UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class KYLE M. WALKER
United States Air Force

ACM 37886

22 March 2013

Sentence adjudged 07 December 2010 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Martin T. Mitchell (sitting alone).

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

Appellate Counsel for the Appellant: Major Nathan A. White.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Tyson D. Kindness; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

PER CURIAM:

A general court-martial composed of a military judge convicted the appellant, consistent with his pleas, of conspiracy to distribute a controlled substance, making a false official statement, wrongful use of a controlled substance, obstruction of justice, forgery and larceny, in violation of Articles 81, 107, 112a, 134, 123, and 121, UCMJ, 10 U.S.C. §§ 881, 907, 912a, 934, 923, 921. The adjudged sentence consisted of a bad-conduct discharge, confinement for 1 year, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged. On appeal, the appellant asserts that he suffered cruel and unusual punishment following his trial and that the obstruction of justice specification fails to state an offense because it omits the required terminal

element for Article 134, UCMJ, offenses. Finding no error that materially prejudices the appellant, we affirm.

Background

The appellant pled guilty to a variety of offenses stemming from his misuse of Oxycodone (commonly known as OxyContin), a Schedule II controlled substance. After a random urinalysis sample provided by the appellant in June 2009 tested positive, the appellant was brought back early from his deployment to Afghanistan. Under rights advisement in September 2009, he made false official statements to military investigators by saying he had taken what he thought was an over-the-counter pill given to him by a friend, when in fact he knew the friend had provided him with Oxycodone. Soon thereafter, he began using this drug on a frequent basis through November 2010. He also provided the drug to his girlfriend, and the two of them provided it to others, including an undercover informant working with military investigators. The appellant also stole prescription pads from a civilian oral surgeon, forged that doctor's signature, and filled multiple orders of Oxycodone between June and September 2010.

The appellant pled guilty to the offenses on 7 December 2010. During his guilty plea inquiry and in his sentencing case, the appellant explained how he had become addicted to Oxycodone in late 2009, the effect this addiction had on him, and his efforts to quit "cold turkey." When those efforts failed, he conducted research into local drug treatment centers. On 17 November 2010, he met with personnel from the Center for Behavioral Health in Tucson.

According to a letter signed by a drug counselor from the Center, the appellant was evaluated and diagnosed with Opioid Dependency and had been admitted into "Medication Assisted Treatment" (MAT), meaning he was being treated with "methadone in conjunction with a recovery model approach." The letter explained "the length of treatment is dependent on the individual's recovery process which includes the patient's genetic make-up and history of life events that shapes the individual's perceptions" and that "some individuals may require MAT for an undetermined amount of time in conjunction with individual and group therapy."

Between 17 November 2010 and his court-martial, the appellant had been to the Center every day for his methadone dose. The appellant testified the Center's approach was to raise the dose of methadone until the patient is stabilized and then use that, along with counseling, to help the patient understand their destructive behavior with drugs. He also testified the Center's goal is to wean individuals off methadone, though some patients need to be on it for the rest of their lives.

On 7 December 2010, the appellant was sentenced to confinement by the military judge. According to declarations submitted to this Court by the appellant and his wife,

military personnel from the local Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program evaluated him when he entered confinement and concluded he did have an opiate addiction and that the best course of treatment was to continue with his MAT program. The appellant was informed that he could continue with the methadone treatment even after he was transferred to the regional correctional facility at Miramar Air Base.

The declarations also state that personnel from the appellant's unit took him from the local confinement facility to his Center appointment each day until approximately 3 January 2011. On that day, the appellant and his wife contend he was involuntarily taken to a local hospital so he could undergo a medically-supervised "detox" from methadone, as local authorities had learned he could not be on methadone when he was transferred to or confined at Miramar. The trial defense counsel's declaration says "[m]y understanding was that, although it was medically permissible to do so, the sole purpose of admitting [the appellant to the hospital] was to detoxify him so that he could be transferred to Miramar" and "I am unaware of any reason why [his] transfer could not be delayed until [he] completed his methadone treatment while confined [on base]." The appellant's wife was concerned by this turn of events and contacted the appellant's commander who arranged for the appellant's transfer to Miramar to be delayed for as long as necessary to properly remove him from the methadone.

The declarations describe the mental and physical pain the appellant experienced while withdrawing from methadone, as well as various claims about improper treatment and advice being provided to them by what they perceived to be the inattentive and incompetent staff at the civilian hospital. The appellant was released from the hospital on 11 January 2011 and returned to the base confinement facility. The following day, the appellant states he was taken to the emergency room for "esophagus spasm and an irregular heartbeat, clear indications I was still in withdrawal." Two days later, he was transferred to the Miramar confinement facility.

The appellant's declaration states he was still suffering from withdrawal after his arrival at Miramar. While playing basketball the day after his arrival, the appellant suffered an ankle injury. He contends he received inadequate and delayed treatment for this injury, which was determined ten days later to be a "third degree sprain with ligament tearing that had resulted in a bone fragment being pulled away with the ligament." According to a declaration from the appellant's trial defense counsel, based on that counsel's undefined "interaction" with the appellant and Miramar Brig personnel, the latter "seemed indifferent to [his] situation and did not seem to provide him appropriate medical assistance in a timely manner."

The appellant and his wife filed a complaint with the Inspector General's office regarding their concerns about his medical treatment, and communicated with multiple individuals in the confinement facility and the appellant's chain of command. He also

raised these issues with the convening authority in his 23 March 2011 clemency submission.

On appeal, the appellant contends he suffered cruel and unusual punishment "when he was forcibly admitted to a civilian detoxification center and suffered the painful effects of complete withdrawal from opioid treatment therapy for the sole purpose of affecting his transfer from one confinement facility to another." He makes the same claim based on "endur[ing] a painful ankle injury without adequate and timely medical treatment while at Miramar." He further states he has exhausted his administrative remedies by seeking out help from his unit, the Inspector General, and complaining to prison officials, as well as the convening authority and his staff judge advocate.

Cruel and Unusual Punishment

The Eighth Amendment prohibits "cruel and unusual punishments." U.S. CONST. amend. VIII. It prohibits punishments that are "'incompatible with the evolving standards of decency that mark the progress of a maturing society, or which involve the unnecessary and wanton infliction of pain.'" *United States v. Lovett*, 63 M.J. 211, 214 (C.A.A.F. 2006) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976)). Similarly, Article 55, UCMJ, 10 U.S.C. § 855 prohibits "cruel or unusual punishment."

We determine whether the facts alleged constitute cruel and unusual punishment de novo. *United States v. White*, 54 M.J. 469, 471 (C.A.A.F. 2001). Absent evidence that the appellant has been subjected to one or more of certain enumerated punishments specifically prohibited by Article 55, UCMJ, we apply the same standard to claims of Eighth Amendment and Article 55, UCMJ, violations. *United States v. Pena*, 64 M.J. 259, 265 (C.A.A.F. 2007). To prevail, the appellant "must show: (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [his] health and safety; and (3) that he 'has exhausted the prisoner-grievance system [] and . . . petitioned for relief under Article 138, UCMJ, 10 U.S.C. § 938.'" *Lovett*, 63 M.J. at 216 (footnotes and citations omitted).

We note that "[d]enial of adequate medical attention can constitute an Eighth Amendment or Article 55[, UCMJ,] violation." *White*, 54 M.J. at 474 (citing *United States v. Sanchez*, 53 M.J. 393, 396 (C.A.A.F. 2000)). However, while medical care provided to inmates must be reasonable, it need not be not "perfect" or "the best obtainable." *Id.* at 475 (quoting *Harris v. Thigpen*, 941 F.2d 1495, 1510 (11th Cir. 1991).

The appellant has not met his burden of establishing that he was denied reasonable medical care either through his removal from methadone or the treatment of his ankle. Although the process of detoxifying from methadone was undoubtedly uncomfortable and painful, there is no evidence in the record that this process was conducted in a

medically inappropriate manner or that the medical professionals' judgments were unreasonable. By the appellant's own admission, some patients remain on methadone the rest of their lives, and his counselor's letter makes clear that the future track of his treatment was uncertain and dependent on a variety of factors. Given that, the military's decision to have him undergo a medically-supervised detoxification so he could be transferred to another military confinement facility was not unreasonable and certainly does not rise to the level of cruel and unusual treatment or punishment. Similarly, the treatment the appellant experienced for his injured ankle does not constitute a violation of the Eighth Amendment or Article 55, UCMJ, as he has not met his burden of establishing that he was denied reasonable medical care. Having concluded that the conditions complained of by the appellant did not constitute cruel or unusual treatment, we need not address whether or not he exhausted his administrative remedies before seeking judicial redress.

Sufficiency of the Article 134, UCMJ, Specification

After he was interviewed by agent from the AFOSI about his distribution and possession of controlled substances, the appellant called his girlfriend, ADT, and asked her to remove his drug paraphernalia from his apartment. She complied with his request, removing a lighter, dollar bill, straw, and case that the appellant frequently used to consume Oxycodone. Based on this incident, the appellant was charged on 10 May 2010 with "wrongfully endeavoring to impede an investigation . . . by instructing [ADT] to go to his residence and destroy any evidence of drugs therein," in violation of Article 134, UCMJ. This specification omitted the terminal element for Article 134, UCMJ, offenses, which the appellant alleges is error.

Whether a charged specification states an offense is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted). The failure to allege the terminal element of an Article 134, UCMJ, offense is error. *United States v. Ballan*, 71 M.J. 28, 34 (C.A.A.F.), *cert. denied*, 133 S. Ct. 43 (2012) (mem.). In the context of a guilty plea, such an error is not prejudicial when the military judge correctly advises the appellant of all the elements and the plea inquiry shows that the appellant understood to what offense and under what legal theory he was pleading guilty. *Id.* at 34-36.

During the plea inquiry into the present case, the military judge advised the appellant of each element of the Article 134, UCMJ, offense at issue, including the terminal element. The military judge defined the terms "conduct prejudicial to good order and discipline" and "service discrediting" for the appellant. The appellant then admitted that it would have been important to the military investigation if his drug paraphernalia had been found in his residence, and that ADT's actions caused a "reasonably direct and obvious injury to good order and discipline." He also admitted that this type of conduct was service discrediting as military members are held to a high

standard of conduct and the public would think less of the Air Force if they knew what he did. Therefore, as that in *Ballan*, the appellant here suffered no prejudice to a substantial right because he knew under what clause he was pleading guilty and clearly understood how his conduct violated the terminal element of Article 134, UCMJ.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[1] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[1] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).