UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JAMES R. POWDRILL JR.
United States Air Force

ACM 37983

13 February 2013

Sentence adjudged 17 May 2011 by GCM convened at Ramstein Air Force Base, Germany. Military Judge: Jefferson B. Brown (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 120 months, and reduction to E-1.

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

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel Christopher C. Vannatta; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and SOYBEL
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

A general court-martial composed of military judge sitting alone convicted the appellant in accordance with his pleas of aggravated sexual contact with a child, in violation of Article 120, UCMJ, 10 U.S.C. § 920, and possessing, viewing, and manufacturing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The court sentenced him to a dishonorable discharge, confinement for 18 years, and reduction to the grade of E-1. In accordance with a pretrial agreement, the convening authority approved the dishonorable discharge and reduction to E-1 but only 120 months of the adjudged confinement. The appellant assigns as error that certain conditions of his pretrial confinement constituted unlawful pretrial punishment, in violation of Article 13,

UCMJ, 10 U.S.C. § 813. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

The appellant was properly ordered into pretrial confinement at the United States Army Correctional Facility, Mannheim, Germany. The regulations of that facility required leg and hand restraints on pretrial confinees when released from the facility under unit escort. The restraints could be removed by order of a judge or physician. The appellant argues that the use of such restraints when the appellant was transported to his base of assignment for either trial preparation with his counsel or judicial proceedings were more rigorous than circumstances required to ensure the appellant's presence at trial and therefore violated Article 13, UCMJ.

Article 13, UCMJ, prohibits purposefully imposing punishment before conviction as well as imposing pretrial confinement conditions more rigorous than necessary to ensure the accused's presence at trial. *United States v. Fricke*, 53 M.J. 149, 154 (C.A.A.F. 2000) (citing *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997)). Where the request for relief is based on a claim that the conditions imposed were more rigorous than necessary, the appropriate inquiry is whether the conditions are reasonably related to a legitimate governmental objective or operating policy of the facility; if not, such conditions may show an intent to punish. *United States v. James*, 28 M.J. 214, 216 (C.M.A. 1989) (citing *Bell v. Wolfish*, 441 U.S. 520, 538-39 (1979)). Unduly rigorous conditions must be so egregious as to give rise to an inference of punishment or so excessive as to constitute punishment. *McCarthy*, 47 M.J. at 165. In detailed findings and conclusions, the military judge determined that the evidence did not show an intent to punish and did not show that the conditions of restraint were unreasonable.

We review the issue of whether there was unlawful pretrial restraint as a mixed question of law and fact. *McCarthy*, 47 M.J. at 165. We defer to the findings of fact by the military judge unless clearly erroneous. *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005). But we review de novo the conclusions based on those facts. *United States v. Zarbatany*, 70 M.J. 169, 174 (C.A.A.F. 2011); *United States v. Mosby*, 56. M.J. 309, 310 (C.A.A.F. 2002); *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000). The appellant has the burden of establishing his entitlement to relief under Article 13, UCMJ. *Mosby*, 56 M.J. at 310.

We agree with the military judge that the appellant was not intentionally punished and that the conditions of pretrial restraint were not unreasonable. As did the military judge, we look to the intent of the conditions imposed to determine whether the purposes are "reasonably related to a legitimate governmental objective." *United States v. Palmiter*, 20 M.J. 90, 95 (C.M.A. 1985) (citing *Bell*, 441 U.S. at 539). The Army rule requiring restraints whenever an inmate is away from the facility is a reasonable requirement related to the legitimate governmental objective of security for both the inmate and the escorts, especially given the foreign location of the confinement facility.

Indeed, the military judge highlighted this circumstance in his ruling: "[I]f a confinee is unshackled and flees a meeting with defense counsel, and manages to escape the base, the confinee will then be immediately outside of the United States and will be loose in a host nation." Considering all the circumstances of the appellant's pretrial confinement in the context of the restraint imposed, the military judge was properly reluctant to second guess security determinations of confinement officials. *See McCarthy*, 47 M.J. at 167 (The Court will not "engage in second-guessing the decision of brig authorities."). The findings of fact are not clearly erroneous, and, reviewing the conclusions de novo, we agree that the conditions of restraint did not constitute illegal pretrial punishment under the facts of this case.

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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist