

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

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UNITED STATES

v.

Airman First Class HAKIEM J. DEAN  
United States Air Force

ACM S31339

21 November 2008

Sentence adjudged 13 June 2007 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: William M. Burd (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 2 months, forfeiture of \$867.00 pay per month for 2 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, and Captain Jamie L. Mendelson.

Before

FRANCIS, HEIMANN, and THOMPSON  
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with his pleas, the appellant was found guilty of a single use of marijuana and divers uses of cocaine in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The military judge, sitting alone as a special court-martial, sentenced the appellant to a bad-conduct discharge, confinement for two months, forfeiture of \$867.00 pay per month for two months, and reduction to the grade of E-1. The convening authority approved the findings and sentence as adjudged. The appellant now asserts that the military judge erred by failing to grant him credit against his approved sentence to confinement because his restriction to the Transition Flight at Lackland Air Force Base

(AFB) was tantamount to confinement. In addition, he contends that the sentence is inappropriately severe in light of his lengthy stay in Transition Flight. We disagree.

### *Background*

The appellant was assigned to a training squadron at Lackland AFB. In late November and early December 2006, the appellant used both marijuana and cocaine. On 15 December 2006, the appellant's drug use was discovered and he was immediately assigned to the Transition Flight, a dormitory for airmen pending involuntary separation. He remained assigned to the Transition Flight until his trial ended on 13 June 2007.

At trial, the appellant brought a motion for appropriate relief, asserting that the conditions in the Transition Flight were tantamount to confinement and that Rules for Courts-Martial 305(h) and 305(i) were violated when no pretrial confinement hearing was conducted prior to placement in the Transition Flight. On appeal, the appellant renews the claim that the restrictions of the Transition Flight were tantamount to confinement.

The evidence on the motion showed that the appellant was subject to a variety of restrictions, similar to confinement conditions. He was generally restricted to the Transition Flight building when he was not on a work detail or at an appointment. When he left for an appointment or work detail, he had to sign out, and when he returned, he had to sign back in. He could not leave the building without permission and was generally escorted to appointments and work details. He was required to march to the dining facility with other Transition Flight members for all meals. The appellant was not allowed to wear civilian clothes. There were cameras in the hallway to monitor Transition Flight personnel. Finally, at night an NCO was permitted to check the appellant's room to make sure he was there.

At the same time, the appellant was given some liberties that are inconsistent with a claim of confinement. He was given essentially unlimited access to base support facilities, e.g., the family support center, the library, the education center, and the hospital. He was allowed to go the Base Exchange when escorted on weekends. He was allowed to go to church services unescorted. He had limited duty responsibilities on weekends and was permitted to sleep in on Sundays. He was allowed to have visitors with approval by the Transition Flight personnel or his commander. The appellant shared a room with one other person. His dorm room door was locked during the hours of 2200-0500. In addition, after the first week in the Transition Flight, the appellant earned certain privileges.\* These privileges permitted him to have personal items, such as a

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\* The appellant did lose his privileges if he failed to comply with the rules of the Transition Flight. Apparently, during the appellant's six months in the Transition Flight, his privileges were revoked for up to half his tenure for failure to comply with the Transition Flight rules. We reject the appellant's argument that because he frequently,



video game player, a television, CDs, and DVDs. As such, after 1700 he was permitted to spend time in his room and use his personal items until lights out at 2200. In addition, the appellant was allowed, as a privilege, to use either the Transition Flight telephone during the day or his personal cell phone after duty hours for personal calls.

At trial, the military judge, in addition to finding the facts outlined above, concluded that there was no intent to punish the appellant, and that the restrictions placed on the appellant served a legitimate military purpose. He found there was no illegal pretrial punishment in violation of Article 13, UCMJ, 10 U.S.C. § 813. The military judge also concluded the restrictions placed on the appellant were not tantamount to confinement. Finally, the military judge advised the appellant that he would consider the appellant's time in the Transition Flight as a factor in mitigation when arriving at his sentence.

### *Analysis*

We review de novo the ultimate legal question of whether certain pretrial restrictions are tantamount to confinement. See *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) (citations omitted).

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:

Factors to consider include 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

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but temporarily, lost privileges during his tenure in the Transition Flight, we must base our analysis solely on the most restrictive conditions.

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).

After reviewing the record before us, and considering the nature and scope of the appellant's pretrial restriction and the conditions imposed upon him, we hold, even accepting the fact that he was denied some privileges at times, that the appellant's pretrial restriction was not tantamount to confinement. We are particularly persuaded by the facts that the appellant had almost complete liberty to choose his evening activities, that he was never under guard and had the ability to visit any and all services throughout the base (to include the Base Exchange), that he was only required to perform light duties that were appropriate for any airman, and that he shared a room with only one other airman and could spend time alone in the room during the evenings, doing things of his choosing. He also knew that simple compliance with basic military standards of conduct would entitle him to access personal items. Considering his presence on an installation devoted almost exclusively to training new airmen, we find the conditions imposed on the appellant and others in the Transition Flight were necessary in that environment to maintain good order and discipline on the installation and amongst airmen awaiting separation from the Air Force. While strict, the restrictions were not equivalent to confinement and were not punishment under Article 13, UCMJ. We note that we also agree with the military judge's decision to consider the conditions of the appellant's pretrial restraint in deciding an appropriate sentence.

#### *Sentence Appropriateness*

Finally, the appellant argues that his sentence is inappropriately severe. In support of this argument, he asks us to consider, among other factors, the fact that he spent six months in the Transition Flight. In making this argument, he acknowledges that the military judge expressly advised the appellant he would consider his time in the Transition Flight as mitigation in reaching a proper sentence.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005); *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006). We have a great deal of discretion in determining whether a particular sentence is appropriate, but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

Having considered the entire record, including the conditions of the Transition Flight, we are satisfied that the military judge properly considered this fact in mitigation. We are also satisfied that the sentence is appropriate.

*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