

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

First Lieutenant JAMES E. THOMPSON
United States Air Force

ACM 36943

24 September 2007

Sentence adjudged 18 January 2007 by GCM convened at Offutt Air Force Base, Nebraska. Military Judge: Eric L. Dillow (sitting alone).

Approved sentence: Dismissal and confinement for 2 years.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major David P. Bennett, and Captain Timothy M. Cox.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Amber E. Hirsch.

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with his pleas, the appellant was found guilty of taking an indecent liberty with a female under 16 years of age, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The military judge, sitting alone as a general court-martial, sentenced the appellant to a dismissal and confinement for two years. The convening authority approved the finding and sentence as adjudged.

The appellant asserts one assignment of error. He argues that the military judge's failure to award him three days of *Allen*¹ credit toward his adjudged confinement was plain error. In the alternative, he argues that if plain error did not occur, his trial defense

¹ *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984).

counsel was ineffective in not bringing the civilian confinement to the attention of the military judge. Although we find neither plain error nor ineffective assistance of counsel, we agree with appellant's claim that the time he spent in civilian confinement should count against his sentence. In our decretal paragraph we direct that the appellant receive three days of sentence credit.

The appellant was arrested by civilian authorities on 2 August 2006 on charges of attempted sexual assault and was released on bail on 4 August 2006. Sometime after that, the local authorities agreed to cede jurisdiction over the offense to the Air Force. The appellant's court-martial was held on 18 January 2007, more than five months after his brief stay in civilian custody. On appeal, the appellant argues that his trial defense counsel should have been aware of the civilian custody based on the appellant's police report. He also argues that the military judge should have picked up on the issue when the appellant said, during his lengthy unsworn statement, "I was arrested and jailed on 2 August and released on bail." We find that neither the police report, the appellant's comment, nor both considered together rise to the level of plain error or ineffective assistance of counsel. Our position is further reinforced by the appellant's response to the military judge's question regarding pretrial confinement during the providence inquiry. The following colloquy took place:

MJ: Counsel, looking at the, again, the first page of the charge sheet. I see no indication of any sort of pretrial restraint or pretrial confinement. Is that correct, Trial Counsel?

TC: Yes, Your Honor.

MJ: Defense Counsel?

DC: That's correct, Sir.

MJ: And, Lieutenant Thompson, is that correct?

ACC: Yes, Your Honor.

The military judge's question was clear and the appellant had his opportunity to bring his pretrial confinement time to the judge's attention, but failed to do so. Nonetheless, it has now become clear that the appellant was held in civilian custody for three days for the offense that was later tried in his court-martial. Thus, error or no error, he is entitled to three days of administrative credit. *United States v. Sherman*, 56 M.J. 900 (A.F. Ct. Crim. App. 2002), *United States v. Murray*, 43 M.J. 507 (A.F. Ct. Crim. App. 1995).

Conclusion

The 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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). We order that the appellant receive a credit of three days against the confinement portion of his sentence. The finding and sentence are

AFFIRMED.

OFFICIAL



STEVEN LUCAS, GS-11, DAF
Clerk of Court