UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class SARAHLYNN W. BELTON
United States Air Force

ACM 37484

19 May 2010

Sentence adjudged 14 May 2009 by GCM convened at Holloman Air Force Base, New Mexico. Military Judge: William M. Burd.

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of all pay and allowance, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Andrew J. Unsicker.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain Joseph Kubler, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

PER CURIAM:

Consistent with the appellant's pleas, a military judge convicted her of five specifications of being absent without leave and three specifications of communicating indecent language, in violation of Articles 86 and 134, UCMJ, 10 U.S.C. §§ 886, 934. Contrary to her pleas, a panel of officer members sitting as a general court-martial convicted her of one specification of being absent without leave and one specification of communicating a threat, in violation of Articles 86 and 134, UCMJ. The adjudged and approved sentence consists of a bad-conduct discharge, six months of confinement, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand.

On appeal, the appellant asks this Court to set aside the findings of guilty on the contested absence without leave specification, to reassess the sentence, and to grant fifteen days of additional confinement credit. As the basis for her request, she opines that: (1) the military judge erred by refusing to give a defense-requested mistake of fact instruction; (2) Specifications 2-8 of Charge I constitute an unreasonable multiplication of charges; (3) Specifications 2-4 of Charge II constitute an unreasonable multiplication of charges; and (4) she is entitled to additional confinement credit because the confinement officials violated Air Force Instruction (AFI) 31-205, *The Air Force Corrections System* (7 Apr 2004), such that she was punished in violation of Article 13, UCMJ, 10 U.S.C. § 813.[1] We disagree. However, because of an error with the convening authority's action, we affirm the findings and only that portion of the sentence consisting of a bad-conduct discharge, six months of confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1.

Background

On six separate occasions between 11 September 2008 and 30 December 2008, the appellant failed to report to work either because she disliked her supervisor and did not want to be around him or because she simply did not want to go to work. On each occasion the appellant either voluntarily returned to work, was escorted back to work by her chain of command, or was placed into pretrial confinement. On three separate occasions during the same time period, the appellant sent messages containing indecent language to BB, her husband's ex-girlfriend. Lastly, on 8 November 2008 and again on 23 December 2008, the appellant threatened to bodily harm BB if she continued to communicate with the appellant's husband.

At trial, the appellant moved for a: (1) mistake of fact instruction on the contested absence without leave specification; (2) ruling that the absence without leave specifications and indecent language specifications represented an unreasonable multiplication of charges; and (3) ruling that she was punished in violation of Article 13, UCMJ, and should receive additional confinement credit. After hearing argument on the issues, the military judge denied the appellant's motions.

Mistake of Fact Instruction

Whether a military judge properly instructed a panel is a question of law this Court reviews de novo. *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003); *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002) (quoting *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996) (quoting *United States v. Snow*, 82 F.3d 935, 938-39 (10th Cir. 1996))). A military judge is required to instruct the members on any special

[1] Issues 2-4 are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

defense under Rule for Courts-Martial (R.C.M.) 916 that was raised as an issue during trial. R.C.M. 920(e)(3).

> [I]t is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. . . . If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances.

R.C.M. 916(j)(1).

A matter is considered to be in issue "when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose." R.C.M. 920(e), Discussion; *see also United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007); *United States v. Gillenwater*, 43 M.J. 10, 13 (C.A.A.F. 1995). The evidence to support a mistake of fact instruction can come from "evidence presented by the defense, the prosecution, or the court-martial." R.C.M. 916(b), Discussion; *United States v. Jones*, 49 M.J. 85, 91 (C.A.A.F. 1998).

It is well settled that "a mistake of fact must be both honest and reasonable in order to constitute a defense to [absence without leave]." *United States v. Kaase*, 34 C.M.R. 883, 889 (A.F.B.R. 1964) (citing *United States v. Scheunemann*, 34 C.M.R. 259 (C.M.A. 1964); *United States v. Farris*, 26 C.M.R. 279 (C.M.A. 1958); *United States v. Holder*, 22 C.M.R. 3 (C.M.A. 1956); *United States v. McCluskey*, 20 C.M.R. 261 (C.M.A. 1955)).

Was there some evidence that the appellant was mistaken as to whether she was required to be at her place of duty on 11 September 2008? At trial, the appellant's trial defense counsel asserted that the testimony of PB, the appellant's immediate supervisor, constituted some evidence that warranted a mistake of fact instruction. On appeal, the appellant asserts that both her trial defense counsel's opening statement and PB's testimony constituted some evidence necessitating a mistake of fact instruction. We disagree. First, we note that opening statements, like closing arguments, are not evidence. *United States v. Schap*, 49 M.J. 317, 327 (C.A.A.F. 1998); *see also United States v. Mobley*, 34 M.J. 527, 528 (A.F.C.M.R. 1991), *aff'd*, 36 M.J. 34 (C.M.A. 1992). Second, contrary to the appellant's assertion, PB did not testify that the appellant may have mistakenly believed she was not required to report to duty on 11 September 2008. When asked if he thought the appellant assumed she was able to extend her leave, PB testified that "[s]he didn't request for leave." PB was also asked whether, based on a phone conversation between PB and the appellant, it was possible that the appellant thought she had reported to him regarding her work schedule. PB testified, "I'm not sure.

I don't know."[2] Put simply, neither PB's testimony nor any other evidence was sufficient to warrant a mistake of fact instruction. Accordingly, we find that the military judge did not err by refusing to give such an instruction.

Unreasonable Multiplication of Charges

"Unreasonable multiplication of charges is reviewed for an abuse of discretion." *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004) (quoting *United States v. Monday*, 52 M.J. 625, 628 n.8 (A.F. Ct. Crim. App. 1999)). Our superior court has noted that

> even if offenses are not multiplicious as a matter of law with respect to double jeopardy concerns, the prohibition against unreasonable multiplication of charges has long provided courts-martial and reviewing authorities with a traditional legal standard—reasonableness—to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system.

United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001).

"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4). To discern whether an unreasonable multiplication of charges has occurred, our superior court has enunciated a five-part test:

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?
>
> (2) Is each charge and specification aimed at distinctly separate criminal acts?
>
> (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
>
> (4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure?
>
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

[2] The appellant requested leave on 9 September 2008 so she was aware of the proper procedure for requesting leave. During a phone call to PB on 10 September 2008 placed at 0530, the appellant indicated she was having an argument with her husband. PB testified that leave was not discussed during this conversation.

Pauling, 60 M.J. at 95 (citing *Quiroz*, 55 M.J. at 338). The factors are to be balanced, with no single factor dictating the result. *Id*.

Here, we find no unreasonable multiplication of charges. While the trial defense counsel did object to the charging at trial, the other factors weigh against the appellant. Specifically, we note that: (1) each charge and specification is aimed at distinctly criminal acts—absences without leave on different dates which were terminated by different methods and the communication of different indecent language on separate dates; (2) the number of charges and specifications do not misrepresent or exaggerate the appellant's criminality; (3) the number of charges and specifications do not *unreasonably* increase the appellant's punitive exposure; and (4) there is no evidence of prosecutorial overreaching. In short, the military judge did not abuse his discretion by finding no unreasonable multiplication of charges.

Illegal Pretrial Punishment

The appellant contends that she was illegally punished prior to trial in violation of Article 13, UCMJ, and is therefore entitled to additional sentence credit. She asserts that, in violation of AFI 31-205, she was, inter alia, subjected to mold; denied vegetarian meals and adequate amounts of food; denied physical training; escorted to appointments in handcuffs and shackles; and, on one occasion, forced to wear red scrubs.

Whether an appellant is entitled to credit for a violation of Article 13, UCMJ, presents a mixed question of fact and law. *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997). When a military judge makes a finding of fact that there was no intent to punish, we review that finding to determine whether it was clearly erroneous. *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000); *United States v. Washington*, 42 M.J. 547, 562 (A.F. Ct. Crim. App. 1995), *aff'd*, 46 M.J. 477 (C.A.A.F. 1997). We will not overturn a military judge's findings of fact unless they are clearly erroneous. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). "We will review *de novo* the ultimate question [of] whether an appellant is entitled to credit for a violation of Article 13[, UCMJ]." *Id*.

It is well established that "a government agency must abide by its own rules and regulations where the underlying purpose of such regulations is the protection of personal liberties or interests." *United States v. Adcock*, 65 M.J. 18, 23 (C.A.A.F. 2007) (quoting *United States v. Dillard*, 8 M.J. 213, 213 (C.M.A. 1980) (quoting *United States v. Russo*, 1 M.J. 134, 135 (C.M.A. 1975))). AFI 31-205 reflects a decision by the Air Force to ensure that pretrial confinees are treated as innocent individuals. *Id*. However, confinement in violation of AFI 31-205 does not create for the appellant a per se right to sentencing credit; it only provides the military judge with the discretion to award additional sentencing credit for abuse of discretion by pretrial confinement authorities. *Id*. at 23-24. "[U]nder R.C.M. 305(k), a service-member may identify abuses of

discretion by pretrial confinement authorities, including violations of applicable service regulations, and on that basis request additional confinement credit. A military judge's decision in response to this request is reviewed, on appeal, for abuse of discretion." *Id*. at 24 (citing *United States v. Rock*, 52 M.J. 154, 156 (C.A.A.F. 1999)).

We now turn to whether the military judge abused his discretion in declining to award the appellant additional sentencing credit for alleged AFI 31-205 violations. The military judge accepted, as fact, the testimony of Staff Sergeant CS, one of the appellant's confinement officials, and concluded that there was no Article 13, UCMJ, violation as there was no intent to punish and no unduly harsh confinement conditions.[3] We agree. Moreover, we find that the appellant's pretrial confinement conditions were "reasonably related to a legitimate governmental objective." *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005) (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)). In the final analysis, the award of additional confinement credit was clearly a matter within the sound discretion of the military judge and he did not abuse his discretion by refusing to award additional confinement credit.

Erroneous Action

Although not raised as an assignment of error, we note that in the action, dated 29 June 2009, the convening authority approved the sentence as adjudged. However, there was no reprimand language in the action or the promulgating order. A reprimand, if approved, must be in writing in the convening authority's action. R.C.M. 1003(b)(1), 1107(f)(4)(G). There is no evidence in the record to suggest that the convening authority intended to reprimand the appellant. Accordingly, we affirm only that portion of the sentence consisting of a bad-conduct discharge, six months of confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1. *See United States v. Casey*, 32 M.J. 1023, 1024 (A.F.C.M.R. 1991).

Conclusion

The approved findings and sentence, as modified, 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).

[3] Staff Sergeant CS testified, in part, that: (1) in response to the appellant's mold complaint, bioenvironmental engineers tested the confinement facility and found no mold; (2) they provided her with pasta, beans, salad, peanut butter, and other vegetarian meals three times a day and she also had access to the base dining facility but refused to go; (3) she had access to two exercise bicycles at the confinement facility and access to the base gymnasium but refused to go; (4) the appellant was an escape risk and when transferred in a vehicle was required to wear handcuffs and shackles for security reasons; and (5) the appellant was not required to wear a special uniform—she typically wore her military uniform.

Accordingly, the approved findings and sentence, as modified, are

AFFIRMED.

OFFICIAL

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