UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant DAVID D.B. LUCKADO
United States Air Force

ACM 37962

01 August 2013

Sentence adjudged 8 April 2011 by GCM convened at Moody Air Force Base, Georgia. Military Judge: Donald R. Eller, Jr.

Approved sentence: Dishonorable discharge, confinement for 18 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the appellant: Major Daniel E. Schoeni and Captain Christopher James

Appellate Counsel for the United States: Lieutenant Colonel Linell A. Letendre; Major Daniel J. Breen; and Gerald R. Bruce, Esquire.

Before

HARNEY, MITCHELL, and SOYBEL
Appellate Military Judges

This opinion is subject to editorial correction before final release.

OPINION OF THE COURT

MITCHELL, Judge:

The appellant was convicted, contrary to his pleas, by a general court-martial comprised of officer members of three specifications of aggravated sexual contact with a child, in violation of Article 120, UCMJ, 10 U.S.C. § 920. The adjudged and approved sentence consisted of a dishonorable discharge, confinement for 18 years, reduction to the grade of E-1, and total forfeitures of all pay and allowances.[1]

[1] The Court notes that charges and specifications which were withdrawn or dismissed after arraignment are not reflected on the court-martial order (CMO). Promulgation of a corrected CMO, properly reflecting the disposition of these charges and specifications, is hereby ordered.

On appeal, the appellant raises three issues, asserting: (1) The military judge abandoned his impartial role by asking questions that helped the Government meet its burden of proof on a motion to suppress statements made by the victim to a medical provider; (2) He was subjected to cruel and unusual punishment when he was held in isolation in a civilian confinement facility to prevent Article 12 violations and; (3) His rights under Article 12, UCMJ, 10 U.S.C. § 812, were violated when he was confined in immediate association with a foreign national for 19 days after his release from solitary confinement.

Background

The appellant was a Staff Sergeant with more than 14 years of service, to include a deployment to Iraq in January 2010. He shared custody of his 6-year-old daughter SLL and her 12-year-old brother with his ex-wife, Ms. SA. In January 2010, Ms. SA caught SLL "touching herself" and on several other occasions over the following months. During this time, Ms. SA told SLL that this was not appropriate behavior for children. Ms. SA told SLL that if she was doing this because someone had touched her that person would go to jail, but if SLL was doing this on her own then she would be punished. On 23 May 2010, Ms. SA walked into SLL's room and found her touching herself with her hand inside her pants. Ms. SA was angry and left the room for a belt to punish SLL. When Ms. SA returned to SLL's room, SLL exclaimed that "I only do it because he did it when he was here" and "I only do it because Daddy did it when he was here."

After this initial report, a law enforcement investigation began. As part of the investigation, Ms. SA received a referral to have SLL examined by Dr. Janice Loeffler, a pediatrician with the Children's Advocacy Center in Macon, GA. On 22 July 2010, Dr. Loeffler examined SLL and obtained a medical history from her regarding the abuse.

A panel of officer members convicted the appellant of three of the specifications and acquitted him of one specification.[2]

In his unsworn statement to the members, the appellant raised the issue that he would serve his initial confinement at the Cook County Jail as Moody Air Force Base (AFB) did not have a military confinement facility. He asked the members to consider that he would be in an "isolation cell" to prevent his contact with "non-American inmates." He also submitted this same unsworn statement in his clemency submission to the convening authority.

[2] Several of the original charges and specifications were dismissed upon motion or withdrawn by the Government prior to the members closing for deliberations. The military judge granted a defense motion for multiplicity and dismissed Specification 3 of Charge II. After arraignment, the Government withdrew Charge III and its specifications. The military judge sua sponte raised a Rule for Courts-Martial (R.C.M.) 917 motion and directed a finding of Not Guilty to Charge I and its Specification, Specification 5 of Charge II, and to the excepted language of "on divers occasions" from Specification 3 and Specification 4 of Charge II.

The appellant was confined at Cook County Jail from 8 April to 3 May 2011 before he was transferred to a military confinement facility. He was initially in segregation for the first week and then was transferred to general population for the remainder of his time at the county jail. He alleges that during this time with the general population there was a Mexican national who was also imprisoned and in the same pod but he does not recall the other prisoner's name.[3]

Partiality of Military Judge

Trial Counsel filed a motion in limine seeking the admission of statements made by SLL to Dr. Loeffler pursuant to Military Rule of Evidence 803(4) as statements made for purposes of medical diagnosis or treatment. Trial Defense Counsel objected to the statements as inadmissible hearsay. At the motion hearing both Ms. SA and Dr. Loeffler were called as witnesses. SLL did not testify at the motion hearing.

