

CORRECTED COPY

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
SCHENCK, ZOLPER, and WALBURN
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant First Class DAVID R. THOMPSON
United States Army, Appellant

ARMY 20000342

Headquarters, U.S. Army Armor Center and Fort Knox
Richard J. Anderson, Military Judge
Colonel Leo E. Boucher III, Staff Judge Advocate

For Appellant: Captain Patrick B. Grant, JA (argued); Colonel Mark Cremin, JA; Lieutenant Colonel Kirsten V.C. Brunson, JA; Major Charles A. Kuhfahl, Jr., JA; Captain Julie A. Caruso, JA (on brief); Lieutenant Colonel Steven Henricks, JA; Major Fansu Ku, JA; Captain Patrick B. Grant, JA (on specified issue brief).

For Appellee: Captain Magdalena A. Acevedo, JA (argued); Colonel John W. Miller II, JA; Lieutenant Colonel Michelle B. Shields, JA; Captain Magdalena A. Acevedo, JA (on brief); Colonel John W. Miller II, JA; Captain Magdalena A. Acevedo, JA (on specified issue brief).

24 March 2008

MEMORANDUM OPINION ON REHEARING

WALBURN, Judge:

On 11 May 2000, a panel composed of officer and enlisted members sitting as a general court-martial convicted appellant, contrary to his pleas, of indecent acts with a child on divers occasions, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 [hereinafter UCMJ].¹ The convening authority

¹ Appellant was originally charged with one specification of rape, in violation of Article 120, UCMJ. The panel at appellant's first court-martial found appellant not guilty of rape, but guilty of the lesser-included offense of indecent acts with a child.

approved the adjudged sentence to confinement for four years and reduction to Private E1. This court summarily affirmed the findings and sentence in an unpublished opinion on 30 September 2002. *United States v. Thompson*, ARMY 20000342, (Army Ct. Crim. App. Sep. 2002) (unpub.). On 5 May 2004, our superior court set aside the findings and sentence, authorized a rehearing, and returned the case to The Judge Advocate General. *United States v. Thompson*, 59 M.J. 432 (C.A.A.F. 2004).²

On 24 August 2005, a panel composed of officer and enlisted members sitting as a general court-martial again convicted appellant, contrary to his pleas, of indecent acts with a child, in violation of Article 134, UCMJ. The panel sentenced appellant to a dishonorable discharge. The convening authority converted the dishonorable discharge to twelve months confinement and granted appellant sixty-nine days of confinement credit. The case is again before the court for review pursuant to Article 66, UCMJ.

Appellant now asserts, *inter alia*, the staff judge advocate (SJA) erroneously advised the convening authority of his ability to convert the adjudged dishonorable discharge to twelve months confinement. Appellant argues the absence of an adjudged punitive discharge at his initial court-martial forces the convening authority to approve no sentence for his second court-martial. Appellant argues any approved sentence now would be “in excess of or more severe” than either the sentence approved after his first court-martial, or that adjudged at the rehearing. Prior to the rehearing, appellant had successfully served his sentence to confinement and retired as a Private E1 on 31 August 2003. If appellant’s argument is accurate, appellant could retire as a sergeant first class. Following 12 March 2004 oral argument, we specified the following two additional issues:

I.

WHETHER, ON REHEARING, THE MILITARY JUDGE
ERRED TO THE SUBSTANTIAL PREJUDICE OF
APPELLANT BY FAILING TO PROPERLY INSTRUCT
THE PANEL MEMBERS THAT THE MAXIMUM

² The basis of the court’s reversal was three-fold: the military judge’s (1) failure to conduct a statute of limitations waiver inquiry with appellant; (2) erroneous inclusion of the time-barred period in the instructions to the members; and (3) post-announcement modification of the findings. The court found these errors “constituted a series of errors materially prejudicial to the substantial rights of [a]ppellant.” *Id.*

SENTENCE THEY COULD ADJUDGE WAS CONFINEMENT FOR FOUR YEARS AND REDUCTION TO PRIVATE E1. *See United States v. Turner*, 34 M.J. 1123 (A.F.C.M.R. 1992), *aff'd on other grounds*, 39 M.J. 259 (C.M.A. 1994); Rule for Courts-Martial [Hereinafter R.C.M.] 1005(e) and discussion.

II.

WHETHER, IF THE MILITARY JUDGE PREJUDICIALLY ERRED BY FAILING TO PROPERLY INSTRUCT THE PANEL MEMBERS REGARDING THE MAXIMUM SENTENCE, THIS COURT MAY MODIFY AND REASSESS APPELLANT'S SENTENCE TO CURE THE ERROR THAT OCCURRED AT TRIAL. *See United States v. Turner*, 39 M.J. 259 (C.M.A. 1994) (citing *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) (discussing when a Court of Criminal Appeals may reassess the sentence to cure error, and when it must order a rehearing)).

We agree with appellate counsel that the military judge properly instructed the panel concerning the maximum authorized sentence that could be adjudged at appellant's rehearing (dishonorable discharge, confinement for seven years, forfeiture of all pay and allowances, and reduction to Private E1). *See United States v. Davis*, 63 M.J. 171, 175 (C.A.A.F. 2006); Article 63, UCMJ. We disagree with appellant's asserted error. For the reasons discussed below we find the convening authority's approval of twelve months confinement after appellant's rehearing a lawful exercise of his discretionary power to approve a less severe sentence.

FACTS

At his second court-martial appellant's trial defense counsel requested that the panel reduce appellant to E4 and allow him to retire. After the sentence was announced at the rehearing the military judge opined, and government and defense counsel agreed, that the convening authority, under R.C.M. 810(d), could not approve the adjudged dishonorable discharge. The military judge further concluded "the [c]onvening [a]uthority in this case can approve no sentence in this case. There is a conviction, a finding of guilty, but there is no sentence. Well, there's an adjudged sentence, there simply won't be an approved sentence."

The SJA’s recommendation (SJAR) advised the convening authority:

Per Article 60(c), UCMJ, a convening authority may commute a punishment such as a punitive discharge into another form of punishment. Per the discussion of R.C.M. 810(d), a convening authority is not limited to approving the same or lesser amount of the same type of punishment formerly approved. An appropriate sentence on a retried or reheard offense should be adjudged without regard to any credit to which the accused may be entitled.

The SJA then recommended the convening authority “change the sentence extending to the dishonorable discharge into confinement for [twelve] months and approve and execute the sentence as changed.” Appellant’s trial defense counsel, as part of appellant’s clemency submissions, objected, arguing it was “clear that the panel did not feel that [Sergeant First Class (SFC)] Thompson should be reduced to [E1] nor should he be confined.” He further argued the SJAR was “merely an attempt to keep SFC Thompson from receiving retirement benefits as an [E7].” The convening authority accepted the SJA’s advice and approved confinement in lieu of the adjudged punitive discharge.

LAW

In taking initial action on the sentence adjudged in a court-martial, a convening authority has a great deal of discretion. As Article 60(c)(2), UCMJ, states, with emphasis added: “The convening authority or other person taking such action, *in his sole discretion*, may approve, disapprove, *commute*, or suspend the sentence in whole or in part.” Rule for Courts-Martial 1107(d)(1) also explains, with emphasis added:

The convening authority may *for any or no reason* disapprove a legal sentence in whole or in part, mitigate the sentence, and *change a punishment to one of a different nature as long as the severity of the punishment is not increased*. The convening or higher authority may not increase the punishment imposed by a court-martial. The approval or disapproval shall be explicitly stated.^[3]

³ Subsection (d)(1) of R.C.M. 1107 is based on Article 60(c), UCMJ. *See* R.C.M. 1107 analysis at A21-86.

The convening authority's power under this rule is further explained in the Discussion to R.C.M. 1107(d)(1), with emphasis added:

One form of punishment may be changed to a less severe punishment of a different nature, *as long as the changed punishment is one that the court-martial could have adjudged*. For example, a bad-conduct discharge adjudged by a special court-martial could be changed to confinement for up to one year (but not vice versa)

When the convening authority's action follows a sentence rehearing, however, Article 63, UCMJ, provides, with emphasis added:

Upon a rehearing the accused may not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence *in excess of or more severe than the original sentence may be approved*, unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings, or unless the sentence prescribed for the offense is mandatory.

Rule for Courts-Martial 810(d)(1) further instructs:

Sentences at rehearsings, new trials, or other trials shall be adjudged within the limitations set forth in R.C.M. 1003.^[4] Except as otherwise provided in subsection (d)(2)^[5] of this rule, offenses on which a rehearing, new trial, or other trial has been ordered shall not be the basis for an approved sentence *in excess of or more severe than the sentence ultimately approved by the convening or higher authority following the previous trial or hearing*, unless the sentence prescribed for the offense is mandatory

⁴ Rule for Courts-Martial 1003 sets forth the types and amounts of punishments authorized at different levels of courts-martial. None of these limitations affect the sentences appellant received.

⁵ This subsection pertains to pretrial agreements.

As with other discretionary acts, we will review the convening authority's conversion of appellant's adjudged sentence for an abuse of discretion. *See United States v. Palmer*, 59 M.J. 362, 366 (C.A.A.F. 2004) (applying abuse of discretion standard to convening authority's decision in contingent confinement case); *United States v. Ruiz*, 49 M.J. 340, 347–48 (C.A.A.F. 1998) (applying abuse of discretion standard to convening authority's refusal to order post-trial Article 39(a) session); *United States v. McKnight*, 30 M.J. 205, 209 (C.M.A. 1990) (applying abuse of discretion standard to convening authority's decision to approve findings of guilty). Under this standard, as in the case of a military judge's discretionary acts at trial, where a convening authority “has a range of choices [he] will not be reversed so long as the decision remains within that range.” *United States v. Freeman*, __ M.J. __, 2008 CAAF LEXIS 137, slip op. at 4* (C.A.A.F. 1 Feb. 2008) (quoting *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004)).

