

**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Staff Sergeant SANTO A. SPINELLA  
United States Air Force**

**ACM S31708**

**17 December 2010**

Sentence adjudged 23 July 2009 by SPCM convened at Beale Air Force Base, California. Military Judge: Vance H. Spath (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 185 days, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Darrin K. Johns, and Major Bryan A. Bonner.

Appellate Counsel for the United States: Lieutenant Colonel Jeremy S. Weber, Major Coretta Gray, Major Megan E. Middleton, and Gerald R. Bruce, Esquire.

Before

**BRAND, GREGORY, and ROAN  
Appellate Military Judges**

This opinion is subject to editorial correction before final release.

**PER CURIAM:**

Pursuant to his pleas, a special court-martial composed of a military judge convicted the appellant of one specification of absenting himself from duty, three specifications of insubordinate conduct toward a noncommissioned officer, one specification of failure to obey a lawful order, one specification of resisting apprehension, one specification of being drunk on duty, and one specification of wrongfully communicating a threat, in violation of Articles 86, 91, 92, 95, 112, and 134, UCMJ, 10 U.S.C. §§ 886, 891, 892, 895, 912, 934. Contrary to his plea, he was convicted of one specification of wrongful use of a controlled substance in violation of Article 112a,

UCMJ, 10 U.S.C. § 912a.<sup>1</sup> The adjudged sentence consists of a bad-conduct discharge, 185 days confinement, and reduction to E-1. The convening authority approved the findings and sentence as adjudged. On appeal, the appellant asks this court to set aside the action and punitive discharge.

### *Background*

Prior to his court-martial, the appellant was placed in pre-trial confinement at the Yuba County jail from 30 May 2009 through 22 July 2009, a period of 55 days.<sup>2</sup> At trial, defense counsel raised a timely motion that the appellant was entitled to Rule for Courts-Martial (R.C.M.) 305(k) credit for illegal pretrial confinement, asserting the appellant had been unlawfully confined with foreign nationals in violation of Article 12, UCMJ, 10 U.S.C. § 812. Based on a representation from Sergeant MvdB, an employee at the Yuba County jail, trial and defense counsel stipulated that the appellant had been housed in the same cell-pod with foreign nationals for 23 days. In his conclusions of law, the military judge granted the defense's motion and awarded the appellant two additional days R.C.M. 305(k) credit for each of the 23 days Sergeant MvdB stated the appellant was in immediate association with foreign nationals.

As part of his R.C.M. 1105 clemency matters to the convening authority, appellant submitted a second message from Sergeant MvdB who stated the appellant had in fact been housed with foreign nationals for 41 days rather than the initially stated 23 days. The appellant asked the convening authority to grant two-for-one R.C.M. 305(k) credit for each of the additional 18 days indicated by Sergeant MvdB. The appellant also claimed that he continued to be associated with foreign nationals for the 29 days he had been in post-trial confinement and requested two-for-one credit for this time as well.

In the addendum to his recommendation, the staff judge advocate correctly informed the convening authority that the appellant would be given credit for 55 days of pretrial confinement as well as the additional 46 days of R.C.M. 305(k) confinement credit awarded by the military judge. The staff judge advocate also recommended the convening authority grant an additional 60 days credit for the 30 days the appellant had been placed in post-trial confinement with foreign nationals.<sup>3</sup> The staff judge advocate did not mention or discuss the merits of the appellant's request to be given 36 days of further credit based on Sgt MvdB's modified calculations.

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<sup>1</sup> The appellant was acquitted of one specification of going from his appointed place of duty in violation of Article 86, UCMJ, 10 U.S.C. § 886.

<sup>2</sup> From 6 June through 18 June 2009, appellant was placed in a medical center within the Yuba County jail but remained in pretrial confinement.

<sup>3</sup> Although the trial defense counsel referenced 29 days of post-trial confinement, the convening authority did not sign the Action until the 30th day.

### *Appellant's Request to Set Aside the Convening Authority's Action*

We review post-trial processing issues de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). The appellant argues the convening authority's action must be set aside because the staff judge advocate's addendum to his recommendation failed to discuss the appellant's assertion he was entitled to an additional 36 days of R.C.M. 305(k) credit based on Sergeant MvdB's supplemental statement. After reviewing the entire record of trial, we are convinced the failure to grant the appellant the further illegal pretrial confinement credit he now seeks was error.

In his addendum, the staff judge advocate readily admits the appellant should be credited with not only the original 46 days of credit the military judge awarded at trial, but based solely on the appellant's clemency matters, he also recommends the convening authority grant an additional two-for-one credit for each of the 30 days the appellant was in illegal post-trial confinement. Although it is unclear why he did not discuss or even mention the appellant's claim for the additional 36 days of R.C.M. 305(k) credit, we are satisfied the omission was unintentional. Based on the entire record, we conclude that but for the staff judge advocate's oversight, the convening authority would have properly granted the appellant the additional 36 days of credit he now seeks. We conclude that we do not need to set aside the convening authority's action, but we do find that appellant should receive credit for the additional 36 days. Accordingly, we order that the appellant be awarded with 36 additional days for pre-trial confinement in violation of Article 12, UCMJ.

### *Appellant's Request to Set Aside the Punitive Discharge*

As discussed above, the appellant is entitled to an additional 36 days of R.C.M. 305(k) credit against his adjudged sentence. Adding this credit to the existing 101 days of pretrial confinement credit and 60 days of post-trial confinement credit previously mentioned, the appellant has 12 days of R.C.M. 305(k) credit remaining after accounting for the 185 days of confinement adjudged. The Rule addresses this specific situation: "[I]f the confinement adjudged is insufficient to offset all the credit to which the accused is entitled, the credit shall be applied against hard labor without confinement, restriction, fine, and forfeiture of pay, in that order, using the conversion formula under R.C.M. 1003(b)(6) and (7). . . . The credit shall not be applied against any other form of punishment." R.C.M. 305(k).

The appellant argues that his punitive discharge should be set aside in order to provide "meaningful relief" to account for the residual credit. We disagree. Our superior court has conclusively held that "reprimands, reductions in rank, and punitive separations are so qualitatively different from other punishments that conversion is not required as a matter of law." *United States v. Josey*, 58 M.J. 105, 108 (C.A.A.F. 2003). Although a

convening authority may commute a punishment such as a punitive discharge into another form of punishment under Article 60(c), UCMJ, 10 U.S.C. § 860(c), such action is a matter of command prerogative. *Josey*, 58 M.J. at 108. The appellant's request to commute his punitive discharge as a result of the residual confinement credit is more appropriately made through the convening authority and not this court.

*Conclusion*

The approved findings and sentence, as modified, 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). Appellant will be credited with an additional 36 days of confinement credit. Accordingly, the approved findings and sentence, as modified, are

AFFIRMED.

OFFICIAL



A handwritten signature in blue ink, appearing to read "S. Lucas", is written over a faint, light blue circular stamp or watermark.

STEVEN LUCAS  
Clerk of the Court