UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic ABDUL K. ERBY
United States Air Force

ACM 33282 (f rev)

6 February 2003

Sentence adjudged 7 April 1998 by GCM convened at Dyess Air Force Base, Texas. Military Judge: J. Jeremiah Mahoney (sitting alone). Gregory E. Pavlik (*DuBay* hearing).

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

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

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major John D. Douglas.

Before

STONE, EDWARDS, AND ORR, V.A.
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

STONE, Judge:

On 7 April 1998, a military judge sitting alone convicted the appellant, in accordance with his pleas, of two specifications of larceny of government currency, in violation of Article 121, UCMJ, 10 U.S.C. § 921. The adjudged and approved sentence included a bad-conduct discharge and confinement for six months.

This Court affirmed the findings and sentence in *United States v. Erby*, ACM 33282 (A.F. Ct. Crim. App. 14 Apr 2000) (unpub. op.). On 2 May 2001, our superior court set aside that opinion and remanded the case for the purpose of conducting fact-finding in accordance with *United States v. Ginn*, 47 M.J. 236 (1997). *United States v.*

Erby, 54 M.J. 476 (2001). On 12 July 2001, this Court ordered a fact-finding hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). On 21 May 2002, the *DuBay* hearing was held at Dyess Air Force Base (AFB), Texas.

We are asked in this case to determine whether the appellant sufficiently exhausted his administrative remedies so that this Court can review his allegations of cruel and unusual punishment while he was confined as a prisoner in the Dyess AFB confinement facility. If so, we are to determine if the conditions he complains of while in confinement amounted to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article 55, UCMJ, 10 U.S.C. § 855. For the reasons below, we affirm.

Background

The military judge's findings of facts developed at the hearing are reviewed under a clearly-erroneous standard, *United States v. Sullivan*, 42 M.J. 360, 363 (1995), and are discussed below.

The appellant was no stranger to the military justice system or incarceration. In an earlier general court-martial on 25 June 1996, while stationed at Kadena Air Base (AB), Japan, he was convicted of five specifications of larceny and ten specifications of falsely altering official documents to divert government funds into his personal bank account, in violation of Article 121 and 134, UCMJ, 10 U.S.C. §§ 921, 934. His punishment at his first court-martial included confinement for three years. He served time at Camp Hansen, a Marine Corps brig in Okinawa, Japan, and was subsequently sent to the Naval Consolidated Brig at Miramar, in San Diego, California. After serving approximately two years of his three-year sentence, the appellant applied for and was granted parole, but his parole was revoked when he was charged for the offenses that were the subject of his second court-martial. This second court-martial was initiated because, although the appellant had been tried for numerous offenses at Kadena AB, there were additional larcenies that remained outstanding from the appellant's previous service at Dyess AFB. Consequently, Miramar authorities transferred the appellant to the Dyess AFB confinement facility to prosecute the appellant on the outstanding charges. He arrived at Dyess AFB in November of 1997. His second court-martial convened on 7 April 1998, and he was transferred back to Miramar approximately one month later. The conditions of his confinement while at Dyess AFB are the subject of this appeal.

When the appellant's case first came up on appeal, his affidavit raised several matters concerning the conditions of his confinement while at Dyess AFB which are no longer at issue. First, at no time was physical abuse or the threat of physical abuse inflicted on the appellant while at the Dyess AFB confinement facility. There was no evidence that the appellant was denied proper medical care, and although he was upset by the type of razor he was provided, there is no evidence that he was deprived of the ability

to maintain proper hygiene. Additionally, there was no evidence that he was placed in fear of being raped.

The appellant's main complaint is the verbal abuse he received from facility guards. While in the general confinement population, the appellant got to know Senior Airman (SrA) Jenkins, one of the guards. SrA Jenkins worked the night shift and treated the appellant well. The appellant considered him to be a nice guy and was comfortable talking to him. On the other hand, two other guards, Staff Sergeant (SSgt) Maceluch and SSgt Shields, regularly used "extremely vulgar" and loud profanity with the confinees, including the appellant. Other guards did not use profanity with the same frequency as SSgt Maceluch and SSgt Shields.

The appellant's initial complaint involved the treatment he received during his in-processing at the Dyess AFB facility. He was strip-searched for the purpose of checking for contraband. Distinguishing marks were recorded, thus providing documentation in the event he escaped or guards inflicted physical abuse. He was required to keep his back against the wall, which was difficult after his lengthy travel from California to Texas. He remained naked for approximately 45 minutes to an hour and was subjected to cursing and profane name-calling for about two hours. He felt degraded and humiliated. After the in-processing, he was placed in administrative segregation for 72 hours, the standard period needed to ensure a new confinee will adjust to the confinement environment. He then moved to the general population.

In addition to the name-calling during in-processing, the appellant was singled out with profanity ten to fifteen times during the five-month period before his court-martial and three to four times during the one-month period afterward. On these occasions, guards called him a "bitch," a "ho," and a "dumb ass" and used similar vulgar language when asking him to complete tasks. The appellant does not routinely use profanity and found the cursing and profane name-calling to be degrading and humiliating. He was also troubled and disturbed by the way he saw the other inmates being verbally harassed.

Moreover, the appellant recalled three times where he personally participated in harassing other inmates at the direction of the guards. He was once asked to take another inmate's soap until the inmate asked for it to be returned. Another time, guards directed him to push over the locker of an inmate who did not have his possessions correctly organized; on another occasion he was with a group of other inmates who were asked to push a locker over.

During the time the appellant was in the Dyess AFB confinement facility, he made some efforts to discuss the conditions of his confinement with authorities. For example, soon after he was in-processed, the appellant spoke to an unidentified Air Force chaplain for about an hour. The focus of the conversation was about the illness of the appellant's mother and getting out of confinement, but he did tell the chaplain about the conditions

he faced. The record is silent as to whether the appellant asked the chaplain to intervene on his behalf, but nothing apparently came of this discussion. On another occasion, he told Master Sergeant (MSgt) Callahan, the superintendent of the confinement facility, that he did not "appreciate" the treatment he was receiving at the facility. He told MSgt Callahan that he would "leave" when he had enough. As a result of this conversation, the appellant was thereafter required to have two escorts whenever he left the facility. Finally, the appellant submitted three congressional complaints. No copies of these letters were produced at the fact-finding hearing. The appellant testified, however, that two of these complaints focused on the circumstances surrounding the decision to proceed on the outstanding charges. Thus, they are not relevant to our inquiry. According to the appellant, the third complaint mentioned the conditions of the Dyess AFB confinement facility, but was submitted after he left Dyess AFB and returned to Miramar. Unfortunately, the only response the appellant received from his congressional representative was that he or she was looking into the matter. This congressional complaint was never forwarded to the Dyess AFB Inspector General's (IG) office.

Other than the chaplain, the superintendent, and his congressman, the appellant failed to address his concerns with other, more appropriate, authorities. The appellant never attempted to contact the commander of the confinement facility to complain, either formally or informally, even though the facility had a functioning prisoner grievance system in place and the appellant had easy access to the proper forms. The appellant also failed to seek help from his squadron commander and first sergeant when he saw them on the day charges were preferred against him--about a month after his in-processing. Unfortunately, when he made later requests to talk to them, he was told they refused to see him. However, he did have access to a telephone, and on one occasion, the appellant was escorted by Mr. Castro, the superintendent of his squadron, to an appointment with his defense counsel and failed to raise any concerns about the conditions of the confinement facility.

Moreover, he failed to use other available remedies. The appellant filed neither an Article 138, UCMJ, complaint nor an IG complaint. Additionally, most of the improper conduct the appellant complains of occurred prior to his second court-martial, but the appellant never raised any concerns about the treatment he was receiving to his defense counsel, the military judge, or the convening authority. In addition, on 22 May 2000, more than a month after his second trial, he submitted a clemency request to the convening authority pursuant to Rule for Courts-Martial (R.C.M.) 1105. He complained primarily about the timing and fairness of his second court-martial in light of the effect it had on him and his family, and his counsel raised several legal issues, but neither raised any concerns about conditions at the Dyess AFB confinement facility. The appellant apparently never told any of his defense counsel about the treatment he received until some unspecified time after he returned to Miramar, and thus his complaints were aired for the first time on appeal.

Exhaustion of Administrative Remedies

Ordinarily, we would not review a complaint concerning cruel and unusual punishment unless the appellant has shown that all means of administrative relief have been exhausted. *United States v. Miller*, 46 M.J. 248, 250 (1997); *United States v. Coffey*, 38 M.J. 290, 291 (C.M.A. 1993). "In this regard appellant must show us, absent some unusual or egregious circumstance, that he has exhausted the prisoner-grievance system . . . *and* that he has petitioned for relief under Article 138, UCMJ, 10 USC § 938." *Coffey*, 38 M.J. at 291 (emphasis added).

In *United States v. Towns*, 52 M.J. 830 (A.F. Ct. Crim. App. 2000), *aff'd*, 55 M.J. 361 (2001), this court concluded that an appellant was not required to file a complaint pursuant to Article 138, UCMJ, if he or she raised the issue in post-trial submissions pursuant to R.C.M. 1105. Our Court noted that requiring an appellant "to file a second identical complaint under the rubric of Article 138 would be a redundant and senseless waste of time" when the post-trial submissions already established a complete record upon which to decide the case. *Towns*, 52 M.J. at 834. Neither the appellant nor his counsel, however, raised any concerns about conditions at the Dyess AFB confinement facility as part of his R.C.M. 1105 submissions.

The appellant did not avail himself of the confinement facility's grievance system, the Article 138, UCMJ, complaint procedures, or the post-trial review process as required by *Miller*, *Coffey*, and *Towns*. These are well-established remedies that would have addressed his complaints in a timely fashion and led to a well-developed record to assist in further review upon appeal. If he was dissatisfied with the way the confinement superintendent addressed his concerns, his next step would have been to complain to the facility commander, and if that did not bring satisfactory results, he was obligated to pursue an Article 138, UCMJ, complaint or raise it in his post-trial submissions.

In determining whether the appellant exhausted his administrative remedies, however, we have also considered whether other reasonable remedial relief was available. In this regard, we note the appellant declined to discuss his mistreatment with his commander and first sergeant at the time charges were preferred, even though he felt comfortable raising concerns about his second trial with them. Further, he failed to address his concerns to his civilian supervisor or the base IG. But perhaps most importantly, he did not tell any of his defense counsel about the conditions of his confinement so they could raise it--either with the convening authority prior to referral or during clemency or with the military judge at trial.

Although the appellant did not exhaust his administrative remedies, we must consider whether "unusual or egregious" circumstances excused his failure to complain. *Miller*, 46 M.J. at 250; *Coffey*, 38 M.J. at 291. Clearly, the unwarranted harassment and frequent use of profanity led to a very unpleasant living environment for the appellant.

But nothing in the record suggests there was any express or implied threat of retaliation if the appellant were to complain. Although the guards' language may have gone beyond a certain "saltiness of expression" one would expect to hear in a confinement facility, it was not so intense or frequent so as to excuse his obligation to exhaust reasonably available remedies. We also recognize and have considered the appellant's relative sophistication concerning the confinement system--given he had spent two years in Naval and Marine Corps facilities--in determining what effect to give his lack of complaint. In fact, it is significant that in his unsworn statement at his second court martial, he described his time in the Marine Corps brig as "very hard," yet failed to mention anything whatsoever about the conditions at Dyess AFB.

Based upon the entire record, we therefore conclude that the appellant has failed to establish that he exhausted the particular remedies set forth in *Miller*, *Coffey*, and *Towns*, or any other reasonably available and reliable mechanism to redress his complaints. We further hold that the record fails to reflect any unusual or egregious circumstances that would constitute good cause for failing to exhaust his administrative remedies. Nonetheless, rather than dismissing the appellant's assignment of error on procedural grounds, and because the facts have now been developed in a fact-finding hearing, we will consider his claim of cruel and unusual punishment.

Cruel and Unusual Punishment

Claims of cruel and unusual punishment under the Eighth Amendment and Article 55, UCMJ, are reviewed de novo. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). The Supreme Court's interpretation of Eighth Amendment claims is usually applied to claims raised under Article 55, UCMJ. *United States v. Avila*, 53 M.J. 99, 101 (2000). The Supreme Court has held that "conditions" of confinement can constitute cruel and unusual punishment and has articulated a two-part test to make this determination. *Farmer v. Brennan*, 511 U.S. 825 (1994). First, the prisoner must have suffered an objective, "sufficiently serious" deprivation of "the minimal civilized measure of life's necessities." *Id*. at 834 (quoting *Rhodes v. Chapman* 452 U.S. 337, 347 (1981)). Second, the victim must show the pain inflicted was "unnecessary and wanton" and done with a subjective state of mind exhibiting "deliberate indifference" to inmate health and safety. *Id.*

The harassment or verbal abuse of a prisoner may result in "sufficiently severe" physical and psychological harm that can, under certain circumstances, constitute "unnecessary and wanton" infliction of pain and violate the Eighth Amendment. *Whitley v. Albers*, 475 U.S. 312, 319 (1986). Claims of verbal harassment or abuse must be supported by "well-established and clinically diagnosed" evidence of psychological pain. *United States v. White*, 54 M.J. 469, 474 (2001) ("verbal harassment, intimidation, or abuse, standing alone, does not constitute a constitutional violation"). *See also United*

States v. Sanchez, 53 M.J. 393, 396 (2000) (repeated verbal sexual harassment by guards and fellow inmates was not cruel and unusual punishment because there was no proof of clinically documented psychological trauma and deliberate indifference by prison officials); *Warburton v. Goord*, 14 F. Supp. 2d 289, 292 (W.D.N.Y. 1998) (harassment or profanity alone, without any injury, "no matter how inappropriate, unprofessional, or reprehensible it might seem," is not a violation of "any federally protected right"). *Cf. United States v. Corteguera*, 56 M.J. 330 (2002) (harassment of pretrial confinee during facility's orientation process, while inappropriate, was de minimus and did not warrant confinement credit pursuant to Article 13, UCMJ, 10 U.S.C. § 813).

The appellant asserts that he was subjected to frequent, unwarranted, and loud profanity on 13 to 19 occasions during his six-month stay at the Dyess AFB confinement facility and that he was required to harass other inmates on three other occasions. He testified that these incidents were "unprofessional" and more a "mental type thing" and indicated he felt irritated, uncomfortable, and hassled. The appellant makes no claim that his safety or health was jeopardized or that he was physically abused or threatened. He provides no clinical evidence of any psychological trauma.

Accordingly, we find the appellant has not met his burden to provide well-established and clinically diagnosed evidence of psychological pain and therefore hold he was not subjected to cruel and unusual punishment under the Eighth Amendment of the Constitution of the United States or Article 55 of the UCMJ.

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 (2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator