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

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**UNITED STATES**

**v.**

**Airman First Class LESLIE R. ST. CYR**
**United States Air Force**

**ACM S30166**

**9 January 2003**

Sentence adjudged 17 May 2002 by SPCM convened at Barksdale Air Force Base, Louisiana. Military Judge: Steven B. Thompson (sitting alone).

Approved sentence: Bad-conduct discharge, forfeiture of $600.00 pay, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher.

Before

BURD, PECINOVSKY, and EDWARDS
Appellate Military Judges

OPINION OF THE COURT

BURD, Senior Judge:

On 17 May 2002, the appellant was tried by special court-martial composed of a military judge sitting alone at Barksdale Air Force Base (AFB), Louisiana. Consistent with her pleas, she was found guilty of desertion, in violation of Article 85, UCMJ, 10 U.S.C. § 885. The military judge sentenced the appellant to a bad-conduct discharge, restriction to Barksdale AFB for 30 days, forfeiture of $600.00 pay, and reduction to E-1.

The appellant was seven and one-half months pregnant at the time of her court-martial. After she delivered her child, she was on convalescent leave at the time the convening authority took action on the record of trial on 5 August 2002. Her leave status was included in the staff judge advocate recommendation (SJAR). The SJAR also indicated that the appellant's "unit" had expressed a desire for the appellant to start appellate leave immediately, contingent upon approval of the sentence, with the exception of the restriction. The convening authority approved only so much of the sentence as provided for a bad-conduct discharge, forfeiture of $600.00 pay, and reduction to E-1.

While this case was submitted to us on its merits, during our review we have discovered two matters that warrant discussion. Both matters relate directly to the pretrial "restriction" of the appellant.

The charge sheet, Department of Defense (DD) Form 458, contains personal data in the first nine blocks. Block 8, Nature of Restraint of Accused, states "Restricted." Block 9, Date(s) Imposed, states "27-Feb-02 to present." At trial, immediately after findings, during the presentencing portion of the trial, the following exchange occurred.

> Military judge (MJ): [Defense counsel (DC)], has the accused been punished in any way prior to trial that would constitute illegal pretrial punishment under Article 13?
>
> DC: No, [Y]our Honor.
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> MJ: Airman St. Cyr, is that correct?
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> Accused (ACC): Yes sir.
>
> MJ: Counsel, on the charge sheet it refers to restriction but no pretrial confinement. Is that correct, there was no pretrial confinement?
>
> DC: Yes, Your Honor.
>
> Trial counsel (TC): Yes, Your Honor.

The question raised from this situation does not relate to pretrial punishment, as that was resolved by appellant's responses to the military judge. *See United States v. Smith*, 53 M.J. 168, 170-72 (2000). The question is whether the record is sufficiently clear to support a conclusion that the restriction was not equivalent to confinement. We conclude that the record is ambiguous on this question.

If an accused is entitled to credit for pretrial restraint because the conditions of the restraint make it equivalent to confinement, that is a matter we would expect trial defense counsel to bring to the attention of the military judge.[1] The trial counsel ought to know the conditions of any pretrial restraint as well. Further, given the information the military judge had in this case, he should have verified that the restriction was not equivalent to confinement.[2] Notwithstanding, we hold the ambiguity to be harmless. Article 59a, UCMJ, 10 U.S.C. § 859(a).

The appellant was restricted for 79 days prior to the day of her court-martial. The nature and duration of the restriction would have been a proper matter for the sentencing authority to consider (the military judge in this case) in deciding punishment. *See United States v. Smith*, 56 M.J. 290, 291 (2002). Also, the convening authority was required to consider the nature and duration of any pretrial restraint before taking action. Rule for Courts-Martial (R.C.M.) 1107(b)(3)(A)(ii); R.C.M. 1106(d)(3)(D).

If the restriction had been equivalent to confinement, the appellant would have been entitled to credit for the days restricted, applied against any confinement. *Smith*, 56 M.J. at 291 (citing *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985)). But we have held the ambiguity harmless because there was no adjudged confinement to apply any pretrial confinement credit against. *Smith*, 56 M.J. at 293.

The other matter we comment upon is the lack of consideration of pretrial restraint post-trial. The SJAR makes no reference to pretrial restraint in the body of the recommendation. The SJAR appropriately made the Personal Data Sheet (PDS), Prosecution Exhibit 2, an attachment. But, there is no reference to the restriction in the PDS. On the line, Nature of Pretrial Restraint, it states "none."

As cited above, R.C.M. 1107(b)(3)(A)(ii) and R.C.M. 1106(d)(3)(D), when read in conjunction, require the convening authority to consider the nature and duration of any pretrial restraint before taking action. This is because R.C.M. 1107(b)(3)(A)(ii) requires the convening authority to consider the SJAR before action and R.C.M. 1106(d)(3)(D) requires the SJAR to include "[a] statement of the nature and duration of any pretrial restraint."

The failure to include this information in the SJAR, while plain error, need not detain us from affirming the approved findings and sentence in this case. In *United States v. Wheelus*, 49 M.J. 283 (1998), our superior court said the following:

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[1] While some might argue that the implication from counsels' responses to the judge is that the restriction was not equivalent to confinement, we do not rely upon such an implication in this case.

[2] The judge could have resolved the matter by simply asking the defense counsel to describe the nature of the restriction or if there was any basis to conclude the restriction was equivalent to confinement.

> The applicable statutory and Manual provisions, as well as our prior cases, establish the following process for resolving claims of error connected with a convening authority's post-trial review. First, an appellant must allege the error at the Court of Criminal Appeals. Second, an appellant must allege prejudice as a result of the error. Third, an appellant must show what he would do to resolve the error if given such an opportunity.

*Id*. at 288. The appellant has taken none of these steps.

The approved findings and sentence are correct in law and fact. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (2000). Accordingly, the approved findings and the sentence are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court