UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman AMANDA L. MOSHER
United States Air Force

ACM S31379

11 February 2008

Sentence adjudged 10 August 2007 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: William M. Burd (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 3 months, forfeiture of $867.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major David P. Bennett, and Captain Timothy M. Cox.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel George F. May, and Major Matthew S. Ward.

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

PER CURIAM:

In accordance with her pleas, the appellant was found guilty of absence without authority and wrongful use of cocaine in violation of Articles 86 and 112a, UCMJ, 10 U.S.C. §§ 886, 912a. The military judge, sitting alone as a special court-martial, sentenced the appellant to a bad-conduct discharge, confinement for 3 months, forfeiture of $867 pay per month for 3 months, and reduction to the grade of E-1. The convening authority approved the findings and sentence as adjudged. The appellant now asserts that the military judge erred by failing to grant appellant credit against her approved sentence to confinement for conditions that constituted restriction tantamount to confinement. We disagree.

Background

The appellant was assigned to a training squadron at Lackland Air Force Base, Texas, at the time of the offenses. On 4 April 2007 the appellant went to a motel off base with a fellow airman. She remained away from her unit, without authorization, until 8 April 2007. The appellant told the military judge that during her absence she wrongfully used cocaine by snorting it through a straw. Upon returning to her unit the appellant consented to a urinalysis which tested positive for cocaine use. On 9 April 2007 the appellant was assigned to the transition flight on Lackland AFB, a dormitory for airmen pending involuntary separation. She stayed in the transition flight until her trial ended on 10 August, 2007.

At trial, the appellant brought a motion for appropriate relief asserting that the conditions in transition flight from the time she entered until 1 July 2007 were tantamount to confinement and that they violated Article 13, UCMJ, 10 U.S.C. §813. Several of the restrictions of which the appellant complains were eased beginning 1 July 2007 and thus the motion at trial and the assignment of error is limited to the conditions in transition flight up to that date.

The evidence on the motion showed that the appellant was restricted to the transition flight building when she was not on a work detail or at an appointment. When she left for an appointment or work detail she had to sign out, and when she returned she had to sign back in. The appellant could not leave the building without permission and was generally escorted to appointments and work details. There were occasions when she was allowed to go to work details without an escort. She was allowed to go the Base Exchange when escorted. She was allowed to go to church services unescorted. The appellant was not allowed to wear her civilian clothes. After the first week in the transition flight, the appellant earned certain privileges. She was allowed to have personal items, such as a laptop computer, video game players, a television, and DVDs. The appellant was allowed to use the transition flight telephone during the day, and she had access to her cell phone after duty hours. She was allowed to have visitors after approval by transition flight personnel. There were cameras in the hallway to monitor transition flight personnel, and during the night the NCO on duty checked the appellant's room to make sure she was there.

At trial the military judge concluded that there was no intent to punish the appellant and that the restrictions placed on the appellant served a legitimate military purpose, and thus found there was no illegal pretrial punishment in violation of Article 13, UCMJ. The military judge also concluded the restrictions placed on the appellant were not tantamount to confinement.

Analysis

We review de novo the ultimate legal question of whether certain pretrial restrictions are tantamount to confinement. *See United States v. King*, 58 M.J. 110, 113 (C.A.A.F. 2003) (citing *United States v. Guerrero*, 28 M.J. 223 (C.M.A. 1989)). If the pretrial restraint falls so close to the confinement end of the spectrum ranging between restriction and confinement as to be tantamount to confinement, the appellant is entitled to administrative credit against her sentence. *See United States v. Smith,* 20 M.J. 528, 531 (A.C.M.R. 1985) (citing *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985) (summary disposition)).

In conducting our review of the condition of restrictions, we look to the totality of the conditions imposed. *Id.* at 530. In *King*, our superior court outlined the factors to consider in determining whether restrictions are tantamount to confinement:

> Factors to consider include the nature of the restraint (physical or moral), the area or scope of the restraint (confined to post, barracks, room, etc.), the types of duties, if any, performed during the restraint (routine military duties, fatigue duties, etc.), and the degree of privacy enjoyed within the area of restraint. Other important conditions which may significantly affect one or more of these factors are: whether the accused was required to sign in periodically with some supervising authority; whether a charge of quarters or other authority periodically checked to ensure the accused's presence; whether the accused was required to be under armed or unarmed escort; whether and to what degree [the] accused was allowed visitation and telephone privileges; what religious, medical, recreational, educational, or other support facilities were available for the accused's use; the location of the accused's sleeping accommodations; and whether the accused was allowed to retain and use his personal property (including his civilian clothing).

King, 58 M.J. at 113 (citing *Smith*, 20 M.J. at 531-32).

After reviewing the record before us, and considering the nature and scope of the appellant's pretrial restriction and the conditions imposed upon her, we hold that the appellant's pretrial restriction was not tantamount to confinement. The conditions imposed on the appellant and others in the transition flight were necessary to maintain good order and discipline among airmen awaiting separation from the Air Force, and while strict, the restrictions were not equivalent to confinement and were not punishment under Article 13, UCMJ.

Conclusion

The 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 findings and sentence are

AFFIRMED.

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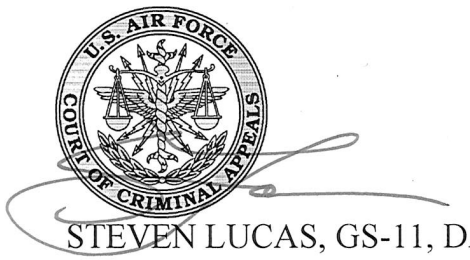

STEVEN LUCAS, GS-11, DAF
Clerk of the Court