

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman DESHIA M. BRANDON
United States Air Force**

ACM 37399

22 March 2010

Sentence adjudged 19 December 2008 by GCM convened at Offutt Air Force Base, Nebraska. Military Judge: Dawn R. Eflein (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel James B. Roan, Major Shannon A. Bennett, and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Major Coretta E. Gray, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Senior Judge:

In accordance with her pleas, the appellant was found guilty by a military judge sitting alone of two specifications of wrongfully distributing marijuana, and one specification each of wrongfully possessing marijuana and wrongfully using marijuana,

in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The approved sentence consists of a bad-conduct discharge, confinement for six months, and reduction to E-1.¹

The issue on appeal is whether the appellant's confinement in the same open bay area with foreign nationals at the Cass County, Nebraska, confinement facility violated Article 12, UCMJ, 10 U.S.C. § 812, and Air Force Instruction (AFI) 31-205, *The Air Force Corrections System* (7 Apr 2004), and, if so, whether the appellant forfeited her Article 12, UCMJ, claim by failing to exhaust her administrative remedies under *United States v. White*, 54 M.J. 469 (C.A.A.F. 2001).

Background

On 19 December 2008, the appellant was tried at Offutt Air Force Base (AFB), Nebraska (NE). At the conclusion of her trial, the appellant was initially confined at Offutt AFB. On 30 December 2008, she was transferred to the Cass County, NE, civilian confinement facility. After initially spending a few days in segregation, the appellant was moved to an open bay area with approximately nine other female inmates. This bay area consisted of an upper level with six sets of bunk beds, and a lower level containing bathrooms, showers, and picnic tables. According to the appellant in her post-trial declaration, some of the inmates that she lived with were foreign nationals from countries such as Mexico, Guatemala, and Laos.

On 5 January 2009, the appellant's defense counsel, Captain (Capt) AO, visited her at the Cass County confinement facility. During this meeting, the appellant informed Capt AO that some of her fellow inmates were foreign nationals. The appellant told him that they ate together, had free time together, and spent most of the day together. Capt AO was informed by one of the guards that the confinement facility did contract with the U.S. Immigration and Customs Enforcement agency to house foreign nationals at the facility.

Capt AO advised the appellant that she was being confined in violation of Article 12, UCMJ. Although he did not advise her to submit a complaint under Article 138, UCMJ, 10 U.S.C. § 938, he did inform the appellant to notify her commander and first sergeant. He also informed her that he would notify the Offutt AFB legal office of her confinement conditions. Within the next couple of days, Capt AO informed Capt EL, chief of military justice, Offutt AFB legal office, about the possible Article 12, UCMJ, violation.

On 22 January 2009, the appellant was visited by her commander and two other members of her squadron. During this meeting, the appellant informed her commander

¹ The convening authority also credited the appellant with nine days against her sentence to confinement for a possible violation of Article 12, UCMJ, 10 U.S.C. § 812.

that she was being confined with foreign nationals. Her commander informed her that she could not be moved back to the Offutt AFB confinement facility because of manning issues. The appellant did not submit an Article 138, UCMJ, complaint against her commander because at the time she was unaware of how to submit such a complaint. The appellant also did not raise the Article 12, UCMJ, violation with the confinement facility because she was unaware this was an option.

On 30 January 2009, the appellant, through her counsel, submitted her clemency request to the general court-martial convening authority through the Offutt AFB legal office.² In her submission, the appellant informed the convening authority of the Article 12, UCMJ, violation, and requested to be transferred back to the Offutt AFB confinement facility. On 10 February 2009, the appellant was transferred from the Cass County confinement facility to the Offutt AFB confinement facility. In an addendum to the staff judge advocate's (SJA's) recommendation, dated 12 February 2009, the SJA informed the general court-martial convening authority that,

Once we received notice that there might have been an Article 12[, UCMJ,] issue with [the appellant's] confinement in the civilian facility, we investigated her claim. We discovered [the appellant] was being confined with four other female inmates, one of whom is in pretrial lockup for local criminal charges, but is also believed to be in the United States illegally and will be the subject of an immigration hearing following the disposition of her charges. All five females sleep in a large bay-style 12-person occupancy dormitory in one of six bunk beds and share a large bathroom.

The SJA recommended that the convening authority credit the appellant with nine days of confinement due to a possible Article 12, UCMJ, violation which "reflects the amount of time encompassed from [the appellant] providing notice of the potential Article 12[, UCMJ,] violation on 2 Feb 09, our investigation of her complaint, our determination that there may have been a violation of Article 12, [UCMJ,] and ultimately moving her into another confinement facility on 10 Feb 09." On 6 March 2009, the convening authority took action on the appellant's case and credited her with nine days post-trial confinement for a possible Article 12, UCMJ violation.

Law

“‘[A] prisoner must seek administrative relief prior to invoking judicial intervention’ to redress concerns regarding post-trial confinement conditions.” *United States v. Wise*, 64 M.J. 468, 471 (C.A.A.F. 2007) (alteration in original) (citing *United White*, 54 M.J. at 472). The purpose of this requirement is to promote the resolution of

² The convening authority in this case was the Commander, Eighth Air Force, who was physically located at Barksdale Air Force Base, Louisiana.

grievances at the lowest possible level and to ensure that an adequate record has been developed to aid our appellate review. *Id.* at 471 (citing *United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997)).

Whether an appellant exhausted her administrative remedies is reviewed de novo. *Id.* “Exhaustion requires [the a]ppellant to demonstrate that two paths of redress have been attempted, each without satisfactory result.” *Id.* The appellant must show that absent some unusual or egregious circumstances, she has exhausted the prisoner-grievance system in the confinement facility and that she has petitioned for relief under Article 138, UCMJ. *Id.* (citing *White*, 54 M.J. at 472).

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.” The “immediate association” language means that military members can be confined in the same jail or brig as a foreign national but they have to be segregated into different cells. *Wise*, 64 M.J. at 475. “The Air Force confines inmates in facilities that prevent immediate association with enemy prisoners of war or foreign nationals who are not members of the US Armed Forces.” AFI 31-205, ¶ 1.2.4.

Article 138, UCMJ, provides that:

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

Discussion

The appellant avers that her confinement in the Cass County confinement facility with foreign nations violated Article 12, UCMJ, and that she did not forfeit her Article 12, UCMJ, claim, by not exhausting her administrative remedies. We concur.

In this case, the appellant did fail to exhaust her administrative remedies by not filing a complaint with the confinement facility or submitting an Article 138, UCMJ, complaint. However, she notified her immediate commander of the potential Article 12, UCMJ, violation as early as possible, her defense counsel notified the Offutt AFB legal office, and she informed the general court-martial convening authority in her clemency submission. This allowed her complaint to be investigated and ensured that an adequate

record had been developed to aid our appellate review. As a result of her clemency submission, the convening authority's legal office was able to verify that the appellant was being confined with someone who was likely in the United States illegally. Further, the government has provided no information refuting the appellant's allegations that she was confined with foreign nationals.

Considering our review of the Record of Trial, we conclude that in the "unusual" circumstances of this case, the appellant is entitled to have the merits of her complaint addressed. In considering the merits of her complaint, we find that the appellant's conditions of confinement in the Cass County confinement facility were in violation of Article 12, UCMJ. The appellant has claimed from the beginning that she was confined in the same bay area with foreign nationals where they essentially lived with each other for most of the day. This is consistent with the convening authority's SJA who verified that the appellant was confined in a large bay-style 12-person dormitory with six bunk beds and shared a bathroom with the other female inmates. Accordingly, we find that this satisfies the meaning of "immediate association" of foreign nations that is prohibited by Article 12, UCMJ, and AFI 31-205.

Although the convening authority credited the appellant with nine days of post-trial confinement beginning on 2 February 2009, the date his legal office was notified of the potential Article 12, UCMJ, violation, we find that the appellant should receive credit for the entire 40 days she was confined in immediate association with foreign nationals in the Cass County confinement facility, from 2 January 2009 to 10 February 2009. Accordingly, we order that the appellant be awarded with 31 additional days for post-trial confinement in violation of Article 12, UCMJ.³

We note the appellant avers that reducing an additional 31 days of confinement from her sentence when she has already served her entire sentence would not provide meaningful relief. Instead, the appellant requests that we set aside the bad-conduct discharge or provide other meaningful relief. We disagree. Considering the seriousness of the offenses committed by the appellant, to include distributing marijuana to other military members, setting aside the bad-conduct discharge in this case is not warranted.

The approved findings and sentence, as modified, are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

³ We recommend that all base legal offices ensure that any support agreements with civilian operated confinement facilities include a provision requiring compliance with Article 12, UCMJ.

Accordingly, the approved findings and sentence, as modified, are

AFFIRMED.

OFFICIAL



A handwritten signature in blue ink, appearing to read "S. Lucas", is written over the seal and extends to the right.

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