

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman First Class JARED L. MURR
United States Air Force**

ACM S30907

12 April 2007

Sentence adjudged 2 May 2005 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: James L. Flanary.

Approved sentence: Bad-conduct discharge, confinement for 37 days, and reduction to E-1.

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

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

Before

**BROWN, MATHEWS, and BECHTOLD
Appellate Military Judges**

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

BECHTOLD, Judge:

The appellant was convicted, in accordance with his pleas, of one specification of wrongful use of methamphetamine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The sentence adjudged and approved was a bad-conduct discharge, 37 days confinement and reduction to E-1. The appellant received 7 days of administrative credit for pretrial punishment in violation of Article 13, UCMJ, 10 U.S.C. § 813. Appellant now asserts that the military judge erred by failing to grant appellant credit against his

approved sentence to confinement for conditions that constituted restriction tantamount to confinement. We concur.

Background

The appellant was attending technical school at Lackland Air Force Base, Texas, at the time of the offense. In the 82 days leading up to trial, he was assigned to the transition flight, which, according to defense counsel's motion at trial, is designed as a "type of holding area for technical training students within the 37th Training Group who are pending involuntary separation." According to both government and defense motion witnesses, there were restrictions that were imposed on all members assigned to the transition flight. These restrictions included confinement to his unlocked dormitory room from 2200 to 0600, except for latrine visits and bed checks every 30-45 minutes throughout the night. Staff members also did frequent head counts throughout the day. As a member of the Transition Flight, the appellant was prohibited from reentering his room during the day and was required to remain in the common areas of the dorm where there were surveillance cameras monitored by transition flight staff. The appellant was also prohibited from leaving the dormitory except for work details, and he was required to have an escort whenever he left the dormitory. He could not go to the base exchange, gym, or any other support facilities, although he was escorted to the "mini exchange" twice a month. He was prohibited from stepping outside onto the dorm patio. He could only have visitors or make phone calls with permission. He was forbidden to have personal property and was required to be in uniform at all times. His room was subject to search at any time. Transition flight members were also subject to many of the same rules experienced by basic trainees such as being required to sidestep through the chow line and being given 10 minutes to eat while being prohibited from talking to other members. Members of transition flight were also subject to collective punishment if one of them engaged in misconduct. This group punishment was the basis for the successful defense motion for relief for illegal pretrial punishment in violation of Article 13, UCMJ.

At trial, the military judge concluded that the appellant was subject to the "strict requirements of transition flight." However, he determined that the conditions experienced by the appellant while assigned to transition flight were not tantamount to confinement. The military judge reached this conclusion by applying a "valid military purpose" test. Specifically, the military judge found: "the reason behind transition flight is militarily valid and required; that is, it is to protect the morale and welfare of other squadron members." Finding further that the restrictions imposed by transition flight also had a valid military purpose, the military judge denied the motion.

Discussion

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 his 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)).

The question sub judice is not whether the restrictions imposed on the appellant were lawful. The military judge correctly determined that the restriction was legitimate under Article 13, UCMJ, utilizing a valid military purpose test. That determination, however, is not dispositive of whether the restriction is also tantamount to confinement. Actual confinement, pretrial or post-trial, also serves a valid military purpose. The issue now is whether the restriction on the appellant's personal liberty falls on the spectrum so close to the confinement end that the appellant should be awarded *Mason* credit. That determination is made by "scrutiniz[ing] those factors which reflect substantial impairment of the basic rights and privileges enjoyed by service members." *Smith*, 20 M.J. at 531.

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.

Conclusion

We have reviewed the conditions of transition flight, considered the referenced factors, and analyzed the relevant cases. We find that the restrictions imposed on the appellant were tantamount to confinement and warrant the award of administrative credit.

We order that, in addition to the 7 days administrative credit awarded by the military judge, the appellant receive an additional 82 days of administrative credit against his approved sentence to 37 days of confinement.

The findings and the 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 the sentence are

AFFIRMED.

Senior Judge MATHEWS participated prior to his retirement.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator