UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class SCOTT M. BAKER
United States Air Force

ACM 36279

17 October 2006

Sentence adjudged 26 January 2005 by GCM convened at Moody Air Force Base, Georgia. Military Judge: Bruce T. Smith (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 8 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall and Major Sandra K. Whittington.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Nurit Anderson.

Before

ORR, MATHEWS, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

THOMPSON, Judge:

A military judge sitting alone as a general court-martial found the appellant guilty, in accordance with his pleas, of wrongful use of cocaine and methamphetamine and of wrongful use of marijuana on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 8 months, forfeiture of all pay and allowances and reduction to E-1. The convening authority disapproved the finding of guilty with respect to divers use of marijuana,

dismissed that specification, and approved the sentence as adjudged. The appellant now asserts two errors for our consideration: (1) the addendum to the staff judge advocate's recommendation (SJAR) contained "new matter" and should have been served on the appellant and his trial defense counsel; and (2) the appellant suffered unlawful post-trial punishment.[1] Finding no error, we affirm.

Service of Addendum to the SJAR

The appellant asserts that the addendum to the SJAR contains "new matter." Specifically, he argues that it was improper for the staff judge advocate (SJA) to assert in the addendum that the appellant and his trial defense counsel did not provide any documentation or records to substantiate his claims of improper post-trial treatment. The addendum noted the defense had not "provided any medical documents" and had not "provided any records" to support their claims. The addendum further stated that "[n]one of the issues the defense raises, yet fails to support with documentation, warrants clemency." Because of these statements, the appellant avers that the SJA should have served both him and his trial defense counsel with a copy of the addendum. We disagree.

Whether the addendum to the SJAR contained new matter is a question we review de novo. *United States v. Key*, 57 M.J. 246, 248 (C.A.A.F. 2002) (citing *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997)). Rule for Courts-Martial (R.C.M.) 1106(f)(7) requires service of an addendum if it contains new matter. The Discussion to R.C.M. 1106(f)(7) defines new matter as including, "new decisions on issues in the case, matter from outside the record of trial, and issues not previously discussed. 'New matter' does not ordinarily include any discussion by the staff judge advocate or legal officer of the correctness of the initial defense comments on the recommendation."

As required by Article 60(d), UCMJ, 10 U.S.C. § 860(d), the SJA prepared a formal recommendation for the convening authority, and served it on the trial defense counsel for review. The SJA recommended that the convening authority disapprove the finding of guilt regarding the marijuana use, and approve the sentence as adjudged. The appellant and his trial defense counsel submitted a request for clemency pursuant to R.C.M. 1105, asking that the convening authority reduce the appellant's sentence to confinement to three months. The primary basis for the request for clemency was the post-trial medical care and confinement conditions the appellant said he endured.

[1] This assignment of error is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

The SJA prepared an addendum to his earlier recommendation, advising the convening authority that he must consider the matters submitted by the defense. The SJA also advised the convening authority that if he considered matters outside the record of trial adverse to the appellant, the appellant must be notified and given an opportunity to respond. The SJA further pointed out that, aside from a memorandum from the trial defense counsel, a memorandum from the appellant, and a brief e-mail from an attorney at the base legal office, there was no documentation to support appellant's claims.

In *Key*, the Court held that an SJA's comment about the absence of supporting documentation in a clemency request was not new matter. *Key*, 57 M.J. at 249 (citing R.C.M. 1106(f)(7), Discussion). In the instant case, the addendum to the SJAR is simply a permissible, non-inflammatory comment on matters submitted in the clemency request. It did not inject anything from outside the record and did not contain new matter. Therefore, we find this assignment of error without merit.

Post-Trial Punishment

The appellant next contends that he suffered illegal post-trial punishment, in violation of the Eighth Amendment[2] and Article 55, UCMJ, 10 U.S.C. § 855. He claims, *inter alia*, that he was denied his proper medication, not allowed to attend physical therapy, placed in solitary confinement and that the back brace supplied to replace his metal brace did not provide equal support. We find that even if the facts asserted by the appellant are true, he has not met his burden of establishing grounds for relief.

Whether the conditions alleged constitute cruel and unusual punishment is a question we review de novo. *United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006) (citing *United States v. White*, 54 M.J. 469, 471 (C.A.A.F. 2001)). To support a claim that conditions of confinement amount to cruel and unusual punishment in violation of the Eighth Amendment the appellant must show: (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to the appellant's health and safety; and (3) that he has exhausted the prisoner-grievance system and petitioned for relief under Article 138, UCMJ, 10 U.S.C. § 938. *Lovett*, 63 M.J. at 215 (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997)).

[2] U.S. CONST. amend. VIII

The appellant's claims are supported by his petition for clemency and two declarations submitted to this Court. Assuming, without deciding, that the appellant's post-trial treatment was as he claims, we find that he has not sustained his burden of showing deliberate indifference to his health and safety. This burden requires that the appellant show that officials knew of and disregarded an excessive risk to his health or safety. *Lovett*, 63 M.J. at 216. As our superior court has opined, we need not speculate about what prison officials knew of the specific conditions of the appellant's confinement, or what conclusions they might have drawn. *Id.* The burden to make this showing rests upon the appellant, and he has failed to establish that prison officials were deliberately indifferent to conditions that might have violated the Eighth Amendment or Article 55, UCMJ.

In addition, we find the appellant neither exhausted his administrative remedies nor petitioned for relief under Article 138, UCMJ. He has, therefore, failed to establish his Eighth Amendment and Article 55, UCMJ, claim.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

JEFFREY L. NESTER
Clerk of Court