father as a sentencing witness. Mr. Roseboro generally testified about appellant's upbringing, leadership, and caring nature. Mr. Roseboro also stated that he and appellant's mother were divorced and that she subsequently joined the Army. At the conclusion of Mr. Roseboro's testimony, the military judge asked Mr. Roseboro:

**Q. But among the options that I have available to me is a fine in conjunction with potentially some period of confinement. I don't want to pry into your financial affairs, but is that something potentially that you could assist Corporal Roseboro with if the court were to determine that some amount of fine was appropriate?**

**A. Yes, some arrangements, yes, could be made, sir.**

The military judge also asked Mr. Roseboro several questions about whether appellant's mother had stayed in the Army long enough to earn retired pay. The record otherwise indicated that the appellant was deeply in debt and had no assets with which to pay a fine.

The purpose of a fine is to correct an unjust enrichment by an accused and not to impose collateral financial hardship on his parents. *See United States v. Tuggle*, 34 M.J. 89, 92 (C.M.A. 1992) (court rejected mother's offer to take a \$6,000.00 mortgage on her home to help pay her son's \$10,000.00 fine to avoid contingent confinement if the fine was not paid). The government concedes that it is not appropriate for a military judge to consider the ability, or willingness, of the parents of an accused to pay a fine when determining an appropriate sentence. However, the government notes that a military judge is presumed to know and apply the law<sup>2</sup> and argues that there is insufficient proof in this case to indicate otherwise. The government's position is simply not tenable. Based on this record, we are not satisfied that the military judge did not consider the ability and willingness of appellant's father to assist in paying any adjudged fine when determining a sentence in this case.

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<sup>1</sup> Our disposition of this issue moots appellant's second assigned error. We have also considered the matters personally submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them to be without merit.

<sup>2</sup> *See United States v. Prevatte*, 40 M.J. 396, 398 (C.M.A. 1994).

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The findings of guilty are affirmed. After considering the entire record, the court affirms only so much of the sentence as provides for a dishonorable discharge, confinement for three years, forfeiture of all pay and allowances, and reduction to Private E1.

Senior Judge TOOMEY and Judge TRANT concur.

FOR THE COURT

  
JOHN T. RUCKER  
Lieutenant Colonel, JA  
Clerk of Court