UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Second Lieutenant CHRISTOPHER L. AHN
United States Air Force

ACM 38217

16 September 2013

Sentence adjudged 29 June 2012 by GCM convened at Vandenberg Air Force Base, California. Military Judge: Shane W. Cohen (sitting alone).

Approved Sentence: Dismissal, confinement for 13 months, and a reprimand.

Appellate Counsel for the Appellant: Captain Travis K. Ausland.

Appellate Counsel for the United States: Colonel Don M. Christensen and Gerald R. Bruce, Esquire.

Before

ORR, HARNEY, and MITCHELL
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MITCHELL, Judge:

A general court-martial composed of a military judge sitting alone convicted the appellant, contrary to his pleas, of one specification of absence without leave (AWOL); one specification of disrespect to a superior commissioned officer; one specification of dereliction of duty; one specification of false official statement; three specifications of assault upon a person performing security forces duties; and two specifications of conduct unbecoming an officer, in violation of Articles 86, 89, 92, 107, 128 and 133, UCMJ, 10 U.S.C. §§ 886, 889, 892, 907, 928, 933.

The adjudged and approved sentence consisted of a dismissal, confinement for 13 months, and a reprimand. We affirm the findings. Due to errors in the post-trial processing, we set aside the action and remand.

Background

The appellant graduated from the United States Air Force Academy in May 2010, and reported to the Naval Postgraduate School (NPS) in Monterey, California, for a year-long course to become a weather officer. While there, the appellant reported to Lieutenant Colonel (Lt Col) PW, the Air Force Institute of Technology (AFIT) Section Commander.

All new students at NPS are provided an in-brief, which includes rules for "mustering." All students muster every duty day, and electronic mustering, through a website, is allowed and encouraged. By "electronically mustering," the students confirm they are in the local area and available for duty. If they are unable to access the secured website from their home computer, they need to report to NPS to use a government computer to muster. If that does not work, they need to report to NPS Student Services in person. NPS students are also informed of a requirement to provide advance notice of foreign travel and receive a travel briefing before proceeding overseas. On two or three occasions, the appellant followed these requirements and took leave in Russia.

In December 2011, the appellant went on leave in Russia to visit his girlfriend and her family. Prior to departing, the appellant received Lt Col PW's verbal authorization, provided the required advance notice of foreign travel, and received the travel briefing. However, a Medical Evaluation Board (MEB) had previously been initiated to consider if the appellant was fit to remain on duty, and once the MEB process began the appellant was required to have all leave cleared through the medical chain. While the appellant was on leave in Russia, Lt Col PW was informed the appellant had missed mandatory appointments related to the MEB. As a result, Lt Col PW ordered the appellant back from leave.

Lt Col PW issued the appellant a Letter of Admonishment (LOA) for the missed appointments. The appellant replied with a "Letter of Astonishment," that he sent to Lt Col PW electronically. When Lt Col PW required the appellant's signature on the first indorsement to the LOA, he repeatedly contacted the appellant asking him to come in and sign it. The appellant eventually replied by email, stating he did not have time.

Lt Col PW went to a classroom where he assumed he would find the appellant, but discovered the classroom was empty. Lt Col PW contacted the class professor who told him classes were cancelled for the week of 23-29 January 2012. The professor also said the appellant had indicated he was going to visit somebody in Russia. Lt Col PW then

emailed the appellant, asking him, "Are you in Monterey?" After further emails between Lt Col PW and the appellant, the appellant eventually sent an email that read in part:

> Upon your urgent request, I feel as if I have done my explaining quite well. I believe it was fully sufficient and answered your questions without allowing you to completey [sic] pry into my private affairs. You did not believe that I was busy, as you hinted by saying "what's keeping you so busy?" I can give you a list of encyclopedic proportions regarding my busy altruistic, good-natured, and productive life if you would like.

The appellant, it turned out, had gone back to Russia. He had not asked for leave, and was absent from Monterey, CA from 18-31 January 2012. Nevertheless, from 19-26 January 2012, the appellant was electronically mustering, thus indicating he was in the local area. The appellant also failed to provide advance foreign travel notification and did not receive his required travel briefing prior to departing the United States.

After the appellant returned, Lt Col PW picked him up at the San Francisco Airport and persuaded the appellant to hand over his passport. Lt Col PW also gave the appellant a restriction order. A few days later, Lt Col PW gave the appellant an enhanced restriction order, which required the appellant to physically report on weekends. Lt Col PW also gave the appellant an order for a Commander-Directed Mental Health Evaluation. The appellant signed both; however, he told Lt Col PW that he would not report on the weekends and that he would not obey the order for the referral for a mental health evaluation.

The appellant sent another email to Lt Col PW, in which he stated, "I would like for you to pass a word or two up the chain to whoever issued these new rights to me. And that is - 'Sir or ma'am, with all due respect, go to hell'. . . . I don't appreciate this at all. So, they can go to hell."

Based on the appellant's refusal to obey the restriction order, the earlier AWOL, and other aberrant behavior, Lt Col PW ordered the appellant into pretrial confinement on 3 February 2012. When he arrived at the Vandenberg Air Force Base confinement facility, the appellant was not compliant. He refused to take off his clothes for the required complete search of his naked body. The appellant told the confinement guards that he would not take off his civilian clothing and they would have to do it. A struggle ensued, and the appellant hit, kicked, elbowed, and bit three confinement guards. He was taken to the ground, handcuffed, and restrained. After he was restrained, the appellant was forcibly stripped of his clothes.

The appellant continued to misbehave while in confinement. During his 147 days in pretrial confinement, the accused received 160 infractions to include failing to report properly to the confinement personnel, failing to obey orders by confinement personnel,

dismantling property, and communicating threats. The appellant also made comments about his ability to escape and encouraged others confined there to escape. The appellant had at most 10 days when he was not in segregation.

Failure to Serve Staff Judge Advocate's Pretrial Advice

The Staff Judge Advocate (SJA) pretrial advice was completed on 30 March 2012, and contains all of the information required by Rule for Courts-Martial (R.C.M.) 406. R.C.M. 406(c) requires a copy to be served on the defense. The record of trial contains a Memorandum for Record that the SJA pretrial advice was never served on the accused or trial defense counsel. The appellant did not raise this as an issue before the entry of pleas and does not now raise it on appeal.

Objections to defects in the preferral, forwarding, investigation, or referral of charges must be raised before pleas are entered or they are waived. R.C.M. 905(e); R.C.M. 905(b)(1). Waiver is an intentional relinquishment or abandonment of a known right as determined by looking at the state of the law at the time of trial. *United States v. Sweeney*, 70 M.J. 296, 303 (C.A.A.F. 2011). As R.C.M. 406(c) was in existence long before this trial, we find this issue is waived and no relief is warranted.

Post-Trial Processing Errors Regarding Pretrial Confinement Credit

At trial the military judge ordered that the appellant receive a total of 210 days of credit against the sentence to confinement. The appellant received 147 days of credit for time he spent in pretrial confinement. *See United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). The military judge ordered 14 days of credit under R.C.M. 305(k) as the 7-day review for pretrial confinement was completed by the same officer who performed the 48-hour probable cause determination. *See United States v. Stuart*, 36 M.J. 746, 747 (A.C.M.R. 1993). The military judge ordered an additional 29 days of credit for lengthy time in solitary confinement without a disciplinary board hearing, and an additional 20 days of credit as the appellant was unnecessarily shoved by a SrA XM, a confinement officer. Both of these additional credits were based on R.C.M. 305(k) and Article 13, UCMJ. *See United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983). The military judge considered the issue of the forcible strip search, but decided not to award additional credit; however, the military judge stated he considered the search as a matter in extenuation and mitigation which had an impact on the amount of confinement adjudged.

The trial adjourned on 29 June 2012. A DD Form 2707, *Confinement Order*, was completed the same day and lists the sentence adjudged but does not include any reference to any of the pretrial confinement credit.

A military judge may sua sponte reconsider any ruling, except one amounting to a finding of not guilty, prior to authentication of the Record of Trial (ROT).

R.C.M. 905(f). On 23 August 2012, the military judge supplemented the record with written findings of fact and conclusions of law. The military judge confirmed his earlier rulings on granting a total of 210 days of credit. However, he reconsidered his ruling on credit for the forcible strip search. The military judge explained that the forcible strip search was "unusually harsh and more rigorous than necessary" and ordered an additional 15 days of credit under R.C.M. 305(k) and Article 13, UCMJ. The military judge considered the appellant's request for 30 days of credit for the forcible strip search but concluded that since the appellant shared "some, if not the majority, of the blame in creating that condition," 15 days was the appropriate amount of credit. The military judge's final ruling was for 78 days of additional credit added to the 147 days of pretrial confinement credit, for a total of 225 days of credit.

The ROT was authenticated on 4 October 2012. The Staff Judge Advocate's Recommendation (SJAR) was completed on 15 October 2012 and correctly explained the 225 days of credit awarded by the military judge, with a brief breakdown of the source of each portion of the credit. Attached to the SJAR was an AF Form 1359, *Report of Result of Trial* (1 November 2000), dated 27 September 2012, which stated in the block for Pretrial Confinement Credit: "210 total days: Judicial credit-63 days/Pretrial Credit-147 days." The SJAR Addendum was completed on 25 October 2012 and was silent on the conflict between the credit expressed in the SJAR and the credit on the AF Form 1359. On 27 October 2012, the convening authority signed that he considered all matters listed on the SJAR Addendum before taking action. The Action was completed the same day and stated in part, "[T]he sentence is approved and, except for the dismissal, will be executed. The term of confinement having been served, no place of confinement is designated." The Action was silent on the issue of pretrial confinement credit. The Court-Martial Order (CMO) included the language from the action verbatim.

When a military judge orders credit for illegal pretrial confinement for violations of Article 13 or R.C.M. 305, the credit shall be included in the convening authority's initial action. R.C.M. 1107(f)(4)(F); Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 9.4.2 (6 June 2013) ("Any credit for pretrial confinement should be clearly reflect on the Report of Result of Trial memorandum [AF Form 1359] and DD Form 2707, along with the source of each portion of credit and total days of credit awarded . . ."). The SJAR is required to include any confinement credit that is to be applied. R.C.M. 1106(d)(3).

This court is unable to determine if the appellant was ultimately credited with the 210 days announced at trial or the military judge's final ruling of 225 days credit. There are five documents that are required to include the pretrial confinement credit. Of the five, one is correct (the SJAR), one is incorrect (the AF Form 1359), and three are silent (the Action, the CMO, and the DD Form 2707) and are thus incorrect as well.

Conclusion

We conclude the approved findings are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Therefore, on the basis of the entire record, the findings are affirmed. Article 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). The Action of the convening authority is set aside. The record of trial is returned to The Judge Advocate General for remand to the convening authority for post-trial processing consistent with this opinion. Article 66(e), UCMJ, 10 U.S.C. § 866(e). Thereafter, Article 66(b), UCMJ, 10 U.S.C. § 866(b), will apply.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court