

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MARCUS D. TERRY
United States Air Force

ACM S30738

31 October 2006

Sentence adjudged 25 August 2004 by SPCM convened at Incirlik Air Base, Turkey. Military Judge: Adam Oler (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, Major L. Martin Powell, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Jefferson E. McBride.

Before

MOODY, JOHNSON and ZANOTTI
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ZANOTTI, Judge:

The appellant was tried by a military judge sitting alone as a special court-martial at Incirlik Air Base (AB), Turkey. Pursuant to his pleas, he was found guilty of absence without authority from his place of duty, terminated by apprehension, in violation of Article 86, UCMJ, 10 U.S.C. § 886, and wrongful use of marijuana on divers occasions in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 6 months and reduction to E-1. The convening authority approved the sentence as adjudged. The appellant asserts before this Court that the military judge erred when he denied additional credit against

the appellant's sentence for illegal pretrial punishment, in violation of Article 13, UCMJ, 10 U.S.C. § 813. The appellant requests that this Court grant him relief by ordering thirty-two days of additional credit against his sentence to confinement for each day he spent in a civilian confinement facility near San Antonio, Texas. For the reasons set forth below, we agree and grant relief.

Background

This case arose when the appellant departed Incirlik AB, Turkey, on a 30-day "consecutive overseas tour" leave before reporting to his unit at Kadena AB, Japan. He left Incirlik AB on or about 22 Oct 2003, and was due to report at Kadena AB not later than 30 November 2003. He took leave in his hometown -- San Antonio, Texas. He thereafter elected not to go to Kadena AB and did not report as required. On 3 June 2004, agents of the Air Force Office of Special Investigations apprehended him in San Antonio.

The appellant was placed in pretrial confinement on Lackland Air Force Base (AFB) on 3 June 2004. On 4 June 2004, he was transferred to the Comal County Jail, a civilian confinement facility near San Antonio. He was released from that facility on 6 July 2004 and returned to Incirlik AB, where he remained in pretrial confinement until his court-martial on 25 August 2004. He was in pretrial confinement a total of 83 days, 33 of which were spent in the Comal County Jail.¹

At his trial, the appellant raised a motion requesting additional credit for illegal pretrial punishment in violation of Article 13, UCMJ. During the trial defense counsel's initial presentation of the motion, he made a representation to the court that the appellant was transferred from the Lackland confinement facility to the civilian jail "because the San Antonio, Lackland Air Base facility was full." The military judge invited both parties to stipulate as to the matters of fact each presented in their initial representations to the court; however, the trial counsel declined to do so. The appellant then testified for the limited purpose of his motion. The appellant testified that he was confined in "basic training type" arrangements in a "dormitory-style cell" with 10 bunks, 19 civilian inmates, a table, and 3 shared commodes with little privacy. He wore a striped uniform emblazoned with the words, "Comal County Jail" and was subject to the same general conditions in the jail as other prisoners.² This motion was the appellant's first objection

¹ At trial, and on brief before this Court, counsels' calculations were reported to be 82 days of pretrial confinement, 32 of which were served in the civilian facility. The military judge calculated the length of confinement to be 83 and 33 days, respectively. This court agrees that relief for 33 days confinement is at issue.

² While the appellant is correct that the conditions of his pretrial confinement at the Comal County Jail did not comply with Air Force Instruction 31-205, *The Air Force Corrections System*, ¶¶ 5.8.1.2, 7.1.1 (7 Apr 2004), violations of that Instruction do not serve as independent grounds for relief under Article 13, UCMJ. See *United States v. Adcock*, 63 M.J. 514, 519 (A.F. Ct. Crim. App. 2006).

to his pretrial confinement conditions and was first brought to the court's attention on 23 August 2004 – two days before his trial was scheduled to begin.

In his findings of fact, the military judge referenced the trial defense counsel's earlier representation that the appellant was transferred to the civilian jail because the Lackland confinement facility was full.³ In spite of the fact that that the court received no evidence as to the status of Lackland's confinement facility capacity during 3-4 June 2004,⁴ the military judge stated that the trial defense counsel's representation, "in and of itself indicates military officials had a clear motive other than punishment" for the appellant's transfer to the civilian facility. He went on to state that the appellant's failure to object to his confinement conditions at the civilian facility, prior to 23 August 2004, was "strong evidence that no illegal pretrial punishment occurred." In the end, the military judge concluded there was no intent to punish on the part of either civilian or military officials and that the "conditions were in furtherance of the legitimate non-punitive government objectives." Based on that conclusion, the military judge denied relief.

Discussion

We review a military judge's findings of fact under a clearly erroneous standard. *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005). The application of those facts to any determination of whether the appellant is entitled to credit for unlawful pretrial confinement or punishment is reviewed *de novo*. *Id.* This Court reverses a trial judge's ruling as an abuse of discretion only "if the military judge's findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law." *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995) (citing 2 Steven A. Childress and Martha S. Davis, *Federal Standards of Review* § 11.02 (2d ed. 1992)).

We reverse the military judge's findings in the present case because the capacity status of the Lackland confinement facility during 3-4 June 2004 was not a *fact before the court*. Although the trial defense counsel did represent to the court that the Lackland confinement facility was full when the appellant was transferred, the record clearly indicates that the military judge recognized that the only evidence available to consider was that provided by the appellant. The government offered no evidence to explain the reason for the appellant's transfer from the confinement facility at Lackland AFB to the civilian jail. In spite of this, the military judge concluded there was "clear motivation other than punishment" for the appellant to be confined at the civilian facility. As argument by counsel does not constitute evidence, we disagree. *Cf. United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000) (citing *United States v. Nelson*, 1 M.J. 235, 239-

³ The trial defense counsel's representation regarding the Lackland confinement facility's capacity status was made as part of the same argument in which he suggested that the confinement facility at Lackland could have moved one of its *post-trial* prisoners to the civilian facility instead of moving the appellant.

⁴ The trial counsel was afforded the opportunity to present additional evidence but declined to do so.

40 (C.M.A. 1975)); *United States v. Davis*, 47 C.M.R. 50, 53 (C.M.A. 1973). Accordingly, this Court finds that the military judge's findings are clearly erroneous. As this was the cornerstone of the military judge's ruling, we also find it prejudicial.

Accordingly, it is ORDERED that the appellant be credited with an additional 33 days of pretrial confinement credit. The findings and sentence with additional credit for 33 days of unlawful pretrial confinement are correct in law and fact, and no other error prejudicial to the substantial rights of the appellant occurred. The findings and the sentence, as reassessed, are

AFFIRMED.

Senior Judge MOODY participated in this decision prior to his retirement.
Judge JOHNSON participated in this decision prior to her reassignment.

OFFICIAL

JEFFREY L. NESTER
Clerk of Court