UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ARTERY D. LENOIR
United States Air Force

ACM S30161

22 March 2005

Sentence adjudged 21 May 2002 by SPCM convened at Aviano Air Base, Italy. Military Judge: Thomas W. Pittman (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Lieutenant Colonel Robert L. Marconi.

Before

PRATT, SMITH, and PETROW
Appellate Military Judges

PER CURIAM:

This case presents the question whether the appellant is entitled to pretrial confinement credit for a period of time spent in German confinement without the knowledge of United States authorities. We find error, and will grant relief.

The record of trial reflects that on 17 February 2002, the appellant was arrested by German police for possession of cocaine. He was taken into custody and detained pending prosecution. The appellant did not inform the German authorities that he was a United States servicemember. On 25 February 2002, Air Force authorities became aware of the appellant's arrest and detention. On 4 March 2002, the German authorities released the appellant to Air Force custody.

During the sentencing portion of the court-martial, the military judge and all parties agreed that the appellant should be awarded (1) 54 days of credit for a period of pretrial confinement served while in Air Force custody, (2) an additional 8 days of credit for the portion of German confinement which occurred after Air Force authorities became aware of his detention, but (3) no credit for the 8 days of German confinement during which Air Force authorities were unaware of his detention. On appeal, the appellant contends that he was entitled to 8 days of credit for that latter period. We agree.

In *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984), our superior court held that, by operation of Department of Defense instructions, a person confined as a result of a sentence "shall be allowed credit toward the service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed." *Allen*, 17 M.J. at 128 (quoting 28 C.F.R. § 2.10(a) (1980)).

Since 1994, computation of federal sentences to confinement has been governed by 18 U.S.C. § 3585(b), which provides, in part, that a defendant "shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences . . . as a result of the offense for which the sentence was imposed . . . that has not been credited against another sentence." *See also United States v. Murray*, 43 M.J. 507, 514 (A.F. Ct. Crim. App. 1995). This requirement has been extended to apply to pretrial confinement by state officials (*Murray*, 43 M.J. at 514-15) and by foreign governments (*United States v. Pinson*, 54 M.J. 692, 694-95 (A.F. Ct. Crim. App. 2001), *aff'd*, 56 M.J. 489 (C.A.A.F. 2002)).

In this case, the appellant was arrested by German authorities for possession of cocaine, hashish, and marijuana. At his court-martial, the appellant was tried and convicted of, inter alia, possession of cocaine. Accordingly, the matter falls squarely within the parameters of 18 U.S.C. § 3585(b) (notwithstanding the appellant was also tried for other charges). We are aware of no distinction made for the fact that United States authorities are not aware of the member's detention. Under these circumstances, although civilian defense counsel failed to object at trial, we find plain error. *United States v. Powell*, 49 M.J. 460, 464 (C.A.A.F. 1998).

We may use the punishment equivalencies in Rule for Courts-Martial 305(k) to fashion a remedy in cases where an accused has served excess confinement. *United States v. Sherman*, 56 M.J. 900, 902 (A.F. Ct. Crim. App. 2002). Therefore, we order that the appellant receive an amount equal to 8 days of pay at the grade of E-1 to compensate for the additional confinement he served.

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

ANGELA M. BRICE
Clerk of Court