UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MARCUS A. DE VANEY
United States Air Force

ACM S31551

30 June 2009

Sentence adjudged 14 May 2008 by SPCM convened at Dyess Air Force Base, Texas. Military Judge: Bryan D. Watson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 9 months and 23 days, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Maria A. Fried, Major Michael A. Burnat, and Captain Tiaundra Sorrell.

Appellate Counsel for the United States: Major Jeremy S. Weber, Major Kimani R. Eason, and Gerald R. Bruce, Esquire.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

OPINION OF THE COURT

HELGET, Judge:

In accordance with his pleas, the appellant was found guilty of one specification of violating a lawful order, one specification of carnal knowledge, one specification of aggravated sexual assault of a child, and one specification of communicating a threat, in violation of Articles 92, 120,[1] and 134, UCMJ, 10 U.S.C. §§ 892, 920, 934. The

[1] The appellant was charged with both carnal knowledge and aggravated assault of a child because of the 1 October 2007 amendments to Article 120, UCMJ, 10 U.S.C. § 920.

approved sentence consists of a bad-conduct discharge, confinement for 9 months and 23 days, and reduction to E-1.

The appellant asserts two assignments of error before this Court. The first issue is whether a seven-day reduction of appellant's sentence by the convening authority was inadequate as a remedy for the appellant's post-trial punishment in light of the fact that his supervisor, Master Sergeant (MSgt) BL, deliberately included white sneakers with pink shoelaces, women's high heel rainbow shoes, and incomplete uniform items when packing the appellant's duffel bag for confinement, which humiliated the appellant and left him with one wearable uniform for 30 days. The second issue is whether the Staff Judge Advocate's (SJA) advice pertaining to the defense request for a post-trial hearing was prejudicial to the appellant in that it failed to inform the convening authority that MSgt BL was a sentencing witness against the appellant and it erroneously stated that "cited provisions of the RCM allowing for a post-trial hearing are to address misconduct of trial participants *during trial*." Finding no error, we affirm.[2]

Background

On 14 May 2008, at the conclusion of his court-martial, the appellant was placed in a local civilian confinement facility. On 22 May 2008, the appellant was transferred to the Naval Consolidated Brig, Miramar Naval Air Station, California, to serve the remainder of his confinement. Prior to his transfer, the appellant's supervisor, MSgt BL, and his First Sergeant, MSgt AJ, were tasked with acquiring the items the appellant needed to serve his confinement at Miramar. On the morning of his transfer, the appellant's escorts from his unit inspected his confinement bag to ensure he had all of the requisite items. They found one pair of women's rainbow-colored high heel shoes and a pair of tennis shoes with pink shoelaces. They also noticed that the appellant was missing several of the required items. Considering there was not enough time to obtain the necessary items, the appellant processed into Miramar with the items that had been packed for him. As a result, the appellant had only one serviceable uniform to wear for the first 30 days he was in confinement at Miramar. On 12 June 2008, as a result of the actions against him by his supervisor and First Sergeant, the appellant requested a post-trial Article 39(a), UCMJ, 10 U.S.C. § 839(a), hearing. On 13 June 2008, the convening authority denied his request.

In clemency, the defense requested that the convening authority reduce confinement by four months to give four for one credit for the 30 days the appellant was required to wear the same uniform at Miramar due to his unit's failure to properly pack his confinement bag and to remedy the humiliation his unit caused by including

[2] Although not affecting the legal sufficiency of the findings or sentence, the court-martial order erroneously states that the sentence was adjudged on 15 May 2008 vice 14 May 2008. In addition, the appellant's last name should be written as "DE VANEY." We order the promulgation of a corrected court-martial order.

inappropriate items in his bag. The convening authority agreed in part and granted a seven-day reduction in the appellant's sentence.

Convening Authority's Action

The first issue is whether the seven-day reduction of the appellant's sentence was an inadequate remedy for the post-trial punishment sustained by the appellant. The appellant essentially asserts that he was subjected to cruel and unusual punishment under the Eighth Amendment. U.S. CONST. amend. VIII; *see also* Article 55, UCMJ, 10 U.S.C. § 855.

"We review allegations of cruel or unusual punishment under a de novo standard." *United States v. Pena*, 64 M.J. 259, 265 (C.A.A.F. 2007) (citing *United States v. White*, 54 M.J. 469, 471 (C.A.A.F. 2001)). The Supreme Court has stated that punishments violate the Eighth Amendment when they "are incompatible with the evolving standards of decency that mark the progress of a maturing society or which involve the unnecessary and wanton infliction of pain." *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976) (internal citations omitted). In *Farmer v. Brennan*, 511 U.S. 825 (1994), the Supreme Court defined the two factors necessary for an Eighth Amendment claim to succeed regarding conditions of confinement. First, there is an objective component where an act or omission must result in the denial of necessities and is, objectively, "sufficiently serious." *Farmer*, 511 U.S. at 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). The second component is subjective, testing for a culpable state of mind. *Id.* "In prison conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety." *Id.* (quoting *Wilson*, 501 U.S. at 302-03).

In this case, the appellant has failed to show that he was subjected to cruel and unusual punishment. While the actions of his supervisor and First Sergeant were embarrassing and humiliating, they do not rise to the level of cruel and unusual punishment. The appellant was not denied medical care, food, or any basic necessity. Nor was he subjected to any physical pain or psychological harm requiring mental health intervention. Accordingly, any relief granted by the convening authority was discretionary and an appropriate act of clemency.

Post-Trial Article 39(a), UCMJ, Hearing

The appellant next asserts that he was prejudiced by the SJA's advice to the convening authority concerning his request for a post-trial Article 39(a), UCMJ, hearing in that the SJA failed to inform the convening authority that MSgt BL was a sentencing witness against the appellant, and the SJA erroneously advised the convening authority that post-trial Article 39(a), UCMJ, hearings are used to address misconduct of trial participants during trial.

In his request for a post-trial Article 39(a), UCMJ, hearing, the appellant asserted that MSgt BL and MSgt AJ intended to "embarrass and punish" him. In response to the appellant's request, the SJA advised that a post-trial hearing was not appropriate in this case because a post-trial hearing was meant to "address misconduct of trial participants *during trial* . . . not to address matters during post trial confinement." The convening authority subsequently denied the request.

Rules for Courts-Martial (R.C.M.) 1102(b)(2) provides in relevant part: "An Article 39(a)[, UCMJ,] session under this rule may be called, upon motion of either party or *sua sponte* by the military judge, for the purpose of inquiring into, and, when appropriate, resolving any matter that arises after trial and that substantially affects the legal sufficiency of any findings of guilty or the sentence."

R.C.M. 1102(d) provides that "[t]he military judge may direct a post-trial session any time before the record is authenticated. The convening authority may direct a post-trial session any time before the convening authority takes initial action on the case or at such later time as the convening authority is authorized to do so by a reviewing authority."

"When an appellant requests the convening authority to order a posttrial [sic] Article 39(a)[, UCMJ,] session, it is a matter for the convening authority's sound discretion whether to grant the request." *United States v. Ruiz*, 49 M.J. 340, 348 (C.A.A.F. 1998). The convening authority's decision not to order a post-trial Article 39(a), UCMJ, session is reviewed for an abuse of discretion. *Id.*

The appellant asserts the SJA's advice that R.C.M. 1102(b)(2) was intended to address misconduct during trial is contrary to our superior court's holding in *United States v. Scaff*, 29 M.J. 60 (C.M.A. 1989). In *Scaff*, the Court held that "Article 39(a) of the Code empowers the military judge to convene a post-trial session to consider newly discovered evidence and to take whatever remedial action is appropriate." *Scaff*, 29 M.J. at 66. However, in *Scaff*, the post-trial Article 39(a), UCMJ, session considered exculpatory evidence that was available but unknown at the time of trial. The case did not involve post-trial misconduct of a witness. Other cases have reached a similar result. *United States v. Webb,* 66 M.J. 89 (C.A.A.F. 2008) (military judge's decision to order a post-trial Article 39(a), UCMJ, session and subsequent order for a new trial was proper for newly-discovered evidence that a urinalysis observer, who provided a stipulation of expected testimony, had received nonjudicial punishment); *United States v. Brickey*, 16 M.J. 258 (C.M.A. 1983) (military judge empowered to conduct a post-trial Article 39(a), UCMJ, session to determine whether trial counsel had violated her constitutional duty to disclose exculpatory information); *United States v. Witherspoon*, 16 M.J. 252 (C.M.A. 1983) (military judge could convene a post-trial session to consider possible jury misconduct). In all of these cases, the information discovered post-trial called into question the fairness and integrity of the court-martial proceedings. An entirely different

situation exists in this case. Here, we are dealing with witness misconduct that actually occurred post-trial rather than being discovered post-trial. Any post-trial misconduct on the part of either MSgt BL or MSgt AJ did not affect the legal sufficiency of the findings of guilty or the sentence.

The appellant also asserts that since the military judge considered the testimony of MSgt BL in fashioning an appropriate sentence, the Article 39(a), UCMJ, hearing would have afforded the military judge the opportunity to consider MSgt BL's post-trial misconduct and his apparent bias against the appellant and to reassess the sentence. We disagree. If a post-trial Article 39(a), UCMJ, session had been granted, it would have been inappropriate for the military judge to reassess MSgt BL's in-court testimony based upon any post-trial misconduct by MSgt BL.

Whether or not the SJA should have informed the convening authority that MSgt BL was a sentencing witness who testified against the appellant during the sentencing portion of his court-martial, the appellant has failed to show that he was prejudiced by the omission. Additionally, the appellant has failed to show that he was prejudiced by the SJA's advice that post-trial Article 39 (a), UCMJ, hearings are to address misconduct of trial participants during trial rather than to address matters during post-trial confinement. Accordingly, we find that the convening authority did not abuse his discretion in denying the appellant's request for a post-trial Article 39(a), UCMJ, session.

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