

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

J.D. HARTY

K.K. THOMPSON

R.G. KELLY

UNITED STATES

v.

**Jeremy A. WHITE
Private First Class (E-2), U. S. Marine Corps**

NMCCA 200200803

Decided 31 August 2006

Sentence adjudged 31 May 2001. Military Judge: J.S. Brady. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Air Station, Cherry Point, NC.

LT E.G. NG, JAGC, USNR, Appellate Defense Counsel
Capt RICHARD VICZOREK, USMCR, Appellate Defense Counsel
Maj WILBUR LEE, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HARTY, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of murder while engaging in an act inherently dangerous to another, in violation of Article 118, Uniform Code of Military Justice, 10 U.S.C. § 918. The appellant was sentenced to a dishonorable discharge, confinement for 22 years, forfeiture of \$700.00 pay per month for 24 months, and reduction to pay grade E-1. Pursuant to a pretrial agreement, the convening authority approved the sentence as adjudged, but suspended all confinement in excess of 15 years.

The appellant claims that his guilty plea was improvident, that he suffered illegal pretrial confinement, that he received ineffective assistance of counsel at trial, that he has been subjected to cruel and unusual punishment, that the maximum sentence for the offense violates the Due Process and Equal Protection Clauses of the United States Constitution,¹ and that

¹ The appellant claims that he has been denied due process and equal protection because if he was tried in federal court he would only be charged with involuntary manslaughter in violation of 18 U.S.C. § 1112, and would

the military judge who conducted a post-trial hearing regarding the issue of illegal pretrial confinement erred in his findings.

We have considered the record of trial, the appellant's assignments of error and supplemental assignment of error, the Government's response, and the record of the post-trial hearing. We conclude that the appellant is entitled to additional confinement credit, and will order corrective action in our decretal paragraph. Otherwise, we find that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The facts of this case are clear and uncontested. The appellant, while alone at home with his five-week-old son, Cody, became frustrated at Cody's crying. The appellant slapped Cody across the face several times, and threw him down onto the bed. The appellant then grabbed Cody by the head from behind and lifted him from the bed by his head alone. The appellant then violently squeezed Cody's head, fracturing his skull, and shook Cody, still holding him by the head, causing internal neck and head injuries. Cody suffered brain and spinal cord injuries that caused his death following a comatose period of ten days spent on life support. The appellant was placed in pretrial confinement in the Camp Lejuene Brig where he was detained in special quarters until his trial.

Improvident Plea to Murder

In his first assignment of error, the appellant contends that his plea of guilty was improvident because the record does not establish that he, at the time of his actions, knew that death or great bodily harm were the probable consequences of his actions. He asks this court to set aside the finding of guilty to murder and substitute a finding of guilty to the lesser included offense of involuntary manslaughter. We disagree and decline to grant relief.

A military judge shall not accept a plea of guilty without explaining the elements of the offense and making a sufficient inquiry of the accused to establish that there is a factual basis for the plea. Art. 45(a), UCMJ; *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996); *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). The standard of review to determine whether a plea is provident is whether the record reveals a substantial basis in law and fact for questioning the plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

face no more than six years of confinement. We reject the appellant's speculation as to how he would be charged under the federal system as the basis for his argument. This supplemental assignment of error is without merit.

The military judge accurately informed the appellant of the elements of the offense, including the requirement that the appellant knew, at the time of the offense, that death or great bodily harm were the probable consequences of his actions. The military judge then conducted a thorough inquiry into the factual basis for the guilty plea, using both the appellant's answers and the facts contained in the stipulation of fact, Prosecution Exhibit 1. In the stipulation of fact, the appellant admits that he "squeezed" Cody's head "violently" and that he shook him with "tremendous force." *Id.* During the providence inquiry, the appellant stated that he remembered shaking Cody and squeezing Cody's head violently, but did not remember how forcefully he shook the baby. Record at 37 and 41. The appellant stated that, based on information from the treating physicians and the potential evidence against him, he believed that he had shaken Cody with great force. The appellant also admitted that he knew, at the time of the offense, that death or great bodily harm was a probable consequence of the physical force he used on his infant son. *Id.* at 43 and 70. The appellant stated that he knew this because Cody was an infant, *id.* at 43, and because he knew that he was "supposed to cradle [Cody's] head [in order to not] hurt his neck." *Id.* at 46.

During sentencing, the appellant called Lieutenant Commander (LCDR) Simmer, a forensic psychiatrist who had examined the appellant, to testify. LCDR Simmer opined, based on his interview of the appellant and a review of the appellant's records, that the appellant did not know, at the time of the offense, that death or great bodily harm could result from his actions. The military judge reopened providence and discussed the doctor's testimony with the appellant, who stated that he believed the doctor misunderstood what he meant when he told the doctor that he did not intend to harm Cody. The appellant was able to distinguish between intent to harm and taking an action with knowledge that great harm could likely result, and reiterated that he did know, at the time of the offense, that death or great bodily harm were probable consequences of his actions. The appellant explained that he had been taught how to care for an infant by his mother and, at age 17, had helped care for his younger infant brother. The military judge reaffirmed his acceptance of the appellant's pleas of guilty.

The record is unambiguous on the issue of the appellant's knowledge of the probable consequences of his actions at the time of those acts, based on the appellant's own admissions. There is no basis in law and fact for questioning the appellant's plea. This assignment of error is without merit.

Pretrial Confinement

The appellant first raised the issue of illegal pretrial confinement on appeal.² We ordered a post-trial hearing pursuant

² Because the appellant's court-martial was tried prior to 31 May 2003, we

to *United States v. Dubay*, 37 M.J. 411 (C.M.A. 1967), to address the issue. The military judge received testimony and other evidence, and issued detailed findings of fact and conclusions of law, finding no basis for a claim of illegal pretrial punishment under Article 13, UCMJ. We disagree with the military judge's ultimate conclusion and will grant relief in our decretal paragraph.³

Article 13, UCMJ, prohibits, in relevant part, "arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial." *United States v. Crawford*, 62 M.J. 411, 414 (C.A.A.F. 2006)(citing *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005)). Whether an appellant is entitled to credit for a violation of Article 13, UCMJ, is a mixed question of fact and law. *Id.* (citing *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000)). "Whether the facts amount to a violation of Article 13, UCMJ, is a matter of law the court reviews *de novo*," and the burden to establish a violation rests upon the appellant. *Id.* (citing *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002)). If an appellant meets this burden, then RULE FOR COURTS-MARTIAL 305(k), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) provides him "additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances." *Id.* (quoting *United States v. Inong*, 58 M.J. 460, 463 (C.A.A.F. 2003))(citing *United States v. Spaustat*, 57 M.J. 256, 261 (C.A.A.F. 2002) and *United States v. Suzuki*, 14 M.J. 491, 493 (C.M.A. 1983)).

In *Crawford*, our superior court held that a Brig may impose maximum custody on a pretrial detainee as the result of a reasonable evaluation of all the facts and circumstances in that detainee's case, but not solely because of the charges. The court renewed its position on Article 13, UCMJ, violations stating, in part, that when the imposition of maximum custody is "arbitrary and unnecessary to ensure an accused's presence for trial, or unrelated to the security needs of the institution, we will consider appropriate credit or other relief to remedy this type of violation" *Crawford*, 62 M.J. at 416 (citing *United States v. Palmiter*, 20 M.J. 90, 99 (C.M.A. 1985)(Everett, J., concurring in the result)(quoting *Bell v. Wolfish*, 441 U.S. 520, 538-39 (1979) (indicating that arbitrary conditions may be inferred to constitute punishment)). *Crawford* was detained in the same brig and was housed in the same special quarters unit

do not find waiver. See *United States v. Inong*, 58 M.J. 460, 465 (C.A.A.F. 2003)(holding that illegal pretrial confinement issues not raised at trial are waived absent plain error effective 31 May 2003).

