UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class GARY M. BILLIOT
United States Air Force

ACM 34878

26 September 2003

Sentence adjudged 31 October 2001 by GCM convened at Hurlburt Field, Florida. Military Judge: James L. Flanary (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 12 months, and reduction to E-1.

Appellate Counsel for Appellant: Major Kyle R. Jacobson (argued), Major Andrew S. Williams, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Captain Kevin P. Stiens (argued), Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, Lieutenant Colonel David N. Cooper, Lieutenant Colonel Robert V. Combs, and Major John D. Douglas.

Before

BURD, ORR, W.E., and ORR, V.A.
Appellate Military Judges

OPINION OF THE COURT

ORR, W.E., Judge:

In accordance with his pleas, the appellant was convicted of being absent without leave, wrongfully using of 3, 4-methylenedioxymethamphetamine (ecstasy) on divers occasions, wrongfully using marijuana, making bad checks, breaking restriction, dereliction of duty and assault, in violation of Articles 86, 112a, 123a, 134, 92, and 128, UCMJ, 10 U.S.C. §§ 886, 912a, 923a, 934, 892, 928. A military judge sentenced the appellant to a bad-conduct discharge, confinement for 14 months, and reduction to E-1. The convening authority approved the adjudged findings, reduced the amount of

confinement to 12 months, but otherwise approved the sentence. The appellant raised two errors for our consideration. We will discuss each issue herein after providing relevant background. We find no error and affirm.

Background

The appellant was assigned to Hurlburt Field, Florida, where he served as an electronic warfare systems apprentice. On or about 1 June 2001, the appellant went to New Orleans with another airman, but did not return to Hurlburt Field on 4 June 2001 as originally planned. The appellant was declared a deserter on 6 June 2001 after not reporting to work for two days. He remained in New Orleans for 12 days, during which time he possessed and used marijuana and ecstasy, and wrote bad checks with the intent to defraud others in order to obtain cash to buy drugs. Even though the appellant returned to Florida voluntarily on 13 June 2001, his commander placed him on restriction after learning that the appellant was under investigation by the Air Force Office of Special Investigations.

The appellant broke restriction twice and engaged in further misconduct. Specifically, he drank underage and committed two acts of assault consummated by a battery by twice urinating on another airman. As a result of his misconduct, on 22 July 2001, the appellant was ordered into pretrial confinement at the Pensacola Naval Brig in Pensacola, Florida. On 18 September 2001, he was transferred to the Eglin Air Force Base confinement facility, where he remained until his court-martial on 31 October 2001.

The pretrial confinement reviewing officer found that the appellant's pretrial confinement was appropriate under Rule for Courts-Martial (R.C.M.) 305(h)(2)(B), in order to keep him from fleeing and using drugs. He did, however, recommend that the appellant be afforded the opportunity to seek help for his perpetual drug use while in pretrial confinement.

On 11 August 2001, Captain (Dr.) Tom Barbera, a licensed clinical psychologist, evaluated the appellant and determined that the appellant was dependent on drugs and needed to receive inpatient drug treatment. The appellant did not receive inpatient drug treatment before his trial. On 12 October 2001, the appellant's trial defense counsel filed a motion with the military judge seeking the appellant's release from pretrial confinement based on the government's denial of inpatient drug treatment. The appellant's motion was denied on 25 October 2001. At trial, the appellant's defense counsel asked the military judge to award confinement credit to the appellant for the government's violation of Article 13, UCMJ, 10 U.S.C. § 813. Specifically, the motion asserts that the government's failure to provide adequate medical treatment constituted deliberate indifference to the appellant's health and welfare. The military judge denied the request for confinement credit and the appellant raised two issues on appeal.

I

WHETHER DEPRIVATION OF MEDICAL CARE CONSTITUTES ILLEGAL PRETRIAL PUNISHMENT UNDER ARTICLE 13, UCMJ, AND IF SO, WHETHER APPELLANT SHOULD BE CREDITED WITH ADDITIONAL CREDIT FOR THE GOVERNMENT'S FAILURE TO TRANSFER HIM TO A FACILITY AT WHICH TREATMENT WOULD HAVE BEEN AVAILABLE.*

Standard of Review

The issue of unlawful pretrial punishment is a mixed question of law and fact subject to de novo review. *United States v. Fulton*, 52 M.J. 767, 770 (A.F. Ct. Crim. App. 2000) (citing *Thompson v. Keohane*, 516 U.S. 99, 113 (1995)), *aff'd*, 55 M.J. 88 (2001). A military judge's findings of fact, including a finding of no intent to punish, are reviewed under a clearly erroneous standard. *United States v. Mosby*, 56 M.J. 309, 310 (2002). If the military judge fails to make a finding on the intent of confinement officials to punish, then that factual issue is reviewed de novo. *United States v. Smith*, 53 M.J. 168, 170 (2000). The ultimate question of whether the appellant is entitled to sentence credit for an Article 13, UCMJ, violation is reviewed de novo. *Mosby*, 56 M.J. at 310.

Analysis

After receiving evidence, hearing argument, and considering the written motions submitted by counsel at trial, the military judge concluded that the government's actions did not violate Article 13, UCMJ. In arriving at his decision, he made the following findings of fact:

> 1. The accused has met their initial burden to present a prima facia case to support their claim that the accused received illegal pretrial punishment as envisioned under Article 13 of the Uniform Code of Military Justice. By doing so, the burden of proof shifts to the prosecution to present evidence to rebut the allegation "beyond the point of inconclusiveness."
>
> 2. In this case, the accused was ordered into pretrial confinement on 22 July 2001 and was incarcerated at the Pensacola Naval Brig in Pensacola, Florida.

* We heard oral argument on this issue on 6 August 2003.

3. On 11 August 2001, he was evaluated by Captain Tom Barbera, a 16th Medial Operations Squadron staff psychologist. Captain Barbera recommended inpatient treatment for the accused for his diagnosed hallucinogen abuse and disorder. The inpatient treatment was to be accomplished at a local unsecured civilian treatment facility named Twelve Oaks, to begin on 20 August 2001.

4. Due to his status as a pretrial confinee, the accused was not allowed to attend Twelve Oaks for treatment, due to the fact that it was an unsecured facility.

5. Inquires [sic] into transferring the accused to another military confinement facility were unsuccessful due to the fact that general Air Force and Department of Defense instructions would not allow the transfer of a pretrial confinement detainee to a facility outside the local area.

6. The accused could've attended the Twelve Oaks facility if his unit had been able to provide two escorts to accompany him to the facility. Since the facility was unsecured, the escorts would be required to remain with the accused 24-hours per day, seven days per week, as long as he remained at the facility.

7. The court further finds significantly that the treatment recommended by Captain Barbera was discretionary and therefore, there was no pressing medical necessity requiring immediate receipt of the treatment.

Additionally, the court finds that the accused was classified as "med-in" that's m-e-d-in confinee, meaning that he posed an escape risk, though is nonviolent.

8. In evaluating such Article 13 requirements and requests, as stated in *US v. McCarthy,* 47 M.J. 162, (1997), an Article 13 violation must be analyzed under two prongs. First, the article prohibits the imposition of punishment or penalty on a pretrial confinement confinee prior to trial. This prong requires a purpose or intent to punish the confinee before guilt or innocence has been adjudicated.

9. In this case, while the affect [sic] of the accused not receiving the recommended treatment could possibly be viewed as punishment, this is an unintended consequence if it is punishment at all. It is clear to the court that the intent or purpose of not allowing the accused to attend the inpatient treatment was not to punish the accused. It was a combination of factors to include the facts that the proposed facility was unsecured, the treatment did

not amount to a medical necessity, the burden on the unit to provide two escorts continuously while the accused would be there, and the fact that the accused was classified as an escape risk. This is especially so, in view of the current crisis the United States has faced since the attacks of 11 September, and that Hurlburt Field is home to the Air Force Special Operations Command, and the 16th Special Operations Wing.