In reviewing the convening authority's action in this case we are also mindful of the following passages from our superior court's opinion in *Waller v. Swift*, 30 M.J. 139, 143 (C.M.A. 1990):

In any event, a convening authority's power to “commute” is not absolute and cannot be used to increase the severity of the sentence. A basic theme of the UCMJ is to prevent command influence. With this in mind, we are sure that Congress never intended that a convening authority would be free to exercise the power of commutation to increase the severity of a sentence when a court-martial is specifically prohibited from doing so in a revision proceeding or a rehearing. *See* arts. 60(e)(2)(C) and 63, [UCMJ].

As we noted in *United States v. Hodges*, 22 M.J. 260, 262 (CMA 1986), in comparing two different species of punishment, it is not always apparent which is the more or the less “severe.” We have, however, generally acknowledged that a punitive discharge may lawfully be commuted to some period of confinement. *See, e.g., United States v. Brown*, 13 U.S.C.M.A. 333, 32 C.M.R. 333 (1962) (permissible to substitute [six] months' confinement and partial forfeitures for [six] months for a bad-conduct discharge); *United States v. Prow*, [13 U.S.C.M.A. 63, 32 C.M.R. 63 (1962)] (permissible to substitute [three] months confinement and partial forfeitures for [three] months for a bad-conduct discharge).

* Corrected

It is also important to recognize “the process of commutation cannot be handled mechanically.” *Hodges*, 22 M.J. at 262. As noted by our superior court in *United States v. Josey*, 58 M.J. 105, 108 (C.A.A.F. 2003):

Reprimands, reductions in rank, and punitive separations are so qualitatively different from other punishments that conversion is not required as a matter of law. Although a punitive separation potentially involves monetary consequences, particularly with respect to veterans’ benefits, the primary impact involves severance of military status. The issue of whether a member of the armed forces should or should not receive a punitive discharge reflects a highly individualized judgment as to the nature of the offense as well as the person’s past record and future potential, and does not lend itself to a standard conversion formula.

Although a convening authority may commute a punishment such as a punitive discharge into another form of punishment under Article 60(c), UCMJ, such action is a matter of command prerogative. Commutation involves a reduction in penalty rather than a substitution, and it is highly case-specific. *See Waller*, [30 M.J. at 143]. There is no formula guiding such action that could provide a standard formula for former-jeopardy credit. The litigation concerning use of the commutation power -- even when requested by an accused -- underscores the difficulty of converting reprimands, reductions, and discharges into other forms of punishment. *See, e.g., United States v. Carter*, 45 M.J. 168, 170-71 (C.A.A.F. 1996); *Waller*, 30 M.J. at 143-45.

ANALYSIS

Appellant asserts the lack of a punitive discharge at his original court-martial prohibits the convening authority from approving *any punishment*. This argument flies in the face of the pertinent provisions of the *Manual for Courts-Martial, United States* (2000 ed.),* military case law, and common sense. Appellant argues confinement for twelve months (the converted sentence) is somehow “more severe” than his original sentence which included confinement for four years and reduction to Private E1. We disagree. Appellant urges us to look to the practical effect of his approved second sentence. We will assume the military judge and appellant are correct; the convening authority in appellant’s case could not approve the adjudged

* Corrected

dishonorable discharge because it was a qualitatively more severe sentence than appellant originally received.⁶ However, it does not automatically follow that the convening authority was powerless to convert the adjudged sentence simply because the approved confinement prevented appellant from retiring as a sergeant first class. In fact, the approved second sentence placed appellant in no worse position; he had already served his adjudged confinement and could again retire as a Private E1.

We find the convening authority was properly advised of his power to change the adjudged dishonorable discharge to a period of confinement. This advice was consistent with R.C.M. 1107(d)(1) since a sentence which included confinement (for a period of up to seven years) could have been adjudged at the rehearing and then approved (for a period of up to four years). Were we to hold otherwise, appellant, after twice being convicted of committing indecent acts with his stepdaughter, would receive no approved punishment. In essence, appellant asks us to apply the rules only as a shield. He seeks to prohibit the convening authority from approving the adjudged dishonorable discharge because it was a *more severe sentence* than had been approved after appellant's first trial.⁷ It does not legally or logically follow that a convening authority should, therefore, be prohibited from approving *any punishment*.

In *Waller*, our superior court held it was improper, as an act of commutation, to change a bad-conduct discharge to confinement for twelve months. 30 M.J. at 145. The court looked at several factors in reaching this conclusion. Importantly, at trial *Waller* demonstrated that he did not view confinement for twelve months as a less severe punishment when his defense counsel argued for a punitive discharge in lieu of confinement. *Id.* at 144. Moreover, the court looked to the adjudged sentence stating:

⁶ This assumption is a double-edged sword for appellant. If the adjudged dishonorable discharge could not be approved because it was a “more severe punishment,” approval of punishment in a lesser amount than the original sentence would by definition be “less severe.”

⁷ See *United States v. Carter*, 45 M.J. 168 (C.A.A.F. 1996) (where our superior court held two years *additional* confinement a lawful substitute punishment as a matter of law for a bad-conduct discharge). In *Carter*, the accused had requested disapproval of the bad-conduct discharge in exchange “for more confinement” (the adjudged sentence included confinement for twelve months).

[I]t seems clear that the members of the court-martial were of the same opinion. Apparently, they believed that a long term of confinement would be harsh for petitioner's family and, at least partly for this reason, chose to sentence him to a punitive discharge, as he had requested, and not to impose punishment.

Id. Finally, Waller had already received an honorable discharge from a prior enlistment of service, which would diminish the effects of receiving a punitive discharge at his court-martial.

Under those facts, to uphold the convening authority's action would have undermined the view of Waller and the panel that *at the time of trial* a punitive discharge was a less severe sentence than a period of confinement. The present case, however, is clearly distinguishable from *Waller*. At the rehearing, appellant's defense counsel argued appellant's only punishment should be reduction to E4. His counsel highlighted to the panel that adjudging this punishment would permit appellant to retire at the reduced grade. The panel, by adjudging a dishonorable discharge, clearly rejected this request. By their sentence they apparently believed not only should appellant be dismissed from the service but also denied the ability to retire. Therefore, unlike in *Waller*, the convening authority's action in the present case does not undermine the panel's sentence.⁸

The present case is also distinguishable from *Waller* in another important respect; the convening authority's action in *Waller* was not taken in the context of a sentence rehearing. Here, appellant had already received a prior sentence, thereby precluding the convening authority from approving the adjudged punitive discharge. In other words, the convening authority had to choose between approving no punishment or converting the adjudged punitive discharge to a less severe form of punishment. In this case he properly used the command discretion provided him in R.C.M. 1107(d)(1) to do the latter.

Finally, we do not find deference to an accused's views concerning the severity of differing punishments to be as strong a consideration when the

⁸ As the convening authority could not approve a punitive discharge he could not enforce the panel's sentence as adjudged. By approving confinement for twelve months the convening authority satisfied two of the three consequences of the panel's adjudged sentence - reduction to Private E1 and loss of retirement at the grade of E4.

sentencing landscape includes an approved rehearing sentence. An appellant’s view of severity at a rehearing will arguably be shaped more by the sentence rendered at the original court-martial than an honest assessment of what punishment(s) are truly more severe.⁹ If we hold appellant can receive no punishment in the present case we foresee future unintended consequences. For example, future appellants in similar circumstances could strongly argue for punitive discharges, and if successful, “force” convening authorities to approve no punishment. We are unwilling to so limit a convening authority’s discretionary sentencing powers.

CONCLUSION

We hold that where an original court-martial sentence includes confinement for four years and reduction to Private E1, the conversion of an adjudged dishonorable discharge (at a rehearing) to an approved sentence of confinement for twelve months does not constitute “a more severe punishment” under the provisions of Article 63, UCMJ, R.C.M. 810(d)(1), and R.C.M. 1107(d)(1).

⁹ While the term of confinement is finite, the effects of the increased stigma of a dishonorable discharge may linger long after one has been released from confinement. It remains unclear how an appellate court in such a case can apply an objective standard. In our view, it cannot be known what effects a particular punitive discharge will have on a particular accused. These effects will no doubt differ between individuals based on their personal circumstances. Indeed, a youthful offender might very well perceive he has benefited by less confinement, but a more severe discharge, only to learn in his more mature years of the potentially socially debilitating effects of dishonorable separation from the service.

United States v. Mitchell, 58 M.J. 446, 448-49 (C.A.A.F. 2003) (holding a dishonorable discharge and confinement for six years a more severe sentence than a bad-conduct discharge and confinement for ten years).

THOMPSON – ARMY 20000342

We have considered appellant's other assignment of error and find it to be without merit. Accordingly, the findings of guilty and the sentence are affirmed.

Senior Judge SCHENCK and Judge ZOLPER concur.



FOR THE COURT:

A handwritten signature in black ink, which appears to read "Malcolm H. Squires, Jr.".

MALCOLM H. SQUIRES, JR.
Clerk of Court