

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Senior Airman JOHN W. HOLMES
United States Air Force**

ACM 35411

28 September 2004

Sentence adjudged 4 October 2002 by GCM convened at Pope Air Force Base, North Carolina. Military Judge: Ann D. Shane.

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Andrew S. Williams.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Captain Kevin P. Steins.

Before

**MALLOY, JOHNSON, and GRANT
Appellate Military Judges**

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JOHNSON, Judge:

In accordance with his pleas, the appellant was convicted of one specification of dereliction of duty, five specifications of wrongful use of a controlled substance, three specifications of larceny, and two specifications of forgery, in violation of Articles 92, 112a, 121, and 123, UCMJ, 10 U.S.C. §§ 892, 912a, 921, 923¹. A panel of officer and enlisted members sentenced the appellant to a bad-conduct discharge, confinement for 4

¹ The appellant was also charged with two additional specifications of wrongful use of a controlled substance, in violation of Article 112a, UCMJ, but the specifications were dismissed after arraignment, pursuant to a motion by trial defense counsel.

months, and reduction to E-1. The convening authority approved the sentence. The appellant raises one error for our consideration. Finding no error, we affirm.

Issue

WHETHER THE MILITARY JUDGE COMMITTED REVERSIBLE ERROR WHEN SHE INSTRUCTED THE COURT MEMBERS IN SENTENCING THAT MILITARY CONFINEMENT FACILITIES ARE CORRECTIVE RATHER THAN PUNITIVE.

Background

Prior to discussing confinement, as well as other forms of authorized punishment, the military judge stated, “In adjudging a sentence, you are restricted to the kinds of *punishment* which I will now describe, or you may adjudge no punishment.” (Emphasis added.) The military judge then proceeded to describe each type of punishment, to include confinement. Specifically, she instructed the members that:

Military confinement facilities are corrective, rather than punitive. Prisoners perform only those types of productive work that may be required of duty airmen. The Confinement Corrections Program is intended to help individuals solve their problems, correct their behavior and improve their attitude towards themselves, the military and society.

The instructions were also provided to the members in written form. Trial defense counsel objected to this specific language regarding confinement.

Standard of Review

The issue of whether a jury was properly instructed is a question of law and is reviewed de novo. *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003), *cert. denied*, *Hibbard v. United States*, 539 U.S. 928 (2003). “The sentencing instructions of a military judge are reviewed for [an] abuse of discretion.” *United States v. Hopkins*, 56 M.J. 393, 395 (C.A.A.F. 2002). The trial judge has considerable discretion in tailoring instructions to the evidence and the law. *Id.*

Analysis

It is clear from the record that the military judge did not instruct the members that confinement is not punishment. Quite to the contrary, the judge specifically characterized confinement as “punishment” when she informed the members of the maximum authorized punishment and previewed the types of punishments they may adjudge, prior to discussing each type. The appellant’s argument that the trial judge

mischaracterized confinement as corrective and not punitive is without merit. *United States v. Eatmon*, 47 M.J. 534, 539 (A.F. Ct. Crim. App. 1997), *aff'd*, 49 M.J. 273 (C.A.A.F. 1998). The members were properly instructed and the military judge did not abuse her discretion in crafting the sentencing instruction concerning military confinement.

The 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

Angela M. Brice
Clerk of Court