

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman Basic LARRY R. LANDON JR.
United States Air Force**

ACM 35831

12 January 2006

Sentence adjudged 4 December 2003 by GCM convened at Tinker Air Force Base, Oklahoma. Military Judge: John J. Powers (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 17 months.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, Major Jennifer K. Martwick, and Captain David P. Bennett.

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

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

BROWN, Chief Judge:

The appellant was tried by a military judge alone sitting as a general court-martial at Tinker Air Force Base (AFB), Oklahoma. Pursuant to the appellant's pleas, he was found guilty of desertion; wrongful use of ecstasy and marijuana; wrongful distribution of ecstasy; wrongful possession of marijuana; and writing bad checks, in violation of Articles 85, 112a, 123a, and 134, UCMJ, 10 U.S.C. §§ 885, 912a, 923a, 934. The military judge sentenced the appellant to a bad-conduct discharge and confinement for 19

months. The convening authority approved the bad-conduct discharge, but reduced the period of confinement to 17 months. The appellant has submitted one assignment of error: Whether the military judge erred when he found the appellant had not been subjected to illegal pretrial punishment, in violation of Article 13, UCMJ, 10 U.S.C. § 813.¹ The appellant asks this Court to award him a two-for-one credit for every day he spent in pretrial confinement. We agree in part with the appellant and grant sentence credit.

Background

At trial, the defense brought a motion for appropriate relief asserting that the conditions of the appellant's pretrial confinement violated Article 13, UCMJ, and thus, requested the military judge to award him additional credit against his sentence. The appellant was held in pretrial confinement at the Oklahoma County Detention Facility, Oklahoma City, Oklahoma, and he testified during his motion and explained the conditions of his pretrial confinement. He had many complaints and made them known to his civilian jailers, to military officials at Tinker AFB, and to his defense counsel. Some, but not all of his complaints were that he shared a cell with a convicted Airman from Tinker AFB for an unspecified time;² he had to wear the same color jumpsuit as convicted prisoners;³ and when he was taken on base he was transported in shackles, handcuffs, and wearing a jumpsuit.⁴ In addition, he was supposed to be given a clean jumpsuit each week, but on three occasions it took longer than that. Twice he did not get a clean jumpsuit for 12 days and once he did not get a clean jumpsuit for 13 days.

The military judge denied the defense motion, finding there was no intent to punish or stigmatize the appellant. He also found that though the conditions of the Oklahoma County Detention Facility were unpleasant, they were in furtherance of legitimate, non-punitive governmental objectives to provide a secure, safe, structural environment to detain the appellant and ensure his presence for trial.

¹ The appellant raised this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). The appellant spent 77 days in pretrial confinement. He was awarded one day of credit for each of these days pursuant to *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984).

² Commingling does not per se entitle the appellant to sentence credit. *United States v. King*, 61 M.J. 225, 228 (C.A.A.F. 2005); however, cohabitating pretrial detainees with post-trial inmates does violate Air Force Instruction (AFI) 31-205, *The Air Force Corrections System*, ¶ 5.8.1.2. (7 Apr 2004) (This paragraph is substantially the same as the previous edition of this AFI that was in effect at the time of the appellant's pre-trial confinement).

³ Rule for Courts-Martial 304(f) provides in part, that "[p]risoners being held for trial shall not be required to . . . wear special uniforms prescribed only for post-trial prisoners." See also AFI 31-205, ¶ 7.1.1.

⁴ The appellant testified he was taken to the Tinker AFB Federal Credit Union on two occasions and once to his defense counsel's office.

Law and Analysis

Article 13, UCMJ, provides:

No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

This Court's determination of whether the appellant suffered from unlawful pretrial punishment involves constitutional and statutory considerations. *Bell v. Wolfish*, 441 U.S. 520, 535-36 (1979); *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005).

We will defer to the findings of fact by the military judge unless they are clearly erroneous; however, our application of those facts to the constitutional and statutory considerations, as well as any determination of whether this appellant is entitled to credit for unlawful pretrial punishment, involves independent de novo review by this Court. *King*, 61 M.J. at 227 (citing *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000)). The appellant bears the burden of establishing his entitlement to additional sentence credit because of a violation of Article 13, UCMJ. *King*, 61 M.J. at 227; *see also* Rule for Courts-Martial (R.C.M.) 905(c)(2).

The facts and circumstances of this case cause us to question whether the conditions of appellant's pretrial confinement were more rigorous than necessary to ensure his presence for trial. We are bothered by his sharing of a cell with a convicted Airman; his being required to wear the same color jumpsuit as those who had been convicted; his being required to wear a jumpsuit, shackles, and handcuffs when he was taken to Tinker AFB; and his having to wear a dirty jumpsuit during the three occasions mentioned above. While none of these conditions alone resulted in making the appellant's pretrial confinement unduly rigorous, their combination worked to make the conditions of that confinement so excessive as to constitute pretrial punishment in violation of Article 13, UCMJ. *See King*, 61 M.J. at 228. The military judge erred in concluding otherwise. The appellant is entitled to appropriate relief. *See* R.C.M. 305(k).

Relief

The appellant has asked this Court to award him two-for-one credit for each of the 77 days he was in pretrial confinement. We agree in part with the appellant, but determine he is entitled to only 15 additional days of administrative credit. Because the appellant's sentence to confinement has already elapsed, we order that he receive an amount equal to 15 days pay and allowances at the grade of Airman Basic. *See United*

States v. Sherman, 56 M.J. 900, 902-03 (A.F. Ct. Crim. App. 2002). *See also United States v. Hammond*, 61 M.J. 676, 680 (Army Ct. Crim. App. 2005).

Conclusion

The approved findings and sentence are correct in law and fact, and except as specified above, 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