

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
JOHNSTON, SQUIRES, and ECKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class RAYNOR T. COOK
United States Army, Appellant

ARMY 9502164

V Corps
C. S. Schwender, Military Judge

For Appellant: Colonel John T. Phelps II, JA; Lieutenant Colonel Michael L. Walters, JA; Major Leslie A. Nepper, JA; Captain Dirk Gifford, JA.

For Appellee: Colonel Joseph A. Ross; Lieutenant Colonel Frederic L. Borch III, JA; Captain Chris A. Wendelbo, JA; Captain Arthur J. Coulter, JA; Captain John M. Bergen, JA.

12 February 1999

MEMORANDUM OPINION ON REMAND

Per Curiam:

Contrary to his pleas, the appellant was convicted by a special court-martial consisting of officer and enlisted members of violating a lawful general regulation and possession of marijuana with intent to distribute in violation of Articles 92 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 912a [hereinafter UCMJ]. The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for three months, and reduction to Private E1.

On 4 December 1996 in an unpublished opinion, this court set aside and dismissed the specification and charge concerning violation of a lawful general regulation. Reassessing the sentence on the basis of the entire record and the error noted, we affirmed the sentence. On 10 September 1998, the United States Court of Appeals for the Armed Forces noted that our opinion did not make it clear whether we determined that the sentence was both appropriate and free of all prejudice caused by the trial error. Consequently, they affirmed our decision as to findings, set aside our decision as to sentence, and returned the record of trial to The Judge

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COOK - ARMY 9502164

Advocate General for remand to us for further consideration consistent with their opinion.

When we reassess a sentence because of prejudicial error, our task differs from that performed in the ordinary review of a sentence. When prejudicial error has occurred, as in this case, we must assure not only that the sentence is appropriate to the affirmed finding of guilt, but also that the sentence is no greater than that which would have been imposed at trial if the prejudicial error had not been committed. See *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985). On the facts of this case we are convinced that the accused's sentence would have been at least as severe as that adjudged. In our view, the original sentence was not affected by the error at trial. In making this decision, we have been careful not to substitute our judgment for that of the members.

Accordingly, reassessing the sentence on the basis of the error noted and the entire record, and applying the principles of *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), the court affirms the sentence.

FOR THE COURT:



JOSEPH A. NEURAUTER
Clerk of Court