

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Airman First Class (E-3))	
JOHN D. FREDENBURG,)	Misc. Dkt. No. 2009-10
USAF,)	
Petitioner)	
)	
v.)	ORDER
)	
UNITED STATES,)	
Respondent)	Panel No. 2

On 9 October 2009, the petitioner filed a petition for extraordinary relief, in the nature of a Writ of Habeas Corpus. The petitioner, who was entered into the Department of Defense's Mandatory Supervised Release program (MSR), asks this Court to order his release from the MSR or, in the alternative, order the modification of the conditions of his supervised release. The basis for his request is that he opines: (1) his period of post-release supervision violates his right to due process because it was not part of his adjudged sentence and was not explicitly imposed by his court-martial; (2) his placement in the MSR, outside of his sentence, unlawfully abridges his liberty interest in abatement days, where good conduct time is an essential part of his sentence and where Department of Defense and Air Force regulations define good conduct abatement as a day-for-day reduction in the length of an inmate's sentence; (3) his placement into the MSR is illegal where the Air Force's Clemency and Parole Board's procedures and practices for implementing the MSR fail to meet due process standards of the Constitution; and (4) the Air Force Clemency and Parole Board abused its discretion, where it imposed additional conditions on his post-confinement supervision that were not related to his circumstances, are unconstitutionally vague, or result in a greater deprivation of his liberty than necessary to achieve the MSR objectives.

On 17 December 2003, a military judge sitting as a general court-martial, pursuant to the petitioner's pleas, found him guilty of one specification of attempting to manufacture methamphetamine, one specification of conspiracy to distribute ecstasy, one specification of divers possession of approximately 6,000 grams of ecstasy, one specification of divers distribution of approximately 1,900 grams of ecstasy, one specification of divers use of ecstasy, one specification of distribution of cocaine, one specification of importing cocaine and ecstasy into the United States, and one specification of traveling in interstate commerce with intent to distribute ecstasy on divers occasions, in violation of Articles 80, 81, 112a, and 134, UCMJ, 10 U.S.C. §§ 880, 881, 912a, 934.

The adjudged and approved sentence consisted of a dishonorable discharge, confinement for ten years, forfeiture of all pay and allowances, and a reduction to the grade of E-1. On appeal, this Court modified the “divers possession of ecstasy” finding by excepting out the words “on divers occasions,” affirmed the remaining findings, and reassessed the sentence. The reassessed sentence consisted of a dishonorable discharge, confinement for ten years, forfeiture of all pay and allowances, and a reduction to the grade of E-1. *United States v. Fredenburg*, ACM 35880 (A.F. Ct. Crim. App. 21 Nov 2005) (unpub. op.).

On 18 December 2008, the Air Force Clemency and Parole Board advised the petitioner that it was placing him on MSR, effective 9 October 2009 and continuing until 7 November 2013. As part of his supervised release, the petitioner must comply with a host of conditions, including entering a community-based substance abuse program, attending Alcoholics Anonymous/Narcotics Anonymous meetings, abstaining from alcohol, and performing 250 hours of volunteer community service. On 17 March 2009, the petitioner asked if he could appeal his entry into the MSR and was advised that he could not appeal. Despite being advised that he could not appeal, on 17 April 2009, the petitioner appealed his entry into the MSR and asked the Air Force Clemency and Parole Board to reconsider his entry into the MSR. On 28 April 2009, the Air Force Clemency and Parole Board denied the petitioner’s appeal and declined to reconsider the petitioner’s entry into the MSR.

Writ of Habeas Corpus Jurisdiction

The All Writs Act authorizes “all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions.” 28 U.S.C. § 1651(a). The Act requires two separate determinations: (1) whether the requested writ is in aid of its existing statutory jurisdiction; and (2) whether the requested writ is necessary or appropriate. See *Denedo v. United States*, 66 M.J. 114, 120 (C.A.A.F. 2008) (citing *Loving v. United States*, 62 M.J. 235, 245-246 (C.A.A.F. 2005); *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999)), *aff’d*, 129 S. Ct. 2213 (2009).

This Court’s authority is limited to reviewing proceedings with respect to the findings and sentence approved by the convening authority. See *Huschak v. Gray*, No. 08-3257-RDR, 2009 WL 2413981, at *5 (D. Kan. Aug 6, 2009) (citing 10 U.S.C. §§ 866(c), 867(c)); *United States v. Pena*, 64 M.J. 259, 264 (C.A.A.F. 2007), *cert. denied*, 550 U.S. 937 (2007). We are without authority to review the general administration of the Air Force Clemency and Parole Board and its proceedings. *Pena*, 64 M.J. at 264 (citing *United States v. Towns*, 52 M.J. 830, 833 (A.F. Ct. Crim. App. 2000), *aff’d*, 55 M.J. 361 (C.A.A.F. 2001)); see also *United States v. Tate*, 64 M.J. 269, 272 (C.A.A.F. 2007). Stated differently, we only have authority to review the Air Force Clemency and Parole Board and its proceedings as they impact the petitioner’s findings and sentence. *Pena*, 64 M.J. at 264; see also *Tate*, 64 M.J. at 272. Issues #3 and #4 are not issues that

impact the petitioner's findings and sentence. Rather they concern the general administration of the Air Force Clemency and Parole Board and its proceedings and, as such, these issues are beyond our review authority. Accordingly we will not review Issues #3 and #4.

*Issue #1: Post-Release Supervision as a
Violation of the Petitioner's Due Process Rights*

This claim fails because there is no requirement, statutorily or otherwise, that MSR must be part of an adjudged sentence and explicitly imposed by a court-martial to survive legal scrutiny. MSR is a collateral consequence of an adjudged sentence. It is well established that members are sentenced without regard to collateral administrative effects of a sentence and while a military judge is free to inquire about the possible collateral consequences of a conviction, to include MSR, he is not obliged to so inquire. *United States v. Pena*, 61 M.J. 776, 784 (A.F. Ct. Crim. App. 2005), *aff'd*, 64 M.J. 259 (C.A.A.F. 2007). In short, while the petitioner may want to impose a requirement that MSR be a part of an adjudged sentence and explicitly imposed at a court-martial before MSR can be legally imposed, there is no legal basis for such a requirement. Accordingly, we find that the petitioner's post-release supervision does not violate his due process rights.

Issue #2: MSR as an Abridgement of the Petitioner's Liberty Interest

With this issue, the petitioner essentially asserts MSR extends or lengthens his adjudged sentence and that he will lose his good conduct time. We disagree. First, good conduct time is not part of an adjudged sentence and is simply a collateral consequence of the petitioner's sentence. The petitioner was sentenced to ten years of confinement and has no reasonable right to expect that he will serve less than ten years of confinement. *See Huschak*, No. 08-3257-RDR, 2009 WL 2413981, at *6. Second, as a collateral consequence, he may end up serving less than ten years of confinement, assuming he successfully completes MSR, but failing that, the maximum period of confinement he will serve will be his adjudged period of ten years.

Third, "[t]he violation of conditions of parole leading to a loss of 'street time' credit or good conduct time . . . does not constitute an increased punishment." *Id.* (citing *Thomas v. United States*, 327 F.2d 795, 797 (10th Cir. 1964)). Moreover, courts have routinely held that parole regulations which operate to negate the impact of earned good conduct time upon a sentence of confinement do not violate the Constitution. *Id.* at *8 (citing *Patterson v. Knowles*, 162 F.3d 574 (10th Cir. 1998); *Young v. Nickels*, 59 F. Supp. 2d 1137 (D. Kan. 1999); *Noreen v. U.S. Army Clemency and Parole Board*, No. 04-3004-RDR, 2005 WL 1027097 (D. Kan. Apr. 27, 2005); *Sanders v. Nickels*, No. 97-3449-RDR, 2000 WL 134466 (D. Kan. Jan. 7, 2000)). Lastly, the petitioner received the

benefit of his good conduct time as it was a factor considered in determining his minimum release date which, in turn, determined when he would be release on MSR.

Having considered the matters submitted, the petitioner has failed to demonstrate that extraordinary relief is warranted.

Accordingly, it is by the Court on this 9th day of November, 2009

ORDERED:

That Petitioner's Writ of Habeas Corpus is hereby **DENIED**.

FOR THE COURT

OFFICIAL



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