UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant DERRICK M. WILLIAMS
United States Air Force

ACM 36679 (f rev)

30 October 2008

Sentence adjudged 02 March 2005 by GCM convened at Kirtland Air Force Base, New Mexico. Military Judge: Jack L. Anderson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 18 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland. Major Anniece Barber, Captain Vicki A. Belleau, and Captain Timothy M. Cox.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, Lieutenant Colonel Matthew S. Ward, Lieutenant Colonel Jeffrey A. Ferguson, and Captain Jamie L. Mendelson.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

UPON FURTHER REVIEW

PER CURIAM:

In accordance with his pleas, the appellant was found guilty of desertion, escaping from confinement, two specifications of fleeing from apprehension, operating a vehicle in

a reckless manner, wrongful appropriation of an automobile,[1] assaulting an airman who was in execution of her law enforcement duties, three specifications of assault consummated by battery, assault upon a federal law enforcement officer who was in the execution of his duties, assault with a dangerous weapon, unlawful entry,[2] communicating a threat, and wrongfully seizing and holding an individual against her will in violation of Articles 85, 95, 111, 121, 128, and 134, UCMJ, 10 U.S.C. §§ 885, 895, 911, 921, 928, 934.

Contrary to his pleas, the appellant was found guilty of additional specifications of assault consummated by battery, assault with a dangerous weapon, wrongfully confining and holding an individual against her will, and communicating a threat, in violation of Articles 128 and 134, UCMJ. A military judge, sitting alone as a general court-martial, sentenced the appellant to a dishonorable discharge, confinement for 18 years, total forfeitures of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant raises four assignments of error.[3] Essentially he argues: (1) he was illegally punished prior to trial in violation of Article 13, UCMJ, 10 U.S.C. § 813; (2) that several specifications, taken together, constitute an unreasonable multiplication of charges; and (3) that his sentence should be reassessed because his

---

[1] The appellant was originally charged with robbery of the vehicle, in violation of Article 122, UCMJ, 10 U.S.C. § 922, but pled guilty to the lesser included offense of wrongful appropriation in violation of Article 121, UCMJ, 10 U.S.C. § 921.

[2] The appellant was originally charged with burglary, in violation of Article 129, UCMJ, 10 U.S.C. § 929, but pled guilty to the lesser included offense of unlawful entry in violation of Article 134, UCMJ, 10 U.S.C. § 934.

[3] The appellant's specific assignments of error are as follows:

I.

Whether mental health care providers were deliberately indifferent to appellant's psychiatric needs by keeping him in suicide watch status without evaluating him in accordance with acceptable mental health standards and Air Force Instruction (AFI) 31-205, *The Air Force Corrections System* (7 Apr 2004), such that he was punished in violation of Article 13, UCMJ, 10 U.S.C. § 813, and if so, whether appellant is entitled to additional sentence credit.

II.

Whether the conditions of appellant's pretrial confinement in suicide watch, which included, inter alia, denial of books, a radio, and/or a CD player, and 24-hour-a-day lighting, were so excessive that they constitute punishment in violation of Article 13, UCMJ, and if so, whether appellant is entitled to additional sentence credit.

III.

Whether the Specification of Additional Charge III and Specification 2 of Additional Charge V and the Specifications of Additional Charges VI and IX constitute an unreasonable multiplication of charges.

Supplemental Assignment of Error

Whether the interests of justice require reassessment of appellant's sentence to confinement in light of the fact were it not for his illegal pretrial confinement, he would have been eligible to receive 10 days per month good conduct time abatement credit against his sentence instead of only 5 days per month. This issue is filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

illegal pretrial confinement resulted in a reduction in his potential good conduct time abatement credit.

In an earlier decision, this Court, ruling adversely to the appellant, affirmed the findings and sentence. *United States v. Williams*, ACM 36679 (A.F. Ct. Crim. App. 19 Dec 2007) (unpub. op.). However, the Court of Appeals for the Armed Forces set aside our decision and remanded the case to us for consideration in light of *United States v. Adcock*, 65 M.J. 18 (C.A.A.F. 2007). *United States v. Williams*, No. 08-0339/AF (C.A.A.F. 7 Aug 2008). Upon further review, this Court must not only decide the issues raised by the appellant's assignments of error, we must also decide whether the military judge abused his discretion in not awarding the appellant additional sentencing credit for a violation of Air Force Instruction (AFI) 31-205, *The Air Force Corrections System* (7 Apr 2004). Having conducted a further review, we: (1) find no merit in the appellant's asserted errors; (2) find the military judge did not abuse his discretion in deciding not to award the appellant additional sentencing credit for a violation of AFI 31-205; and (3) accordingly affirm the findings and the sentence.

Background

The appellant was a noncommissioned officer with almost 10 years of service when he was ordered by his commander to undergo a mental health evaluation in March 2004. The evaluator, Dr. Leckie, concluded that the appellant was a low, though not nonexistent, risk for suicide and recommended the unit continue to provide support, encouragement, and queries about thoughts of self-harm. On 31 March 2004 the appellant kidnapped his ex-girlfriend, SSgt R, and transported her by car to Las Vegas, Nevada. The Federal Bureau of Investigation (FBI) captured him the next day. During the course of the kidnapping, the appellant was originally threatening toward his victim, but became progressively less threatening and more suicidal.

By the end of the ordeal, SSgt R testified that part of the reason she did not try to escape was because she still cared for the appellant and did not want him to kill himself. This crime eventually led to the appellant's pleas of guilty to pushing SSgt R's head with his hand, kicking her once, pointing a loaded firearm at her, breaking into her house, wrongfully seizing and holding her against her will, and threatening to shoot her. Also related to this incident were his pleas of guilty to making a false official statement to the FBI agent who apprehended him and "kicking his foot at" the agent as he attempted to flee. No specifications were litigated in relation to these events.

The appellant was held in federal custody for about 14 days and then returned to Kirtland Air Force Base (AFB) and placed in pretrial confinement. On 29 May 2004, the appellant escaped from pretrial custody by overpowering the lone guard, handcuffing her to a pipe, and fleeing in her car. He led Security Forces on a chase around the base, including through base housing, then jumped out of the still-moving car and escaped over

a fence. He was apprehended the next day. On 31 May 2004, Major JL, a mental health provider, evaluated the appellant and placed him on suicide watch. On that same day, Major JL noted the appellant was uncooperative with the suicidal intervention.

The events of 29 May 2004 led to the appellant's pleas of guilty to assaulting the confinement officer by choking her, wrongfully appropriating her car, operating the car in a reckless manner by speeding through base housing, escaping from confinement, desertion, fleeing apprehension while driving the vehicle, and fleeing apprehension the next day when an OSI agent came to the door of the house in which he was staying. A specification alleging he kidnapped the confinement officer was litigated at trial. After evidence was presented, the military judge granted the defense's motion for a finding of not guilty pursuant to Rule for Courts-Martial (R.C.M.) 917.

In addition to charges relating to these two events, the government brought charges that were related to the appellant's marriage to SSgt W. The offenses charged allegedly occurred in late 2001 and early 2002. The appellant pled guilty to striking SSgt W in the face with his hand. He pled not guilty, but was found guilty of wrongfully confining and holding SSgt W against her will, choking her, communicating a threat to injure or kill her, and assaulting her by pointing a loaded firearm at her.

On 26 August 2004, Major JL, in recognition of the appellant's lack of cooperation with the suicidal intervention but with full cognizance of the appellant's potential risk for suicide and homicide, recommended removing the appellant from formal suicide watch. The appellant's trial was originally scheduled to begin in October 2004 but shortly before it took place, he hired civilian defense counsel and requested a delay until 8 December 2004. On 8 December 2004, the appellant was arraigned but his counsel moved for a new sanity board based on the bizarre behavior the appellant had been exhibiting. The sanity board was granted and the trial was postponed until late February 2005.

From 31 May 2004 until 2 March 2005, the appellant remained on formal suicide watch. From 1 June 2004 until 2 March 2005, the government failed to review the appropriateness of the appellant's continued suicide watch every 24 hours as required by AFI 31-205, ¶ 8.10. At trial, the appellant moved, inter alia, for additional sentencing credit for the government's failure to comply with AFI 31-205. The military judge granted the appellant the appropriate amount of pretrial confinement credit and additional sentencing credit (188 days) for the violations that occurred from 26 August 2004 until 2 March 2005. However, the military judge declined to award credit for the violations that occurred from 1 June 2004 until 26 August 2004.

