UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JAMES E. KELLY
United States Air Force

ACM 37383

24 November 2009

Sentence adjudged 20 November 2008 by GCM convened at Langley Air Force Base, Virginia. Military Judge: Gregory Friedland (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 13 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel James B. Roan, Major Shannon A. Bennett, Major Tiffany M. Wagner, and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain Joseph Kubler, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

OPINION OF THE COURT

GREGORY, Judge:

A general court-martial composed of military judge alone convicted the appellant of absence without leave (AWOL), willfully disobeying a superior commissioned officer, violating lawful orders, using cocaine and marijuana, and passing worthless checks, in violation of Articles 86, 90, 92, 112a, and 134, UCMJ, 10 U.S.C. §§ 886, 890, 892, 912a, 934. The appellant entered pleas of guilty to AWOL, use of cocaine, use of marijuana,

and passing worthless checks but litigated the Article 90, UCMJ, violations.[1] The convening authority approved the adjudged sentence of reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for 13 months, and a bad conduct discharge.[2]

The appellant now challenges the military judge's denial of additional pretrial confinement credit based on conditions of confinement and the sufficiency of the evidence to support his conviction of violating a no contact order issued by his commander.

Background

The appellant entered active duty in November 2003 and had an excellent service record until June 2008 when he provided a urine specimen that tested positive for both cocaine and marijuana. Another urine sample provided in August 2008 likewise tested positive for both substances. After the appellant failed to report for duty on the morning of Friday, 1 August 2008, his first sergeant and supervisor retrieved him from his home and escorted him to the acting squadron commander's office. The commander ordered the appellant to report to the unit on Saturday and Sunday.

The commander also issued a no contact order prohibiting the appellant from contacting his wife over the weekend based on information concerning a domestic dispute. The appellant was provided a room on base for the weekend. After the appellant failed to report as ordered on Saturday, his supervisor again went to the appellant's house where he saw the appellant exiting the front door and apparently speaking to someone inside. The only other known occupant of the house was the appellant's wife. After taking the appellant to base, the supervisor returned to appellant's home to see if his wife was, in fact, there. She was. Based on the events leading up to and including the weekend of 2-3 August, the appellant's commander ordered him into pretrial confinement.

Lawfulness of Pretrial Confinement Conditions

The appellant entered pretrial confinement at the Norfolk Naval Brig on 6 August 2008. A shortage of guard personnel required the Norfolk Naval Brig to close one section of sleeping quarters for prisoners, resulting in pretrial detainees and post-trial

[1] The appellant pled not guilty to violating the no contact order as alleged in Specification 1 of Charge II and guilty to the lesser included offenses of violating a lawful order as alleged in Specifications 2 and 3 of Charge II. The military judge found him guilty as charged of Specification 1 and guilty as pled of Specifications 2 and 3.

[2] In his action, the convening authority approved the adjudged forfeiture of all pay and allowances but waived automatic forfeitures in the amount of $200 per month payable to the appellant's dependent child under child support obligations imposed by divorce decree. While this appears inconsistent since approved total forfeitures would leave nothing to waive, the maximum period the waiver would have continued (six months) has expired and the appellant has not asserted non-payment of the money. Therefore, we find this error to be harmless.

prisoners sharing a common sleeping area. The Norfolk Naval Brig distinguished pretrial detainees by: (1) allowing them to wear rank; (2) having them wear a distinctive pretrial identification card; (3) segregating work details; and (4) segregating lunch during weekdays. In denying the motion for additional credit, the military judge entered detailed findings of fact and conclusions of law that emphasized the legitimate governmental objectives served by the sleeping arrangements at the Norfolk Naval Brig and the lack of any intent to punish pretrial detainees.

Air Force Instruction (AFI) 31-205, *The Air Force Corrections System* (7 Apr 2004, incorporating change 1 dated 6 Jul 2007), governs administration of Air Force inmates to include pretrial detainees. Among the requirements set forth in the AFI is that pretrial detainees "will be housed in separate cells or sleeping areas, separated by sight, from post-trial inmates." AFI 31-205, ¶ 5.8.1.2. The sleeping arrangements at the Norfolk Naval Brig did not comply with this requirement.

A military judge may award additional pretrial confinement credit for conditions that involve an abuse of discretion or unusually harsh circumstances. Rule for Courts-Martial 305(k). Although violations of service pretrial confinement regulations may provide a basis for award of additional credit for abuses of discretion, such violations do not trigger a per se enforceable right to such credit. *United States v. Adcock*, 65 M.J. 18, 25 (C.A.A.F. 2007). We review a military judge's decision regarding such credit for abuse of discretion. *Id*. at 24 (citing *United States v. Rock*, 52 M.J. 154, 156 (C.A.A.F. 1999)).

The evidence supports the military judge's finding that the sleeping arrangements at the Norfolk Naval Brig were based on a legitimate governmental purpose and were not designed to punish pretrial detainees. Lack of manning at the facility required closing the separate sleeping bay that would have permitted segregated sleeping areas for pretrial detainees and adjudged prisoners. Other measures to distinguish the two classes of prisoners remained in effect such as wearing rank, separate identification cards, separate work details, and separate eating arrangements for the noon meal.

Unlike the knowing and deliberate violations of service regulations at issue in *Adcock*, the conditions at the Norfolk Naval Brig were driven by the legitimate governmental objective of providing sufficient security in a minimally manned facility. The procedures used by Navy personnel at the Norfolk Naval Brig complied with applicable Navy regulations, sufficiently distinguished pretrial detainees from adjudged prisoners, and adequately protected the appellant's presumption of innocence while a pretrial detainee. We find the military judge did not abuse his discretion in denying additional pretrial credit.

Legal and Factual Sufficiency

In accordance with Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

The appellant challenges the legal and factual sufficiency of the evidence to support his conviction of violating the no contact order. He specifically attacks the circumstantial evidence, arguing that his supervisor did not visually identify who the appellant was speaking with at the front door of his home. He argues "[t]he mystery individual could have been a friend, a repairman, or a host of other possibilities–the evidence simply did not establish this person's identity."[3] The military judge found otherwise, and the evidence supports his finding. The appellant's supervisor saw the appellant exit the front door of his home, the appellant's wife was the only other occupant of the house, and when the supervisor returned to the home a few minutes later the appellant's wife answered the door. We have carefully considered the evidence with particular attention to the matters raised by appellant and are convinced beyond a reasonable doubt that the appellant is guilty of the charges and specifications of which he was convicted.

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

[3] The appellant also argues that "the members" more than likely convicted the appellant based on improper spillover. This was a military judge alone trial, and we presume the judge to have correctly applied the law and not based a conviction on impermissible spillover.

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court