UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ANDREW J. THOMPSON
United States Air Force

ACM S32019

19 November 2012

Sentence adjudged 13 December 2011 by SPCM convened at Buckley Air Force Base, Colorado. Military Judge: Scott E. Harding (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 3 months, forfeiture of $978.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Scott W. Medlyn and Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Rhea A. Lagano; and Gerald R. Bruce, Esquire.

Before

STONE, GREGORY, and HARNEY
Appellate Military Judges

PER CURIAM:

On 13 December 2011, in accordance with his pleas, a military judge sitting alone found the appellant guilty of one specification of wrongful use of a synthetic cannabinoid commonly referred to as "spice" and one specification of wrongful use of "spice" while on duty as a sentinel or lookout, both in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 3 months, forfeiture of $978.00 pay per month for 3 months, and reduction to E-1. On 18 January 2012, the convening authority approved the sentence as adjudged.

The appellant has raised two issues for our consideration on appeal: 1) whether the appellant's confinement in the same open cell, or "pod," with a foreign national at the Douglas County Jail (DCJ) in Colorado violated Article 12, UCMJ, 10 U.S.C. § 812, and, if so, whether the burden should be placed upon the appellant for resolving a violation of Article 12, UCMJ, because it promotes a national security interest beyond the individual interest of the appellant; and 2) whether the appellant was denied his Sixth Amendment[1] right to effective assistance of counsel when the appellant's trial defense counsel failed to advise the appellant of his Article 12, UCMJ, rights or the process for resolving its violation.

Background

On 13 December 2011, the appellant was tried at Buckley Air Force Base, Colorado. At the conclusion of his trial, the appellant was initially confined at DCJ and remained there until his transfer to the Miramar Naval Brig on 12 January 2012. In his post-trial declaration, the appellant states that, each day during his 30 days of confinement time at DCJ, he had direct and indirect interaction on numerous occasions with 8-12 "Mexicans" being held for deportation. The appellant states that, between 0700-2130 hours, he congregated with the foreign nationals by watching television, playing cards and games, sharing cleaning details, and playing basketball together. During the nighttime hours, the appellant was confined to a separate cell.

Even though it was clear to the appellant that he was confined with foreign nationals, which implicates Article 12, UCMJ, he did not advise his trial defense counsel or submit a complaint under Article 138, UCMJ, 10 U.S.C. § 938. The appellant stated "I had no knowledge of Article 12, UCMJ, or that my confinement in immediate association with a foreign national was a violation of Article 12," UCMJ. He states he was aware of a prisoner grievance system at DCJ, but did not use the system because he was "unaware that my situation was in violation of any regulations." He further avers that he did not seek redress under Article 138, UCMJ, because neither his unit nor his defense counsel told him about that process.

Law

Article 12, UCMJ, provides, "No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces." The "immediate association" language means that military members can be confined in the same jail or brig as a foreign national but they have to be segregated into different cells. *United States v. Wise*, 64 M.J. 468, 475 (C.A.A.F. 2007). "The Air Force confines personnel in facilities that prevent immediate association with enemy prisoners of war or foreign nationals who are not

[1] U.S. CONST. amend. VI.

members of the US Armed Forces." Air Force Instruction (AFI) 31-205, *The Air Force Corrections System*, ¶ 1.2.4 (6 July 2007).

'"[A] prisoner must seek administrative relief prior to invoking judicial intervention' to redress concerns regarding post-trial confinement conditions." *Wise*, 64 M.J. at 471 (alteration in original) (quoting *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001)). *See also United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997). The purpose of this requirement is to promote the resolution of grievances at the lowest possible level and to ensure that an adequate record has been developed to aid our appellate review. *Wise*, 64 M.J. at 471 (citing *Miller*, 46 M.J. at 250).

Whether an appellant exhausted his administrative remedies is reviewed de novo. *Id*. "Exhaustion requires [the a]ppellant to demonstrate that two paths of redress have been attempted, each without satisfactory result." *Id.* The appellant "must show that, 'absent some unusual or egregious circumstance . . . he has exhausted the prisoner-grievance system [in the confinement facility] and that he has petitioned for relief under Article 138," UCMJ. *Id*. (citing *White*, 54 M.J. at 472).[2]

Discussion

The appellant avers that his confinement in the DCJ with foreign nationals violated Article 12, UCMJ. We agree.

In this case, we find that the appellant failed to exhaust his administrative remedies by not filing a complaint with the confinement facility or submitting an Article 138, UCMJ, complaint. [However, at the time he notified his appellate defense counsel of the potential Article 12, UCMJ, violation, the appellant had been released from confinement and the special court-martial convening authority had already taken action in his case. As a result, few, if any, administrative remedies were available to take corrective action. We conclude that in the "unusual" circumstances of this case, the appellant is entitled to have the merits of his asserted error addressed.]

In considering the merits of his asserted error, we find that the appellant's conditions of confinement in the DCJ violated Article 12, UCMJ. The appellant claimed

[2] Article 138, UCMJ, 10 U.S.C. § 938, states:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

that he was confined in the same pod area with foreign nationals where they essentially interacted with each other for most of the day until 12 January 2012, when he was transferred to Miramar Naval Brig. As such, we find that the appellant was confined with foreign nationals, which satisfies the meaning of "immediate association" of foreign nationals prohibited by Article 12, UCMJ, and AFI 31-205.

Because of this Article 12, UCMJ, violation, we find that the appellant should receive credit for the 30 days he was confined in immediate association with foreign nationals in the DCJ, from 13 December 2011 to 12 January 2012. Accordingly, we order that the appellant be awarded 30 days of post-trial confinement credit for the violation of Article 12, UCMJ.[3] Additionally, we find no national security concern based on the matters submitted by the appellant. Because we resolved the first assignment of error favorable to the appellant, his claim that he received ineffective assistance of counsel is moot.

Conclusion

The approved findings and sentence, including 30 days of confinement credit, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant remains. 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 approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court

[3] We again recommend that all base legal offices ensure that any support agreements with civilian operated confinement facilities include a provision requiring compliance with Article 12, UCMJ, 10 U.S.C. § 812.