

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman **THOMAS A. SZCESZINSKI**
United States Air Force

ACM S30983

16 July 2007

Sentence adjudged 14 September 2005 by SPCM convened at McConnell Air Force Base, Kansas. Military Judge: Mary M. Boone (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Major Matthew S. Ward, Major Amy E. Hutchens, and Captain Jefferson E. McBride.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, consistent with his pleas, of one specification of absence without leave (AWOL) terminated by apprehension and one specification of wrongful use of 3, 4-methylenedioxymethamphetamine (Ecstasy), in violation of Articles 86 and 112a, UCMJ, 10 U.S.C. §§ 886, 912a. He was sentenced to a bad-conduct discharge, confinement for 7 months, and reduction to the grade of E-1. Consistent with a pretrial agreement, the convening authority reduced the period of confinement to 6 months, but otherwise approved the sentence as adjudged.

On appeal, the appellant asserts he is entitled to credit for illegal pretrial confinement, in violation of Article 13, UCMJ, 10 U.S.C. § 813.¹ Finding no error, we affirm.

Background

After his apprehension for AWOL, the appellant was placed in pretrial confinement. He remained confined until trial, with most of the time served in a local civilian facility near his base of assignment. The appellate briefs of the parties indicate some unspecified portion of the appellant's confinement at that civilian facility was not imposed by the military as pretrial confinement, but was based on State charges unrelated to the offenses for which the appellant was court-martialed. The military judge, with the express agreement of the prosecution and defense, nonetheless awarded the appellant day-for-day credit for the entire period held, a total of 82 days.

Under the auspices of Department of Defense pay regulations, the appellant received no pay and allowances for the period he was purportedly being held by State authorities on State charges.² For the first time on appeal, the appellant claims that during the time his pay was withheld, he was really being held by civilian authorities on behalf of the military as the result of a "military hold" order. As a result, he argues that the withholding of his pay and allowances was not pursuant to the pay regulations, but constituted "punishment", in violation of Article 13, UCMJ. The appellant also asserts his pretrial confinement was punishment because other similarly situated offenders were not confined, but merely restricted to base, and because his first sergeant neglected to move the appellant's belongings out of his off-base civilian apartment for him while the appellant was in civilian custody.

The asserted wrongs are not evident from the record of trial, but are supported by a personal declaration of the appellant submitted with his appeal. In response, the government submitted an affidavit from the appellant's former first sergeant, denying all of the asserted wrongs. Faced with such conflicting statements, determining what occurred, and whether it constituted illegal pretrial punishment, would require this Court to order an evidentiary hearing. *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997); *United States v. Dubay*, 17 C.M.A. 147 (1967); however, we decline to do so, finding the appellant waived the issue by failing to raise it at trial.

¹ Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

² Department of Defense Financial Management Regulation 7000.14-R, Volume 7A, Chapter 1, ¶ 010302.D.1, Table 1-12, Rules 4-6, Table 1-13, Rules 1-10 (Feb 1999), provide guidelines on pay of members held by civil authorities. With some exceptions, members held in confinement by civil authorities on civilian charges accrue no pay and allowances while in confinement.

“Failure at trial to seek sentence relief for violations of Article 13 waives that issue on appeal absent plain error.” *United States v. Inong*, 58 M.J. 460, 465 (C.A.A.F. 2003). We find no plain error here. The appellant obviously knew about the conditions of his own pretrial confinement at the time of his trial. Indeed, he chose to emphasize some negative aspects of that pretrial confinement in his unsworn statement during sentencing proceedings, in support of his plea for leniency. Despite that knowledge, the appellant not only failed to raise the issue at trial, but both he and his trial defense counsel responded negatively to specific questions by the military judge as to whether the appellant had been subjected to illegal punishment in violation of Article 13, UCMJ.

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

AFFIRMED.

OFFICIAL

MARTHA E. COBLE-BEACH, TSgt, USAF
Court Administrator

