UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class SARAH L. THOMPSON
United States Air Force

ACM 36911

30 May 2008

Sentence adjudged 07 November 2006 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Paula B. McCarron (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 9 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Coretta E. Gray.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

OPINION OF THE COURT

FRANCIS, Senior Judge:

Consistent with her plea, the appellant was convicted by general court-martial of one specification of desertion, in violation of Article 85 UCMJ, 10 U.S.C. § 885. A military judge sentenced her to a dishonorable discharge, 9 months confinement, forfeiture of all pay and allowances, and reduction to E-1. The convening authority reduced the punitive discharge to a bad-conduct discharge, but otherwise approved the adjudged sentence. The appellant asserts two errors. We affirm the findings and sentence, but find the appellant entitled to an additional 39 days credit for illegal pre-trial confinement.

Illegal Pre-trial Punishment

The appellant asserts the judge erred by not awarding the appellant credit under Article 13, UCMJ, 10 U.S.C. § 813 for illegal pre-trial confinement when a civilian confinement facility punished her for others' misconduct by placing her on cell lockdown for 39 days, wherein she could not exercise or talk, and could only leave her cubicle to eat, shower, and use the toilet.

We review claims for additional sentence credit arising from alleged Article 13 violations de novo. *United States v. Fischer*, 61 M.J. 415, 418 (C.A.A.F. 2005); *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). Such claims present mixed questions of law and fact, and we will not overturn the military judge's findings of fact unless they are clearly erroneous. *Fischer*, 61 M.J. at 418. The appellant bears the burden of establishing that a violation occurred. *Id.*

"Article 13, UCMJ, prohibits two things: (1) the imposition of punishment prior to trial, and (2) conditions of arrest or pretrial confinement that are more rigorous than necessary to ensure the accused's presence for trial." *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005). The first prong necessarily requires an "intent to punish, determined by examining the intent of detention officials or by examining the purposes served by the restriction or condition, and whether such purposes are 'reasonably related to a legitimate governmental objective.'" *Id.* (internal citations omitted). The second prong "prevents imposing unduly rigorous circumstances during pretrial detention." *Id.*

The appellant spent a total of 61 days in pre-trial confinement, all in the local civilian detention facility in Sumter, South Carolina.[1] The military facility at Shaw Air Force Base, (AFB) South Carolina, her base of assignment, could not simultaneously accommodate both male and female inmates and already had male inmates in residence when the appellant was ordered into confinement. After determining that other area military confinement facilities did not have sufficient space, confinement officials at Shaw AFB transported the appellant to the Sumter facility. The Air Force had an established Memorandum of Understanding with the Sumter facility governing confinement of military inmates. The Sumter facility was certified by the state, and had previously been used to house military inmates without incident.

Within the Sumter facility, the appellant was housed in an open pod with 39-40 other females, including both pre-trial and post-trial inmates. All, including the appellant, wore the same orange jumpsuit. The pod had an open, common area with tables for eating and activities, open bay toilets and showers, and individual open bay

[1] The decision to place the appellant in pre-trial confinement is not in issue. Within two days of the start of her confinement, a pre-trial confinement hearing determined there was probable cause to believe she committed the offense of desertion, that she posed a continuing flight risk, and that lesser forms of restraint were inadequate.

cubicles, which were occupied by anywhere from two to four inmates, depending on the size of the cubicle. During part of her stay, the appellant was in a two person cubicle, and had a succession of single person roommates. At other times, she was in a four person cubicle, with two to three other roommates.

When the appellant was placed in the Sumter facility, the entire female pod was already in lockdown status, and remained that way for 39 days into her confinement. Given the open bay configuration of the pod, and the open cubicles, lockdown was observed by having the inmates sit on their beds, without talking. They could not get up except to go to the bathroom, take a shower, or eat their meals. They also were not allowed to go to the exercise yard and were prohibited from exercising in their cubicles. The lockdown was started after female prisoners were caught passing notes to the male prisoners in the laundry room.

Based on the evidence presented in connection with the defense motion for Article 13 credit for the entire period of pre-trial confinement, the judge, with one minor exception, denied the requested relief, finding that a) there was no intent to punish; and b) the circumstances under which the appellant was confined were not unduly rigorous or so excessive as to constitute punishment.[2]

The evidence of record supports the judge's finding that there was no intent to punish the appellant. She was placed in pre-trial confinement because she was believed to be a flight risk and the civilian facility was chosen solely because no nearby military facility was available. The appellant's own testimony in connection with the defense Article 13 motion established that the lockdown restrictions were not aimed specifically at her, but were already in place when she arrived and were imposed as the result of prior inmate misconduct. Maintaining security and order are within the expertise of corrections officials. *United States v. Crawford,* 62 M.J. 411, 414 (C.A.A.F. 2006). In the absence of substantial evidence that the methods used by confinement officials to meet such goals were unreasonable or arbitrary, we will not second guess such determinations. *Id.*

However, the conditions imposed on the appellant during the 39 days of lockdown fail the second Article 13 prong, in that they were more rigorous than necessary to insure her presence at trial. We do not question the efficacy of the method used by the confinement officials to maintain order. Nonetheless, it is clear that, vis-à-vis this appellant, the conditions imposed during lockdown, *i.e.,* forcing her to remain sitting in her bunk, without talking, with only limited meal, bathroom, and shower breaks, were excessive when measured by Article 13 standards. The appellant's un-rebutted testimony

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[2] The sole exception related to lost shower privileges. On five occasions while the appellant was confined, all female inmates in the pod were temporarily deprived of shower privileges after one of the inmates (not the appellant), misbehaved. The military judge found the loss of shower privileges to be illegal "punishment" and awarded the appellant five extra days credit.

at trial established that she engaged in no personal misconduct to merit the lockdown restrictions and indeed, had not yet even arrived at the facility when the triggering inmate misconduct occurred. Nor are we able to see how forcing the appellant to remain on her bed, without talking, somehow increased the government's assurance that she would be available for trial beyond that guaranteed by her general confinement.

In reaching this conclusion, we recognize that civilian confinement facilities often suffer space limitations that force the same confinement conditions on pre-trial and post-trial inmates. With fewer military confinement facilities available, military members held in pre-trial confinement are more likely to be subject to those same conditions. When they are, the only realistic relief available may often be an appropriate credit against any adjudged period of confinement. We grant it here.

At trial, the trial defense counsel sought additional credit under Article 13 and Rule for Courts-Martial 305(k) for the entire period the appellant was held in pre-trial confinement. Although the petition before this Court seeks relief only for the 39 days she was held in lockdown status, our review encompasses the entire period of pre-trial confinement. Except for the 39 days at issue here, we find no error in the military judge's determination that further credit was not warranted. The fact that the appellant was co-mingled with, and wore the same attire as post-trial prisoners does not *per se* amount to illegal pre-trial confinement, but are simply factors to be considered. *King,* 61 M.J. at 228. The military judge did so, as have we. Further, while not raised by the appellant, we have considered our superior court's ruling in *United States v. Adcock*[3] and find this case distinguishable.

Critical to the court's holding in *Adcock* was a finding that Air Force officials abused their discretion through knowing, repeated "regulatory violations [that demonstrated] 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.'" *United States v. Junior*, 65 M.J. 830, 833 (A.F. Ct. Crim. App. 2007) (quoting *Adcock*, 61 M.J. at 23). The appellant has presented no evidence of such an abuse of discretion here. On the contrary, Air Force personnel at Shaw AFB went to great lengths to ensure the appellant's safety and to preserve the presumption of innocent that surrounded her while in pre-trial confinement. At no time during her pre-trial confinement was appellant referred to as "prisoner." Rather, civilian confinement personnel called her by her last name, while base officials, consistent with her pre-trial status, either referred to her by her last name or called her "Pre-trial confinee Thompson." Further, the appellant, even during the lockdown period, was taken from the facility at least once a week, sometimes more, and driven back to Shaw AFB to visit counsel and take care of personal business. Each time, she was allowed to change from prison garb to street clothes before leaving confinement. The base visits usually lasted anywhere from

[3] *United States v. Adcock*, 65 M.J. 18 (C.A.A.F. 2007).

two and a half to four hours, and sometimes longer. During each visit, the base confinement officer asked the appellant a series of questions about her health and safety. Each time, the appellant assured him she was safe and never expressed concerns to the contrary. In addition, whenever the appellant raised a specific request for care, whether dental, medical, or spiritual, she was taken to the base to get it. Considered as a whole, it is clear from the appellant's treatment that Air Force officials were cognizant of the appellant's status as a pre-trial confinee and acted accordingly.

Sentence Appropriateness

The appellant asserts that her sentence is inappropriately severe when the individual she deserted with only received one month and 12 days of confinement, 36 days of hard labor without confinement, reduction to E-2, forfeiture of $500, and no punitive discharge.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate, but are not authorized to engage in exercises of clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

Although we generally consider sentence appropriateness without reference to other sentences, we are required to examine sentence disparities in closely related cases. *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001). Closely related cases include those which pertain to "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999). "[A]n appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.'" *Id.* If both factors apply, the question becomes whether there is a rational basis for the difference in the respective sentences. *Id.*; *United States v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001).

The appellant's sentencing claim urges comparison of her sentence to the sentence received by Airman First Class (A1C) Ung. The appellant deserted from her unit at Shaw AFB in June 2006 and flew to Seattle, Washington, where she met up with A1C Ung, an airman from a different unit who was also absent without authority. Together, the appellant and A1C Ung drove across the border into Canada, where they remained until voluntarily returning to the United States, and military control, on 6 September 2006. Both airmen were charged with desertion.

Given these circumstances, the appellant correctly asserts that the two cases are "closely related," in that the two airmen clearly acted in concert. Further, the sentences received are, at least facially, "highly disparate," in that A1C Ung received no punitive discharge and a significantly lesser period of confinement. Nonetheless, there is a rational basis for the sentence differences. The appellant pled guilty to desertion and was convicted of that offense. A1C Ung contested the desertion charge and was found not guilty, but guilty of being absent without leave, a significantly less serious offense. The difference in the seriousness of the offenses of which they were convicted is alone sufficient to justify the difference in their respective sentences.

Considering the entire record, the appellant's sentence is not disproportionately severe, but is fair, just, and appropriate.

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. The appellant will be credited with an additional 39 days against the approved sentence to confinement.

OFFICIAL

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