IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

United States
Appellee

Amicus Curiae Brief

v.

Airman First Class
Israel B. Flores
United States Air Force
Appellant

Crim. App. Dkt. No. 40294

USCA Dkt. No. 23-0198/AF

Brief In Support of Neither Party

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TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

INTEREST OF AMICUS

Amicus is a retired judge advocate whose career focused on military justice, including two tours of duty as a military judge and two as a military appellate judge. After retiring from military service, *Amicus* served as the senior legal advisor to the Honorable Scott W. Stucky for the full term of his active service at this Court. He has written extensively on military justice in military law publications and made presentations at several military justice seminars and conferences, including this Court's Annual Continuing Legal Education and Training Program.

Amicus has no personal stake in the outcome of the proceedings, has not consulted either party on the contents of this brief, and is only interested in improving the military justice system and its processes.

ISSUE PRESENTED

> WHETHER SENTENCE APPROPRIATENESS REVIEW FOR SEGMENTED SENTENCING MUST CONSIDER EACH SEGMENTED SENTENCE TO CONFINEMENT, OR INSTEAD, ONLY THE OVERALL SENTENCE.

RELEVANCE OF THE BRIEF

From before the founding of the Republic until recent changes to Article 56, Uniform Code of Military Justice

(UCMJ), the military employed a unitary sentencing protocol: the court-martial considered all of the offenses of which an accused had been convicted and imposed one sentence. *See, e.g.*, *United States v. Weymouth*, 43 M.J. 329, 336 (C.A.A.F. 1995). The recent changes established a segmented sentencing protocol for cases in which the military judge is the sentencing authority. Article 56(c)(2), UCMJ. This brief directly addresses the granted issue.

Although agreeing with Appellant that the case should be remanded to the Air Force Court of Criminal Appeals (CCA), *Amicus* disagrees with his argument suggesting that, in reviewing a segmented sentence for appropriateness, a CCA must isolate each offense to its own facts and circumstances. That argument is outside the scope of the granted issue and contrary to law.

Statement

Not having access to the record of trial, *Amicus* adopts the facts as rendered by the CCA in its section labeled "Background." *United States v. Flores*, No. ACM 40294, slip op. at 3 (A.F. Ct. Crim. App. Apr. 13, 2023), *rev. granted*, No. 23-0198/AF (C.A.A.F. July 20, 2023).

Before the CCA, Appellant claimed his sentence to confinement for 12 months for making a false official statement was unduly severe. The CCA, nevertheless, affirmed the adjudged and approved sentence.

> We conclude that the nature and seriousness of the offenses support the adjudged sentence. Understanding we have a statutory responsibility to affirm only so much of the sentence that is correct and should be approved, Article 66(d), UCMJ, we conclude that the sentence is not inappropriately severe, and we affirm the sentence adjudged and as entered by the military judge.

Id. at 10.

ARGUMENT

1. This Court interprets the meaning of statutes *de novo*.

The scope, applicability, and meaning of Article 66(d), UCMJ, is a matter of statutory interpretation that this Court reviews *de novo*. *United States v. McAlhaney*, 83 M.J. 164, 166 (C.A.A.F. 2023).

2. Article 66(d)(1)(A), UCMJ, requires the Courts of Criminal Appeals to review each segment of the military judge's sentencing determinations separately.

"The [CCA] may affirm only the sentence, or such part or amount of the sentence, as the [CCA] finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1)(A), UCMJ.

Under the current statute, a military judge performing sentencing duties must (1) determine separately the sentence to confinement, if any, and fine, if any, for each offense of which the accused has been convicted, (2) determine whether those sentences to confinement should run concurrently or consecutively, and (3) determine what if any other punishment should be imposed, such as a punitive discharge, reduction in grade, and forfeiture of pay and allowances. Article 56(c)(2), UCMJ; R.C.M. 1002(d)(2).

In proposing the change from unitary to segmented sentencing, the Military Justice Review Group cited two benefits: (1) increased transparency "by allowing the parties and the public to know the specific punishments for each offense," while providing clarity to victims as to the sentence associated with their particular injury; and (2) increased efficiency of appellate review by decreasing the number of remands after an appellate court sets aside some, but not all, of the convictions and is unable to determine what sentence the court-martial would have adjudged without those convictions. 1 REPORT OF. THE MILITARY JUSTICE REVIEW GROUP 509–10 (2015).

As the military judge is now required to sentence an accused separately for each conviction, the only way a CCA may assess the appropriateness of the sentence is by reviewing each segment of the sentence separately: (1) each separate sentence to confinement; (2) whether the separate sentences to confinement should run concurrently or consecutively, and (3) all other components of the approved sentence. To review the sentence in its entirety makes no sense, as it defeats the very purposes of segmented sentencing.

3. This Court should remand the case to the Court of Criminal Appeals for further consideration.

In affirming Appellant's convictions, the CCA may have considered each segment of the new sentencing protocol separately. But reading together the language employed in both the section concerning the appropriateness of the sentence to confinement for the false official statement offense and the conclusory paragraph of its opinion, *Amicus* is left with some uncertainty as to whether the CCA did so.

