UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM S32440

UNITED STATES
Appellee

v.

Jeramy A. BELL
Airman (E-2), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 3 May 2018

Military Judge: Mark F. Rosenow.

Approved sentence: Bad-conduct discharge, confinement for 1 month, forfeiture of $1044.00 pay per month for 1 month, and reduction to E-1. Sentence adjudged 1 September 2016 by SpCM convened at Kirtland Air Force Base, New Mexico.

For Appellant: Major Mark C. Bruegger, USAF; Major Patrick A. Clary, USAF; Major Jarett F. Merk, USAF.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Major Tyler B. Musselman, USAF; Major Mary Ellen Payne, USAF; Major Meredith L. Steer, USAF; Captain Michael T. Bunnell, USAF.

Before JOHNSON, MINK, and DENNIS, *Appellate Military Judges.*

Senior Judge JOHNSON delivered the opinion of the court, in which Judge MINK and Judge DENNIS joined.

JOHNSON, Senior Judge:

Appellant was found guilty by a military judge, in accordance with his pleas, of one specification of wrongfully using cocaine on divers occasions and one specification of wrongfully using marijuana on divers occasions in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a. A special court-martial composed of officer members sentenced Appellant to a bad-conduct discharge, confinement for 30 days, forfeiture of $1044.00 pay per month for one month, and reduction to the grade of E-1. The convening authority approved the adjudged sentence.

Appellant raises two issues on appeal: (1) Whether the military judge erred by failing to suppress the results of several follow-up urinalysis inspections of Appellant; and (2) Whether Appellant is entitled to additional sentence relief due to the conditions of his pretrial confinement in a civilian detention facility.[1] We find Appellant waived the first issue by his unconditional guilty plea and find no basis for relief on the second issue. Accordingly, we affirm the findings and sentence.

I. BACKGROUND

On 19 July 2013, the 377th Air Base Wing (377 ABW) commander, Col M, in his capacity as the installation commander for Kirtland Air Force Base (AFB), New Mexico, signed a policy memorandum entitled "Follow-up Urinalysis Inspection Testing Policy." The policy provided, *inter alia*, that any active duty member at Kirtland AFB "who has a positive result from a random urinalysis drug test (to include unit sweeps, gate sweeps and inspection testing) will be tested immediately after notification to their unit of the member's positive result." The policy further provided "[s]uch follow-up urinalysis inspections shall be repeated until a negative result is received from the testing facility." Furthermore, the policy required the member's unit commander to issue a written order to direct the member to submit to such a test. The memorandum asserted the "primary purpose of this testing is to determine and ensure the security, military fitness, and good order and discipline of this installation."

On 25 April 2016, Appellant provided a urine sample pursuant to a lawful unit inspection. On 5 May 2016, Kirtland AFB Drug Demand Reduction Program personnel received notification that Appellant's sample tested positive for cocaine. The following day, 6 May 2016, in accordance with the 19 July 2013 policy memorandum, Appellant's squadron commander ordered Appellant in

[1] Appellant personally raises the second issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

writing to provide a sample for a follow-up urinalysis test, and Appellant complied. Appellant provided additional samples on 23 May 2016, 15 June 2016, and 30 June 2016 at the direction of his unit leadership as his samples continued to test positive for cocaine, marijuana, or both. In most cases, Appellant received written orders from his squadron commander in accordance with the policy memorandum; however, on 23 May 2016 Appellant's first sergeant orally conveyed an order to Appellant from the commander. Although each of these urinalyses tested positive, the follow-up tests ceased after Appellant entered pretrial confinement on 30 June 2016.

In May 2016, Col F succeeded Col M as commander of the 377 ABW. Col F did not rescind his predecessor's reinspection policy. On 14 July 2016—after the last of Appellant's urinalysis retests—Col F signed his own policy memorandum which was nearly identical to the 2013 version.

The Defense moved before trial to suppress the results of the follow-up urinalysis tests from 6 May 2016 onwards,[2] as well as any derivative evidence. The Defense argued that the May 2016 change of command at 377 ABW invalidated the 19 July 2013 policy memorandum; that the oral order from the first sergeant directing the 23 May 2016 urinalysis failed to comply with the policy; and that all of the follow-up tests represented a subterfuge to search for evidence for use at trial rather than valid inspections. The Government opposed the motion. At trial, before Appellant entered pleas, the military judge received additional evidence and argument before denying the motion.

