UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic DEANDREA J. KING JR.
United States Air Force

ACM 35653

19 August 2004

Sentence adjudged 27 June 2003 by GCM convened at Barksdale Air Force Base, Louisiana. Military Judge: Gregory E. Pavlik (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 9 months.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Captain Stacey J. Vetter

Before

MALLOY, JOHNSON, and GRANT
Appellate Military Judges

OPINION OF THE COURT

JOHNSON, Judge:

In accordance with his pleas, the appellant was convicted of attempted possession of cocaine and ecstasy and breaking restriction, in violation of Articles 80 and 134, UCMJ, 10 U.S.C. §§ 880, 934. A military judge, sitting alone, sentenced the appellant to a bad-conduct discharge and confinement for 9 months. The convening authority approved the sentence. The appellant raises one error for our consideration. Finding no error, we affirm.

Issue

WHETHER THE MILITARY JUDGE ERRED IN DENYING THE APPELLANT CREDIT PURSUANT TO ARTICLE 13, UCMJ, 10 U.S.C.

§ 813, WHEN HE RULED THE APPELLANT WAS PROPERLY CONFINED IN MAXIMUM CUSTODY AND WHEN HE FOUND NO ERROR WHEN THE APPELLANT WAS CONFINED WITH A POST-TRIAL PRISONER AND THEN PLACED IN A WINDOWLESS SEGREGATION CELL FOR TWO WEEKS AFTER IT WAS DETERMINED HE COULD NO LONGER BE HOUSED WITH THE POST-TRIAL PRISONER.

Standard of Review

Whether an appellant is entitled to credit for a violation of Article 13, UCMJ, is a mixed question of fact and law. *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997). We will not overturn a military judge's findings of fact unless they are clearly erroneous. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). On the ultimate question of whether an appellant is entitled to credit under Article 13, UCMJ, we will review de novo. *Id*.

Background

On 7 February 2003, the appellant was detained by civilian authorities on charges of attempted possession and distribution of cocaine and ecstasy. He was released on 3 March 2003. On 9 March 2003, following an incident at the enlisted club between the appellant and a security forces member, the appellant's commander placed him in pretrial confinement at Barksdale Air Force Base, Louisiana. Upon entry, the Barksdale confinement officials screened the appellant and classified him as a "maximum custody"[1] inmate.

The appellant was placed in a maximum custody cell with another pretrial maximum custody inmate. The cell is approximately 172 square feet and can house two inmates.[2] As a maximum custody inmate, the appellant could not leave his cell except for emergencies and appointments. All meals were delivered to the appellant's cell. He could not go to the library or the gym. If he so desired, books and gym equipment could be brought to him in his cell. The appellant was permitted to watch television. A television would be rolled in front of his cell and he could reach through the bars to change the channels. The appellant was also prohibited from sleeping during duty hours. When the appellant had appointments, he was required to wear a yellow jumpsuit and was shackled about the wrists and ankles. (Pretrial inmates donned yellow jumpsuits,

[1] "Maximum Custody" is used to confine those inmates who "[p]ose a serious threat to themselves or others, are an extreme escape risk, or whose behavior is seriously disruptive to the operation of the facility." Air Force Instruction (AFI) 31-205, *The Air Force Corrections System*, ¶ 5.6.3. (9 Apr 2001).

[2] The Barksdale confinement facility consists of one maximum custody cell, a general population cell, which can house eight inmates, a transition/female cell, which can house four inmates, and two segregation cells, which can house one inmate per cell. The facility has a total of 16 beds.

while post-trial inmates donned orange jumpsuits.) The appellant was escorted by two security forces members, one of whom was armed. When transported outside the confinement facility, confinement personnel moved the appellant early in the morning and used alternate entrances to public places to minimize contact with the general public.

On 8 April 2003, the pretrial inmate who shared the same cell with the appellant was convicted. However, he continued to share the maximum custody cell with the appellant. Confinement officials requested a waiver to permit the post-trial inmate to share the cell with the appellant due to a lack of space in the confinement facility. At the time, the facility was holding two female post-trial inmates in the custody grade of "medium-out,"[3] one pretrial female inmate in the custody grade of "medium-in,"[4] one male post-trial inmate in the custody grade of maximum custody, and the appellant. On 1 May 2003, the waiver request to continue housing the appellant with the post-trial inmate was denied. At that point, the appellant was moved into one of the windowless segregation cells until 14 May 2003 when the post-trial inmate was moved to another facility.

At trial, defense counsel moved for appropriate relief and asked for 3-for-1 credit for the time the appellant spent in pretrial confinement while in maximum custody. Defense counsel argued the circumstances of the appellant's confinement were more rigorous than necessary to insure the appellant's presence at trial. The military judge denied the motion and found the conditions of the appellant's pretrial confinement were based on legitimate non-punitive reasons and that the conditions were not more rigorous than necessary. The appellant was credited with 135 days of pretrial confinement credit.[5]

Analysis

Article 13, UCMJ, prohibits two things: 1) the intentional imposition of punishment on an accused before his guilt is established at trial, and 2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial. *United States v. Fricke*, 53 M.J. 149, 154 (C.A.A.F. 2000); *McCarthy*, 47 M.J. at 165.

"[T]he question of whether particular conditions amount to punishment before trial is a matter of intent, which is determined by examining the purposes served by the restriction or condition, and whether such purposes are 'reasonably related to a legitimate governmental objective.'" *United States v. Palmiter*, 20 M.J. 90, 95 (C.M.A. 1985) (citing *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)). "[I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental

[3] Inmates classified as "medium-out" pose a "minimal escape risk." AFI 31-205, ¶ 5.6.4.2.
[4] "Medium-In" inmates require continual supervision and pose an escape risk, but do not "present a significant threat to others or property." *Id.* at ¶ 5.6.4.1.
[5] *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984)

objective, it does not, without more, amount to 'punishment.'" *Palmiter*, 20 M.J. at 99 (quoting *Bell v. Wolfish*, 441 U.S. at 539). *See also United States v. James*, 28 M.J. 214, 216 (C.M.A. 1989).

We have reviewed the military judge's findings of fact. They are amply supported by the testimonial and documentary evidence and therefore are not clearly erroneous.

The appellant's custodial classification and placement in the confinement facility are clearly and reasonably related to a legitimate governmental objective--safety. The confinement officials were aware of the appellant's prior assault (stabbing someone with a knife) approximately five years ago, his history of substance abuse, his recent altercation with a security forces member in a club, a local arrest downtown, and the pending court-martial charges. Furthermore, the confinement facility was not perfectly designed to accommodate all the different classifications and sexes of inmates on hand at the time; hence, they attempted to secure a waiver to commingle two male maximum custody inmates (one pretrial and one post-trial) in the same cell. When the waiver was rejected, the post-trial inmate and pretrial inmate (the appellant) were separated. The commingling,[6] inmate classification, and placement decisions were made to ensure the safety of all of the inmates, as well as the confinement staff in the facility. Clearly, safety is a legitimate governmental objective. We hold the appellant was not punished under Article 13, UCMJ, and that the conditions of his pretrial confinement were not more rigorous than necessary to ensure the appellant's presence at trial. Hence, the appellant is not entitled to 3-for-1 credit because there was no violation of Article 13, UCMJ.

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 findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court

[6] Commingling of pretrial detainees and sentenced prisoners, per se, without more, does not constitute punishment within the meaning of Article 13, UCMJ. *Palmiter*, 20 M.J. at 96.