UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ANGELINA C. SACRISTE
United States Air Force

ACM 37041

19 August 2008

Sentence adjudged 10 May 2007 by GCM convened at Dyess Air Force Base, Texas. Military Judge: Maura McGowan (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 14 months, forfeiture of $600.00 pay per month for 14 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Major Shannon A. Bennett.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Ryan N. Hoback.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

HEIMANN, Senior Judge:

The appellant was tried at Dyess Air Force Base (AFB), Texas before a military judge alone. Consistent with her pleas, she was convicted of three specifications of use of cocaine on three separate occasions in violation of the UCMJ, Article 112a, 10 U.S.C. § 912a. Contrary to her pleas, she was convicted of two additional specifications of use of cocaine. She was acquitted of a single specification of use of cocaine. The adjudged and approved sentence consists of a bad-conduct discharge, 14 months confinement, forfeiture of $600.00 pay per month for 14 months and reduction to E-1. The convening authority deferred and waived a portion of the automatic forfeitures.

The appellant raises three issues on appeal. The first is that the findings for specifications 4 and 5 are legally and factually insufficient.[1] Second, the appellant alleges the military judge abused her discretion when she found that appellant's pretrial confinement was lawfully imposed. Third, the appellant alleges her defense counsel was ineffective in failing to request relief for illegal pretrial punishment under Article 13, UCMJ, because of the conditions of her 72 days of pretrial confinement in a local county jail. The first two issues are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). We discuss the issues in the order which the appellant raises them in her brief and, for the reasons set forth below, find against the appellant and grant no relief.

Legal and Factual Sufficiency

The appellant's first contention is that the findings of guilty for Specifications 4 and 5 of the Charge are in error. Relying on the testimony of her expert at trial, the appellant asks this Court to set aside the convictions for these two uses of cocaine. The appellant's argument is that when she used cocaine on 15 January 2007, it remained in her system until at least 6 February 2007. As a result, her positive urinalyses on 16 January at 79,297 nanograms, 26 January at 2774 nanograms and 6 February at 2084 nanograms were all evidence of a single use of cocaine which formed the basis for her plea of guilty to wrongful use of cocaine on or about 16 January 2007, Specification 3 of the Charge. The appellant's argument rests solely on her expert's testimony that it was possible for all three positive urinalyses to be caused by the single use of cocaine. The prosecution's expert testified that in his opinion it simply was impossible because of the half-life of cocaine metabolite.

We review each court-martial record de novo to consider its legal and factual sufficiency. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). With regard to legal sufficiency, we ask whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all of the elements of the offense proven beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). For factual sufficiency, we weigh the evidence in the record of trial and, after making allowances for not having personally observed the witnesses, determine whether we ourselves are convinced beyond a reasonable doubt of the appellant's guilt. *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002); *Turner*, 25 M.J. at 325.

Having considered the testimony of both experts, we are satisfied that the appellant's conviction is legally and factually sound. On review of the record, we found the testimony of the defense expert to be significantly less convincing and persuasive than the testimony of the prosecution expert.

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[1] Specification 4 of the Charge references an alleged wrongful use of cocaine which the government charged as occurring between 18 and 26 January 2007, and Specification 5 is for an alleged wrongful use of cocaine which the government charged as occurring between 29 January and 6 February 2007.

Pretrial Confinement

On 24 February 2007, the appellant's commander ordered her restricted to the limits of Dyess AFB, Texas because the appellant had received five positive urinalyses for cocaine use between 28 November 2006 and 15 February 2007. On 26 February 2007, the same commander was notified that two additional urinalyses tested positive for cocaine. The two additional urinalyses were taken on 12 and 20 February 2007, prior to the restriction.

On 27 February 2007, the commander ordered the appellant into pretrial confinement. In support of this order, the commander relied upon several factors: the appellant's admission to use of cocaine; the appellant's continued use of cocaine despite "repeated advisements against the continued use;" her unwillingness to conform to military standards, as evidenced by her failures to report to work and poor duty performance and the fact that the urinalysis of 12 February 2007 (sixth positive) reported the highest nanogram level of usage thus far.

On 27 February 2007, the Pretrial Confinement Reviewing Officer (PCRO) held a hearing, pursuant to Rule for Courts-Martial (R.C.M.) 305(i)(2), to review the basis and necessity for continued pretrial confinement. Following the hearing, the PCRO prepared a memorandum in which he concluded that the appellant should be continued in pretrial confinement. At trial, the appellant moved that she be granted additional administrative credit against her sentence for illegal pretrial confinement in violation of R.C.M. 305. After entering findings of fact and conclusions of law on the record, the military judge denied the appellant's request.

In support of her claim of error, the appellant contends that neither her commander nor the PCRO adequately considered lesser forms of restraint before placing and keeping the appellant in pretrial confinement. At trial, and on appeal, the appellant's argument rests primarily on the fact that the appellant was initially restricted to base on the 24th of February and there is no evidence of additional misconduct occurring between that date and the 27th of February, the date of the imposition of pretrial confinement. This argument was further bolstered by the fact that upon entry into pretrial confinement the appellant's urinalysis taken on that day was reported negative. Despite this later fact, the PCRO denied a subsequent request that he reconsider his decision.

Consideration of Lesser Forms of Restraint

When the issue is the legality of pretrial confinement already served, the "reviewing magistrate's decision on the propriety of pretrial confinement will be reviewed by a military judge and this Court solely for an abuse of discretion." *United States v. Gaither*, 41 M.J. 774, 778 (A.F. Ct. Crim. App. 1995).

In his memorandum to the PCRO, the appellant's commander stated:

> [Airman First Class (A1C)] Sacriste has admitted to using cocaine on multiple occasions. Given A1C Sacriste's history of continued cocaine use and her disregard for Air Force rules and regulations, I feel less severe forms of restraint would be inadequate in this case. I had previously invoked a less severe form of restraint by restricting her to Dyess AFB. However, after seven positive tests for cocaine, I feel the only way to eliminate her cocaine use is to have 24hr restriction and observation. This cannot be achieved without pretrial confinement.

Based on this recitation, it is clear that the appellant's commander not only considered lesser forms of restraint but only concluded it would be ineffective when confronted with even more evidence of repeated cocaine use.

In his 28 February 2007 memorandum, the PCRO concluded he believed that continued pretrial confinement is required under the criteria of R.C.M. 305(h)(2)(B). He specifically notes the appellant tested positive for cocaine on numerous occasions despite efforts by her commander and first sergeant to intervene and the fact that she was the mother of a newborn. Finally, he concluded that the only way to ensure she stayed away from drugs was to keep her confined until she was brought to trial.

In her findings, the military judge determined that the PCRO had considered lesser forms of restraint and was aware that there was no evidence that the appellant had used drugs since being restricted to the base. Ultimately, the judge found no abuse of discretion by the PCRO in ordering or continuing the pretrial confinement.

It is clear the commander and the PCRO considered lesser forms of restraint before deciding the appellant's pretrial confinement should continue. The fact that the commander changed his mind on the type of restraint required when confronted with more information does not undermine his decision. As for the PCRO, he considered all the information and considered lesser forms of restraint both initially and on the reconsideration request after the final negative urinalysis. Accordingly, the military judge's findings in this regard were well substantiated and we find no abuse of discretion.

Claim of Ineffective Assistance of Counsel

On appeal, via an affidavit, the appellant alleges that her military defense counsel was ineffective in failing to request relief for illegal pretrial punishment under Article 13, UCMJ, 10 U.S.C. § 813. The appellant contends that her conditions of confinement at the county jail amounted to pretrial punishment. Normally, Article 13, UCMJ, claims are waived on appeal absent plain error. However, since the issue also forms the basis of an ineffective assistance of counsel claim, it is necessary to examine the first issue to the

extent necessary to resolve the second. In addition to relevant evidence presented at trial, we have considered the appellant's post-trial affidavit and the affidavit submitted by her counsel in response to the claim of ineffective assistance of counsel, consistent with *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

A) Background

We begin by assessing what facts can be established, under *Ginn*, 47 M.J. at 248, by the record of trial and the affidavits. The appellant's affidavit establishes that she was in pretrial confinement from 26 February to 10 May 2007 "at the Taylor County Jail in Abilene Texas because Dyess Air Force Base did not have its own confinement facility." While in jail, she was "housed in a solitary confinement cell . . . with only a small window in the door looking into the hallway." She was only allowed in the court yard for a total of 3 hours a week and she was only given 10 minutes to eat her meals. In addition, in her affidavit, the appellant acknowledges that she never mentioned these "conditions" to the defense counsel. Finally, she admits she told the judge that she was not subject to any pretrial punishment in violation of Article 13, UCMJ, but contends she simply mimicked her defense counsel when questioned by the judge at trial.

In a response affidavit, the trial defense counsel establishes the following additional uncontroverted facts. The trial defense counsel was able to meet with the appellant on "more than one occasion" at the county jail. The appellant was able to speak to defense counsel "numerous times" while confined. The appellant was escorted on "several occasions" to the defense counsel's office to prepare for trial, and the defense counsel reviewed the trial "script" with the appellant prior to trial.

Finally, during the sentencing phase of trial, the following additional facts regarding the conditions of confinement are established. Her roommate, A1C JT visited the appellant in jail twice a week and also brought the appellant's infant child to visit the appellant once a week. When asked about the impact of the pretrial confinement on the appellant, A1C JT testified, "[s]he's seen the error of her ways and she smiles a lot more now, and like I said she actually speaks of having goals and looks toward the future."

B) Discussion

Article 13, UCMJ, prohibits: (1) intentional imposition of punishment on an accused before his or her guilt is established at trial; and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial. *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005); *United States v. Inong*, 58 M.J. 460, 463 (C.A.A.F. 2003). In addition, under *United States v. Adcock*, 65 M.J. 18 (C.A.A.F. 2007) military judges are authorized to grant pretrial confinement credit if there has been a violation of service regulations by Air Force officials amounting to an "abuse of discretion." *Id.* at 24; R.C.M. 305(k). This abuse of discretion threshold is

crossed when regulatory violations demonstrate a disregard by the Air Force of the duty to "ensure that servicemembers who are housed in civilian jails are treated in a manner that recognizes the presumption of innocence." *Adcock*, 61 M.J. at 23. Whether the appellant is entitled to credit for a violation of Article 13, UCMJ, is a mixed question of fact and law. *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000); *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997). Whether the facts amount to a violation of Article 13, UCMJ is a matter of law the court reviews de novo. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002); *United States v. Crawford*, 62 M.J. 411, 414 (C.A.A.F. 2006).

Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis,* 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight,* 53 M.J. 340, 342 (C.A.A.F. 2000)). We analyze claims of ineffective assistance of counsel under the framework established by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984). Counsel are presumed to be competent. Where there is a lapse in judgment or performance alleged, we ask first whether the conduct of the defense was actually deficient, and, if so, whether that deficiency prejudiced the appellant. *Id.* at 687. *See also United States v. Polk,* 32 M.J. 150, 153 (C.M.A. 1991). The appellant bears the burden of establishing that his trial defense counsel was ineffective. *United States v. Garcia,* 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell,* 55 M.J. 479, 482 (C.A.A.F. 2001).

C) Analysis

Ultimately the question before the Court today is, has the appellant met her burden of establishing that her attorney was ineffective because he failed to seek relief for her pretrial confinement conditions? In making this assessment, we are governed by the prohibitions of illegal pretrial punishment established under Article 13, UCMJ, and relevant case law, to include *King*, 61 M.J. at 228 and *Adcock*, 65 M.J. at 23, and the evidentiary limitations set for in *Ginn*, 47 M.J. at 248.

Applying the principles of *Ginn*, we are satisfied that we are able to resolve this claim without directing a *DuBay*[2] hearing. *See Ginn*, 47 M.J. at 248. First, as to the claim that the trial defense counsel never discussed Article 13, UCMJ, with the appellant, we believe that under the fourth and fifth principals of *Ginn* we can conclude that this assertion is simply not believable. *Id.* The appellant admits that she reviewed the script with her counsel but contends that they never discussed Article 13, UCMJ. She also admits that she was specifically asked by the military judge about Article 13, UCMJ, at trial. Yet, despite these two facts, we are asked to conclude that counsel never explained the concepts of Article 13, UCMJ, to the appellant. The appellant's assertion fails both because she fails to rationally explain why she told the judge she was not subject to

[2] *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

illegal pretrial punishment under Article 13, UCMJ, if such was not true, and also the appellate filings and the record as a whole "compellingly demonstrate" the improbability of appellant's claim of not being advised of Article 13, UCMJ, prior to trial. *See Ginn*, 47 M.J. at 248.

However, even if we were to accept that her attorney never investigated or discussed the issue with his client, we still find that the appellant has not met her burden. The facts provided by the appellant in her affidavit simply do not overcome the burdens necessary to establish ineffective assistance. Looking to the most serious contention, that she was placed in "solitary confinement," she does not meet her burden. It is well established that pretrial confinees are not to be commingled with post-trial prisoners. *See Adcock,* 65 M.J. at 23. Without some evidence that this was done with intent to punish or with more evidence regarding the conditions, we will not assume that this segregation is illegal pretrial punishment, *per se*. *United States v. Palmiter*, 20 M.J. 90, 96 (C.M.A. 1985). Unlike the prisoner in *King*, 61 M.J. at 228, the appellant has not made any assertions that her cell was normally reserved for inmates with disciplinary problems. As for the assertion that it was "solitary confinement," we conclude that the appellant has only established that she had an individual cell, nothing more. Keeping a female pretrial confinee in a separate cell, does not, alone, equal intent to punish, especially when such measures may be the only option when the confinee is a female being kept in a local confinement facility. Nor do we believe that it meets the circumstances outlined in *King* without more information. To conclude otherwise would create a *per se* rule that being placed in a single cell equals punishment. Finally, we must keep in mind the far greater concern raised by commingling a pretrial confinee with convicted prisoners, as in the *Adcock* case.

When we move beyond the intent question and apply the requirements of the *Adcock* decision, we still reach the same conclusion. The appellant does not allege that she was treated in any way inconsistent with the presumption of innocence required by *Adcock*. Her claims of limited "yard" time and meal time are also easily explained by the realities of having to be kept separate from the post-trial prisoners in a county jail. While the limited nature of these times causes us concern, the allegations themselves do not meet the "abuse of discretion" threshold required by *Adcock* for additional credit. *See Adcock*, 65 M.J. at 24; R.C.M. 305(k). Our conclusion that these limitations were not an abuse of discretion undermining the presumption of innocence is also corroborated by the fact that the appellant was permitted regular visitors, to include her infant daughter, and was given apparently unfettered access to her attorney. In addition, she makes no claims of mistreatment, shackling, or being deprived of medical care.

In sum, even if we accepted all of the appellant's claims, we do not find she has met her burden of establishing a basis for a claim of ineffective assistance.

Conclusion

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

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