

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman First Class TIMOTHY M. TOWHILL
United States Air Force**

ACM 37695

16 March 2012

Sentence adjudged 21 April 2010 by GCM convened at Grand Forks Air Force Base, North Dakota. Military Judge: Nancy J. Paul and J. Wesley Moore (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 30 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr and Captain Nathan A. White.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Lauren N. Didomenico; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ORR, Chief Judge:

In accordance with his pleas, the appellant was found guilty by a military judge sitting alone of one charge and specification of indecent conduct, and one charge and one specification of wrongfully and knowingly possessing one or more visual depictions of minors engaging in sexually explicit conduct, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. § 920, 934. The approved sentence consists of a bad-conduct discharge, confinement for 30 months, and reduction to E-1.

The appellant 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 Grand Forks County Correctional Center (GFCCC), in North Dakota, 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, violation where the Article promotes a national security interest beyond the individual interest of the appellant; and 2) whether the appellant was denied his Sixth Amendment¹ right to effective assistance of counsel when the appellant's trial defense counsel failed to advise appellant of Article 12, UCMJ, or the process for resolving its violation.

Background

On 21 April 2010, the appellant was tried at Grand Forks Air Force Base, North Dakota. At the conclusion of his trial, the appellant was initially confined at GFCCC and remained there until his transfer to the Charleston Naval Brig on 15 June 2010. After initially spending several days in segregation, the appellant was placed into housing Pod #2-A. On 10 May 2010, a GFCCC corrections officer moved the appellant to a different housing Pod (Pod #2-B) because there was a foreign national who was also residing in housing Pod #2-A. According to the appellant in his post-trial declaration, the foreign national only spoke Spanish and was known by his nickname, "The Mexican." Although the appellant and "The Mexican" were confined in separate cells, they had direct and indirect interaction on numerous occasions.

During his confinement at the GFCCC, the appellant received visits from members of his squadron and his defense counsel. Even though it was clear to the appellant that he was confined with a foreign national, 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 "no civilian or military government official, including my trial defense counsel, advised me of the ability to raise the issue of Article 12 formally or informally." He does not recall any briefings concerning grievance procedures at the GFCCC. The appellant claims he was not aware that being confined with a foreign national was a problem until sometime after his transfer to the Charleston Naval Brig. He avers that he learned of his right of redress only after talking to other prisoners in the Naval Brig and later to his appellate defense counsel in January 2011.

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.

¹ U.S. CONST. amend. VI.

468, 475 (C.A.A.F. 2007). “The Air Force confines inmates in facilities that prevent immediate association with enemy prisoners of war or foreign nationals who are not members of the US Armed Forces.” Air Force Instruction (AFI) 31-205, *The Air Force Corrections System*, ¶ 1.2.4 (28 April 2011).

“‘[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) (citing *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001); *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. *Id.* (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).

Article 138, UCMJ, provides that:

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.

Discussion

The appellant avers that his confinement in the GFCCC with a foreign national violated Article 12, UCMJ, and that he did not forfeit his Article 12, UCMJ, claim by not exhausting his administrative remedies. We agree.

In this case, 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 transferred to a military facility and the general 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.

Additionally, the appellant's failure to exhaust his administrative remedies did not preclude the development of an adequate record as to the facts and circumstances of his confinement so that we could conduct our appellate review. *See Wise*, 64 M.J. at 471 (citing *Miller*, 46 M.J. at 250). Therefore, under the facts and circumstance of this case, judicial intervention is appropriate.

Considering our review of the Record of Trial, 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 GFCCC were in violation of Article 12, UCMJ. The appellant claimed that he was confined in the same bay area with a foreign national where they essentially interacted with each other for most of the day until 10 May 2010, when he was moved. Captain LW, who was in charge of the adult corrections at GFCCC during the relevant time period, signed a declaration stating that the appellant "was transferred to Pod #2-B on 10 May 2010 because a non-American prisoner was in Pod #2-A during the time [the appellant] was in Pod #2-A." Thus, we are convinced that the appellant was confined with a foreign national and this satisfies the meaning of "immediate association" of foreign nations that is 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 17 days he was confined in immediate association with a foreign national in the GFCCC from 24 April 2010 to 10 May 2010. Accordingly, we order that the appellant be awarded with 17 days of post-trial confinement credit for the violation of Article 12, UCMJ.²

We note the appellant believes this Court should award him an additional 68 days of confinement credit for the Article 12, UCMJ, violation.³ We disagree. We find no national security concern based on the matters submitted by the appellant. Furthermore, considering the fact that the appellant did not complain or raise this issue until six months after the GFCCC officials transferred him to a military confinement facility, we believe 17 days of confinement credit is sufficient to remedy any harm suffered 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.

² 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.

³ We note that the Appellant's Motion for Expedited Review asks for a 51-day reduction of his sentence. We considered this reduced request as a typographical error.

The approved findings and sentence are correct in law and fact and, in light of the post-trial confinement credit, 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



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

STEVEN LUCAS
Clerk of the Court