

**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman Basic JESSICA L. MALLORY  
United States Air Force**

**ACM S31245**

**6 November 2007**

Sentence adjudged 29 November 2006 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: Barbara G. Brand (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 45 days.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Donna S. Rueppell, and Captain Brendon K. Tukey.

Before

**SCHOLZ, JACOBSON, and THOMPSON**  
Appellate Military Judges

This opinion is subject to editorial correction before final release.

**PER CURIAM:**

In accordance with her pleas, the appellant was found guilty of two specifications of wrongful use of cocaine in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The military judge, sitting alone as a special court-martial, sentenced the appellant to a bad-conduct discharge and confinement for 45 days. The convening authority approved the findings and sentence as adjudged. The appellant now asserts that the military judge erred by failing to grant the appellant credit against her approved sentence to confinement for conditions that constituted restriction tantamount to confinement. We disagree.

## *Background*

The appellant was assigned to a training squadron at Lackland Air Force Base (AFB), Texas, at the time of the offenses. On 6 May 2006 the appellant went to a motel off base with several other airmen. Over the course of the evening the appellant snorted cocaine three times. Three days later the appellant was selected for a random urinalysis, which came back positive, revealing her cocaine use. On 1 July 2006, the appellant went off base again, where she once again used cocaine. Unfortunately for the appellant local law enforcement authorities raided the hotel and she was arrested. Upon being returned to military control, the appellant was assigned to the transition flight on Lackland AFB, a dormitory for airmen pending involuntary separation. She spent a total of 150 days in transition flight.

At trial, the appellant brought a motion for appropriate relief asserting that the conditions of her pretrial confinement were tantamount to confinement and that they violated Article 13, UCMJ, 10 U.S.C. § 813.

The evidence on the motion showed that the appellant was restricted to the transition flight building when she was not on a work detail or at an appointment. When she left for an appointment or work detail she had to sign out, and when she returned she had to sign back in. The appellant could not leave the building without permission and was generally escorted to appointments and work details. She was allowed to go to the Base Exchange but only with an escort. She was allowed to go to church services unescorted.<sup>1</sup> The appellant was not allowed to have civilian clothes, and was not allowed to wear her law enforcement beret, badge, or occupational device on her uniform. After one week in the transition flight, the appellant earned certain privileges. She was allowed to have some personal items, such as CDs and DVDs. The appellant was allowed unlimited telephone access after duty hours, either by using calling cards she purchased or by checking out her cell phone from transition flight personnel. She was allowed to have visitors after approval by transition flight personnel. The appellant and other transition flight personnel were monitored by hallway cameras, and during the night the NCO on duty checked the appellant's room to make sure she was there.

At trial the military judge concluded that there was no intent to punish the appellant and that the restrictions placed on the appellant served a legitimate military purpose, and thus found there was no illegal pretrial punishment in violation of Article 13, UCMJ. The military judge also concluded the restrictions placed on the appellant were not tantamount to confinement. The military judge noted that the transition flight had an ongoing problem with drugs, contraband, and assaults. In announcing the

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<sup>1</sup> The appellant received a letter of counseling for failing to return to the transition flight on time after she had been allowed to attend a church service unescorted.

sentence, the military judge stated that although she did not award credit, she did consider the long amount of time the appellant spent in transition flight.

### *Analysis*

We review de novo the ultimate legal question of whether certain pretrial restrictions are tantamount to confinement. See *United States v. King*, 58 M.J. 110, 113 (C.A.A.F. 2003) (citing *United States v. Guerrero*, 28 M.J. 223 (C.M.A. 1989)). If the pretrial restraint falls so close to the confinement end of the spectrum ranging between restriction and confinement as to be tantamount to confinement, the appellant is entitled to administrative credit against his sentence. See *United States v. Smith*, 20 M.J. 528, 530-31 (A.C.M.R. 1985) (citing *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985) (summary disposition)).

In conducting our review of the condition of restrictions, we look to the totality of the conditions imposed. *Smith*, 20 M.J. at 530. In *King*, our superior court outlined the factors to consider in determining whether restrictions are tantamount to confinement:

Factors to consider include the nature of the restraint (physical or moral), the area or scope of the restraint (confined to post, barracks, room, etc.), the types of duties, if any, performed during the restraint (routine military duties, fatigue duties, etc.), and the degree of privacy enjoyed within the area of restraint. Other important conditions which may significantly affect one or more of these factors are: whether the accused was required to sign in periodically with some supervising authority; whether a charge of quarters or other authority periodically checked to ensure the accused's presence; whether the accused was required to be under armed or unarmed escort; whether and to what degree [the] accused was allowed visitation and telephone privileges; what religious, medical, recreational, educational, or other support facilities were available for the accused's use; the location of the accused's sleeping accommodations; and whether the accused was allowed to retain and use his personal property (including his civilian clothing).

58 M.J. at 113.

After reviewing the record before us, and considering the nature and scope of the appellant's pretrial restriction and the conditions imposed upon her, we hold that the appellant's pretrial restriction was not tantamount to confinement. The conditions imposed on the appellant and others in the transition flight were necessary to maintain good order and discipline among airmen awaiting separation from the Air Force, and while strict, the restrictions were not equivalent to confinement and were not punishment under Article 13, UCMJ.

*Conclusion*

The 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 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL



STEVEN LUCAS, GS-11, DAF  
Clerk of the Court