UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class SHARON B. JOHNSON
United States Air Force

ACM 36397

4 May 2007

Sentence adjudged 28 June 2005 by GCM convened at Tinker Air Force Base, Oklahoma. Military Judge: Dawn R. Eflein (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 13 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major Anniece Barber.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Matthew S. Ward.

Before

BROWN, BECHTOLD, and BRAND
Appellate Military Judges

PER CURIAM:

The appellant was convicted by a military judge, in accordance with her pleas, of one specification of wrongful use of cocaine on divers occasions, one specification of wrongful distribution of cocaine, and one specification of divers wrongful introduction of cocaine onto an installation, all in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Her approved sentence consists of a bad-conduct discharge, confinement for 13 months, and reduction to E-1.

On appeal, the appellant raises three issues pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982). The appellant asserts: (1) She received ineffective assistance of counsel when her trial defense counsel failed to request credit for illegal pretrial

punishment in violation of Article 13, UCMJ, 10 U.S.C. § 813; (2) She is entitled to sentence relief because she was subjected to illegal post-trial punishment as a result of the confinement facility's deliberate indifference to her high-risk pregnancy; and (3) Her sentence is inappropriately severe.

Ineffective Assistance of Counsel

The appellant's first assigned error is that her counsel were ineffective in that they failed to raise the issue of illegal pretrial punishment in violation of Article 13, UCMJ. Article 13, UCMJ, prohibits the government from: (1) punishing an accused before guilt is established at trial, and (2) imposing pretrial confinement that is more rigorous than circumstances require to ensure an accused's presence at trial. *See United States v. Crawford*, 62 M.J. 411, 414 (C.A.A.F. 2006); *United States v. Fischer*, 61 M.J. 415, 418 (C.A.A.F. 2005); *United States v Inong*, 58 M.J. 460, 463 (C.A.A.F. 2003); *United States v. Fricke*, 53 M.J. 149, 154 (C.A.A.F. 2000); *United States v. Mazer*, 62 M.J. 571, 577 (N.M. Ct. Crim. App. 2005). If an appellant can establish that either prohibition was violated, she is entitled to sentence relief. Rule for Courts-Martial 905(c)(2); *Inong*, 58 M.J. at 463 (citing *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002)).

This Court has the first opportunity to consider the appellant's claim of illegal pretrial punishment, as she did not raise this issue at trial. Normally, the issue would be waived on appeal absent plain error. *Inong*, 58 M.J. at 461 (citing *United States v. King,* 58 M.J. 110 (C.A.A.F. 2003)). However, since the issue forms the basis of the ineffective assistance of counsel claim, it is necessary to examine the first issue to the extent necessary to resolve the second. Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis,* 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight,* 53 M.J. 340, 342 (C.A.A.F. 2000)). We analyze claims of ineffective assistance of counsel under the framework established by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984). Counsel are presumed to be competent. Where there is a lapse in judgment or performance alleged, we ask first whether the conduct of the defense was actually deficient, and, if so, whether that deficiency prejudiced the appellant. *Id.* at 687. *See also United States v. Polk,* 32 M.J. 150, 153 (C.M.A. 1991). The appellant bears the burden of establishing that her trial defense counsel was ineffective. *United States v. Garcia,* 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell,* 55 M.J. 479, 482 (C.A.A.F. 2001). Because the appellant raised these issues by submitting a post-trial affidavit, we will resolve the issues in accordance with the principles established in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

The appellant says that because she was relieved of duty in December 2004, and had to perform menial tasks and had longer work hours, she was illegally punished. During the appellant's trial, she was specifically asked if she had been subjected to illegal pretrial punishment in violation of Article 13, UCMJ, and she answered in the negative. It

is only now on appeal, she alleges illegal pretrial punishment in her post-trial affidavit. At no time does the appellant state she told her counsel of the conditions of her assignment to the Relieved of Duty program. She simply states she told her counsel she had been assigned to the program. Applying the factors set forth in *Ginn,* we conclude we can resolve this assignment of error based upon the record and the appellate filings. *Id.* We find the appellant has failed to meet her burden on the issues of illegal pretrial punishment and ineffective assistance of counsel.

Illegal Post-Trial Punishment

As to the second error, the appellant alleges she was subjected to cruel and unusual punishment while housed in a local civilian county jail for the three months following her court-martial. Specifically, in her affidavit, she states she did not receive proper nutrition and she was not housed with other pregnant women. The appellant says she was forced to drink out of the toilet and she was discriminated against in jail. Whether raised under the Eighth Amendment to the United States Constitution or Article 55, UCMJ, 10 U.S.C. § 855, the appellant must show the following in order to prevail in her assertion of cruel and unusual punishment: (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of the prison officials amounting to deliberate indifference to her health and safety; and (3) that she has exhausted the prisoner-grievance system and that she has petitioned for relief under Article 138, UCMJ, 10 U.S.C. § 938. *United States v. Lovett,* 63 M.J. 211, 215 (C.A.A.F. 2006). Again, taking her affidavit at face value, and applying the factors set out in *Ginn*, the appellant has failed to meet the second and third prongs of the test set out in *Lovett. Id.; Ginn,* 47 M.J. at 248.

Sentence Appropriateness

Finally, the appellant alleges her bad-conduct discharge and confinement for 13 months are inappropriately severe. "Article 66(c), UCMJ, [10 U.S.C. § 866(c),] requires this Court to approve only that sentence, or such part or amount of the sentence, as it finds correct in law and fact and determines should be approved." *United States v. Amador*, 61 M.J. 619, 626 (A.F. Ct. Crim. App. 2005), *pet. denied,* 63 M.J. 183 (C.A.A.F. 2006). "The determination of sentence appropriateness 'involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves.'" *Id.* at 626 (quoting *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988)). Sentence appropriateness is judged by individualized consideration of the particular appellant on the basis of the nature and seriousness of the offense, the appellant's record of service, the character of the offender, and all matters contained in the record of trial. *Amador,* 61 M.J. at 626 (citing *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Mamaluy,* 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

Having given individualized consideration to this particular appellant and having carefully reviewed all the facts and circumstances of her case, we do not find the appellant's sentence to be inappropriately severe. We are convinced the sentence is appropriate.

Conclusion

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator