UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JAMES B. THOMAS
United States Air Force

ACM 35804

27 April 2006

Sentence adjudged 9 August 2003 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: R. Scott Howard.

Approved sentence: Bad-conduct discharge, confinement for 24 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, Major Andrew S. Williams, Major Sandra K. Whittington, and Major David P. Bennett.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major John C. Johnson.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

FINCHER, Judge:

The appellant pled guilty to drunk driving, wrongful distribution and use of cocaine on divers occasions, wrongful use of ecstasy, and possession of marijuana, in violation of Articles 111 and 112a, UCMJ, 10 U.S.C. §§ 911, 912a. The prosecution then attempted to prove multiple uses of ecstasy, but the panel of officers only convicted him of a single use. He was sentenced to a bad-conduct discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1. After the trial, the appellant found out that his life expectancy had been significantly reduced because he had inherited

the gene for Huntington's disease from his father, who had recently died from the disease. As a result of this discovery, the convening authority reduced the amount of the appellant's confinement to 24 months.

The appellant raises three issues on appeal: (1) Whether the military judge abused his discretion when he denied the defense motion to disclose information made pursuant to Mil. R. Evid. 506(f); (2) Whether trial defense counsel was ineffective in his representation of the appellant during the presentencing phase of his court-martial; and (3) Whether the military judge abused his discretion when he effectively denied a continuance so the appellant could obtain new counsel. We resolve all three of these issues adversely to the appellant and affirm.

Background

The focus of this appeal has nothing to do with the crimes the appellant committed. Instead, all of his assertions have their genesis in the duties he was required to perform while he was awaiting trial. Several months prior to his court-martial, the appellant had a positive drug urinalysis test. As a result, the appellant's superiors removed him from his normal responsibilities working with munitions and assigned him to a variety of work details. His coworkers included Airmen who were awaiting disciplinary action, as well as others who had no disciplinary problems.

During a portion of this time, he was part of a crew responsible for renovating an old building. The old building contained asbestos. The appellant and others worked in this building for almost two months. Although the work crew supervisor knew about the presence of asbestos, he thought it was well contained and did not present a safety hazard. After working on the old building for about two months, the appellant was assigned to another project that did not include building renovation. He subsequently filed a complaint with the Inspector General (IG) regarding his exposure to asbestos. Prior to his trial, the appellant was never in pretrial confinement, nor was he subjected to any other form of pretrial restraint.

At trial, the appellant's defense counsel raised a motion for appropriate relief for illegal pretrial punishment under Article 13, UCMJ, 10 U.S.C. § 813, based primarily on the appellant's duties in renovating the old building. He called several witnesses in support of the motion. One of the witnesses was the base IG who had ordered the investigation of the appellant's asbestos complaint.

The IG testified that he expected to substantiate a portion of the appellant's complaint concerning unsafe working conditions. He also testified that the investigation did not examine the reasons for assigning the appellant to the renovation work detail. He

then asserted privilege under Mil. R. Evid. 506[1] and refused to answer questions about other aspects of his unfinished report.

The defense made a motion to compel disclosure of the information in the report. The military judge ruled that the defense had failed to show the relevancy of the information requested and denied the motion. He did not conduct an *in camera* review of the unfinished report. Appellant contends that the military judge erred and should have reported the matter to the convening authority under Mil. R. Evid. 506(f).[2]

Defense Motion Under Mil. R. Evid. 506(f)

We review the military judge's denial of the defense motion for disclosure of the IG information for an abuse of discretion. *United States v. Rivers*, 49 M.J. 434, 437 (C.A.A.F. 1998). In this case, the defense had already established that asbestos was present in the old building, that the appellant was required to work there, and that the squadron had failed to follow proper safety practices in working with asbestos. Because these dispositive facts were before the court, the military judge found that any further information from the IG investigation was irrelevant. Consequently, referral of the matter to the convening authority was unnecessary. We find no abuse of discretion in the military judge's actions. *See id.* He had sufficient information to make his ruling without embarking on an unnecessary fishing expedition.

However, even if the military judge had abused his discretion, we would find no prejudice. *See* Article 59a, UCMJ, 10 U.S.C. § 859a. The facts of this case simply do not support a violation of Article 13, UCMJ. We find no intent to punish or stigmatize the appellant by assigning him renovation duties. To do so would require us to subscribe a "conspiracy theory," that the entire work crew was intentionally exposed to unsafe working conditions for the sake of illegally punishing the appellant. Likewise, we have no doubt that the building renovation served a legitimate, non-punitive government objective. *See United States v. Starr*, 53 M.J. 380, 382 (C.A.A.F. 2000); *United States v. Palmiter*, 20 M.J. 90, 95 (C.M.A. 1985). But we need not even get that far in this case.

[1] "Except where disclosure is required by an Act of Congress, government information is privileged from disclosure if disclosure would be detrimental to the public interest." Mil. R. Evid. 506(a). "The privilege for records and information of the Inspector General may be claimed by . . . the Inspector General." Mil. R. Evid. 506(c).

[2] "*Action after motion for disclosure of information.* After referral of charges, if the defense moves for disclosure of government information for which a claim of privilege has been made under this rule, the matter shall be reported to the convening authority." Mil. R. Evid. 506(f).

We find that even if the military judge had erred, there was no violation of Article 13, UCMJ, because the appellant was not "held for trial" within the meaning of the statute.[3] This Court discussed the history and meaning of this phrase extensively in *United States v. Starr*, 51 M.J. 528, 531-34 (A.F. Ct. Crim. App. 1999), *aff'd*, 53 M.J. 380 (C.A.A.F. 2000). The analysis applies aptly to the appellant's case, and we will not repeat it here. We merely add that Article 13, UCMJ, is contained within Subchapter II of the UCMJ, which is entitled "**APPREHENSION AND RESTRAINT**." It is surrounded by statutory sections and language dealing with apprehension, pretrial restraint, pretrial confinement and confinement. In other words, the entire context of Article 13, UCMJ, deals with those who are being "held" or restrained for trial. It does not address those who are merely "awaiting" trial.

