UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic ERIC S. TUCKER
United States Air Force

ACM 35106

26 September 2003

Sentence adjudged 15 January 2002 by GCM convened by Lackland Air Force Base, Texas. Military Judge: Gregory E. Pavlik (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 16 months.

Appellate Counsel for Appellant: Colonel Beverly B. Knott and Major Jeffrey A. Vires.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major John D. Douglas.

Before

VAN ORSDOL, STUCKY, and ORR, V.A.
Appellate Military Judges

OPINION OF THE COURT

STUCKY, Judge:

At a general court-martial, a military judge convicted the appellant, in accordance with his pleas of guilty, of one specification of absence without leave (AWOL), in violation of Article 86, UCMJ, 10 U.S.C. § 886; two specifications of dereliction of duty for underage drinking, in violation of Article 92, UCMJ, 10 U.S.C. § 892; two specifications of larceny of property of a value of less than $100.00, in violation of Article 121, UCMJ, 10 U.S.C. § 921; one specification of wrongful use of marijuana, and one specification of wrongful, divers uses of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Additionally, he was convicted, in accordance with his pleas, of a violation of the lesser included offense of AWOL terminated by apprehension, in

violation of Article 86, UCMJ, after the greater offense of desertion, Article 85, UCMJ, 10 U.S.C. § 885, was dismissed pursuant to the appellant's pretrial agreement. The military judge sentenced the appellant to a bad-conduct discharge and confinement for 16 months. The convening authority approved the adjudged sentence.

On appeal, the appellant alleges that the conditions of his pretrial confinement in the county jail violated Article 13, UCMJ, 10 U.S.C. § 813. The appellant claims that his trial defense counsel was ineffective because she did not seek additional sentence credit, as the appellant had requested. He only received the day-for-day credit to which all pretrial confinees are entitled under *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). This assignment of error is before this court pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). For the reasons set forth below, we find no merit to this issue and affirm.

I. Background

The appellant was a technical training student at Port Hueneme Naval Base (Port Hueneme), California, until 18 April 2001, when he was transferred to the transition flight at Lackland Air Force Base (AFB), Texas to await court-martial. The bulk of the offenses were committed at Port Hueneme, except for the second incident of underage drinking and the two additional charges of desertion and use of cocaine. The appellant managed to accumulate 11 letters of reprimand and 2 letters of counseling while at Port Hueneme. The appellant was initially ordered into pretrial confinement on 21 July 2001, after being absent from the transition flight area and being found in possession of over 100 pills known as "Red Hots".[1] The appellant was confined at the Bexar County Jail in San Antonio, Texas. At a pretrial confinement hearing on 24 July 2001, the confinement review officer found that continued pretrial confinement was not required under the criteria set forth in Rule for Courts-Martial 305(h)(2)(B), and directed the appellant's release.

On 3 August 2001, charges were preferred against the appellant for the AWOL, dereliction of duty, larceny, and marijuana offenses. The same day, the appellant left Lackland AFB without authority and remained absent until he was apprehended by the San Antonio Police and the Air Force Office of Special Investigations on 8 August 2001. As a result of this action, the appellant was again ordered into pretrial confinement, this time in the Comal County Jail in New Braunfels, Texas. On 27 August 2001, additional charges of desertion and wrongful use of cocaine were preferred against the appellant. He remained in pretrial confinement at the Comal County Jail until his trial by court-martial on 15 January 2002.

[1] These pills were later determined to be over-the-counter drugs.

In his post-trial declaration, dated 28 June 2002, the appellant makes several claims that the conditions of his pretrial confinement violated Article 13, UCMJ, and warrant additional confinement credit. With respect to the much longer time he was confined at the Comal County Jail, the appellant stated that he was strip-searched when he arrived; that the officer removed three body piercings that the appellant had below the waist, which later became infected; that he only got clean clothes once a week; that he was confined with post-trial prisoners; that his issued blanket was too small; that the jail smelled bad and was sometimes too cold; that he contracted genital warts while confined; that the food was bad and insufficient; that there was no weight-lifting equipment; that he spent $700.00 for items at the commissary while there; that fights broke out among the inmates and he was attacked; that he had to pay $120.00 for medicine; that there were illicit drugs in the jail; and that the chain of command only rarely visited him.

In response to the appellant's statement, the government submitted statements from the nursing supervisor and the administrator at the Comal County Jail. The nursing supervisor stated that the appellant never informed the jail staff about the alleged infection from the body piercings; that the appellant was only charged $20.00 for a physician's assistant visit and two prescriptions; that he never informed anyone at the jail of the alleged genital warts; that there were no killings, stabbings, or attempted suicides during the time that the appellant was confined; and that the meals were prepared by a licensed dietician and followed dietary guidelines. The administrator denied the appellant's allegations that he was housed in an overcrowded cell when first confined; that the guards turned on the fans to ventilate the place and made it too cold; that he never went outside (there was an outdoor recreation area); and that he spent a total of $700.00 at the commissary, when records show he spent $413.94.

II. Discussion

An appellant who alleges ineffective assistance of counsel has a heavy burden. Counsel is presumed to be competent until proven otherwise. *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Cronic*, 466 U.S. 648 (1984). Under *Strickland*, an appellant must first show that counsel's performance was deficient, indeed so deficient that he was not acting as the "counsel" guaranteed by the Sixth Amendment of the United States Constitution; and second, he must show that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. Our superior court applies *Strickland* by asking the following questions:

> (1) Are the allegations made by appellant true; and, if they are, is there a reasonable explanation for counsel's actions in the defense of the case?
> (2) If they are true, did the level of advocacy "fall[] measurably below the performance . . . [ordinarily expected] of fallible lawyers"?

> (3) If ineffective assistance is found to exist, "is . . . there . . . a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt?"

United States v. McConnell, 55 M.J. 479, 481 (2001) (citing *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)).

Applying these criteria to the appellant's case requires inquiry into the law governing the conditions of pretrial confinement. Whether conditions constitute pretrial punishment "presents a 'mixed question of law and fact' qualifying for independent review." *United States v. McCarthy*, 47 M.J. 162, 165 (1997) (quoting *Thompson v. Keohane*, 516 U.S. 99, 113 (1995)). Pretrial punishment is prohibited by Article 13, UCMJ. Our superior court has recognized that Article 13, UCMJ, prohibits "two things: (1) the intentional imposition of punishment on an accused before his or her guilt is established at trial, i.e., illegal pretrial punishment, and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial, i.e., illegal pretrial confinement." *United States v. Fricke*, 53 M.J. 149, 154 (2000) (citing *McCarthy*, 47 M.J. at 165). Whether a condition of pretrial confinement constitutes punishment is a question of intent, which turns on whether the condition was reasonably related to a legitimate nonpunitive governmental objective. *United States v. Palmiter*, 20 M.J. 90, 95 (C.M.A. 1985); *Bell v. Wolfish*, 441 U.S. 520, 539 (1979). If the conditions are reasonably related to a legitimate governmental objective, "it does not, without more, amount to 'punishment.'" *Bell v. Wolfish*, 441 U.S. at 539. Some of the appellant's contentions, particularly those relating to medical treatment, or the lack thereof, and suicide or homicide attempts, are refuted by the statements of those in charge of the jail. Others, such as the removal of body piercings that might be used as weapons or the shackling of a person when removed from his cell, are clearly related to legitimate governmental objectives of order and the prevention of crime in the facility. Most of the others are simply grousing about conditions which, while unpleasant, are inherent in confinement, such as unpleasant smells, restricted access to the outdoors, the wearing of uniform clothing, and the serving of institutional food.

Confinement of the appellant with post-trial prisoners, which is not refuted, is more troubling. However, none of the specific conditions complained of by the appellant appear to be related to the presence or absence of such prisoners. Such confinement has never been held to constitute a per se violation of Article 13, UCMJ, see *Palmiter*, 20 M.J. at 96, and we do not regard it as sufficient under these facts to require a finding that the appellant was subjected to unlawful pretrial punishment.

In addition, there is no evidence that the appellant ever complained to the military magistrate or to the chain of command about the conditions of his confinement. This can be considered "strong evidence" that the confinement conditions did not constitute illegal pretrial punishment. *Palmiter*, 20 M.J. at 97. Finally, the appellant in his statement

alleges that he informed his trial defense counsel of the conditions at their second meeting in October 2001, and asked her to request additional credit, which she did not do. Yet three months later, in the pretrial agreement, which was accepted at the trial, the appellant stated that he was satisfied with his trial defense counsel, considered her competent to defend him, and had been fully advised of the consequences of his plea and any defenses, which might apply.

Since allegations of the appellant have not been substantiated, or do not constitute unlawful pretrial punishment, the first prong of the *Strickland* test has not been met. Further inquiry is unnecessary.

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

AFFIRMED.

Judge ORR, V.A., participated in this decision prior to her retirement.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator