UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CODY T. BARRETT
United States Air Force

ACM S31531

12 June 2009

Sentence adjudged 25 July 2008 by SPCM convened at Ramstein Air Base, Germany. Military Judge: Jennifer L. Cline (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Lance J. Wood, Major Anthony D. Ortiz, Captain Timothy M. Cox, and Captain Tiffany Wagner.

Appellate Counsel for the United States: Major Jeremy S. Weber, Captain John M. Simms, and Gerald R. Bruce, Esquire.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

In accordance with the appellant's pleas, a military judge sitting as a special court-martial convicted him of one specification of divers failure to go, three specifications of wrongful use of a controlled substance, and one specification of patronizing a prostitute, in violation of Articles 86, 112a, and 134, UCMJ, 10 U.S.C. §§ 886, 912a, 934. The adjudged and approved sentence consists of a bad-conduct discharge, five months

confinement, and reduction to the grade of E-1.[1] On appeal the appellant asks the Court to award him day-for-day confinement credit for the period of time he was restricted to base or to provide other meaningful relief. The basis for his request is that he opines the military judge erred when she determined that his pretrial restriction did not warrant additional credit against his post-trial confinement.[2] We disagree. Finding no prejudicial error, we affirm.

Background

On a weeknight in November 2007, the appellant attended a gathering with several airmen at another airman's off-base residence. While there, the appellant was offered and used marijuana and ecstasy. After consuming the drugs, the appellant and several of the airmen decided to drive to the Red Light District in Frankfurt, Germany, approximately 130 kilometers away. Later that evening, the appellant visited a brothel, where he snorted cocaine and procured the services of a prostitute. On 27 November 2007, agents with the Air Force Office of Special Investigations summoned the appellant to their office for an interview. After a proper rights advisement, the appellant waived his rights, agreed to answer questions, and confessed to his crimes. On several occasions between 17 March 2008 and 11 June 2008, the appellant either reported late to work or failed to report to work. On 24 June 2008, the appellant's commander restricted the appellant to base, with the proviso that the appellant could leave the base with prior approval from his commander or first sergeant. The appellant remained restricted to base until 25 July 2008, the date of his trial.

Conditions Tantamount to Confinement

"We review de novo the ultimate legal question of whether certain pretrial restrictions are tantamount to confinement." *United States v. King*, 58 M.J. 110, 113 (C.A.A.F. 2003) (citing *United States v. Guerrero*, 28 M.J. 223 (C.M.A. 1989)). "If the level of restraint falls so close to the 'confinement' end of the spectrum as to be tantamount [to confinement], an appellant is entitled to . . . administrative credit against his sentence." *United States v. Smith,* 20 M.J. 528, 531 (A.C.M.R. 1985) (citing *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985)). In conducting our review of the condition of restrictions, we look to the totality of the conditions imposed. *Id.* at 530.

In *King*, our superior court outlined the factors to consider in determining whether restrictions are tantamount to confinement. They include:

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[1] The appellant and the convening authority signed a pretrial agreement wherein the appellant agreed to plead guilty to the charges and specifications in return for the convening authority's promise that "the approved sentence will not exceed seven months."

[2] This issue is filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

> the nature of the restraint (physical or moral), the area or scope of the restraint (confined to post, barracks, room, etc.), the types of duties, if any, performed during the restraint (routine military duties, fatigue duties, etc.), and the degree of privacy enjoyed within the area of restraint. Other important conditions which may significantly affect one or more of these factors are: whether the accused was required to sign in periodically with some supervising authority; whether a charge of quarters or other authority periodically checked to ensure the accused's presence; whether the accused was required to be under armed or unarmed escort; whether and to what degree [the] accused was allowed visitation and telephone privileges; what religious, medical, recreational, educational, or other support facilities were available for the accused's use; the location of the accused's sleeping accommodations; and whether the accused was allowed to retain and use his personal property (including his civilian clothing).

King, 58 M.J. at 113 (quoting *Smith*, 20 M.J. at 531-32).

In this case, the appellant explicitly waived his right to raise the issue at trial and on appeal. Thus the issue is waived. Assuming arguendo the appellant did not affirmatively waive his right to seek credit for his pretrial restraint, we nonetheless find the issue waived under a plain error analysis. Failure at trial to seek *Mason* credit for pretrial restriction tantamount to confinement will constitute waiver of that issue in the absence of plain error. *Id.* at 114 (citing *United States v. Chatman*, 46 M.J. 321 (C.A.A.F. 1997)). "To prevail under a plain error analysis, [the appellant bears the burden of showing] that: '(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.'" *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005) (quoting *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F 2000)). Moreover, while the threshold for establishing prejudice is low, the appellant must nevertheless make a "colorable showing of possible prejudice." *Id.* at 437.

After reviewing the record before us and considering the nature and scope of the appellant's pretrial restriction, we hold the military judge did not err in denying the appellant credit for his pretrial restriction. The appellant acknowledged he had access to all base facilities and could leave the base with prior approval from his commander or first sergeant. Thus his restriction was not so onerous to make it tantamount to confinement. Additionally, assuming the military judge erred in not granting the appellant credit for his restriction, the error was not plain. Moreover, the appellant has failed to meet his burden of making a "colorable showing of possible prejudice." In the final analysis, the appellant has failed to meet any of the "plain error" analysis prongs, the failure of which to meet any one prong results in a finding of no plain error. Lastly, reviewing this issue de novo, we find, under the aforementioned facts, that the appellant's restriction was not tantamount to confinement.

Pretrial Agreement Interpretation

Though not raised as an issue on appeal, we take this opportunity to address a term of the pretrial agreement.[3] In recognition of the appellant's promise to plead guilty to the charges and specifications, the convening authority promised that "the approved sentence will not exceed seven months." This term is ambiguous in that it could reasonably be subject to different interpretations. Does the term mean that *confinement* in excess of seven months will not be approved or does it mean that no punishment in excess of seven months, of which a punitive discharge arguably exceeds,[4] will be approved? If it is the former, the convening authority was well within his authority to approve the bad-conduct discharge. Conversely, if it is the latter, the convening authority lacked the authority to approve the bad-conduct discharge.

"The interpretation of a pretrial agreement is a question of law, which is reviewed under a de novo standard." *United States v. Acevedo*, 50 M.J. 169, 172 (C.A.A.F. 1999) (citing *United States v. Van Thournout*, 100 F.3d 590, 594 (8th Cir. 1996); *United States v. Coleman*, 895 F.2d 501, 505 (8th Cir. 1990)). "[W]e look to the basic principles of contract law when interpreting pretrial agreements." *Id.* (citing *Cooper v. United States*, 594 F.2d 12, 16 (4th Cir. 1979)). "When the terms of a contract are unambiguous, the intent of the parties is discerned from the four corners of the contract." *Id.* (citing *United States v. Liranzo*, 944 F.2d 73, 77 (2d Cir. 1991)). "However, when the contract is ambiguous on its face because a provision is open to more than one interpretation, [as in the case sub judice,] extrinsic evidence is admissible to determine the meaning of the ambiguous term." *Id.* (citing *United States v. Ingram*, 979 F.2d 1179, 1184 (7th Cir. 1992), *cert. denied*, 507 U.S. 997 (1993)).

The actions of the trial participants convinces us that despite the ambiguous pretrial agreement term, the appellant and the convening authority had a mutual understanding of the sentence the convening authority could legally approve. After the announcement of the sentence, the military judge advised and the appellant, trial defense counsel, and trial counsel agreed that the convening authority may approve the sentence [including the bad-conduct discharge] adjudged. Additionally, the fact that the appellant did not raise this issue in response to the staff judge advocate's recommendation, during clemency or on appeal, lends additional support to our finding that there was a mutual "meeting of the minds" between the appellant and the convening authority over the sentence the convening authority could legally approve.

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[3] We raise this as an issue to underscore the importance of drafting pretrial agreement terms in the clearest possible terms.

[4] *See United States v. Cavalier*, 17 M.J. 573, 577-78 (A.F.C.M.R. 1983) (whatever the equivalency rate is between a punitive discharge and a period of confinement, the substitution of a period of confinement for a punitive discharge does not *ordinarily* produce an increase in severity); s*ee also United States v. Roach*, ACM S31143 (f rev) (A.F. Ct. Crim. App. 24 Apr 2009) (unpub. op.) (while it is not universally true, at times a bad-conduct discharge has been deemed roughly equivalent to an additional 12 months confinement).

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, 10 U.S.C. § 866(c); *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court