

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
HOLDEN, HOFFMAN, and SULLIVAN
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class MARC B. WILLIAMS
United States Army, Appellant

ARMY 20070667

Headquarters, 25th Infantry Division
Julie Hasdorff, Military Judge
Colonel Timothy J. Pendolino, Staff Judge Advocate

For Appellant: Colonel Christopher J. O'Brien, JA; Lieutenant Colonel Steven C. Henricks, JA; Major William M. Fischbach III, JA; Major Timothy Litka, JA (on brief).

For Appellee: Colonel Denise R. Lind, JA; Captain Philip Staten, JA; Captain Sarah J. Rykowski, JA (on brief).

29 August 2008

MEMORANDUM OPINION

Per Curiam:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of violating a general order, receiving child pornography, and possessing child pornography, in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934 [hereinafter UCMJ]. The military judge sentenced appellant to a dishonorable discharge, confinement for five years, forfeiture of all pay and allowances *for five years*, and reduction to the grade of Private E1. Pursuant to a pretrial agreement, the convening authority approved: "Only so much of the sentence as provides for reduction to Private [E1], *forfeiture of all pay and allowances*, to be confined for twelve (12) months, and a [d]ishonorable [d]ischarge." (emphasis added).

This case is before us for review under Article 66, UCMJ. Although not addressed by counsel, we find error regarding the sentence of the court-martial as described below.

FACTS

At trial, the military judge sentenced appellant to a dishonorable discharge, confinement for five years, forfeiture of all pay and allowances for five years, and reduction to the grade of Private E1. After reviewing the pretrial agreement, the military judge explained, “the Convening Authority agrees to disapprove any confinement in excess of 12 months and approve any other lawful imposed punishment, to include a fine or dishonorable discharge.” The following colloquy ensued:

Trial Counsel: I’m confused. Ordinarily, when total forfeitures--total forfeitures ordinarily mean total forfeitures and usually it’s not with a particular timeframe. If it’s like two-thirds forfeitures, then oftentimes there is a timeframe.

Military Judge: I wanted it to run the whole time of his confinement.

Trial Counsel: Yes, ma’am, and once the dishonorable discharge takes effect, then he would be out of the Army anyways. My understanding is the total forfeiture would be just that, he had no more pay from there on out. He would forfeit all pay and allowances, meaning all. . . .

Military Judge: That’s fine. Certainly, the forfeitures aren’t going to go any longer than his discharge or his confinement.

The staff judge advocate (SJA), in his post-trial recommendation (SJAR), recommended approval of only so much of the sentence as “provided for reduction to Private [E1], *to forfeit all pay and allowances*, to be confined for twelve (12) months and to be separated from the service with a dishonorable discharge.” (emphasis added). Following the SJA’s advice, the convening authority approved appellant’s sentence to forfeitures without the five-year limitation adjudged by the court.

DISCUSSION

Appellant's sentence to forfeitures is problematic both as adjudged and approved. The military judge's confusing and vague explanation of her sentence to forfeitures set the stage for erroneous SJA advice regarding their intended duration.¹

With regard to the duration of adjudged forfeitures, the military judge first sentenced appellant to total forfeitures for five years; however, the military judge then explained she simply wanted the forfeitures to run for the time of his confinement. This created an ambiguity as to whether the military judge sought to limit the adjudged forfeitures to the period of appellant's approved sentence to confinement.² Further, since appellant's pretrial agreement limited his sentence to confinement to twelve months, total forfeitures could not be approved in excess of twelve months. Appellant could not be subject to more than forfeiture of two-thirds pay per month for the period for which he was not confined. *United States v. Warner*, 25 M.J. 64, 67 (C.M.A. 1987) ("The legislature has indicated that a servicemember in active duty status should receive at least a third of his pay.").

Regarding the duration of approved forfeitures, the SJA's post-trial recommendation did not address the ambiguity of the twelve-month or five-year limitation on the sentence to forfeitures and missed the duration limitation altogether. The automatic forfeiture provisions of Article 58b, UCMJ, notwithstanding, the net effect of the SJA's advice to approve forfeitures without time limitation was to increase appellant's approved sentence beyond that adjudged by the court, an outcome clearly prohibited by Rule for Courts-Martial [hereinafter R.C.M.] 1107(d)(1). *See also Waller v. Swift*, 30 M.J. 139, 143 (C.M.A. 1990).

Article 66(c), UCMJ constrains us from approving sentences not "correct in law and fact." Although we lack sufficient documentation to determine what pay, if any, to which appellant may be *entitled*, we are able to determine the maximum amount and duration of forfeitures the convening authority should have approved in this case and will grant appropriate relief in our decretal paragraph. *See generally United States v. Lonnette*, 62 M.J. 296, 297 (C.A.A.F. 2006).

¹ The punishment of total forfeiture of pay and allowances does not normally have a specified termination date. *See* R.C.M. 1003(b)(2); *see also United States v. Stewart*, 62 M.J. 291 (C.A.A.F. 2006).

² "Ambiguous or uncertain sentences to forfeiture are detrimental because they leave military families unsure of how long wages will be forfeited, and less able to engage in financial planning for the future." *Stewart*, 62 M.J. at 294.

DECISION

We have reviewed the remaining assignments of error, including those errors raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and conclude they are without merit. The findings of guilty are affirmed. On consideration of the entire record, we affirm only so much of the sentence as provides to a dishonorable discharge, confinement for twelve months, forfeiture of all pay and allowances for twelve months, and reduction to the grade of Private E1. All rights, privileges, and property of which appellant has been deprived by virtue of that portion of his approved sentence set aside by this decision are ordered restored. *See* Articles 58b(c) and 75(a), UCMJ.



FOR THE COURT:

A handwritten signature in black ink, appearing to read "Malcolm H. Squires, Jr.", is written over the printed name.

MALCOLM H. SQUIRES, JR.
Clerk of Court