

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,)	Misc. Dkt. No. 2012-08
Respondent)	
)	
v.)	
)	ORDER
Lieutenant Colonel (O-5))	
JAMES W. RICHARDS,)	
USAF,)	
Petitioner)	Panel No. 2

On 18 June 2012, the petitioner filed a petition for extraordinary relief in the nature of a writ of habeas corpus. As a basis for relief, he argues that he is being unlawfully confined prior to trial, in violation of Rule for Courts-Martial (R.C.M.) 305. The petitioner requests that this Court order his immediate release from pretrial confinement.

Procedural History

The petitioner was ordered into pretrial confinement by the 325th Fighter Wing commander on 12 March 2012. On 13 March 2012, the Air Force Legal Operations Agency (AFLOA) commander completed a 72-hour memorandum in accordance with R.C.M. 305(h)(2) electing to keep the petitioner in confinement.¹ On 14 March 2012, a Pretrial Confinement Reviewing Officer (PCRO) conducted an R.C.M. 305(i)(2) hearing to determine whether continued confinement was necessary. The petitioner and his defense counsel were present at the hearing. The PCRO found that probable cause existed to conclude the petitioner had committed the offenses for which he was being confined. He further determined that it was foreseeable that the petitioner would engage in serious criminal misconduct if released. The PCRO directed the petitioner to be continued in pretrial confinement. The petitioner requested that the PCRO reconsider his decision or, in the alternative, order a new pretrial confinement hearing with a new reviewing officer on 3 May 2012. The PCRO denied the petitioner’s request on 7 May 2012.

Background

In April 2011, the Air Force Office of Special Investigations (AFOSI) initiated an investigation into allegations the petitioner had repeatedly molested a minor child while the petitioner was a member of the Big Brothers Big Sisters organization. The AFLOA

¹ The commander’s memorandum also served as a 48-hour probable cause determination required by Rule for Courts-Martial (R.C.M.) 305(i)(1). See R.C.M. 305(h)(2).

commander subsequently issued a “no-contact” order to the petitioner on 24 June 2011, prohibiting him from initiating any contact or having communication with any person he knew to be associated with the Big Brothers Big Sisters program. The order was reissued with minor modifications and clarifications over the next several months. On each instance, the petitioner acknowledged his receipt of the order. During the ensuing investigation, further evidence was uncovered indicating the petitioner had been engaging in an ongoing sexual relationship with a 16-year-old boy, AP. The minor was interviewed and admitted that he and the petitioner had been involved in a physical relationship for the previous eight months. On 10 November 2011, the AFLOA commander issued a new order prohibiting the petitioner from contacting and/or communicating with AP. The order specifically informed the petitioner that he was not to have face-to-face contact or to communicate with AP by telephone or text message. Again, the petitioner acknowledged receipt and understanding of the order. The order was extended on 6 January 2012 and the petitioner was told it would remain in effect until 5 May 2012.

On 10 November 2011, pursuant to a search authorization granted by a military magistrate, AFOSI agents searched the petitioner’s home for materials and items that could be used for transmitting or storing electronic communications. The agents seized four computer hard drives and several portable drives. That same day, the petitioner was arrested by the Bay County Sheriff’s Office in Florida for traveling to meet a minor for the purpose of engaging in sexual activity, in violation of Florida law.² The arresting officers seized a Government and personal laptop computer from the petitioner. The various computer drives were sent to the Defense Computer Forensics Laboratory (DCFL) for analysis. A preliminary report indicated that over 10,000 images and videos of suspected child pornography were found on the drives, including at least 1,000 images identified by the National Center for Missing and Exploited Children as being actual child victims. Additionally, DCFL and AFOSI analysis revealed that the petitioner manufactured child pornography. The individual depicted in the pictures was a minor that the petitioner had previously sponsored and mentored while in the Big Brothers Big Sisters program.

On 11 March 2012, an AFOSI agent observed the petitioner traveling in his car with AP, leaving Tyndall Air Force Base in apparent violation of the commander’s no-contact order. The petitioner was subsequently apprehended and placed into pretrial confinement on 12 March 2012. The petitioner’s car and home were searched. Among the items found was a reservation in the petitioner’s name to a hotel located in the direction the petitioner and AP were traveling when he was apprehended. Additionally, the petitioner’s cell phone history revealed he had been in constant contact with two boys he had mentored while he was a Big Brother. Finally, three more computer drives were

² The minor subsequently recanted his claim of having a relationship with the petitioner. In response, Florida officials filed a NO INFORMATION document with the Florida courts on 12 April 2012, dropping the previously filed state charges.

seized during additional searches conducted on 28 March 2012 and 2 April 2012. The drives were turned over to DCFL for analysis.

On 9 May 2012, the AFLOA commander submitted a memorandum to the general court-martial convening authority explaining why it was not practicable at that time to forward charges against the petitioner. According to a memorandum, DCFL has not been able to complete its analysis due to sophisticated security protocols placed on some of the computer equipment. The AFLOA commander anticipated that the investigation would be completed by the end of June 2012.

Writ of Habeas Corpus Jurisdiction

The All Writs Act authorizes “all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions.” 28 U.S.C. § 1651. The Act requires two separate determinations: (1) whether the requested writ is “in aid of ‘its existing statutory jurisdiction;’” and (2) whether the requested writ is “necessary or appropriate.” *Denedo v. United States*, 66 M.J. 114, 120 (C.A.A.F. 2008) (citations omitted), *aff’d*, 556 U.S. 904 (2009). A writ of habeas corpus is used to order the release of a person from confinement. *Moore v. Akins*, 30 M.J. 249, 254 (C.M.A. 1990). The standard of review for habeas corpus in military courts is whether the prior review:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the [prior] proceeding.

Loving v. United States, 64 M.J. 132, 145 (C.A.A.F. 2006) (quoting 28 U.S.C. § 2254(d)). Based on the above, we conclude that this Court has jurisdiction to consider the petitioner’s writ of habeas corpus.

Petitioner’s Allegation of Error

The petitioner argues that he is entitled to be released from pretrial confinement because charges have not been preferred after 99 days of confinement (as of the date of his motion); the requirements necessary for continued confinement do not exist; the pretrial confinement process was not properly conducted; and lesser forms of restraint are adequate.

Article 33, UCMJ, 10 U.S.C. § 833, and R.C.M. 305 establish the procedural requirements necessary to place and keep a military member in pretrial confinement. Key among these safeguards is a written decision by the member’s commander that an

offense triable by a court-martial has been committed, the member committed it, and confinement is necessary because it is foreseeable that the member will not appear at trial or the member will engage in serious criminal misconduct. The commander must also determine that less severe forms of restraint are inadequate. Additionally, a pretrial confinement reviewing officer must make an independent determination that continued confinement is appropriate. Based upon the information made available by both the petitioner and the respondent, we are convinced that the conditions required by R.C.M. 305 have been met.

While the petitioner contends that the AFLOA commander was not a “neutral and detached officer” within the strictures of R.C.M. 305 and therefore his confinement is improper, this issue is more properly examined by the military judge at the appropriate stage of trial rather than this Court. Likewise, the petitioner’s claim that insufficient grounds exist to continue his confinement should also be addressed to the military judge after he or she is appointed. We find no basis to release the petitioner from pretrial confinement at this time.

Conclusion

Having considered the matters submitted by the petitioner, we find that he has failed to demonstrate that extraordinary relief is warranted.

Accordingly, it is by the Court on this 23rd day of July, 2012,

ORDERED:

That the Petition for Extraordinary Relief in the Nature of a Writ of Habeas Corpus is hereby **DENIED**.

FOR THE COURT

OFFICIAL



A handwritten signature in blue ink, appearing to read "S. Lucas", is written over a horizontal line.

STEVEN LUCAS
Clerk of the Court