10. The second prong of the analysis involves whether or not the confinement experienced by the accused was more rigorous then [sic] required to ensure the accused's presence. Based upon the findings above, the court finds that the conditions were not more rigorous than required.

11. The court therefore finds that the prosecution has presented evidence to rebut the allegation beyond the point of inconclusiveness. The motion for additional Article 13 credit is denied.

The appellant asserts that the military judge's findings of fact are clearly erroneous. We disagree. The appellant is not claiming that the decision to place him in pretrial confinement was unlawful. The essence of the appellant's argument is that the appellant did not receive necessary medical treatment. The appellant asserts that the government's failure to transfer him to an inpatient drug treatment facility constituted deliberate indifference and this deprivation of medical care amounted to illegal pretrial punishment in violation of Article 13, UCMJ.

Pretrial punishment is prohibited by Article 13, UCMJ. That article prohibits (1) the imposition of pretrial punishment on an accused and (2) confinement conditions which are more rigorous than necessary to ensure the accused's presence at trial. *United States v. McCarthy*, 47 M.J. 162, 165 (1997). In this case, the appellant alleges that denial of inpatient drug treatment constituted illegal pretrial punishment. In evaluating claims of illegal pretrial punishment, the court looks to the intent to punish and whether there is a legitimate, nonpunitive government purpose involved. *United States v. Palmiter*, 20 M.J. 90, 95 (C.M.A. 1985). "[I]n the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, which may on its face appear to be punishment, is instead but an incident of a legitimate nonpunitive governmental objective." *Bell v. Wolfish,* 441 U.S. 520, 539, n. 20 (1979). If the conditions are reasonably related to a legitimate governmental objective, "it does not, without more, amount to 'punishment.'" *Id.*

The appellant argues that the trial court's finding that Dr. Barbera's recommendation for treatment was discretionary was "clearly erroneous." According to the appellant's argument, since Dr. Barbera said that the appellant "needed" the treatment, a serious medical need thus existed. While we do not conclude that Dr. Barbera's recommended treatment was discretionary, we agree with the military judge's

finding that there was no "pressing medical necessity requiring immediate receipt of treatment." While Dr. Barbera recommended that the appellant receive treatment immediately, his rationale for immediate treatment indicated just the opposite. Specifically, Dr. Barbera's recommendation stated that "If A1C Billiot is not treated, he will likely relapse when he is released from confinement." Since Dr. Barbera did not offer any other explanation why immediate treatment was necessary, we reviewed the record for the effect the delay in treatment had upon the appellant. During the trial, the appellant testified about the effects of being in pretrial confinement without drug treatment:

> Q. Airman Billiot, you indicated that you had not been provided any counseling or drug treatment in pretrial confinement. Did you have any suffering or pain as a result of not being provided rehabilitation?
>
> A. Yes, ma'am.
>
> Q. Can you describe for the court what you felt?
>
> A. Pretty much just depression, insomnia on several occasions, and slight memory loss.
>
> Q. You mentioned depression. Can you describe for the court your emotional state regarding drug use?
>
> A. I became dependent on it. Without having it was just -- I don't know.

On cross-examination, the appellant stated that he never made any complaints about his symptoms to anyone other than his lawyer while he was in pretrial confinement. Additionally, the appellant's first sergeant testified that the appellant was in "good spirits" and had a "good attitude" while in pretrial confinement. The fact that the appellant did not complain is "strong evidence" that the confinee was not illegally punished prior to trial. *Palmiter*, 20 M.J. at 97. However, complaining about the conditions of confinement "does not, per se, support the conclusion that appellant was subjected to an impermissible punishment or penalty, or to conditions sufficiently rigorous as to violate Article 13." *McCarthy*, 47 M.J. at 166.

While the case before us involved an allegation of illegal *pretrial* punishment, an analysis of illegal post-trial punishment cases under the Eighth Amendment is helpful here. In *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), the Supreme Court held that confinement conditions that constituted a "deliberate indifference" to the "serious medical needs" of prisoners violated the Eighth Amendment. In *Farmer v. Brennan*,

511 U.S. 825 (1994), the Supreme Court identified two requirements that must be met to show an Eighth Amendment violation. There must first be an objective act or omission or deprivation that is "sufficiently serious." *Farmer*, 511 U.S. at 834. Second, there must be a subjective evaluation of the state of mind of the prison official to show whether the prison official exhibited a "deliberate indifference" to the inmate's health or safety. *Id*. *See Wilson v. Seiter*, 501 U.S. 294 (1991). *See also United States v. White*, 54 M.J. 469 (2001).

A serious medical need has been defined in federal courts as "one that has been diagnosed by a physician as requiring treatment, or one that is so obvious that even a layperson would easily recognize the necessity for a doctor's attention." *Camberos v. Branstad*, 73 F.3d 174, 176 (8th Cir. 1995) (citing *Johnson v. Busby*, 953 F.2d 349, 351 (8th Cir. 1991)). It has also been held that "a 'serious' medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.' The 'routine discomfort' that results from incarceration and which is 'part of the penalty that criminal offenders pay for their offenses against society' does not constitute a 'serious' medical need." *Doty v. County of Lassen*, 37 F.3d 540, 546 (9th Cir. 1994) (quoting *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992)). Factors considered by the court included the existence of an injury that a reasonable doctor commented on or treated, the presence of a medical condition that significantly affects an individual's daily activities, and the existence of chronic or substantial pain. *Doty*, 37 F.3d at 546; *McGuckin*, 974 F.2d at 1059-60.

The appellant's alleged symptoms were not obvious to those who saw him on a daily basis. One confinement officer testified that the appellant was an outstanding prisoner. He did not know the appellant was having these symptoms, but he stated that the symptoms the appellant described at trial could very well have resulted from normal confinement. Based on the assumption that the appellant suffered from these symptoms, there simply is no evidence to conclude that the symptoms the appellant described were caused by lack of medical treatment. Even if the symptoms were caused by the lack of treatment, the appellant did not make a showing of harm that equated to a serious medical need. There is absolutely nothing in the record to suggest the appellant was in any pain, chronic or otherwise; or that his daily activities were significantly impacted because of any acute physical or emotional distress. As a result, it was not clearly erroneous for the military judge to find that the appellant's symptoms did not require immediate medical treatment.

Turning to the second factor identified by the Supreme Court, it must also be shown that confinement officials exhibited "deliberate indifference" to the confinee's serious medical needs. *Farmer*, 511 U.S. at 834. Such indifference can arise from a doctor's response to a prisoner's needs, by prison guards' intentional denial or delay of access to medical care, or from the intentional interference with a prescribed treatment. *Estelle,* 429 U.S. at 104-05. Indifference is exhibited when a prisoner has serious

medical needs that a prison official actually knew of but deliberately disregarded. *Jolly v. Knudsen*, 205 F.3d 1094, 1096 (8th Cir. 2000).

In this case, government officials and members of the appellant's unit were aware of Dr. Barbera's recommendation for treatment and their efforts could hardly be described as deliberately indifferent. Government officials attempted to support Dr. Barbera's recommendation for an extensive civilian drug treatment program but mission requirements prevailed. After exploring all reasonable options, the commander of the appellant's unit determined that transferring the appellant to an inpatient treatment facility while in pretrial confinement would have had a detrimental impact on the unit. While lack of basic psychiatric or mental health care can qualify as deliberate indifference, *White*, 54 M.J. at 475 (citing *Harris v. Thigpen*, 941 F.2d 1495 (11th Cir. 1991)), such care need not be "optimal," it need only be "reasonable." *White*, 54 M.J. at 475. There is no constitutional right to drug rehabilitation. *Fiallo v. De Batista*, 666 F.2d 729, 730 (1st Cir. 1981). Drug addiction therapy can fall in the category of necessary medical treatment, but only when denial of such treatment is sufficiently harmful to satisfy the deliberate indifference standard. *Id*. at 731. It is not enough that an accused merely wants a certain type of treatment. *Id.* In this case, the appellant did receive treatment and counseling under the base Alcohol and Drug Abuse Prevention and Treatment Program (ADAPT) while in pretrial confinement. Accordingly, the facts of this case do not support the appellant's assertion of deliberate indifference.

Based on this record, we hold that the military judge's findings are not clearly erroneous. We further hold, as a matter of law, that the appellant is not entitled to additional sentence credit for an Article 13, UCMJ, violation.

II

WHETHER THIS COURT SHOULD ORDER NEW POST-TRIAL PROCESSING WHERE THERE IS NO EVIDENCE THAT THE CONVENING AUTHORITY CONSIDERED TRIAL DEFENSE COUNSEL'S LETTER IN SUPPORT OF APPELLANT'S CLEMENCY.

The facts related to this issue are not in dispute. The staff judge advocate's recommendation (SJAR) was served on the appellant on 29 November 2001 and the appellant's counsel the following day. In response to the SJAR, the appellant submitted matters for consideration by the convening authority. The staff judge advocate (SJA) prepared an addendum to the SJAR dated 18 December 2001, and listed some, but not all of the matters submitted by the appellant. Specifically, the addendum to the SJAR did not list a four-page memorandum from the trial defense counsel requesting clemency for her client. As a result of this omission, the appellant asserts that he is entitled to new post-trial processing.

We review this issue de novo. Article 60(c)(2), UCMJ, 10 U.S.C. § 860 requires the convening authority to consider matters submitted by an accused before taking action on a sentence. Our superior court has stated that we should not guess as to whether clemency matters prepared by the defense counsel were attached to the recommendation or considered by the convening authority. *See United States v. Stephens*, 56 M.J. 391, 392 (2002). This Court has held that a convening authority is presumed to have considered clemency submissions "if the SJA prepared an addendum to the SJAR that (1) tells the convening authority of the matters submitted, (2) advises the convening authority that he or she must consider the matters, and (3) the addendum listed the attachments indicating that they were actually provided." *United States v. Gaddy*, 54 M.J. 769, 773 (A.F. Ct. Crim. App.) (citing *United States v. Foy*, 30 M.J. 664 (A.F.C.M.R. 1990)), *pet. denied*, 55 M.J. 245 (2001).

Even though the third prong of the *Gaddy* requirement was not met, we are convinced that the trial defense counsel's clemency letter was forwarded to the convening authority for consideration. First, we have an affidavit from the SJA stating that he submitted the letter to the convening authority for consideration. While we have no reason to doubt his veracity, this court has normally required the government to submit an affidavit from the convening authority verifying that he or she considered the appellant's submissions. *See United States v. Godreau*, 31 M.J. 809, 811 (A.F.C.M.R. 1990). Since there is additional evidence, an affidavit from the convening authority is not necessary in this case. Second, the addendum itself provides proof that the SJA read and considered the letter submitted by the trial defense counsel. Specifically, the addendum mentions the date of the letter, that the submission is from the appellant and his defense counsel, and includes a request for the convening authority to not approve the bad conduct discharge and/or to reduce the amount of confinement. These specific requests are only found in the trial defense counsel's clemency letter. Therefore, we are convinced that even though the defense counsel's letter was not listed as an attachment, the letter was submitted to the convening authority for consideration. As a result, a remand in this situation is not appropriate.

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; *United States v. Reed*, 54 M.J. 37, 41 (2000). Accordingly, the findings and sentence are

AFFIRMED.

Senior Judge BURD participated in this decision prior to his departure from the Court.
Judge ORR, V.A., participated in this decision prior to her retirement.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator