UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant STEVEN D. LUCAS
United States Air Force

ACM 37363

28 December 2009

Sentence adjudged 30 September 2008 by GCM convened at Moody Air Force Base, Georgia. Military Judge: Terry O'Brien (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 36 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel James B. Roan, Major Shannon A. Bennett, Major Michael A. Burnat, and Dwight H. Sullivan, Esquire.

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

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACKSON, Senior Judge:

In accordance with the appellant's plea, a military judge sitting as a general court-martial convicted him of one specification of divers carnal knowledge with a person who had attained the age of 12 years but was under 16 years of age, in violation of Article 120, UCMJ, 10 U.S.C. § 920. The adjudged and approved sentence consists of a bad-

conduct discharge, 36 months of confinement, and reduction to the grade of E-1.[1] On appeal, the appellant asks this Court to award him sentencing credit to reduce his term of confinement, to set aside the action and remand the case to the convening authority for a new action in compliance with the terms of the pretrial agreement, and to direct the promulgation of a corrected court-martial order.

As the basis for his request, the appellant opines: (1) he was confined in violation of Air Force regulations when he was incarcerated post-trial for 127 days in a civilian jail that was not accredited by the American Correctional Association, the American Jail Association, a state government, or the federal government; (2) he was subjected to cruel or unusual punishment in violation of Article 55, UCMJ, 10 U.S.C. § 855, when he was confined for 127 days without receiving an adequate quantity of food; (3) he was subjected to cruel or unusual punishment in violation of the Eighth Amendment[2] when he was confined in a filthy, overcrowded jail for 127 days without an adequate quantity of food and, for portions of that period, without access to clean drinking water, toilet paper, or an opportunity to exercise; (4) a portion of his confinement is inappropriate because he was incarcerated for 127 days in filthy, overcrowded cells without an adequate quantity of food and, for portions of that period, without access to clean drinking water, toilet paper, or an opportunity to exercise; (5) the convening authority must take new action because the original action failed to suspend confinement in excess of thirty months, as required by the pretrial agreement;[3] and (6) a new promulgating order is necessary because the order's recitation of the specification erroneously states the appellant was charged with raping "a person who had not attained the age of 12."

We affirm the findings; approve only so much of the sentence that calls for a bad-conduct discharge, 30 months of confinement, and reduction to the grade of E-1; and order the promulgation of a corrected court-martial order properly reflecting that the appellant was charged with raping a person who had attained the age of 12 but was under the age of 16.

Background

On five occasions between 1 June 2007 and 15 July 2007, the appellant engaged in sexual intercourse with MR, his then 14-year-old sister-in-law. On 18 September 2008, the appellant and the general court-martial convening authority (GCMCA) entered into a pretrial agreement wherein the appellant agreed to plead guilty to a specification of divers

[1] The appellant and the convening authority entered into a pretrial agreement wherein the appellant agreed to plead guilty to the aforementioned charge and specification in return for the convening authority's promise to not approve confinement in excess of 30 months. The convening authority's approval of 36 months of confinement forms the basis of one of the appellant's assignments of error.

[2] U.S. CONST. amend. VIII.

[3] The pretrial agreement did not mention suspension of confinement time; rather, it limited confinement to 30 months.

carnal knowledge with MR in return for the GCMCA's promise not to approve confinement in excess of 30 months and to grant a waiver of forfeiture for six months. On 30 September 2008, the appellant pled guilty to and was found guilty of the divers carnal knowledge specification. The military judge sentenced him to, inter alia, 36 months of confinement.

After sentencing, the appellant was transferred to the Cook County Detention Facility, a local jail where he spent 127 days of post-trial confinement before his transfer to a military confinement facility. On 26 November 2008, the GCMCA's staff judge advocate recommended the GCMCA, in keeping with the pretrial agreement, approve only so much of the sentence that called for a bad-conduct discharge, 30 months of confinement, and reduction to the grade of E-1. On 15 December 2008, the GCMCA approved the sentence as adjudged.

On 1 September 2009, the appellant filed a sworn declaration with this Court regarding his stay at the Cook County Detention Facility wherein he asserts, inter alia, he: (1) became malnourished and ill because of a shortage of food; (2) was denied adequate access to clean water and was subjected to inmate hostility as he was transferred to other areas of the facility to obtain clean water; (3) was temporarily housed in a four-person, filthy cell with seven other individuals, many of whom were ill; (4) was denied toilet paper for three days and, as a result, could not defecate for three days; (5) was given access to a cold recreational room with 64 other inmates and chose to use the recreational room only two times during his stay at the facility; (6) submitted written grievances to the guards approximately once a week and received a response only once; (7) was subjected to cigarette and marijuana smoke from inmates; and (8) expressed his grievances to his first sergeant when he came to visit.

Alleged Post-Trial Confinement in Violation of Air Force Instruction (AFI) 31-205[4]

"[I]t is well-settled that a government agency must abide by its own rules and regulations where the underlying purpose of such regulations is the protection of personal liberties or interests." *United States v. Adcock*, 65 M.J. 18, 23 (C.A.A.F. 2007) (citing *United States v. Dillard*, 8 M.J. 213, 213 (C.M.A. 1980) (quoting *United States v. Russo*, 1 M.J. 134, 135 (C.M.A. 1975))). AFI 31-205 reflects a decision by the Air Force to provide a basic level of protection and humane treatment to convicted service members who are housed in civilian jails. *See* AFI 31-205, ¶¶ 1.1, 1.2.6. However, unlike instructional violations concerning pretrial detainees, we are unable to discern any rule under the Rules for Courts-Martial which would provide a basis for relief for an instructional violation concerning a post-trial prisoner.[5] Accordingly, as the appellant

[4] Air Force Instruction (AFI) 31-205, *The Air Force Correction System* (7 Apr 2004).

[5] As our superior court in *United States v. Adcock*, 65 M.J. 18 (C.A.A.F. 2007) noted, Rule for Courts-Martial 304(k) provides a basis for relief for AFI 31-205 violations concerning pretrial detainees. *Adcock*, 65 M.J. at 25-26. No such rule exists to address AFI 31-205 violations concerning post-trial prisoners.

was a post-trial prisoner at all times pertinent to this issue, we address his alleged AFI 31-205 violations by looking to Article 55, UCMJ, the only relevant provision in the Uniform Code of Military Justice and the *Manual for Courts-Martial* which addresses prohibitions against cruel and unusual punishment.

Alleged Article 55, UCMJ, Violation

We review claims of cruel and unusual post-trial punishment de novo. *United States v. Wise*, 64 M.J. 468, 473 (C.A.A.F. 2007); *United States v. Pena*, 64 M.J. 259, 265 (C.A.A.F. 2007). Absent evidence that the appellant has been subjected to one or more of the enumerated punishments specifically prohibited by Article 55, UCMJ, we apply Eighth Amendment jurisprudence to alleged Article 55, UCMJ, violations. *Pena*, 64 M.J. at 265 (citing *United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006)). Here, the alleged noncompliance with AFI 31-205 and denial of adequate food do not fall within the enumerated punishments prohibited under Article 55, UCMJ; thus, we will examine these claims under Eighth Amendment jurisprudence.

Alleged Eighth Amendment Violation

"'A prisoner must seek administrative relief prior to invoking judicial intervention' to redress concerns regarding post-trial confinement conditions." *Wise*, 64 M.J. at 471 (quoting *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001); *United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997) (quoting *United States v. Coffey*, 38 M.J. 290, 291 (C.M.A. 1993))). "This requirement 'promot[es] resolution of grievances at the lowest possible level [and ensures] that an adequate record has been developed [to aid appellate review].'" *Id.* (alterations in original) (quoting *Miller*, 46 M.J. at 250). "Absent some unusual or egregious circumstance this means that the prisoner [must exhaust] the prisoner grievance system in his detention facility . . . and . . . [petition] for relief under Article 138, UCMJ, 10 U.S.C. § 938" before submitting his appeal to this Court. *Id.* at 469; *see also Lovett*, 63 M.J. at 215.

Thus, prior to examining the appellant's claims of noncompliance with AFI 31-205, denial of adequate food, and other alleged maltreatment, we must determine if the appellant exhausted his administrative remedies. In the appellant's case, we find no unusual or egregious circumstances warranting a deviation from the exhaustion of remedies requirement; therefore, he is entitled to judicial intervention on this issue only if he has both exhausted the prisoner grievance system at the Cook County Detention Facility *and* filed an Article 138, UCMJ, complaint. Here, there is no evidence that the appellant filed an Article 138, UCMJ, complaint; hence, he did not exhaust his

administrative remedies.[6] Accordingly, the appellant is not entitled to judicial intervention on this issue.

Moreover, assuming, arguendo, the appellant exhausted his administrative remedies, he is still not entitled to relief. In contesting the facts in the appellant's declaration, the government submitted a declaration from Lieutenant BB, the appellant's jailer at the Cook County Detention Facility. We cannot resolve factual disputes in conflicting affidavits by relying on the affidavits alone; we must resort to a post-trial fact-finding hearing. *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). However, we need not remand this case for a post-trial evidentiary hearing when we determine that the facts asserted, even if true, would not entitle the appellant to relief. *Id.* Such is the case here.

To prevail on his Eighth Amendment violation claim, the appellant must show: "(1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [his] health and safety;" and (3) that he exhausted his administrative remedies. *Lovett*, 63 M.J. at 215 (internal citations omitted). To establish deliberate indifference, the appellant must show prison "official[s] [knew] of and disregard[ed] an excessive risk to inmate health or safety." *Id.* at 216 (alterations in original).

In this case, the appellant has indicated only that he made unspecified complaints to prison guards on a weekly basis and, other than on one occasion, received no response. In the absence of evidence showing the officials' knowledge of the appellant's specific grievances and their disregard for known risks to his health and safety, the appellant has failed to demonstrate the prison officials were deliberately indifferent to any conditions that might have violated the Eighth Amendment. He has therefore failed to establish his Eighth Amendment claim. In short, the appellant is not entitled to relief because he failed to exhaust his administrative remedies and, even assuming he had exhausted his administrative remedies and the conditions of his post-trial confinement were as he claimed, the appellant has failed to demonstrate the prison officials were deliberately indifferent to any conditions that might have violated the Eighth Amendment.

[6] We are aware that this Court has previously held that an accused exhausts his administrative remedies if he sufficiently complains of his post-trial confinement conditions in his clemency submission. *United States v. Towns*, 52 M.J. 830, 834 (A.F. Ct. Crim. App. 2000). However, *Towns* is inapposite to the present case because the appellant here did not sufficiently complain of his post-trial confinement conditions until this appeal. Thus, his clemency submission hardly qualifies as a "de facto" Article 138, UCMJ, 10 U.S.C. § 839, complaint. Moreover, he failed to complain to his "jailers" and, as such, did not exhaust his administrative remedies.

Inappropriate Sentence

The appellant asserts a portion of his sentence was inappropriate because he was subjected to the aforementioned poor conditions while incarcerated for 127 days in a civilian jail that did not comply with the requirements of AFI 31-205. He asks this Court to use its Article 66(c), UCMJ, 10 U.S.C. § 866(c), power to grant him sentencing relief. We decline to do so. After a review of the entire record, and even assuming the validity of his assertions, we are convinced the appellant's sentence, as modified below, is appropriate.

Non-Compliance with the Pretrial Agreement

"A pretrial agreement in the military justice system establishes a constitutional contract between the accused and the convening authority. . . . 'In a criminal context, the government is bound to keep its constitutional promises.'" *United States v. Smead*, 68 M.J. 44, 59 (C.A.A.F. 2009) (quoting *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006)). Interpretations of a pretrial agreement are questions of law; therefore, we review issues regarding the "meaning and effect" of such agreements de novo. *Id.* (citing *Lundy*, 63 M.J. at 301). It is a mixed question of law and fact when an appellant asserts the convening authority has not complied with a term of the pretrial agreement. *Id*. (citing *Lundy*, 63 M.J. at 301). "The appellant bears the burden of establishing that the term is material and that the circumstances establish governmental noncompliance." *Id.* (citing *Lundy*, 63 M.J. at 302).

Lastly, "[i]n the event of noncompliance with a material term, we consider whether the error is susceptible to remedy in the form of specific performance or in the form of alternative relief agreeable to the appellant." *Id.* (citing *Lundy*, 63 M.J. at 305). The plea must be withdrawn and the findings and sentence must be set aside if a defect in a material term cannot be cured. *Id.* (citing *United States v. Perron*, 58 M.J. 78, 85-86 (C.A.A.F. 2003)).

Here, the government concedes the convening authority did not comply with the pretrial agreement that he had with the appellant, as he approved the adjudged sentence. We agree and must remedy the error and provide meaningful relief. On this matter, we can set aside the action and remand the case for a new action or we can remedy the error ourselves. Both the legislative and executive intent in this area is for this Court to take corrective action rather than returning the case to the convening authority for further action. S. REP. No. 98-53, at 21 (1983) ("If there is an objection to an error that is deemed to be prejudicial under Article 59[, UCMJ, 10 U.S.C § 859,] during appellate review, it is the Committee's intent that appropriate corrective action be taken by appellate authorities without returning the case for further action by a convening authority.").

The appellant asks this Court to set aside the action and remand the case for new post-trial processing. We decline to do so because setting aside the action and remanding the case to the convening authority would run counter to our obligations under Article 59, UCMJ. Instead, we will modify the sentence. We approve the findings and only so much of the sentence that calls for a bad-conduct discharge, 30 months of confinement, and reduction to E-1. This modified sentence rectifies the error made and gives the appellant the benefit of his pretrial agreement.

Erroneous Promulgating Order

Both parties acknowledge the promulgating order erroneously states the appellant was charged with raping "a person who had not attained the age of 12." Preparation of a corrected court-martial order which properly reflects that the appellant was charged with raping "a person who had attained the age of 12 but was under the age of 16" is hereby directed. *See United States v. Smith*, 30 M.J. 1022, 1028 (A.F.C.M.R. 1990).

Conclusion

The approved findings and the sentence, as modified, are correct in law and fact. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and the sentence, as modified, are

AFFIRMED.

OFFICIAL

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