SLL's mother, Ms. SA testified that although the consultation with the pediatrician was arranged through law enforcement officials at Moody AFB, she was worried about possible injury to her daughter's reproductive system and was seeking a medical evaluation. Prior to the appointment, she explained to her daughter that she was going to see a female doctor who would conduct a physical examination and could help her if she was hurt. Ms. SA took her daughter to an appointment with Dr. Loeffler, a local pediatrician and medical director of the Children's Advocacy Center. Upon arrival, Dr. Loeffler explained to SLL that she would be conducting a physical exam and would be examining her "bottom."

In response to trial counsel's questions, Dr. Loeffler explained that she asks patients for a medical history to aid in completing the physical exam. After Dr. Loeffler was questioned by counsel for each side, the military judge asked clarifying questions. The military judge read each statement to her, asking if SLL made the statement and then asked why the statement was necessary for a medical provider. As he explained, "What I am just trying to figure out is why is this statement important to a medical provider?" The following is an example:

Q. …From a medical provider's standpoint, how is that useful information in terms of determining how to examine or treat the child?

A: None at all….

[3] The Court notes that the appellant's assignment of errors states that the appellant was incarcerated in the Cook County Jail for 34 days, from 17 June to 20 July 2010. Additionally, the appellant states that this confinement was "pretrial." A review of the Record of Trial finds that the appellant was incarcerated in the Cook County facility for 26 days from 8 April to 3 May 2011. Additionally, all of the appellant's confinement was post-trial.

"When a military judge's impartiality is questioned on appeal, we must determine whether, taken as a whole in the context of trial, a court-martial's legality, fairness, and impartiality were put into doubt from the objective viewpoint of a reasonable person." *United States v. Merritt*, 71 M.J. 699, 706 (citing *United States v. Ramos*, 42 M.J. 392, 396 (C.A.A.F. 1995)). "There is a strong presumption that a military judge is impartial in the conduct of judicial proceedings. A party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings." *Merritt*, 71 M.J. at 706 (citing *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001)). "The military judge may be an active participant in the proceedings, but, must take care not to become an advocate for either party.' A defense failure to object at trial to alleged partisan action by the military judge 'may present an inference that the defense believed that the military judge remained impartial.'" *Merritt*, 71 M.J. at 706 (quoting *United States v. Foster*, 64 M.J. 331, 332-33 (C.A.A.F. 2007)).

Here the trial defense counsel did not object to the military judge's questions. The military judge was clearly trying to determine the facts so he could render a ruling on this pretrial motion. As a result of the military judge's questions, he ruled that two of the statements and a portion of a third statement were inadmissible. Even looking solely at this one part of the trial, there is no question that an objective reasonable spectator would have no doubt about the fairness and legality of the proceedings and the impartiality of the military judge. When looking at the whole context of the trial to include the military judge's ruling dismissing a specification as multiplicious, granting a motion to suppress evidence of the appellant's possession of a computer file with a title suggestive of child pornography, granting the two defense challenges for cause over trial counsel objection, and his sua sponte Rule for Courts-Martial (R.C.M.) 917 rulings, it is clear that the military judge was impartial and directly responsible for a court-martial that was objectively legal, fair and impartial.

Cruel and Unusual Punishment

Moody AFB does not have its own confinement facility. The appellant argues that he is entitled to relief for "cruel and unusual" punishment as he was held in an isolation cell for his first week at Cook County Jail in Georgia. The appellant complains that he did not have the same privileges as those in the general population as he was required to sleep on a concrete bench without a mattress and did not have a television, a window, or access to recreation.

We review de novo whether the facts alleged constitute cruel and unusual punishment under the Eighth Amendment[4] to the United States Constitution. *United States v. Lovett*, 63 M.J. 211 (C.A.A.F. 2006). This is also true for violations alleged under Article 55, UCMJ, 10 U.S.C. § 855.

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

To prevail on this type of claim under an Eighth Amendment analysis, the appellant must show: (1) that prison officials committed a sufficiently serious act or omission that denied him necessities; (2) that the act or omission resulted from a culpable state of mind reflecting deliberate indifference to his health and safety; and (3) that he has exhausted administrative remedies. *Lovett*, 63 M.J. at 215.

This Court has previously addressed post-trial confinement of Airmen from Moody AFB at local confinement facilities and claims of cruel and unusual punishment for time in isolation. *United States v. Wilson*, ACM 37897 (A.F. Ct. Crim. App. 1 October 2012) (unpub. op.); *United States v. Simmons*, ACM 37967 (A.F. Ct. Crim. App. 27 June 2012) (unpub. op.). The appellant's claim fails on two fronts. First, solitary confinement, along with the resulting routine restrictive conditions, does not alone rise to the level of deprivation of life's necessities and is not a violation of the Eighth Amendment. *United States v. Avila*, 53 M.J. 99 (C.A.A.F 2000). Second, he fails to establish that the Air Force or local jail officials were deliberately indifferent to his health and safety. The record indicates that time in isolation was determined in part by the Cook County Jail in order to verify that there were no foreign nationals present before transferring Airmen to the general population.

Confinement with Foreign Nationals

After approximately one week in solitary confinement, the appellant was placed in the general population at Cook County Jail until his transfer to a military confinement facility on 3 May 2011. During this time, he alleges that a Mexican national was in the same pod, shared the same common areas, and was frequently in his sleeping quarters to play cards and chess with his friends who were in the same sleeping quarters as the appellant. The appellant did not raise this as an issue in clemency nor is there any evidence that he complained about this condition to the local confinement officials.[5]

Article 12, UCMJ, states: "No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces." We review de novo whether an appellant's post-trial confinement violates Article 12, UCMJ. *United States v. Wise*, 64 M.J. 468, 473-74 (C.A.A.F. 2007). "A prisoner must seek administrative relief prior to invoking judicial intervention to redress concerns regarding post-trial confinement conditions." *Id*. at 469 (citing *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001)). This administrative exhaustion requirement furthers two related goals: the prompt resolution of the conditions of confinement at the lowest level and development of the record for later appellate review. *Wise*, 64 M.J. at 471 (citing *United States v. Miller*, 46 M.J. 248, 250

[5] Appellate Defense Counsel alleges that the appellant and his trial defense counsel included a complaint about Article 12 violations in his clemency; however the clemency request only includes information about solitary confinement in order to prevent Article 12 violations.

(C.A.A.F. 1997)). "Since a prime purpose of ensuring administrative exhaustion is the prompt amelioration of a prisoner's conditions of confinement, courts have required that these complaints be made while an appellant is incarcerated." *Wise*, 64 M.J. at 471. (citations omitted). Unless there are some unusual or egregious circumstances, an appellant with a complaint about post-trial confinement conditions must show he has exhausted the prisoner-grievance system at the confinement facility and that he has petitioned for relief under Article 138, UCMJ, 10 U.S.C. § 938. *Id*. (citing *White*, 54 M.J. at 472).

The appellant was clearly aware of Article 12 and its prohibition as he included in his written unsworn statement at trial, "During my time at Cook County Jail, I will be in a [sic] isolation cell so that I do not accidentally come into contact with non-American inmates. As I understand it, it would violate the law for military inmates to have contact with non-Americans." The appellant also included this same unsworn statement in his clemency request. Yet the appellant did not make any complaints about a violation of Article 12 in his clemency petition even though his clemency request was submitted after he was transferred to the United States Disciplinary Barracks at Fort Leavenworth, Kansas. The appellant waited until appellate review before he raised the issue. He did not notify anyone in his chain of command or at the confinement facility of the Article 12, UCMJ, violation at the time it was allegedly occurring, nor did he file a grievance or make an Article 138, UCMJ, complaint. As a result, the Air Force was unable to investigate the claims, make a record of what they found, or immediately correct the situation, if warranted. With these facts, we find no "unusual or egregious circumstance" to excuse the appellant's failure to pursue available administrative remedies. *See Wise*, 64 M.J. at 471. Accordingly, based on the appellant's failure to exhaust his administrative remedies and the absence of unusual or egregious circumstances, relief for his claim of a violation of Article 12, UCMJ, is not warranted.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[6] Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

[6] Though not raised as an issue on appeal, we note the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). The appellant filed his assignment of errors on 2 April 2012, 361 days after the trial concluded. Appellate government counseled filed their response 31 May 2012, 420 days after the trial concluded. Having considered the totality of the circumstances and the entire record, we find the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).

Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court