

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman Basic BENJAMIN J. WRIGHT
United States Air Force**

ACM 35170

28 April 2004

Sentence adjudged 3 April 2002 by GCM convened at Barksdale Air Force Base, Louisiana. Military Judge: Steven A. Hatfield (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 6 months.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Shannon J. Kennedy.

Before

STONE, MOODY, and JOHNSON-WRIGHT
Appellate Military Judges

PER CURIAM:

Pursuant to his pleas, a military judge sitting alone convicted the appellant of failure to go, dereliction of duty, wrongful use of drugs, and breaking restriction, in violation of Articles 86, 92, 112a, and 134, UCMJ, 10 U.S.C. §§ 886, 892, 912a, 934. The adjudged and approved sentence consisted of a bad-conduct discharge and confinement for 6 months. The appellant raises two issues on appeal.

The first involves an issue of illegal pretrial confinement under the second clause of Article 13, UCMJ, 10 U.S.C. § 813 (illegal pretrial confinement). The appellant received one-for-one credit for his 66 days of pretrial confinement, but argues he is entitled to additional credit because, inter alia, the evidence was insufficient to support the military magistrate's conclusion that there were reasonable grounds to believe the appellant was a serious threat to morale, discipline, and readiness. Rule for Courts-Martial (R.C.M.) 305(h)(2)(B).

This case strongly calls for application of waiver. The appellant failed to ask the magistrate to reconsider his decision. R.C.M. 305(i)(2)(E). He also failed to request the military judge to review the matter. R.C.M. 305(j). Several recent decisions of our superior court have prospectively recognized waiver under similar circumstances. *See United States v. Inong*, 58 M.J. 460 (C.A.A.F. 2003) (failure to raise illegal pretrial punishment issue at trial constitutes waiver absent plain error); *United States v. King*, 58 M.J. 110 (C.A.A.F. 2003) (failure to raise issue of illegal pretrial restriction tantamount to confinement at trial constitutes waiver); *United States v. Chapa*, 57 M.J. 140 (C.A.A.F. 2002) (failure to raise a violation of court-martial rule governing pretrial confinement procedures constitutes waiver absent plain error). *See also* R.C.M. 905(e).

But even if waiver does not apply under the timing and circumstances of this case, we hold the appellant has nonetheless failed to establish that the military magistrate abused his discretion in determining the appellant was likely to engage in serious misconduct. A decision to impose pretrial confinement will be overturned only in those cases where there was an abuse of discretion on the part of the military magistrate. *United States v. Gaither*, 45 M.J. 349, 351-52 (C.A.A.F. 1996). This Court's review is limited to the facts before the reviewing officer.* *Id.* at 351; *United States v. Wardle*, 58 M.J. 156, 157 (C.A.A.F. 2003). It is apparent from the military magistrate's report that he carefully considered the written documentation before him. This documentation indicated the appellant had a long history of flaunting military authority and that prior efforts to gain his attention had failed. He was facing serious charges and had broken restriction twice immediately prior to being placed in pretrial confinement. Applying the aforementioned principles to the available documentation, we conclude the military magistrate did not abuse his discretion.

In his second assignment of error, the appellant contends, and the government does not contest, that the confinement facility erroneously computed his good conduct time credit and that he was held 5 days past his minimum release date. According to the appellant, the confinement facility failed to include good time credit for the 66 days he spent in pretrial confinement. His minimum release date should have been 28 June 2002, but he was released from confinement on 3 July 2002 only after appellate defense counsel complained of the calculation error. He requests confinement credit in the amount of 20 days for this error. On the other hand, the government cites a recent decision of our superior court and maintains this Court lacks jurisdiction to review the matter because the appellant has not exhausted his administrative remedies. *See United States v. Spaustat*, 57 M.J. 256, 263 (C.A.A.F. 2002).

* We note that the magistrate's report references two attachments. Documentation referenced in the first attachment was included in the pretrial allied papers. The second attachment, however, entitled "Addendum to Gov't Exhibit List," was not included in the record of trial. Neither the appellant nor the government has addressed this omission in their briefs or post-trial submissions, and thus we will not speculate on what may have been included in the attachment.

We conclude this Court does have jurisdiction to review this issue. *See United States v. Hilt*, 18 M.J. 604 (A.F.C.M.R. 1984). The amount of additional good time credit the appellant is due is not seriously questioned, and thus this Court is not drawn into what is ordinarily an internal administrative task more readily determined by confinement officials.

The accused is entitled to meaningful relief. *Id.* We may use the punishment equivalencies in R.C.M. 305(k) to fashion a remedy in cases where an accused has served excess confinement. *United States v. Sherman*, 56 M.J. 900, 902 (A.F. Ct. Crim. App. 2002), *pet. denied*, 57 M.J. 467 (C.A.A.F. 2002). Therefore, we order that the appellant receive an amount equal to 5 days of pay at the grade of E-1 to compensate for the additional confinement he served.

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, 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

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator