UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic THOMAS J. LARKIN
United States Air Force

ACM 36334

31 January 2007

Sentence adjudged 9 April 2005 by GCM convened at Elmendorf Air Force Base, Alaska. Military Judge: Anne L. Burman (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 15 months.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Christopher S. Morgan.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Amy E. Hutchens.

Before

BROWN, FRANCIS, and SOYBEL
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

SOYBEL, Judge:

The appellant was convicted in accordance with his pleas of one charge and specification of being absent without leave (AWOL) terminated by apprehension and one charge and four specifications of drug use; specifically ecstasy, methamphetamine, marijuana and psilocybin (mushrooms) in violation of Articles 86 and 112a, UCMJ, 10 U.S.C. §§ 886, 912a. The general court-martial, consisting of a military judge, sentenced the appellant to 15 months confinement and a bad-conduct discharge. On appeal he raises two issues: (1) Whether he was

subjected to illegal pretrial punishment; and (2) Whether his trial defense counsel was ineffective for failing to move for pretrial credit resulting from illegal pretrial punishment.[1] We hold that the appellant was not subject to illegal pretrial confinement and did not receive ineffective assistance of counsel.

This Court has the first opportunity to consider the appellant's claim of illegal pretrial confinement, as appellant did not raise this issue at trial. Normally, the issue would be waived on appeal absent plain error. *United States v. Inong*, 58 M.J. 460, 461 (C.A.A.F. 2003). However, since the issue forms the basis of the ineffective assistance of counsel claim, it is necessary to examine the first issue to the extent necessary to resolve the second.

Background

The appellant was having problems adjusting to Air Force life that would manifest most notably at work. These problems culminated in the appellant finally going AWOL due to his stress over what actions the Air Force might take against him because of his illegal drug use.

While the appellant was AWOL he stayed in an off-base apartment, but told his first sergeant in a telephone conversation he was in New Jersey and would not come back unless he was assured that he would not be charged or prosecuted. Appellant also used more illegal drugs while he was AWOL.

Eventually, agents from the Air Force Office of Special Investigations discovered that the appellant was in the local area. In fact, he had never actually left and made up the story about being in New Jersey. When first confronted, the appellant denied his true identity, but the agents were eventually able to ascertain who he was and brought him back to base. He was placed in pretrial confinement at a local, civilian jail facility in Anchorage, Alaska.

The appellant pled guilty to all charges and specifications at his trial for AWOL terminated by apprehension and the drug offenses. During the pre-sentencing phase of the trial, the military judge inquired about pretrial confinement credit and both the prosecution and defense agreed that the appellant was entitled to 89 days of pretrial confinement credit. That conversation led to a discussion about illegal pretrial confinement:

> MJ: Then Airman Larkin will be credited with 89 days for his pretrial confinement that he has already served. Caption [G], do

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

> you believe that your client has been punished in any way prior to trial that amounts to illegal pre-trial punishment under Article 13?
>
> DC: No, Ma'am.
>
> MJ: Airman Larkin, I'm sure your defense counsel was accurate when he made his representations but I need to make sure that your [sic] aware of what I'm asking. Basic premise of law in American courts is that anyone facing trial, pending trial, is presumed innocent. The corollary to that is, as you are facing trial then you should be treated like an innocent man. You cannot be punished prior to trial because punishment technically should come only if you are found guilty of an offense and appropriately and lawfully punished for the crime that you've been found guilty of.
>
> What Article 13 does is it takes that concept of law that applies to all Americans and applies it to all military members as well to make sure that you will not be punished prior to trial like you were already convicted. So when I ask if there have [sic] been any illegal pretrial punishment and your defense counsel says no, is that true?
>
> ACC: Yes, Ma'am.

During his unsworn statement to the court, the appellant ended by stating: "Being in confinement has given me the opportunity to think about my actions, and to understand that I am among a fraternity that do not and should not tolerate actions of which I exhibited [sic]. Confinement has also given me a chance to reflect upon my life, and make conscious decisions to change and better myself. Please give me the chance to make something of myself."

It was in his post-trial clemency petition that the first glimpse of the issues we are now considering started to become visible. There, the appellant wrote that he had spent a "long time in pre-trial confinement" and "ended up on suicide watch a few times." Appellant went on to explain the conditions surrounding his being placed on suicide watch, by stating: "This meant I was placed in a concrete room, wearing nothing but a sheet and was forced to sleep on the floor. During other times, I was forced to sleep on the floor in a cell with two other people." He also wrote that he was attacked by other inmates because of what he believed to be his military status, and if he had been housed with other military members the attacks would not have happened. The appellant also stated that he did attend narcotics anonymous classes at the civilian confinement facility. However, the

facility did not provide certificates or maintain records so he was unable get credit or consideration for those courses applied to his post-trial confinement.

The appellant submitted a declaration to this Court in support of his appeal. In that submission the appellant avers that his pretrial confinement conditions were unlawful. He claims that he was initially placed on suicide watch for 72 hours. During this time he lived in a "4' x 4'" cell with only a gown, a sheet, no bed, and fed three sandwiches a day. For most of his pretrial confinement, appellant claims he was forced to sleep on the floor, was assaulted on several occasions, had recreation time and other privileges revoked without justification, and was given no assistance by the guards when assaulted in their presence. The appellant finally claims that he asked his trial defense counsel to raise "some type of motion" addressing the conditions at the civilian jail so that they could be made public and corrected. According to the appellant, his trial defense counsel said that such a motion would only be detrimental to his case and "serve to upset the military judge."

Pretrial Confinement

Unlawful pretrial punishment or confinement issues involve mixed questions of law and fact. *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000); *United States v. McCarthy*, 47 M.J. 162, 164-65 (C.A.A.F. 1997). Appellate courts conduct a de novo review of conclusions of law. S*ee Smith*, 53 M.J. at 170. Since this issue was not raised at trial, there are no conclusions of law or findings of fact to review. In cases where the government does not contest the facts as alleged by the appellant, we will accept them as true for the purposes of this appeal. *Inong,* 58 M.J. at 462;[2] *See United States v. Steele*, 53 M.J. 274, 275 (C.A.A.F. 2000).

Article 13, UCMJ, 10 U.S.C. § 813, has two purposes. Article 13, UCMJ, prohibits the government from: (1) punishing an accused before guilt is established at trial, and (2) imposing pretrial confinement that is more rigorous than circumstances require to ensure an accused's presence at trial. *See United States v. Crawford*, 62 M.J. 411, 414 (C.A.A.F. 2006); *United States v. Fischer*, 61 M.J. 415, 418 (C.A.A.F. 2005); *Inong*, 58 M.J. at 463; *United States v. Fricke*, 53 M.J. 149, 154 (C.A.A.F. 2000); *United States v. Mazer*, 62 M.J. 571, 577 (N.M. Ct. Crim. App. 2005). If an appellant can establish that either prohibition was violated, he is entitled to sentence relief. *Inong*, 58 M.J. at 463 (citing *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002)); Rule for Courts-Martial (R.C.M.) 905(c)(2). The appellant does not contend that the treatment he

[2] While it is unlikely that the cell used to hold the appellant was actually "4'x4'", for purposes of this appeal we will assume it was a small cell. However, it would have been most helpful to this Court if the government had submitted an affidavit of their own to help develop the facts of this case more fully.

experienced was dispensed with the intent to punish nor is there the slightest evidence of any such intent. Therefore, we address appellant's pretrial confinement conditions under the second prong.

While the conditions about which appellant complains seem harsh, there is no indication that they are anything other than the standard conditions found at the local civilian confinement facility. Indeed, the appellant does not claim that his conditions were any more severe than the same endured by any other pretrial confinee. Pretrial confinement situations do not violate the "conditions" prong of the above test if they are "supported by reasonable and legitimate governmental interests" and are not imposed as punishment. *McCarthy*, 47 M.J. at 164. Our superior court in *Crawford* adopted the Supreme Court's analysis that "maintaining security and order and operating the institution in a manageable fashion … 'are peculiarly within the province and professional expertise of corrections officials, and, in the absence of *substantial evidence* in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.'" *Crawford,* 62 M.J. at 414 (emphasis added), (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

Under this test the appellant has not met his burden and is not entitled to relief. As experts, prison officials are presumed to have valid and proper reasons for the alleged suicide watch conditions or for not breaking up fights between confinees, an action that might very well depend on how serious, violent, or long lasting the incidents are. Even assuming everything in appellant's affidavit is true, it simply lacks the "substantial evidence" required by the Supreme Court in *Pell*, to indicate that the officials have exaggerated their response to these considerations. In light of this standard, we defer to the judgment of the civilian confinement officials in assessing the way they run their facility and will not assume these conditions constituted a punishment. As such, we do not find a violation of Article 13, UCMJ, in the appellant's case.

Waiver

When a trial defense counsel decides not to raise an illegal pretrial confinement motion to the military judge for additional credit, but instead raises the issue to the panel in an effort to receive a lesser sentence, the issue is waived for appellate purposes. *Inong*, 58 M.J. at 463.

In this case, the appellant did not assert the harsh conditions of his pretrial confinement in his sentencing argument to the military judge in an attempt to reduce the sentence. Instead, his trial strategy took the opposite tack. He highlighted his pretrial confinement in a positive manner maintaining that it had

given him time to "think about my actions" and noting that the time has "given me a chance to reflect upon my life, and make conscious decisions to change, and to better myself." In trial defense counsel's sentencing argument, he mentioned the fact that the appellant was able to attend some courses while in pretrial confinement, and had begun to look into an art program that he wanted to attend at the Architect Institute in Pittsburgh, Pennsylvania. In fact, counsel argued that while in confinement the appellant was able to start taking classes to help him get into that program.

This argument reflects a clear strategy to play up the positive aspects of confinement in order to influence the military judge to give the sentence desired by the appellant, rather than to highlight the negative. This is a legitimate trial strategy which waives the confinement issue on appeal. The issue of waiver is also bolstered by the appellant's statements to the military judge when he explicitly tells her that there is no Article 13, UCMJ, issue in response to her questions regarding illegal pretrial punishment. Given these two facts, notwithstanding that we already found that the conditions in the civilian confinement facility were not unduly harsh, we also find that appellant waived the issue at trial. The facts in this case are very similar to the facts in *Inong*. Both appellants were treated with similar levels of harshness, yet neither one raised the issue until the appellate level. In fact, *Inong* did not raise the Article 13, UCMJ, issue for the first time until the case came before the Court of Appeals of the Armed Forces. *Inong*, 58 M.J. at 461. In both cases, the government did not submit any evidence to rebut the appellant's affidavit. Finally, it is of great importance in the instant case, as was strongly suggested in *Inong,* that the military judge affirmatively inquired about any possible Article 13, UCMJ, issues. *Id*. at 465. She not only asked the trial defense counsel, but specifically asked the appellant, as well, to ensure there were no lurking issues.

Ineffective Assistance of Counsel

In *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the Supreme Court established two factors that an appellate court must find before finding that trial defense counsel was ineffective: deficient performance by defense counsel and that the deficient performance caused prejudice to the appellant. There is a strong presumption that counsel is competent. *Strickland*, 466 U.S. at 689; *United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004). This constitutional standard applies to the military. *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987).

We find that the appellant has shown neither of the two factors required by *Strickland*. While appellant claims that the results of his trial would have come out differently had trial defense counsel raised the conditions of his pretrial confinement in a motion for additional credit to the military judge, he has failed to

show he was prejudiced by this deficiency. Appellant has also failed to show why these tactical decisions were deficient. Indeed, given the current state of the law, such a motion would likely have been unsuccessful. As we recognized above, defense counsel employed a legitimate trial strategy by stressing the positive aspects of pretrial confinement rather than the negative.

Based on a review of the entire record, we are confident that the appellant's defense counsel was competent. He negotiated a favorable pretrial agreement which limited the appellant's exposure to confinement from 17 years and 6 months to 18 months confinement. The appellant's adjudged sentence was only 15 months. Further, he zealously represented the appellant throughout the trial, made an excellent sentencing argument, and submitted a meaningful post-trial petition for clemency. Accordingly, we decline to find counsel's representation of the appellant ineffective.

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 approved findings and sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator