

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

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UNITED STATES

v.

**Airman First Class LORRAINE M. AMARO**  
**United States Air Force**

**ACM S31562**

**16 June 2009**

Sentence adjudged 17 July 2008 by SPCM convened at Tinker Air Force Base, Oklahoma. Military Judge: William M. Burd (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 176 days, forfeiture of \$898.00 pay per month for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Michael A. Burnat and Captain Marla J. Gillman.

Appellate Counsel for the United States: Major Jeremy S. Weber, Captain Michael T. Rakowski, and Gerald R. Bruce, Esquire.

Before

WISE, BRAND, and HELGET  
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with her pleas, the appellant was found guilty of two charges and three specifications of wrongfully using cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The approved sentence consists of a bad-conduct discharge, confinement for 176 days, forfeiture of \$898.00 pay per month for six months, and reduction to E-1.

The issue on appeal is whether the convening authority erred by failing to reference the illegal pretrial confinement credit ordered by the military judge in the Action.

## *Background*

The appellant was ordered into pretrial confinement on 3 June 2008, where she remained until her court-martial. At trial, the trial defense counsel filed a motion requesting four-for-one administrative confinement credit for 33 of her 44 days of pretrial confinement in a civilian confinement facility for violations of Articles 12 and 13, UCMJ, 10 U.S.C. §§ 812, 813.<sup>1</sup>

While incarcerated at the Oklahoma County Jail, the military judge found that the appellant was confined in the general population from 3 to 6 June, 17 June, and part of 18 June 2008, and was subjected to immediate association with foreign nationals, in violation of Article 12, UCMJ. The military judge also found that for the remainder of the 33 days, the appellant was placed in protective custody, which the military judge determined to be tantamount to solitary confinement. The military judge concluded that considering the appellant was in pretrial confinement, where she is presumed to be innocent, placing her in protective custody constituted unusually harsh circumstances. Accordingly, the military judge awarded 132 days of credit, consisting of four-for-one administrative confinement credit for each of those 33 days the appellant spent in the Oklahoma County Jail under conditions in violation of Articles 12 and 13, UCMJ. Additionally, the military judge awarded 44 days of *Allen* credit<sup>2</sup> for the entire period of pretrial confinement, for a total of 176 days credit.

### *Convening Authority's Action*

The appellant asserts that the Action should be returned to the convening authority because it does not include the 132 days of pretrial confinement credit the military judge awarded under Rule for Courts-Martial (R.C.M.) 305(k), which is required to be included in the Action under R.C.M. 1107(f)(4)(F). The government's position is that the military judge awarded the pretrial confinement credit under Articles 12 and 13, UCMJ, which is not required to be included in the Action.

We review post-trial processing issues de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000)). "When the military judge has directed that the accused receive credit under R.C.M. 305(k), the convening authority shall so direct in the [A]ction." R.C.M. 1107(f)(4)(F). R.C.M. 305(k) states, "The military judge may order additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances." Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 9.3.1 (31 Dec 2007) provides, "When a military judge directs credit for illegal pretrial

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<sup>1</sup> The appellant spent 11 of the 44 days in a designated area under suicide watch. The trial defense counsel did not request administrative confinement credit for these days.

<sup>2</sup> This pretrial confinement credit was awarded under *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984).

confinement, this credit must be ordered in the convening authority's initial [A]ction (RCM 1107(f)(4)(F)), and should not be reflected on the AF Form 1359."

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."

Article 13, UCMJ, provides, "No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline."

We agree with the appellant that the Action should have included the 132 days of confinement credit awarded by the military judge. In *United States v. Crawford*, 62 M.J. 411, 414 (C.A.A.F. 2006), our superior court held that if an appellant establishes a violation of Article 13, UCMJ, "then R.C.M. 305(k) provides him additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances." (Internal citations omitted). Therefore, it does not matter if the military judge awarded the credit under Article 13, UCMJ, or R.C.M. 305(k). In either situation, R.C.M. 305(k) is the vehicle the military judge uses to award additional credit. See *United States. Thompson*, ACM S30924 (A.F. Ct. Crim. App. 25 Aug 2006) (unpub. op.). Further, in this case the military judge used the "unusually harsh circumstances" language from R.C.M. 305(k) for the credit he awarded for the conditions in violation of Article 13, UCMJ. We also hold that pursuant to AFI 51-201, ¶ 9.3.1, violations of Article 12, UCMJ, should likewise be included in the Action as these violations constitute illegal pretrial confinement. Accordingly, we order a corrected Action be accomplished in this case to include the 132 days of credit awarded by the military judge for illegal pretrial confinement. R.C.M. 1107(g).

#### *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. Because the Action fails to include the additional 132 days of pretrial confinement awarded by the military judge, the Action is incorrect. Accordingly, we return the record of trial to The Judge Advocate General for remand to the convening authority to withdraw the erroneous Action and substitute a corrected Action. Further, we order the promulgation of a corrected Court-Martial Order reflecting the correct Action.

Thereafter, Article 66, UCMJ, shall apply.

OFFICIAL



*Christina E. Parsons*  
CHRISTINA E. PARSONS, TSgt, USAF  
Deputy, Clerk of the Court