UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic REGINALD A. MCGRIFF
United States Air Force

ACM S29974

28 January 2003

Sentence adjudged 13 April 2001 by SPCM convened at Cannon Air Force Base, New Mexico. Military Judge: Steven A. Hatfield (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 135 days.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Jeffrey A. Vires, and Major Kyle R. Jacobson.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Jennifer R. Rider.

Before

SCHLEGEL, STONE, and ORR, W.E.
Appellate Military Judges

OPINION OF THE COURT

STONE, Judge:

In a special court-martial, a military judge sitting alone convicted the appellant, consistent with his pleas, of breaking restriction, writing checks with the intent to defraud, and breaking arrest, in violation of Articles 95, 123a, and 134, UCMJ, 10 U.S.C. §§ 895, 923a, 934. The adjudged and approved sentence was a bad-conduct discharge and confinement for 135 days.

Admissibility of Presentencing Documents

Appellant avers that during the presentencing proceedings, two documents from his personal information file (PIF) were improperly admitted. Additionally, he argues that his pretrial arrest was tantamount to confinement and therefore warranted

confinement credit. We conclude the sentencing documents were properly admitted, but determine the appellant is entitled to administrative credit for the time he was in arrest.

Appellant's short-lived military career began at Cannon Air Force Base (AFB), New Mexico. Immediately after his arrival in late October 2000, he began to write bad checks to on-base establishments. In addition to his financial problems, the appellant also had a great deal of difficulty adjusting to military life. Very soon after beginning his military career, supervisors began issuing him written counselings and reprimands. After the supervisors' efforts failed, the appellant's commander twice imposed nonjudicial punishment pursuant to Article 15, UCMJ, 10 U.S.C. § 815, for a variety of infractions.

During presentencing, the government submitted documents reflecting all of these actions, pursuant to Rule for Courts-Martial (R.C.M.) 1001(b)(2). The appellant challenged two of these documents at trial and now on appeal.

We begin by noting that a military judge's evidentiary rulings in presentencing proceedings ordinarily will be overturned only for a clear abuse of the judge's broad discretion. *United States v. Hursey*, 55 M.J. 34, 36 (2001). Our superior court has held that this review is less deferential, however, if the military judge does not articulate on the record whether the evidence is more probative than prejudicial using the balancing analysis under Mil. R. Evid. 403. *Id.*; *United States v. Manns*, 54 M.J. 164, 166 (2000).

The first document the appellant challenges is a letter from the support group commander revoking the appellant's on-base driving privileges for failure to show proof of insurance. The defense counsel objected that it was irrelevant and, citing Mil R. Evid. 403, argued it was more prejudicial than probative. The military judge nonetheless admitted the letter after ascertaining it came from the appellant's PIF.

Even if we gave no deference to the military judge, the driving revocation letter is relevant and admissible under R.C.M. 1001(b)(2) because it reflects the appellant's past military efficiency and history. An airman who is unable to drive on a military installation is likely to be less efficient in performing military duties. Moreover, his inability to provide proof of insurance indicates he is unable to perform the most basic of tasks expected of a licensed driver. Given its probative nature, we conclude the document was not unduly prejudicial. Failure to provide proof of insurance is a minor criminal matter under most circumstances and is unlikely to inflame the passions of those who hear of it. Further, the letter does not put the appellant in a bad light in comparison to the offenses he was already facing, nor is it misleading or confusing. And finally, although the letter did not afford the appellant the opportunity to attach a written response, it did afford him substantial due process, including the right to a hearing, to present evidence, and to be represented by counsel at his own expense, all in accordance with service regulations.

We turn now to the letter of reprimand the appellant received for not showing up to his appointed place of duty at the appointed time on 11 October 2001. Consistent with service regulations, this reprimand gave the appellant the opportunity to respond to the allegation. He annotated the reprimand indicating he wished to exercise that right. At trial, defense counsel objected to the reprimand on the basis it had not been maintained in accordance with Air Force directives, arguing that the supervisor should have annotated the document to reflect the appellant's failure to respond despite his earlier expressed desire to do so. Upon clarification by the judge, the trial defense counsel admitted that service regulations do not specifically establish such a requirement. The appellant nonetheless argues that requiring such an annotation would be in keeping with the "spirit" of the regulation and should be established as a matter of fairness. We disagree.

In conducting this analysis, we are mindful that an adverse party may require the proponent of a personnel record to introduce any other part or any other writing or recorded statement which, in fairness, ought to be considered contemporaneously with the document. *United States v. Morgan*, 15 M.J. 128 (C.M.A. 1983). We also note that R.C.M. 1001(b)(2) requires the military judge to determine the admissibility of a document if it is "incomplete in a specified respect." However, the appellant does not aver that there was any written response to be considered. Instead, the appellant suggests that since he marked the letter of reprimand indicating he desired to respond, the government was obligated to annotate he changed his mind, and failing that, the document was inadmissible.

Even if we afford no deference to the military judge's ruling because he did not conduct a M.R.E. 403 balancing analysis on the record, we conclude that the letter of reprimand was properly admitted. The exhibit was a relevant, properly authenticated document which complied in all respects to service regulations intended to implement R.C.M. 1002(b)(2). We decline to create additional administrative requirements beyond those found in the service regulations themselves, especially when the well-recognized rules of "completeness" address the underlying fairness concerns raised by the appellant. The reprimand was probative of supervisory attempts to improve the appellant's military service in a graduated manner before forwarding the matter to higher levels within the squadron. The probative value of the reprimand outweighs any prejudice because it reflected relatively minor misconduct, it was neither misleading nor confusing, and it afforded the appellant appropriate due process which the appellant neglected to exercise.

Finally, with regard to both the driving revocation letter and the letter of reprimand, we note that this was a bench trial. The military judge was not likely to be unduly influenced by this evidence. Thus, even if we assumed the two documents were inadmissible, any error would be harmless. The misconduct reflected in the two documents was de minimis, not only in the context of the charged offenses, but also vis-à-vis the other sentencing documents, which reflect a plethora of minor disciplinary infractions during the appellant's short career.

Pretrial Restraint

On 9 March 2001, the appellant received nonjudicial punishment pursuant to Article 15, UCMJ, 10 U.S.C. § 815 for a variety of infractions. His punishment included restriction to Cannon AFB for 45 days. He broke this restriction on 18 March by attending an off-base dinner party. Consequently, on 20 March, the appellant's commander placed him in arrest to his dormitory room pending trial by court-martial. Unfortunately, the appellant broke arrest the very next day; as a result, the commander placed the appellant into pretrial confinement on 23 March. A pretrial confinement hearing was held on 28 March pursuant to the provisions of R.C.M. 305. The hearing officer determined that lesser forms of restraint were more appropriate than confinement. As a result, the appellant was released from confinement and once again placed in arrest. With the exception of breaking arrest on 7 April, the appellant remained in arrest until his trial.

Thus, the appellant was lawfully subjected to 25 days of pretrial arrest and confinement, but only received credit against his sentence for the six days he was in confinement. We conclude he is entitled to administrative credit for the time he spent in arrest. *Cf. United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). *See also* Articles 9(a) and 10, UCMJ, 10 U.S.C. §§ 89(a), 810. The appellant is not entitled to credit for the two days he broke arrest. R.C.M. 1113 (d)(2)(A)(iv). Nor is he entitled to credit for the day sentence was announced. R.C.M. 1113 (d)(2)(A). He was thus entitled to 16 days of administrative credit against his sentence. Accordingly, we will approve only so much of the sentence as provides for a bad-conduct discharge and confinement for 103 days. This will have the effect of restoring to the appellant 16 days of automatic forfeitures that should not have applied, and giving him 16 days of credit for the days he was in arrest. *Cf. United States v. Horton*, ACM S29991 (A.F. Ct. Crim. App. 28 Jan 2002).

The approved findings and sentence, as modified, 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.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator