UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman TARENCE D. ALEXANDER-LEE
United States Air Force

ACM S31784

16 March 2012

Sentence adjudged 26 January 2010 by SPCM convened at Pope Air Force Base, North Carolina. Military Judge: Michael Savage (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 90 days, forfeiture of $964.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; Major Phillip T. Korman; and Captain Nathan A. White.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Naomi N. Porterfield; Major Matthew F. Blue; and Gerald R. Bruce, Esquire.

Before

ORR, HARNEY, and HECKER
Appellate Military Judges

OPINION OF THE COURT

HECKER, Judge:

In accordance with his pleas, the appellant was found guilty by a military judge sitting alone of fleeing apprehension, drunken operation of a vehicle, and reckless operation of that vehicle, in violation of Articles 95 and 111, UCMJ, 10 U.S.C. §§ 895, 911. The adjudged sentence consists of a bad-conduct discharge, confinement for 90 days, forfeiture of pay of $964.00 per month for 3 months, and reduction to E-1. The convening authority approved the findings and the sentence as adjudged.

On appeal, the appellant contends his post-trial confinement in an open bay with foreign nationals at a civilian detention facility violated Article 12, UCMJ, 10 U.S.C. § 812, and Air Force Instruction (AFI) 31-205, *The Air Force Corrections System* (7 April 2004). We agree. Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant argues the adjudged sentence is inappropriately severe. We disagree. Additionally, we also find that the delay in post-trial review did not prejudice the appellant in light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006).

Background

Late on 29 August 2009, military police officers at Fort Bragg, North Carolina, observed the appellant's vehicle crossing onto the shoulder of the road as he was driving on a road which would take him off base. They initiated a traffic stop and the appellant submitted to a portable breath test, which measured his breath alcohol concentration at .10 grams of alcohol per 210 liters of breath. Under North Carolina law, it is illegal to operate a vehicle on a public road with an alcohol concentration of .08 g/210L or higher.

Upon being asked to submit to a field sobriety test, the appellant instead drove back onto the highway and left Fort Bragg at a high rate of speed. While being pursued by military and civilian law enforcement personnel, the appellant sped through commercial and residential areas, ignoring multiple traffic signals and, at one point, swerving into a lane occupied by a pursuing military police vehicle which caused the driver to run the vehicle onto a curb. He eventually stopped at an apartment complex and fled his vehicle on foot, ultimately being tackled in the woods by a civilian police officer. The appellant remained uncooperative and had to be carried out of the woods. A chemical analysis of his breath at the Fort Bragg Law Enforcement Center again yielded a level of .10 g/210L.

On 26 January 2010, the appellant was tried at Pope Air Force Base, North Carolina. At the conclusion of his trial, the appellant was confined at the civilian Hoke County Detention Facility. He spent his entire detention in a large, open bay community cell, that generally housed around 50 inmates. There were no individual cells and the inmates were able to mingle freely. Bunk beds were located on both the lower and upper floors, and there was a communal shower area. According to the appellant in his post-trial declaration, two of the inmates that he lived with for approximately 30 days were foreign nationals from Mexico.

The appellant was visited on multiple occasions in late February and early March 2010 by his military defense counsel, Captain (Capt) MS. During one of these meetings, when Capt MS asked the appellant about the people with whom he was confined, the appellant described the communal living arrangements and mentioned that some of the inmates were foreign nationals. Capt MS advised the appellant that the presence of foreign nationals in the community cell was likely illegal and agreed to raise the issue on his behalf with the convening authority.

On his way out of the facility, Capt MS asked the on-duty facility officer whether foreign nationals could be housed in the community cell and was informed that, although it was not typical, foreign nationals had recently been housed in the community cell. When Capt MS asked whether any records existed that documented this situation, the facility officer conferred with her supervisor and then advised that no such records would exist.

The appellant relied on Capt MS to alert authorities about the illegal confinement conditions, so he did not complain to civilian prison officials or to his chain of command. During his incarceration, the appellant had minimal contact with his unit. Due to difficulty with the phone system, he was only able to make one successful call to his First Sergeant and subsequently abandoned those efforts after multiple failed attempts to call both his first sergeant and Capt MS. When members of his unit visited him in early February, the appellant did not yet understand the legal significance of being detained with foreign nationals and did not raise the issue with them. He did not submit a complaint under Article 138, UCMJ, 10 U.S.C. § 938, as he was not informed how to do so, and did not complain to prison officials as he was not aware he could use that system to complain about this matter.

During Capt MS' last visit to the facility, he informed the appellant he had spoken to prison officials about the illegal confinement conditions. By the time of this conversation, the foreign nationals were no longer residing in the community cell with the appellant.

On 4 March 2010, the appellant, through his counsel, submitted his clemency request to the special court-martial convening authority through the Pope AFB legal office. In the request for sentence relief, Capt MS asked the convening authority to consider, among other things, that the appellant had been housed in that jail with foreign nationals in violation of AFI 31-205, paragraph 1.2.4. In response, the staff judge advocate (SJA) advised the convening authority on 9 March 2010 that "Per the Hoke County Head Jailer, the Accused is currently housed only with American citizens," that the appellant had not raised any concerns about his confinement conditions during two separate visits by members of his unit (although the dates of those visits were not provided) and that the appellant was aware of how to use the facility telephone to call his unit if he had concerns. The defense response pointed out that the SJA had not addressed the appellant's claim that he had previously been housed with foreign nationals, that the Hoke Country Detention Facility had no policy against such mingling of prisoners and there was no indication the appellant's complaint was inaccurate. The appellant received no relief in clemency and was released from confinement on 11 April 2010.

Law

Article 12, UCMJ, provides, "No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not

members of the armed forces." The "immediate association" language means that military members can be confined in the same detention facility as a foreign national but they have to be segregated into different cells. *Wise*, 64 M.J. at 475. "The Air Force confines inmates in facilities that prevent immediate association with enemy prisoners of war or foreign nationals who are not members of the US Armed Forces." AFI 31-205, ¶ 1.2.4.

Interpreting Article 12, UCMJ, and determining whether it has been violated is reviewed de novo. *United States v. Wise,* 64 M.J. 468, 473-74 (C.A.A.F. 2007). "We review factual findings under a clearly erroneous standard, but the 'ultimate determination' of whether an [a]ppellant exhausted administrative remedies is reviewed de novo, as a mixed question of law and fact." *Id*. at 471 (alterations in original).

'"[A] prisoner must seek administrative relief prior to invoking judicial intervention' to redress concerns regarding post-trial confinement conditions." *Id.* (alteration in original) (citing *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001)). "Exhaustion requires [the a]ppellant to demonstrate that two paths of redress have been attempted, each without satisfactory result." *Id.* The appellant "must show that 'absent some unusual or egregious circumstances, he has exhausted the prisoner-grievance system [in his detention facility] and that he has petitioned for relief under Article 138," UCMJ.[1] *Id*. (citing *White*, 54 M.J. at 472). The purpose of this requirement is to promote the resolution of grievances at the lowest possible level and to ensure that an adequate record has been developed to aid our appellate review. *Id.* (citing *United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997)). Complaints raised to the convening authority by the accused through the post-trial clemency process can be considered a sufficient exhaustion of administrative avenues under the UCMJ. *United States v. Towns*, 52 M.J. 830, 834 (A.F. Ct. Crim. App. 2000).

Discussion

The appellant avers that his confinement in the Hoke County Detention facility with foreign nationals violated Article 12, UCMJ, and that he did not forfeit his Article 12, UCMJ, claim, by not exhausting his administrative remedies. We agree.

In this case, the appellant did not file a complaint with the confinement facility or submit an Article 138, UCMJ, complaint. However, during the initial period of his confinement, the appellant had no understanding of the legal significance of being

[1] Article 138, UCMJ, 10 U.S.C. § 938, provides that "Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon."

confined with foreign nationals and his defense counsel was unaware of the situation. Once he and his defense counsel met and discussed the situation, the defense counsel acted promptly by informing the convening authority of the situation in the clemency submission. The appellant relied upon his defense counsel to pursue this matter with the Government authorities. Under the unusual circumstances of this situation, which included confinement in a civilian facility which had no prohibition on the mingling of foreign nationals and U.S. citizens, an Article 138, UCMJ, complaint to military officials or a grievance to facility personnel would not be realistic solutions to addressing the problem.

The notification in the clemency submission provided the time and opportunity for the government to investigate his complaint and to take appropriate action. Unfortunately, the government did not take advantage of that opportunity, with the SJA electing to simply confirm with the Head Jailer that, as of 9 March 2010, the appellant was housed only with American citizens. Under those circumstances, the government has not provided any information refuting the appellant's allegations that he was confined with foreign nationals for approximately 30 days prior to 9 March 2010.

After reviewing the record of trial and the appellant's complaint, we find that the appellant's conditions of confinement in the Hoke County Detention Facility were in violation of Article 12, UCMJ. The appellant's claim that he was confined in the same bay area with foreign nationals where they lived in a communal cell is unrebutted, and is corroborated by Capt MS' conversation with the prison officer. We find that this satisfies the meaning of "immediate association" of foreign nationals that is prohibited by Article 12, UCMJ, and AFI 31-205, and that the appellant should receive credit for the entire 30 days he was confined in immediate association with foreign nationals in the Hoke County Detention Facility, from 26 January 2010 to 27 February 2010. Accordingly, we order that the appellant be awarded 30 days credit for post-trial confinement in violation of Article 12, UCMJ.[2]

Sentence Appropriateness

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707,

[2] Air Force Instruction (AFI) 31-205, *The Air Force Corrections System*, ¶ 1.2.2.2 (7 April 2004), requires a Memorandum of Agreement in "any circumstance that would cause an anticipated incarceration at a location other than the parent installation." On appeal, the appellant submitted a draft Memorandum of Understanding (MOU) and an email chain which indicated this MOU was generated to cover the Air Force's use of the Hoke County Detention Facility, but that it was never circulated for review or finalization. The language of this draft MOU does not reference any requirement to keep military prisoners separate from foreign national prisoners. We recommend that all base legal offices ensure that any support agreements with civilian operated confinement facilities include a provision requiring compliance with Article 12, UCMJ, 10 U.S.C. § 812.

714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). While we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). "In the interests of justice, [we have the power to] substantially lessen the rigor of a legal sentence." *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955); *see also United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002).

Pursuant to *Grostefon*, the appellant argues that his sentence to 90 days and a bad-conduct discharge is excessively severe for a brief one time incident where his judgment was impaired due to alcohol, when considered in light of the mitigating evidence presented at trial regarding his difficult childhood, and his acceptance of responsibility. He thus asks us to disapprove the bad conduct discharge. After carefully examining the submissions of counsel, the appellant's military record, and all the facts and circumstances surrounding the offenses of which he was found guilty, we find that the appellant's adjudged and approved sentence is appropriate.

Appellate Delay

Although not raised by the appellant, we review de novo claims whether an appellant has been denied the due process right to a speedy appeal. *Moreno*, 63 M.J. at 135. This case was docketed with our Court on 25 March 2010. The overall delay between the docketing of the case with this Court and completion of our review is in excess of 540 days and therefore facially unreasonable.

Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Moreno*, 63 M.J. at 135-36. When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances of this case as well as the entire record, we conclude that any denial of the appellant's right to speedy appeal was harmless beyond a reasonable doubt and that no relief is warranted.

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 (C.A.A.F. 2000).

Accordingly, the approved findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court