UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JASON O. GREEN
United States Air Force

ACM 36664

12 October 2007

Sentence adjudged 1 December 2005 by GCM convened at Kadena Air Base, Japan. Military Judge: Eric L. Dillow (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 18 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Lieutenant Colonel Dana G. Orndorff, Captain Vicki A. Belleau, and Captain Timothy M. Cox.

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

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

SOYBEL, Judge

The appellant pled guilty to one charge and specification of possession, receipt and display of visual depictions of a minor engaging in sexually explicit conduct in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934.

The appellant initially asserted two issues. He claimed the convening authority took action in his case before viewing clemency matters. The appellant also claimed he was subjected to cruel and unusual punishment in violation of the Eighth Amendment to

the United States Constitution and Article 55, UCMJ, 10 U.S.C. § 855.[1] In a supplemental filing, without alleging additional facts, the appellant expanded the second issue to allege violations of the First and Fifth amendments. None of his issues have merit.

Post-Trial Processing Errors

The issue regarding post-trial processing was cleared up with an undisputed affidavit submitted by the government. A lack of attention to detail resulted in improper dates on some of the documents that made it appear the post-trial processing was improperly conducted. We are satisfied that the convening authority did review the appellant's clemency submissions under Rule for Courts-Martial 1106 before taking action in this case.

Background Concerning Allegation of Illegal Post-Trial Punishment

According to post-trial submissions, the Naval Consolidated Brig, Miramar was designated as the facility where the appellant would serve out his sentence. One of the rules of that facility prohibits convicted sex offenders from corresponding or visiting with any minor (under 18 years old) without permission from the "Commanding Officer" (CO). The appellant qualified as a sex offender under the rules.

Prisoners could seek permission for an exception to the rule, and had to include a written recommendation from a "child abuse specialist" recommending such contact. The appellant submitted his request for permission to contact his 17-year-old sister along with a letter from a "licensed professional counselor" who had specialized for "several years" "working with children who have experienced trauma." The counselor recommended approval of the appellant's request because it would be a "positive experience" for the appellant's sister. The CO denied the appellant's request. The appellant's claims focus solely on his inability to communicate with his sister.

Eighth Amendment and Article 55, UCMJ

We review allegations of Eighth Amendment violations and Article 55, UCMJ violations de novo. *United States v. Pena*, 64 M.J. 259, 265 (C.A.A.F. 2007). Unless certain conditions, which are not present in this case, are met, the review for both provisions is identical. *Id.* "[T]he Eighth Amendment prohibits punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society or which involve the unnecessary and wonton infliction of pain." *United States v. White*, 54 M.J. 469, 474 (C.A.A.F 2001) (citing *Estelle v. Gamble*, 429 U.S. 97 (1976)

[1] Submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

(internal citations omitted)); *Pena*, 64 M.J. at 265; *United States v. Lovett*, 63 M.J. 211 (C.A.A.F. 2006).

To prove an Eighth Amendment violation, the appellant must show "(1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [the appellant's] health and safety; and (3) that he 'has exhausted the prisoner grievance system . . . and that he has petitioned for relief under Article 138, UCMJ, 10 U.S.C. § 938 . . . .'" *Lovett*, 63 M.J. at 215 (footnotes omitted).

The appellant's claim fails for several reasons. First, his complaint does not amount to a serious act or omission resulting in a denial of necessities. Typically, these are things such as denial of needed medical attention, proper food, or sanitary living conditions. Physical abuse may also qualify. *See United States v. Avila*, 53 M.J. 99, 101 (C.A.A.F. 2000). The appellant's deprivation is not of the caliber that triggers Eighth Amendment protection. It is more akin to routine conditions associated with punitive or administrative segregation such as restriction of contact with other prisoners, of exercise outside a cell, of visitation privileges, of telephone privileges, and/or of reading material. *Id.* at 102. We also note that not all visitation or outside contact was withheld from the appellant, just a certain segment of it. This partial, rather than full, restriction on the appellant's ability to communicate with friends and family also supports the government's case. *See Turner v. Safley*, 482 U.S. 78 (1987); *Henderson v. Terhune*, 379 F.3d 709 (9th Cir. 2004).

Second, the appellant has not shown the Commanding Officer acted with a culpable state of mind. The commander did not arbitrarily select the appellant and deny him contact with minors. He was acting pursuant to, and enforcing, the Brig rules. An administrative letter from the Brig explaining the purpose of the rule, submitted by the appellant, shows it is clearly designed to protect child victims and is applicable to all sex offenders. This rule has a legitimate purpose of protecting society. By enforcing this existing rule, the Commanding Officer did not display the requisite "deliberate indifference to [the appellant's] health and safety." *Lovett*, 63 M.J. at 215 (citations omitted).

Finally, although he used the Brig grievance system, the appellant did not file a petition for relief under Article 138, UCMJ. Filing an Article 138 petition is required as part of the appellant's obligation to exhaust his administrative remedies prior to seeking redress in this Court for illegal post-trial confinement. *United States v. Wise*, 64 M.J. 468 (C.A.A.F. 2007).

First and Fifth Amendment Claims

The appellant relies primarily on *Overton v. Brazzetta*, 539 U.S. 126 (2003), to support the notion that prison officials may not completely exclude prisoners from having contact with minor children. In that case, the justification for upholding the prison's rule that prohibited visitation with minor nieces and nephews and children to whom parental rights have been terminated was the fact that the prisoners had an alternative means for staying in contact with those family members, namely through letters and phone calls. *Id.* at 135. Here the appellant notes he is subject to a total ban on contact with minor children unless he first receives permission from the Commanding officer of the Brig. We find appellant's claim to be without merit.

The Supreme Court has held in *Shaw v. Murphy*, 532 U.S. 223 (2001),

> [T]he constitutional rights that prisoners possess are more limited in scope than the constitutional rights held by individuals in society at large. In the First Amendment context, for instance, some rights are simply inconsistent with the status of a prisoner or "with the legitimate penological objectives of the corrections system." We have thus sustained proscriptions of media interviews with individual inmates, prohibitions on the activities of a prisoners' labor union, and restrictions on inmate-to-inmate written correspondence. Moreover, because the "problems of prisons in America are complex and intractable," and because courts are "particularly ill" equipped to deal with these problems, we generally have deferred to the judgments of prison officials in upholding these regulations against constitutional challenge.

Id. at 229 (internal citations omitted). The basic test for determining whether a restrictive prison rule withstands a constitutional challenge was first stated in *Turner*, 482 U.S. 78, which asked whether the challenged rule was reasonably related to a legitimate penological interest. To make this determination, *Turner* acknowledged four considerations:

> [W]hether the regulation has a "valid, rational connection" to a legitimate governmental interest; whether alternative means are open to inmates to exercise the asserted right; what impact an accommodation of the right would have on guards and inmates and prison resources; and whether there are "ready alternatives" to the regulation.

Overton, 539 U.S. at 132 (citing *Turner*, 482 U.S. at 89-91).[2]

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[2] *Turner* has been superceded by the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb-1 *et seq*, but only with respect to free exercise of religion. *Show v. Patterson*, 955 F. Supp. 182 (D.N.Y. 1997); *Estep v. Dent*, 914 F. Supp. 1462, 1466 (D. Ky. 1996). The RFRA has no bearing on this case.

Since *Turner*, the test has undergone some refinement depending on the situation to which it was applied. For example, in *Beard v. Banks*, 126 S. Ct. 2572 (2006), the court recognized that not all four factors are equally useful nor need be applied with equal value, depending on the circumstances of the case and the regulation that is challenged. In *Beard*, when reviewing a First Amendment challenge to a rule that deprived a small class of prisoners of most reading material as a means of punishing them for bad behavior, the Court found that the second, third, and fourth factors added little to the analysis because they were logically related to the policy itself and the first factor was shown to be not only logically related to the regulation but was reasonably related. *Id.* at 2580.

In this case the appellant equates his status with those of the appellants in *Overton.* The appellant argues that because in his case there was no "alternative means available to inmates to communicate with their minor family members," the restriction fails the *Turner* test and is unconstitutional. We disagree. First, the rule in the appellant's case restricting communication with minors applies only to "convicted sex offenders involving a minor (including child pornography)," not the entire prison population. This is an important distinction. *See Beard*, 126 S. Ct. at 2580.

Additionally, if a qualified child abuse specialist submitted a letter supporting a confinee's request, the ban could be lifted by the CO. Thus, the concern expressed in *Beard* and *Overton*, that a rule was "a *de facto* permanent ban" was not realized in this case. *Beard*, 126 S. Ct. at 2582; *Overton*, 539 U.S. at 134. If the right conditions were met the ban could be lifted.

In a letter explaining the policy from the CO of the Brig to the parents and guardians of minor children of convicted sexual offenders, the CO explains that essentially all contact between the convicted offender and minor children is prohibited unless approved by him. He explains that the rule is "intended to provide a wide net of protection to minors." He further explains that sex offenders have often abused children other than the ones already identified, both in and outside of the family. He emphasizes that "[s]ecrecy surrounds child sexual abuse" and that children often will not expose the abuse out of fear. Often conversations with children are used to groom them for future molestation. He also stresses that "contact, either direct or indirect with a child can trigger deviant sexual fantasies on the offender's part. Even offenders convicted of possession of child pornography may also have committed unreported 'hands-on' sexual offenses or sexually groomed children."

We find that this policy is reasonably related to the penological interests related to confining this carefully defined segment of the prison population. Because of their offenses, the CO has recognized that special rules must be enforced for this group. The rules not only protect children but also helps minimize sexual fantasies by those incarcerated.

The second part of the test, whether there are alternative means of exercising the right that still remain open to prison inmates, is not an important factor here because any alternative would only serve to undermine the rule and degrade the protections the rule provides. *See Beard*, 126 S. Ct. at 2580.

The third part of the *Turner* test, the extent of the impact accommodating the asserted constitutional right will have on guards and other inmates, including the allocation of prison resources, militates against the appellant. Accepting the CO's statement that even offenders convicted of possession of child pornography may also have committed unreported "hands-on" sexual offenses or sexually groomed children as true, it is impossible to tell whether any individual confined for possession only, may have also done those things. Trying to determine whether a confinee has done these things would not only be impossible, but the impact on the prison staff of investigating possible abuses would be unmanageable.

Finally, we find no, (and none has been suggested) "alternative methods of accommodating the claimant's constitutional complaint . . . that fully accommodates the prisoner's right's at *de minis* cost to valid penological interests." *Beard*, 126 S. Ct. at 2580 (citing *Turner*, 482 U.S. at 90 -91).

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 findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court