Discussion

Issues I and II: Illegal Pretrial Punishment

The appellant, in his first and second assignments of error, contends that he was illegally punished prior to trial in violation of Article 13, UCMJ, and is therefore entitled to additional sentence credit. In his first assignment, he avers the illegal pretrial punishment was a result of the deliberate indifference his mental health care providers exhibited during his pretrial confinement period. In the second, he argues the conditions of his pretrial confinement in suicide watch, which included 24-hour-a-day lighting, denial of books, radio, CD player, and other comforts were so excessive that they constituted punishment. The appellant brought a pretrial punishment motion at trial and the military judge found in his favor, awarding 188 days of additional sentence credit. Before us, the appellant urges we find additional bases of illegal punishment and award additional credit against his sentence.

Whether an appellant is entitled to credit for a violation of Article 13, UCMJ presents a mixed question of fact and law. *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997). When a military judge makes a finding of fact that there was no intent to punish, we review that finding to determine whether it was clearly erroneous. *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000); *United States v. Washington*, 42 M.J. 547, 562 (A.F. Ct. Crim. App. 1995). We will not overturn a military judge's findings of fact unless they are clearly erroneous. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). We "review *de novo* the ultimate question [of] whether an appellant is entitled to credit for a violation of Article 13[, UCMJ]." *Id.*

The appellant's bases for arguing he was punished illegally prior to trial were essentially the same during the motion hearing as they are before this Court. After receiving written briefs and evidence, including the testimony of several witnesses, the military judge entertained argument by counsel and decided the appellant had, in fact, been illegally punished prior to trial. The military judge made detailed findings of fact which we find are consistent with the evidence and not clearly erroneous. We therefore adopt them as our own.

The military judge's findings both support and undermine the appellant's claims that he was illegally punished prior to trial and deserves additional credit. On the one hand, the conditions of his pretrial confinement were much more restrictive than the average pretrial confinee. He was placed in a "suicide watch" cell, forced to wear a suicide gown for several months, and was allowed to possess few personal items. Most onerous was the continuous lighting of his cell, which confinement officials maintained was essential for around-the-clock video monitoring of the suicide watch cell. The appellant's confinement in this cell continued even after 26 August 2004, when Dr.

Leckie determined that a "formal suicide watch" was no longer necessary, although some privileges were restored at that point.

On the other hand, the appellant was not the average pretrial confinee. He had expressed his desire to kill himself on several occasions to different individuals. On 29 May 2004, he escaped from pretrial confinement by overpowering a guard and choking her until she lost consciousness. After the appellant was recaptured, Dr. Leckie classified him as being at "high, long-term risk for suicidal and homicidal behaviors." In the months following this classification he was usually uncooperative with mental health care professionals who attempted to visit him in his cell, an attitude that prevented more thorough evaluations.

Finally, we note that although Dr. Leckie's 26 August 2004 memorandum did not recommend a formal suicide watch, in an earlier memorandum he suggested the appellant "should remain under the provisions of [your] suicidal protocol, segregated from other prisoners (since he may attempt to harm them)," and warned that the appellant was "at high risk for violence and suicide for an indefinite, long period of time." The confinement officials' decisions in regard to the appellant's pretrial treatment were reasonable, based on the information they had available to them at the time. We see no intent to punish, and, with the exception of those conditions found by the military judge to be illegal pretrial punishment, find the appellant's pretrial confinement conditions reasonably related to a legitimate government objective. *See United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005).

Based on the military judge's findings of fact as supplemented by our own independent review of the record, and after conducting our own de novo review of whether the appellant is entitled to additional credit under Article 13, UCMJ, we agree with the military judge's conclusion that the appellant was illegally punished between 26 August 2004 and the date of trial. We also agree that 188 days of additional credit was appropriate for the Article 13, UCMJ, violation and decline to award additional credit as requested by the appellant.

The appellant's first and second assignments of error, insofar as they aver illegal pretrial punishment in addition to that found by the military judge at trial and argue that additional sentence credit is appropriate, are without merit.

Issue III: Unreasonable Multiplication of Charges

In his third assignment of error, the appellant asserts that certain specifications to which he pled guilty constitute an unreasonable multiplication of charges. First, the appellant complains the specification alleging desertion[4] is essentially the same as the

[4] The desertion specification is the Specification of Additional Charge III.

specification alleging escape from confinement[5] because the latter lists the confinement facility as the appellant's place of duty. Second, the appellant argues the fleeing from apprehension[6] and reckless driving[7] specifications punish the same conduct twice. We disagree.

"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4). As we pointed out in *United States v. Butcher*, 53 M.J. 711, 714 (A.F. Ct. Crim. App. 2000), failure to raise the issue at trial waives an unreasonable multiplication of charges argument. We apply waiver "unless we find an extreme or unreasonable 'piling on' of charges." *Butcher*, 53 M.J. at 714 (citing *United States v. Quiroz*, 52 M.J. 510, 513 (N.M. Ct. Crim. App. 1999)). Our superior court has endorsed the following five-part test for determining unreasonably multiplied charges:

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications? (2) Is each charge and specification aimed at distinctly separate criminal acts? (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality? (4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure? (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

United States v. Pauling, 60 M.J. 91, 95 (C.A.A.F. 2004). The factors are to be balanced, with no single factor dictating the result.

With this in mind, we have examined the specifications complained of by the appellant and find no unreasonable multiplication of charges. First, we note the appellant pled guilty unconditionally, and we find no "extreme or unreasonable 'piling on' of charges" that would justify an exception to the waiver doctrine. *Butler*, 53 M.J. at 714. Second, after considering the appellant's actions and the resulting charges in light of the *Pauling* test, we find the charges were not unreasonably multiplied by the government. The appellant's escape from confinement was complete when he walked out the door of the confinement facility. He then committed the crime of desertion by leaving the Air Force behind with the intent to never return.

Similarly, the other specifications complained of describe two completely different crimes. First, the appellant attempted to flee law enforcement by driving away when he saw the flashing lights in his rearview mirror. He then chose to turn into base housing and greatly exceed the speed limit. When he was cornered, he drove across lawns in the

---

[5] The escape from confinement specification is Specification 2 of Additional Charge V.
[6] The fleeing from apprehension specification is the Specification of Additional Charge IX.
[7] The reckless driving specification is the Specification of Additional Charge VI.

base housing area and eventually jumped out of the vehicle while it was still moving. Fortunately it slammed into a tree and not a nearby residence. This was clearly a second crime, above and beyond the crime of fleeing apprehension.

Finally, we find even if the charges were unreasonably multiplied, there was no prejudice. The appellant's maximum allowable sentence, without any of the specifications in question here, was life in prison. The fact finder would have heard the same evidence whether the crimes were charged together or separately. We find it extremely unlikely that this experienced military judge added additional, unwarranted punishment to the appellant's adjudged sentence based on how the government chose to charge this particular case.

Credit for AFI 31-205 Violation

Axiomatically, "a government agency must abide by its own rules and regulations where the underlying purpose of such regulations is the protection of personal liberties or interests." *Adcock*, 65 M.J. at 23 (quoting *United States v. Dillard*, 8 M.J. 213, 213 (C.M.A. 1980)). AFI 31-205 reflects a decision by the Air Force to ensure that service members held on suicide watch in military confinement facilities are held in that status only as long as necessary to ensure the member's safety.

However, confinement in violation of AFI 31-205 does not create for the appellant a per se right to sentencing credit; it only provides the military judge with the discretion to award additional sentencing credit for abuse of discretion by pretrial confinement authorities. *Id.* at 23-24. "[U]nder R.C.M. 305(k), a servicemember may identify abuses of discretion by pretrial confinement authorities, including violations of applicable service regulations, and on that basis request additional confinement credit. A military judge's decision in response to this request is reviewed, on appeal, for abuse of discretion." *Id.* at 24 (citing *United States v. Rock*, 52 M.J. 154, 156 (C.A.A.F. 1999)).

We now turn to whether the military judge abused his discretion in declining to award the appellant additional sentencing credit for AFI 31-205 violations that occurred from 1 June 2004 until 26 August 2004. The military judge made detailed findings of fact and conclusions of law. While he noted technical non-compliance with AFI 31-205, e.g. the government failed to review the appropriateness of the appellant's continued suicide watch every 24 hours as required by AFI 31-205, the military judge found the medical personnel were attempting to provide confinement officials with the necessary information for them to make a decision on whether to maintain the appellant on suicide watch.

Put simply, the military judge's findings of fact are not clearly erroneous and his conclusions of law are correct. The award of additional confinement credit was clearly a

matter within the sound discretion of the military judge and he did not abuse his discretion in refusing to award additional confinement credit. *See id.* at 23-24.

Supplemental Assignment of Error

Finally, we have examined the assignment of error submitted by the appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982) and find it to be without merit.

Conclusion

The approved findings and the 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 approved findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court