This Court normally employs an abuse of discretion standard when reviewing actions by a CCA pursuant to Article 66, UCMJ. *United States v. Guinn*, 81 M.J. 195, 199 (C.A.A.F. 2021). This Court cannot review a lower court's judgment when it cannot be confident that the CCA employed the proper standard of review. *Cf. United States v. Harrington*, No. 22-0100, slip op. at 11 (C.A.A.F. Aug. 10, 2023) ("any legal ruling based on an erroneous view of the law also constitutes an abuse of discretion"). Therefore, this Court should remand Appellant's case with instructions for the CCA to specify whether each segment of the sentence is correct in law and fact and should be approved.

4. Appellant's argument suggests that a military judge in imposing, and thus the CCA in reviewing, a sentence to confinement must view that offense in total isolation from other offenses of which Appellant was convicted. That argument is outside the scope of the granted issue and contrary to law.

At the CCA, Appellant argued *inter alia*, that his sentence to confinement for one year for the offense of making a false official statement was inappropriately severe. *See Flores*, No. ACM 40294, slip op. at 9. In concluding the sentence was not inappropriately severe, the CCA considered the circumstances surrounding the assault consummated by a battery as well as the mitigating factors presented to the trial court. It concluded that the sentence was not inappropriately severe. CCA at 10.

This Court granted review of only one question—whether the CCA must review each segmented sentence to confinement separately. Appellant, not so subtly, wove another issue into his brief—whether the CCA must review each segmented sentence to confinement in isolation of evidence concerning other offenses of which he had also been convicted, rendering his sentence to confinement for one year inappropriate. *See* Appellant's Brief, at 6-7, 21. This Court should reject consideration of these other issues as being outside the scope of the grant. If the Court considers the additional issues it should nevertheless reject Appellant's argument.

Not having access to the record, *Amicus* takes no position on whether Appellant's sentence to confinement for one year for making a false official statement was "appropriate" under the circumstances of this case. Nevertheless, as a matter of general legal principles, Appellant's position as to the manner in which a CCA must consider sentence appropriateness under the segmented sentencing regime is clearly incorrect.

Any person subject to the UCMJ who makes a false official statement may be punished as a court-martial may direct. Article 107(a)(2), UCMJ. Pursuant to the mandate of Article 56(a), UCMJ, the President prescribed a maximum period of confinement for the offense as five years. *Manual for Courts-Martial, United States* pt. IV, ¶ 41d(1) (2019 ed.).

The military judge's sentencing discretion, in this case, was further cabined by the plea agreement, which prohibited the period of confinement for Appellant's offense to exceed one year. Appellant intimates that, as making a false official statement is a relatively minor offense, especially when compared with his two convictions for assault consummated by a battery, his sentence to the maximum confinement permitted under the plea agreement is inappropriately severe. Appellant's Brief at 6. *Amicus* disagrees.

Making a false official statement is not a relatively minor offense; if it were, the President would not have prescribed a maximum period of confinement of five years. The seriousness of making any particular false official statement is based on the seriousness of the lie in light of the circumstances directly related to the lie.

In imposing a sentence "that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces," the military judge must consider "the nature and circumstances of the offense and the history and characteristics of the accused." R.C.M. 1002(f), (f)((2). She may also consider any evidence admitted during the findings or sentencing proceedings. R.C.M. 1002(g).

Appellant limited his confinement exposure by pleading guilty to assault consummated by a battery (max confinement of six months), the lesser-included offense of assault consummated by a battery of a child under 16 years (max confinement of two years). *See MCM*, pt. IV, ¶ 77d(2) (2019 ed.). He further limited his exposure by agreeing to a sentence cap of confinement for one year for making the false official statement, which carried a maximum sentence to confinement of five years. But that did not prevent the military judge from considering, within the one-year cap on the sentence, the circumstances of the battery in determining the seriousness of Appellant's false official statement.

CONCLUSION

For the foregoing reasons, *Amicus* asks this Court to enter judgment remanding the case to the CCA, ordering it to review each segment of the adjudged sentence for appropriateness separately. If the Court answers Appellant's intimated issues, the remand should be with the understanding that in adjudging a sentence, the military judge was authorized to consider, within the one-year sentencing cap for making the false official statement, the circumstances of Appellant's history and characteristics, and any evidence admitted at trial.

Respectfully submitted

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CERTIFICATE OF COMPLIANCE

I certify that this *amicus* brief complies with the maximum length authorized by Rule 26(d) as it contains 1,785 words, not including front matter, the certificate of compliance, and the certificate of filing and service. This brief complies with the typeface and typestyle requirements of Rule 37; it was prepared using Century Schoolbook 14-point font.

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Certificate of Filing and Service

I certify that a copy of the foregoing was transmitted by electronic means on 7 September 2023, to the Clerk of the Court; the Appellate Government Division, Ms. Mary Ellen Payne (mary.payne.5@us.af.mil) and Appellant's counsel Major Heather M. Caine (heather.caine.1@us.af.mil).

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