UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JONATHAN G. ERIKSEN
United States Air Force

ACM S32058

25 June 2013

Sentence adjudged 19 March 2012 by SPCM convened at Kadena Air Base, Okinawa, Japan. Military Judge: Vance H. Spath (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 2 months, forfeiture of $600.00 pay per month for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Nicholas D. Carter.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Nurit Anderson; and Gerald R. Bruce, Esquire.

Before

GREGORY, ORR, and HARNEY
Appellate Military Judges

PER CURIAM:

The appellant was tried by a military judge sitting as a special court-martial on 19 March 2012. Consistent with his pleas, the appellant was found guilty of two specifications of absence without leave, in violation of Article 86, UCMJ, 10 U.S.C. § 886. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 108 days, forfeiture of $600.00 pay per month for six months, and reduction to E-1. The appellant had 33 days of pretrial confinement credit. Consistent with the terms of a pretrial agreement, the convening authority approved only so much of

the sentence as called for a bad-conduct discharge, confinement for 2 months, forfeiture of $600.00 pay per month for six months, and reduction to E-1.[1]

Before this Court, the appellant raises two issues: (1) the military judge should have sua sponte recused himself from sitting on the appellant's court-martial; and (2) the sentence adjudged by the military judge negated the pretrial confinement credit rule in *United States v. Allen*, 17 M.J. 126 (C.M.A. 1894).[2] Finding no error, we affirm.

Recusal of the Military Judge

The appellant first argues that the military judge should have recused himself from sitting on his court-martial because of an alleged pre-trial communication he had with trial defense counsel. The only evidence that such a conversation took place is a post-trial affidavit from the appellant. According to the appellant, the military judge "hinted" to the defense counsel that he "wanted a crack at your [appellant's] AWOL case and could very possibly give a lenient sentence."

We review the impartiality of the military judge for plain error when first challenged on appeal. *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011). Plain error occurs when (1) there is error; (2) the error is plain or obvious; and (3) the error results in material prejudice. *Id*. at 157. We find no error, plain or otherwise, and hold the appellant was not denied his constitutional right to an impartial judge. *United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001). We find no basis upon which the military judge's impartiality "might reasonably be questioned" such that he was required to disqualify himself. Rule for Courts-Martial (R.C.M.) 902(a); *United States v. Quintanilla*, 56 M.J. 37, 45 (C.A.A.F. 2001). The appellant's hearsay affidavit does not state where or when the alleged conversation took place; if the military judge already had been assigned to the appellant's case; or if there were any witnesses to the conversation. Moreover, the military judge recapped on the record his limited pre-trial knowledge of the appellant's case, stated he was impartial and unaware of any grounds for challenge against him, and ensured the appellant's election to be tried by military judge alone was knowing and voluntary. Taken as a whole in the context of this trial, we find the "legality, fairness, and impartiality" of the court-martial were not put into doubt by the military judge's actions. *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000).

[1] The appellant pled not guilty to one charge and one specification of false official statement, in violation of Article 107, UCMJ, 10 U.S.C. § 907. Consistent with the terms of the pretrial agreement, this charge and specification were withdrawn and dismissed with prejudice.

[2] The appellant raises these issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Sentence and Pretrial Confinement Credit

The appellant next argues that the military judge negated the pretrial confinement credit he was entitled to receive when he sentenced the appellant to 108 days confinement, which equaled the sum of the 75 days confinement recommended by trial counsel and the 33 days of pretrial confinement credit under *Allen*. We disagree and find no error.

We review de novo the proper application of credit for lawful pretrial confinement. *United States v. Spaustat*, 57 M.J. 256, 261-62 (C.A.A.F. 2002). We hold that the military judge properly considered and applied the 33 days of *Allen* credit for the appellant's lawful pretrial confinement. Along these lines, our superior court has held that presentencing evidence under R.C.M. 1001(b)(1) that includes the "duration and nature of any pretrial restraint" is broad enough to include pretrial confinement credit information. *United States v. Barnett*, 71 M.J. 248, 252 (C.A.A.F. 2012); *United States v. Balboa*, 33 M.J. 304, 306 (C.M.A. 1991). In addition, our superior court has held that neither its decision in *Allen* nor the *Manual for Courts-Martial* "precludes a court from attempting to fashion an appropriate sentence of confinement in view of time actually served." *Balboa*, 33 M.J. at 306 (citing generally *Wasman v. United States*, 468 U.S. 559 (1984); *Williams v. New York*, 337 U.S. 241 (1949)).[3] Finally, we note that the appellant had a pretrial agreement that capped confinement at two months, a period less than the maximum punishment and the punishment announced by the military judge. Under the circumstances, we find that the appellant received the benefit of his bargain.

Conclusion

We have reviewed the record in accordance with Article 66, UCMJ, 10 U.S.C. § 866. The findings and the sentence are determined to be correct in law and fact and, on the basis of the entire record, should be approved. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

[3] We also note that the military judge announced a sentence that exceeded the two-month cap agreed to in the pretrial agreement. Pretrial confinement credit under *Allen* is applied to the lesser of the adjudged sentence or the sentence limitation in the pretrial agreement. *United States v. Spaustat*, 57 M.J. 256, 261-62 (C.A.A.F. 2002); *United States v. Rock*, 52 M.J. 154, (C.A.A.F. 1999). In this case, the *Allen* credit of 33 days would be applied against the two-month cap in the pretrial agreement.

Accordingly, the findings of guilty and the sentence, as approved below, are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court