UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain BRIAN W. GROCKI
United States Air Force

ACM 37982

12 February 2013

Sentence adjudged 16 May 2011 by GCM convened at Buckley Air Force Base, Colorado. Military Judge: Scott E. Harding (sitting alone).

Approved sentence: Dismissal and confinement for 5 years.

Appellate Counsel for the Appellant: Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Lauren N. DiDomenico; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and CHERRY
Appellate Military Judges

PER CURIAM:

A general court-martial composed of military judge alone convicted the appellant in accordance with his pleas of aggravated sexual assault of a child, aggravated sexual abuse of a child, aggravated sexual contact with a child, and abusive sexual contact with a child, in violation of Article 120, UCMJ, 10 U.S.C. § 920, and sentenced the appellant to a dismissal and confinement for 10 years. In accordance with a pretrial agreement, the convening authority approved the dismissal and confinement for five years. The appellant assigns as error that he was illegally confined with foreign nationals for 18 days after trial and that his sentence is inappropriately severe. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Confinement Conditions

After his trial on 16 May 2011, the appellant was held for 18 days in a local civilian confinement facility pending transfer to Naval Consolidated Brig Miramar. He made no complaints about the conditions of his confinement until February 2012, when he mentioned the issue during a visit by the commander and first sergeant of the security forces squadron from his former base of assignment. Shortly thereafter, he filed a declaration with this Court stating he was confined at the local facility with foreign nationals. The appellant states he was unaware that such commingling with foreign nationals was prohibited, was unaware whether the local facility had a complaint procedure, and was unaware of the Article 138, UCMJ, 10 U.S.C. § 938, complaint process. In his declaration, the appellant describes no adverse effects of his alleged association with foreign nationals.

Article 12, UCMJ, 10 U.S.C. § 812, states: "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." We review de novo the question of whether an appellant's post-trial confinement violates Article 12, UCMJ. *United States v. Wise*, 64 M.J. 468, 473-74 (C.A.A.F. 2007). "[A] prisoner must seek administrative relief prior to invoking judicial intervention to redress concerns regarding post-trial confinement conditions." *Id*. at 469 (quoting *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001)). The purpose of this requirement is to promote the "resolution of grievances at the lowest possible level and [to ensure] that an adequate record has been developed [to aid appellate review]." *Id*. at 471 (quoting *United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997)). "Since a prime purpose of ensuring administrative exhaustion is the prompt amelioration of a prisoner's conditions of confinement, courts have required that these complaints be made while an appellant is incarcerated." *Id*. (citations omitted). The "[a]ppellant must show that 'absent some unusual or egregious circumstance . . . he has exhausted the prisoner-grievance system [in the confinement facility] and that he has petitioned for relief under Article 138[, UCMJ].'" *Id*. (quoting *White*, 54 M.J. at 572).

The appellant failed to pursue the administrative avenues available for redress within the military system that might have permitted an investigation into his allegations in a timely fashion: Namely, the appellant failed to file an Article 138, UCMJ, complaint; submit a grievance with the inspector general; ask his chain of command to address the issue while he was at the civilian jail; or inform his defense counsel of his situation so that he might inquire into the problem with military authorities. Rather, the appellant waited nine months after being transferred to the military brig before he notified anyone. We find no "unusual or egregious circumstances" to excuse the appellant's failure to pursue available administrative remedies. *See Wise*, 64 M.J. at 471.

Sentence Severity

The appellant argues that the adjudged and approved dismissal is inappropriately severe.[1] We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). Applying these standards to the present case, we do not find a dismissal inappropriately severe nor do we find sentence comparison appropriate. *See United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006) (citing *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001)), *aff'd in part*, 66 M.J. 291 (C.A.A.F. 2008).

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[2] Article 66(c), UCMJ. Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist

[1] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[2] We note that the overall delay of over 18 months between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to timely review and appeal, and (4) prejudice." *See United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. The post-trial record contains no evidence that the delay has had any negative impact on the appellant. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.