Read in context, the meaning of the statute is clear. For an accused to be "held for trial" he or she must be subject to some form of pretrial restraint. This can take the form of pretrial confinement or lesser forms of restraint that place a substantial burden on the accused's freedom. *Id.* at 533 (citing *United States v. Combs*, 47 M.J. 330, 334 (C.A.A.F. 1997)). Unless this statutory prerequisite is satisfied, commanders need not fear judicial second-guessing when they ask Airmen to surrender their berets as in *Starr*, or assign them to work details. *United States v. Fay*, 59 M.J. 747 (C.G. Ct. Crim. App. 2004), *pet. denied*, 60 M.J. 46 (C.A.A.F. 2004).

The appellant in this case was not in pretrial confinement. He was not restricted to the base. His freedom of movement was not limited any more than any other Airman. He was simply required to do his job. The nature of the allegations against him made it necessary to remove him from his regular job, but his superiors found other useful work for him to do. Consequently, he was not being "held for trial" within the meaning of the statute and Article 13, UCMJ, does not apply.

Ineffective Assistance of Counsel

The appellant's defense counsel did an excellent job of representing his client during the findings portion of the trial. He won an acquittal on the allegation of multiple uses of ecstasy. The appellant was well satisfied with his performance up to that point. But, as in most trials, everything did not go smoothly. The appellant had observed some rather heated discussions between the military judge and his defense counsel about the proper procedure for filing the Article 13, UCMJ, motion. His defense counsel first

[3] Article 13, UCMJ, states:

> **Punishment prohibited before trial**
> No person, while being *held for trial*, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline. (Emphasis added.)

wanted to argue the motion to the members. The military judge told him it was inappropriate to present the motion in that manner, because the issue dealt with a matter of law rather than a matter of fact. The defense counsel then wanted the military judge to instruct the members that the appellant had been illegally punished. The military judge told him an instruction would not be appropriate either. Finally, the military judge ruled against the defense on the motion to compel disclosure under Mil. R. Evid. 506(f). At that point, the appellant asked for the military judge's permission to release his counsel from the case.

Examined within the context of the entire trial, the defense counsel's confusion about the proper procedure for presenting his motion under Article 13, UCMJ, did not render him ineffective in defending his client. If every counsel who expressed occasional confusion about legal procedures was considered legally ineffective, our judicial system could not function. Fortunately for most of us, perfection is not the standard by which we judge legal effectiveness. Instead, we look at the defense counsel's performance through the lens of *Strickland v. Washington*, 466 U.S. 668 (1984). Was the defense counsel's performance so deficient that it offended the Sixth Amendment, and, if he was so deficient, did it prejudice the defense? *Id.* at 687. In this case, the answer is no. We note that the trial defense counsel ultimately raised the Article 13, UCMJ, motion properly, despite some initial confusion. The military judge then properly denied the motion. Consequently, the defense counsel's performance was not deficient, and even if it had been there was no prejudice.

After the denial of the motion, the defense counsel expressed some misgivings about the restrictive effect of the military judge's ruling on his ability to use the appellant's exposure to asbestos as a matter in mitigation. The military judge denied any such intent to constrain the defense. The defense counsel obviously understood, because the appellant presented information about his asbestos exposure to the court members in his unsworn statement.

The appellant also complained that his defense counsel did not present any character letters during sentencing. Though this is true, the defense counsel's post-trial affidavit reveals that the defense did not present character letters because they did not exist. The defense counsel solicited letters, but received no responses to his requests. Despite the inconsistencies between the two post-trial affidavits, the appellate filings and the record as a whole "compellingly demonstrate" the improbability of the appellant's allegations. *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). Consequently, we see no ineffectiveness here. *See Strickland*, 466 U.S. at 687.

Request for New Counsel

Because of his dissatisfaction with his counsel's performance on the Article 13, UCMJ, motion, the appellant asked the military judge for permission to release his

counsel and obtain a new one. This request occurred on the fifth day of trial. The military judge told the appellant that he could obtain a new counsel, but that his new counsel must be ready to proceed after a two-hour recess. He also told the appellant he had the option of representing himself, but advised against it. Faced with these alternatives, the appellant decided to keep his trial defense counsel on the case.

We find no abuse of discretion in the military judge's decisions. *See United States v. Wiest*, 59 M.J. 276, 279 (C.A.A.F. 2004). "[T]he right to counsel of choice is not absolute and must be balanced against society's interest in the efficient and [orderly] administration of justice." *United States v. Thomas*, 22 M.J. 57, 59 (C.M.A. 1986). The record of trial shows the military judge appropriately balanced all factors, including the reason for the appellant's request, the lack of any irreconcilable conflict between the appellant and trial defense counsel, the timing of the request, and the interest of society in avoiding further delay in a trial before court members. We find no abuse of discretion in the balance struck by the military judge.

Conclusion

All of the allegations of error in this case flowed from an attempt to cloak the appellant's pretrial duties with the mantle of pretrial punishment. This is true despite the fact that the appellant was neither held in pretrial confinement nor subjected to any other form of pretrial restraint. We do not believe Article 13, UCMJ, countenances such debates. Article 13, UCMJ, "should be made of sterner stuff."[4] 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, 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.

Judge FINCHER authored this opinion prior to his reassignment.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator

[4] Shakespeare, William, *Julius Caesar*, Act III, Scene II.