UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Cadet DONCOSTA E. SEAWELL
United States Air Force

ACM 35531 (f rev)

28 December 2007

Sentence adjudged 16 October 2002 by GCM convened at Los Angeles Air Force Base, California. Military Judge: Patrick M. Rosenow and James L. Flanary (sitting alone).

Approved sentence: Dismissal, confinement for 18 months, and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Colonel Beverly B. Knott, Colonel Carlos L. McDade, Major Terry L. McElyea, Capt James M. Winner, Captain Anthony D. Ortiz, and Frank J. Spinner, Esq.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, Lieutenant Colonel Gary F. Spencer, Major Matthew S. Ward, Major John C. Johnson, and Major Brendon K. Tukey.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

PER CURIAM:

Consistent with his pleas, the appellant was convicted of forcible sodomy, in violation of Article 125, UCMJ, 10 U.S.C. § 925. His approved sentence consists of a dismissal, confinement for 18 months, and total forfeitures.

This case is before our Court for the second time. In *United States v Seawell*, ACM 35531 (A.F. Ct. Crim. App. 17 Nov 2005) (unpub. op.), we affirmed the findings and sentence. On appeal, our superior court affirmed the findings, but set aside the

sentence and returned the record to the Judge Advocate General of the Air Force for remand to our Court.

The issue specified for consideration with respect to the sentence is: WHETHER THE DECISION TO DISAPPROVE TIME SERVED ON MANDATORY SUPERVISED RELEASE AND IMPRISON APPELLANT BEYOND HIS MAXIMUM RELEASE DATE INCREASED APPELLANT'S PUNISHMENT ABOVE THE SENTENCE APPROVED BY THE CONVENING AUTHORITY. SEE UNITED STATES V. PENA, 64 M.J. 259 (C.A.A.F. 2007).[1]

Background

The appellant was sentenced, on 16 October 2002, to a dismissal, confinement for 2 years, and total forfeitures. The convening authority, in accordance with the pretrial agreement, reduced the approved confinement to 18 months. On 25 June 2003, the appellant was denied parole. He was advised, on 3 September 2003, that he would be placed in the Mandatory Supervised Release (MSR) program on his minimum release date, 29 December 2003. On 29 December 2003, the appellant was released on MSR until his maximum release date of 15 April 2004.

On 2 February 2004, authorities were notified of alleged parole (MSR)[2] violations occurring on 11 and 14 January 2004. The appellant's supervised release was suspended as of that date. On 14 April 2004, after substantial compliance with governing regulations,[3] the Air Force Clemency and Parole Board (AFC&PB) revoked the appellant's parole and denied him administrative credit for his "street time." The issue of whether the appellant would receive credit for his "street time"[4] was specifically addressed by the AFC&PB. The board determined that because the appellant violated the conditions of the MSR program within two weeks of release, the appellant was never "in material compliance with the conditions" of MSR during the entire period of his time on supervision. *See* DODI 1325.7, ¶¶ 6.20.6, 6.17.11.2. The appellant's maximum release date was adjusted by 35 days.[5]

Discussion

The issue whether the appellant's sentence has been unlawfully increased is an issue we review de novo. *United States v. Pena*, 64 M.J. 259, 265 (C.A.A.F. 2007).

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[1] Although through his brief, the appellant has raised three additional issues, we will limit our decision to the issue specified. *See* Article 67(e), UCMJ, 10 U.S.C. § 867(e).

[2] In execution, MSR is virtually identical to parole. *United States v. Pena*, 61 M.J. 776, 780 (A.F. Ct. Crim. App. 2005), *aff'd*, 64 M.J. 259 (C.A.A.F. 2007).

[3] DODI 1325.7, *Administration of Military Correctional Facilities and Clemency and Parole Authority* (21 Jul 2001); AFI 31-205, *The Air Force Corrections System* (9 Apr 2001); *see also Pena*, 61 M.J. 776.

[4] 29 Dec 03 – 2 Feb 04.

[5] The time he spent on MSR.

Generally, the administrative consequences of a sentence, such as early release programs, do not constitute punishment. *Id.* There is a possibility "that the MSR program could be imposed in a manner that increases the punishment above the punishment adjudged by a court-martial. The burden, however, is on the party challenging the conditions to demonstrate there has been an increase above the punishment of confinement imposed at trial." *Id.* at 266.

In *Pena*, the appellant was predominantly complaining about the conditions[6] of his parole (MSR) whereas in the case sub judice, the appellant complains that the decision to not award credit for "street time" and to re-imprison the appellant, thus creating an adjustment in his maximum release date, unlawfully increased his punishment. The appellant has failed, even minimally, to demonstrate how being released from confinement on parole; and then, after an administrative hearing, being re-confined upon findings of violations of that parole; and being required to serve his approved sentence equates to an unlawful increase in his sentence.

The appellant was required to serve his sentence without receiving credit, as determined by the AFC&PB, in accordance with procedures, for the time he spent on the "street" on MSR. Requiring the appellant to serve out his sentence merely resulted in an adjusted maximum release date, not an increase in punishment. He spent no more time in jail than the total of his approved sentence.

Conclusion

The previously approved and affirmed 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 sentence are

AFFIRMED.

OFFICIAL

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

[6] Conditions that were far more onerous than those imposed upon Cadet Seawell.