UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MARK A. PRICE
United States Air Force

ACM 34869

12 November 2003

Sentence adjudged 8 November 2001 by GCM convened at Luke Air Force Base, Arizona. Military Judge: Jack L. Anderson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 8 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Jeffrey A. Vires, Major Jefferson B. Brown, and Major Karen L. Hecker.

Appellate Counsel for the United States: Lieutenant Colonel Lance B. Sigmon and Major Steven R. Kaufman.

Before

PRATT, ORR, W.E., and GENT
Appellate Military Judges

PER CURIAM:

The appellant was convicted, pursuant to his pleas, of four specifications of housebreaking and four specifications of theft, in violation of Articles 130 and 121, UCMJ, 10 U.S.C. §§ 930, 921. His approved sentence included a bad-conduct discharge, confinement for 8 months, forfeiture of all pay and allowances, and a reduction to E-1. Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant has renewed three issues on appeal.

The appellant first asserts that he should receive sentencing credit for 10 days of psychiatric hospitalization before he was placed in pretrial confinement. The appellant raised this issue before the military judge. However, trial defense counsel affirmatively conceded this issue following testimony from the appellant's psychiatrist stating that the appellant was voluntarily hospitalized for suicidal ideation. This concession, entirely

appropriate in light of the testimony, constituted a waiver of this issue. Accordingly, this issue is not viable on appeal. *United States v. Inong*, 58 M.J. 460 (C.A.A.F. 2003*).*

The appellant next alleges that he was unlawfully placed in pretrial confinement. Having carefully considered the record of trial and the appellant's pleadings, we are convinced that the military judge did not abuse his discretion when ruling on this matter at trial. *United States v. Wardle*, 58 M.J. 156, 157 (C.A.A.F. 2003)(citing *United States v. Gaither*, 45 M.J. 349, 351-52 (C.A.A.F. 1996)).

Finally, the appellant claims that he was illegally punished while in pretrial confinement because he was not permitted to meet with his counsel in a non-threatening and private environment on the day before his trial. The military judge made findings of fact that we adopt as our own. The record reflects that on the day before the appellant's trial, his defense counsel sought the appellant's release from the confinement facility so the appellant could go to the defense counsel's office to prepare for trial. Confinement officials declined to allow the appellant to leave the facility. The military judge found that confinement officials did not make this decision to punish the appellant. Instead, they sought to adhere to regulatory guidance and protect the appellant's safety, and the safety of others. Trial defense counsel met with his client in the confinement facility. Their communications were not impeded and there is no evidence that others overheard privileged communications. In answer to questions from the military judge, trial defense counsel repeatedly informed the military judge that he had sufficient time to prepare for trial. The appellant made a similar acknowledgment through counsel.

Article 13, UCMJ, 10 U.S.C. § 813, prohibits the punishment of those being held for trial. It also requires that confinement be no more rigorous than the circumstances required to ensure the prisoner's presence at trial. The appellant has the burden of proving violations of Article 13, UCMJ. *See* Rule for Courts-Martial (R.C.M.) 905(c)(2). The question whether the appellant is entitled to credit for a violation of Article 13, UCMJ, is a mixed question of fact and law. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002) (citing *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000)). The question of intent to punish is "one significant factor in [the] judicial calculus" for determining whether there has been an Article 13, UCMJ, violation. *United States v. Huffman*, 40 M.J. 225, 227 (C.M.A. 1994), *overruled on other grounds by United States v. Inong*, 58 M.J. 460 (C.A.A.F. 2003) (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)). We will not overturn a military judge's findings of fact, including a finding of no intent to punish, unless they are clearly erroneous. *Smith,* 53 M.J. at 168. We will review de novo the ultimate question whether an appellant is entitled to credit under Article 13, UCMJ. *Mosby,* 56 M.J. at 310. Having considered the record of trial and the arguments asserted by both trial and appellate defense counsel, we hold that the military judge's findings were not clearly erroneous as a matter of law and that the appellant is not entitled to additional sentence credit for an Article 13, UCMJ, violation.

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.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Clerk of Court