Appellant subsequently entered unconditional guilty pleas to the charge and specifications. Before the military judge entered findings, the following colloquy took place:

> [Trial Counsel]: Your honor, before perhaps you consider finding him guilty, should he be advised of the impact of his guilty plea on his – the motion to suppress on appeal?
>
> MJ [Military Judge]: There is no pretrial agreement, defense counsel, right?
>
> DC [Defense Counsel]: Correct, your honor.
>
> MJ: Okay. Defense Counsel, I'm not just assuming, I'll confirm right now. Are you aware that his plea of guilty has impacts on available motions?
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> DC: Yes, your honor.

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[2] During argument on the motion at trial, trial defense counsel conceded the motion did not implicate the first follow-up test on 6 May 2016.

> MJ: Have you talked to your client about the impact of his plea of guilty on the review on appeal of any issues that he may have waived as part of an unconditional guilty plea?
>
> DC: Yes, your honor.
>
> MJ: Do you need any more time to discuss that matter further with [Appellant]?
>
> DC: No, your honor.

The military judge found Appellant guilty of the charge and specifications immediately thereafter.

II. DISCUSSION

A. Motion to Suppress

1. Law

We review a military judge's ruling on a motion to suppress evidence for an abuse of discretion. *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008) (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). The military judge's findings of fact are reviewed for clear error, but his conclusions of law are reviewed de novo. *United States v. Keefauver*, 74 M.J. 230, 233 (C.A.A.F. 2015). "A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law." *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004). In reviewing a ruling on a motion to suppress, we consider "the evidence in the light most favorable to the prevailing party." *United States v. Hoffmann*, 75 M.J. 120, 124 (C.A.A.F. 2016) (citing *Keefauver*, 74 M.J. at 233).

"Rule for Courts-Martial (R.C.M.) 910(j) provides a 'bright-line rule' that an unconditional guilty plea 'which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made.'" *United States v. Mooney,* 77 M.J. 252, 254 (C.A.A.F. 2018) (quoting *United States v. Schweitzer*, 68 M.J. 133, 136 (C.A.A.F. 2009)). "[A] valid waiver leaves no error to correct on appeal." *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017) (citations omitted). Whether an appellant has waived an issue is a question of law we review de novo. *Id.*

2. Analysis

Appellant contends that at trial the Government was required, but failed, to prove by clear and convincing evidence that Col F's intent in implementing the urinalysis reinspection policy was to conduct valid inspections and not to

conduct improper searches for evidence. *See United States v. Ayala*, 69 M.J. 63, 65 (C.A.A.F. 2010).[3] Appellant does not specifically address whether his unconditional guilty plea impacts our review of this issue, but frames his requested remedy as follows: "this Court should set aside Appellant's finding of guilty as to the four follow-up urinalyses and authorize a rehearing on sentence." The Government contends Appellant's unconditional guilty plea waived this issue on appeal. We agree with the Government.

An unconditional guilty plea generally waives any objection related to the factual question of Appellant's guilt of these charges and specifications.[4] *Mooney*, 77 M.J. at 254. Indeed, the United States Court of Appeals for the Armed Forces (CAAF) has held such a plea "generally 'waives *all* defects which are neither jurisdictional nor a deprivation of due process of law.'" *Schweitzer*, 68 M.J. at 136 (*quoting United States v. Rehorn*, 26 C.M.R. 267, 268–69 (C.M.A. 1958)) (emphasis added). Appellant's pretrial motion to suppress the urinalysis retests was evidently related to the factual question of his guilt, and thus falls into this category of objections. Not only did Appellant elect to plead guilty unconditionally, removing any factual question as to his guilt, but at trial counsel's prompting the military judge specifically confirmed that trial defense counsel had advised Appellant that the pleas would impact Appellant's ability to raise the suppression issue on appeal. The specific issue Appellant seeks to raise now is essentially the same as one of the Defense's arguments in support of its pretrial motion—that the Government failed to show the commander's intent behind the reinspection policy was proper. It was waived.

This conclusion does not end our analysis. The CAAF has recognized the service courts of criminal appeals' unique mandate under Article 66, UCMJ, 10 U.S.C. § 866, to "assess the entire record to determine whether to leave an accused's waiver intact, or to correct [an] error." *United States v. Chin*, 75 M.J. 220, 223 (C.A.A.F. 2016). However, we find no reason to pierce Appellant's waiver in this case. We discern no reason to question Appellant's guilt or the providency of his plea. Accordingly, the waiver stands.

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[3] This in itself is a questionable argument, as the opinion in *Ayala* was careful to note it did not endorse the "clear and convincing" standard as the correct one in this situation. *See Ayala*, 69 M.J. at 65 n.1. However, in light of our conclusion Appellant waived this issue we need not further dissect his argument.

[4] R.C.M. 910(a)(2) provides an accused may, with the approval of the military judge and consent of the Government, enter a *conditional* guilty plea that preserves appellate review of an adverse ruling on a specified pretrial motion. However, Appellant's plea was unconditional.

B. Pretrial Confinement Credit

1. Additional Background

Appellant was held in pretrial confinement at the Cibola County (New Mexico) Detention Center (CCDC) from 30 June 2016 until 18 July 2016, when he was moved to a military facility at Davis-Monthan AFB, Arizona. The military judge found, and the record supports, that Appellant experienced a number of discomforts and inconveniences during his confinement at CCDC beyond what one would normally associate with pretrial confinement, including: having no opportunity to shower between 30 June 2016 and 5 July 2016; being without toilet paper for approximately 13 hours; being exposed to inconsistent and at times uncomfortable temperatures; being called derogatory terms by other inmates and at times having difficulty sleeping due to noisy inmates. However, the military judge also found Appellant was afforded regular opportunities to exercise, received enough food to remain healthy, was always separated from other inmates and never feared for his physical safety, was never denied or delayed medical treatment, and was generally treated the same as other inmates except as required by a memorandum of agreement between the 377 ABW and CCDC. In total, Appellant spent 63 days in civilian and military pretrial confinement.

At trial, the Defense moved for additional credit against Appellant's sentence for the conditions he endured during his pretrial confinement, including at the CCDC, alleging violations of Article 13, UCMJ, and R.C.M. 305(f). After receiving additional evidence (including testimony from Appellant) and argument, the military judge denied the motion. He found, *inter alia*, there was no intent to punish Appellant, that all conditions of confinement that were deliberately imposed at the CCDC were reasonably related to legitimate governmental objectives, that those conditions which fell below the expected standard of care were "not sufficiently egregious to give rise to a permissive inference" of punishment, and that no condition or combination of conditions at CCDC "was so excessive as to constitute punishment."

2. Law

Whether an Appellant is entitled to additional confinement credit for alleged violations of Article 13, UCMJ, is a mixed question of fact and law. *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997). We defer to a military judge's findings of fact unless they are clearly erroneous, whereas we consider de novo whether the facts entitle Appellant to additional credit against his sentence. *United States v. Williams*, 68 M.J. 252, 256 (C.A.A.F. 2010). "Article 13, UCMJ, prohibits two things: (1) the imposition of punishment prior to trial, and (2) conditions of arrest or pretrial confinement that are more rigorous than

necessary to ensure the accused's presence for trial." *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005).

3. Analysis

On appeal, Appellant relies upon his motion and testimony at trial to request that we consider whether his confinement at CCDC was a punishment, or whether the conditions there were more rigorous than necessary to ensure his presence at trial, in violation of Article 13, UCMJ. We have done so. We find no violation.

The military judge's factual finding that "[n]o condition of pretrial confinement [Appellant] experienced at any location was the product of a purpose or intent to punish" was supported by the record and not clearly erroneous. In addition, we find the military judge's other conclusions consonant with the record and the applicable law. To the extent certain conditions fell below the expected standard of care to be provided inmates, such as the lack of a shower for several days and the temporary deprivation of toilet paper, these conditions were evidently the result of oversights rather than deliberate. Moreover, they were not of such an excessive nature to give rise to an inference of an intent to punish or to constitute punishment in and of themselves. Minimally discomforting treatment negligently imposed does not entitle an accused to additional confinement credit. *United States v. Corteguera*, 56 M.J. 330, 335 (C.A.A.F. 2002).

Finally, we have considered whether to grant relief even in the absence of an Article 13 violation pursuant to our authority under Article 66(c), UCMJ. *Chin*, 75 M.J. at 223. We find no such extraordinary exercise of our Article 66(c) authority is warranted in this case.

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. 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

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court