³ The military judge did not have the benefit of our superior court's decision in *United States v. Crawford*, 62 M.J. 411 (C.A.A.F. 2006), at the time that he issued his conclusions of law. Our holding also resolves the appellant's final assignment of error, claiming the *Dubay* hearing military judge abused his discretion.

under many of the same conditions as the appellant. The critical differences between Crawford's and the appellant's cases are the "facts and circumstances" that were considered in assigning their respective custody classifications.

Crawford was charged with participation in a scheme to steal and sell military weapons and explosives. His military history demonstrated that he knew how to use these weapons and the stolen explosives. Crawford had also made comments about blowing up buildings on Camp Lejeune, allegedly made threats against his ex-wife, and had shown a willingness to instruct persons he believed to be members of organized crime in how to use the explosives that he sold. In addition, the investigators were not certain that all the explosives stolen by Crawford had been recovered. These "facts and circumstances" combined with Crawford's charges were determined to present "a special security concern for confinement facility officials and, from the outset, Crawford warranted heightened scrutiny." *Crawford*, 62 M.J. at 415. The court found that Crawford "presented nothing in his declaration to refute the very strong indication that his was a unique case requiring special security considerations." *Id.* The appellant's "facts and circumstances" are substantially different.

The appellant was ordered into pretrial confinement on 5 December 2000. He was initially held for approximately 12 hours in maximum custody in A-Row within the special quarters unit while he went through his initial assessment. Based on that assessment, the appellant was classified as maximum custody, potentially violent and dangerous, awaiting evaluation, and moved into C-Row of special quarters. C-Row is for detainees who are potentially suicidal and/or awaiting a mental evaluation. The appellant was not believed to be suicidal, however, the possibility of depression, based on the death of a family member, was present, and the brig staff wanted him evaluated before placing him in a single cell without constant supervision.

While in C-Row, the appellant was allowed to wear only his underpants, and was given a suicide blanket.⁴ He was escorted in hand and leg shackles whenever outside his cell, including to the shower. The appellant remained in his cell 22 to 23 hours per day, was required to sit at his desk all day, could not communicate with other detainees, and he ate all meals in his cell. After up to three weeks in C-Row, the appellant was moved back to A-Row, but continued to be classified as maximum custody, potentially violent and dangerous. On A-Row, the appellant was detained under the same conditions as C-Row except that he could wear clothes and communicate in soft tones with detainees on either side of his cell. On 20 March 2001, the appellant's custody classification was reduced to medium custody, inside escape risk, but he remained in special quarters until sentenced on 31 May 2001. While in medium custody, inside escape risk, the

⁴ A suicide blanket does not tear, so a prisoner cannot make strips of fabric to use as a weapon or to hang himself with.

appellant did not have to be escorted in leg shackles unless he left the special quarters area. However, he still remained in his cell 22 to 23 hours per day and ate all meals in his cell.

The Brig commanding officer (CO) testified that they use the Corrections Management Information System (CORMIS) to determine a detainee's custody level. That computer-based system assigns points to answers given by the appellant during the initial assessment and information contained in the pretrial confinement order. The higher the point total, the higher the custody level that is assigned to a detainee. Seriousness of the offense and potential sentence weigh heavily in the CORMIS calculations, however, other factors, such as substance abuse, suicide risk, history of violence, and history of escape, are also considered. Because the Camp Lejuene Brig is designed as a medium security facility and, therefore, not completely fenced in, the Brig CO takes a more stringent approach to custody classification of pretrial detainees. This consideration results in higher custody classifications than if the Brig was fully enclosed.

The CORMIS system appears, at first blush, to be an objective means of assigning custody classifications and, therefore, not arbitrary. However, it is clear from the Brig CO's testimony that the number of points assigned by CORMIS to a charged offense may, by itself, be high enough to result in a maximum custody classification, without regard for all surrounding facts and circumstances. Such was the result in the appellant's case.

The appellant was placed into pretrial confinement for aggravated assault on his five-week-old son. He had no history of suicidal ideations, controlled substance abuse, escape attempts, aggressive behavior, or prior criminal history. While we agree that the segregated "evaluation, classification, and examination of newly received prisoners about whom the correctional and medical staff know little or nothing" is "necessary" and "related to a rational custodial purpose," we do not agree that continued segregation, under the conditions in the appellant's case, was rationally related to security concerns or warranted to ensure his presence at trial. See *Palmiter*, 20 M.J. at 92 n.2.

According to the Brig CO, the appellant should have been evaluated by the clinical social worker the day after he was placed in C-Row, and the Class and Assignment Board should have considered his custody classification every seven days during his first 60 days of confinement. The appellant testified that he was never seen by a social worker, and the Brig CO had no evidence to refute that testimony.⁵ The appellant testified

⁵ The Brig CO submitted an affidavit dated 23 November 2004 as part of the appellate process, and it was admitted at the fact-finding hearing. *Dubay Record*, Appellate Exhibit VII. In that affidavit, he states that the appellant was taken off "AE status" (awaiting evaluation) on 15 December 2000,

that he remained in C-Row for two to three weeks in his underpants, remained in his cell 23 hours per day, had to sit at his desk all day, could not communicate with other detainees, ate all meals in his cell, and was escorted in hand and leg shackles whenever outside his cell, including to the shower. The Brig CO confirmed the appellant's conditions on C-Row, except for having to sit at his desk all day. On that issue, he testified that it was not Brig policy to have detainees sit at their desk all day, however, he admitted that a guard may have misinterpreted that rule and enforced it just as the appellant described. The Brig CO had no evidence to refute the appellant's testimony concerning the length of his stay on C-Row.

Based on the record before us, we find that the appellant spent 21 days on C-Row before being transferred to A-Row.⁶ We see no reason for a detainee awaiting evaluation, under the appellant's circumstances, to spend more than seven days on C-Row waiting for their evaluation to be completed and their first Class and Assignment Board review.⁷ Because of the harsh conditions on C-Row, and the Brig's failure to timely complete the appellant's evaluation, if at all, we will grant three-for-one credit beginning on the date the Class and Assignment Board should have considered the appellant's case for the first time (day seven) through day 21, in addition to the day-for-day credit already granted pursuant to *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984), for an additional 42 days of confinement credit. The conditions imposed during this period were not rationally related to security concerns taking into consideration all of the circumstances, and were more rigorous than necessary to ensure the appellant's presence at his trial.

Once transferred from C-Row to A-Row on or about 27 December 2000, the appellant kept his maximum custody, potentially violent and dangerous, classification. His conditions were the same as on C-Row except he could now wear clothes and could speak in low tones to detainees in the cells next to him. The Brig CO testified that the appellant's continued maximum custody, potentially violent and dangerous, classification was the result of the seriousness of the appellant's charge, which was changed from aggravated assault to murder once the infant was removed from life support, and the potential length of the appellant's sentence if he was convicted. The appellant remained on this

however, he does not state that the appellant was transferred from C-Row to A-Row on that date. Although the Brig CO drafted his affidavit based on the contents of the appellant's prisoner book, those records were missing and unavailable for the parties to use at the time of the fact-finding hearing on 29 April 2005.

⁶ This is contrary to the military judge's finding of "approximately two weeks." *Dubay Record*, Appellate Exhibit XI at 2.

⁷ We do not by our ruling create a bright-line rule requiring evaluations and the first Class and Assignment Board review to be completed within seven days. We will review each situation case-by-case.

custody level from 27 December 2000 until 20 March 2001, a period of 83 days.

Even if the continued maximum custody classification was based on CORMIS calculations, it was still based solely on the severity of the charge and potential sentence - which is merely two ways of saying the same thing. Therefore, the maximum custody conditions were not rationally based on security concerns taking into consideration all of the circumstances, and the resulting conditions were more rigorous than necessary to ensure the appellant's presence at his trial. We will grant two-for-one credit for each day the appellant spent on A-Row in maximum custody, potentially violent and dangerous, in addition to the day-for-day credit already granted pursuant to *Allen*, for a total of 166 days of additional confinement credit.

On 20 March 2001, the Brig CO manually overrode CORMIS and downgraded the appellant's custody classification to medium custody, inside escape risk. This change allowed the appellant to be escorted within special quarters without leg shackles, although both hand and leg restraints were used when he was escorted outside special quarters. Otherwise, his conditions remained the same as before. The Brig CO justified these medium custody conditions based on the fact that the Camp Lejuene Brig is designed as a medium custody facility and, therefore, enclosed by fence on only three sides. The appellant's status, however, was still based on the seriousness of his charge. The minor change in conditions resulting from a downgrade in custody classification resulted in restraint conditions that were still not rationally based on security concerns taking into consideration all of the circumstances, and were more rigorous than necessary to ensure the appellant's presence at his trial.

In effect, the Government chose to impose greater conditions of restraint on detainees rather than remedy the reason for imposing those greater conditions - fencing. Like our superior court, "we are reluctant to second-guess the security determinations of confinement officials." *Crawford*, 62 M.J. at 414. However, when those determinations are based on fiscal or manning issues disguised as security concerns -- the imposition of greater conditions of restraint because of a shortage of guards or fencing -- we will not hesitate to hold the Government accountable. We will grant one-for-one credit for each day the appellant spent on medium custody, inside escape risk, in addition to the day-for-day credit already granted pursuant to *Allen*, for an additional 72 days of confinement credit.

Effective Assistance of Counsel

For his third assignment of error, the appellant claims that he was denied effective assistance of counsel because: (1) his counsel advised him to plead guilty against his wishes; and (2) his counsel failed to raise the illegal pretrial punishment issue at trial. We disagree.

We apply a presumption that counsel provided effective assistance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004). This presumption is rebutted only by "a showing of specific errors made by defense counsel that were unreasonable under prevailing professional norms." *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005)(citing *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001)). Even if defense counsel's performance was deficient, the appellant is not entitled to relief unless he was prejudiced by that deficiency. *United States v. Quick*, 59 M.J. 383, 385 (C.A.A.F. 2004)(citing *Strickland*, 466 U.S. at 687). If the issue can be resolved by addressing the prejudice prong of this test, we need not determine whether counsel's performance was deficient. *Id.* at 386 (citing *Strickland*, 466 U.S. at 697).

Because the appellant raises the first issue by post-trial affidavit,⁸ we will resolve the issue in accordance with the principles established in *United States V. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). In *Ginn*, our superior court announced six principles to be applied by courts of criminal appeals in disposing of post-trial, collateral, affidavit-based claims. We believe the appellant's first claim of ineffective assistance can be disposed of under the fourth and fifth *Ginn* principles which state:

Fourth, if the affidavit is factually adequate on its face but the appellate filings and the record as a whole "compellingly demonstrate" the improbability of those facts, the Court may discount those factual assertions and decide the legal issue.

Fifth, when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal.

Id.

The appellant claims his defense team was deficient by recommending that he plead guilty to a charge greater than involuntary manslaughter, and for giving him the answers to survive providence, because he lacked the knowledge of potential consequences of his actions. Pursuant to the fourth *Ginn* principle, the record of trial compellingly demonstrates otherwise. As we previously stated in resolving the appellant's claim of improvident plea, his own admissions establish that he

⁸ Appellant's sworn Declaration of 31 October 2003.

did have the required knowledge to support the finding of guilt. His statement that his mother trained him how to protect his infant brother's head, and that he did care for his infant brother, is not alleged to have come from his defense counsel. This statement appears to be the genuine product of the appellant's own experience. As to the fifth *Ginn* principle, the record states that the appellant believed that his defense team's advice was in his best interests. Record at 22 and 78. We, therefore, discount the appellant's factual allegations and hold that the defense team's assistance was not ineffective. Even if the performance was deficient, we find no prejudice to the appellant.

The appellant's second claim of ineffective assistance of counsel alleges that his defense team was deficient in not raising the Article 13, UCMJ, illegal pretrial punishment issue at trial. We resolve this issue under the prejudice prong of *Strickland*. There is no dispute over whether the illegal pretrial confinement issue was raised at trial -- it was not. However, it is unnecessary to address whether it was deficient practice not to raise the issue at trial, because the appellant has not suffered any prejudice as a result. *Quick*, 59 M.J. at 385.

This court has determined that the appellant is entitled to additional confinement credit. That credit will not come into play until the end of the appellant's 15-year sentence. Under these circumstances, the appellant has not suffered any prejudice as a result of his defense team not raising the issue at trial. This assignment of error is without merit.

Cruel and Unusual Punishment

For his fourth assignment of error, the appellant claims that the post-trial conditions in the Camp Lejuene Brig and the U.S. Disciplinary Barracks, Fort Leavenworth, Kansas, constituted cruel and unusual punishment under the U.S. CONST. amend. VIII and Article 55, UCMJ. We disagree.

To support his claim that the conditions of his confinement violated the Eighth Amendment, the appellant must show: "(1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [the appellant's] health and safety; and (3) that he 'has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ," *United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006) (quoting *United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997) (quoting *United States v. Coffey*, 38 M.J. 290, 291 (C.M.A. 1993)) (internal quotation marks omitted). The appellant has failed to carry his burden.

There is no showing that the conditions at the Camp Lejeune Brig, even if they existed, meet the proof requirements in *Lovett*.⁹ The same is true for the allegations concerning the U.S. Disciplinary Barracks.¹⁰ *Lovett*, 63 M.J. at 215-16. Any greater protection that may be available under Article 55, UCMJ, does not require a different result. See *United States v. Matthews*, 16 M.J. 354, 368 (C.M.A. 1983)(noting that Article 55, UCMJ, was intended to provide even greater protections than the Eighth Amendment).

Authentication

Although not raised as an issue, we note that the transcript covering the first Article 39(a), UCMJ, session was not authenticated. The record contains a letter from the military judge stating that he is no longer available to authenticate transcripts due to his Permanent Change of Duty Station, and authorized the trial counsel to conduct a substitute authentication pursuant to R.C.M. 1104(a)(2)(B). No one with authority to conduct a substitute authentication did so. During this initial session, the appellant was advised of his counsel rights, forum rights, the specification was modified, and the appellant was arraigned.

This court has found harmless error, and declined to order the record of trial returned for a certificate of correction or a new authentication, when there is no claim that the record is inaccurate. *United States v. Merz*, 50 M.J. 850, 854 (N.M.Ct.Crim. App. 1999); see *United States v. Ayers*, 54 M.J. 85, 92 (C.A.A.F. 2000). We find that any error in not authenticating the first ten pages of this record is harmless.

First, there has not been any claim that those pages are inaccurate. Second, the appellant was asked if he wanted his counsel rights explained again, and the appellant declined during the second session. He apparently was advised of his counsel rights at the prior session and understood those rights, because he appeared at the second session with his detailed military counsel and a civilian counsel who was not present at the first session. Third, forum rights were repeated, and the appellant entered pleas. Fourth, the minor modifications to the specification appear on the charge sheet, and the appellant did not object to proceeding on that charge and specification. Under these circumstances, we will not return the record for substitute authentication by the trial counsel or court reporter.

⁹ The appellant was placed back into maximum custody in special quarters under the same conditions as the appellant claimed in his illegal pretrial confinement issue: restraints, mice, insects, heat, cold, and time spent in the cell.

¹⁰ The appellant claims that he was in maximum custody where he had poor ventilation, inadequate heat when it was cold, inadequate cooling when it was hot, mold, cold water in the cells, mice and roaches.

Conclusion

Accordingly, the findings and sentence, as approved below, are affirmed. The appellant is granted an additional 280 days of credit against his approved confinement.

Judge THOMPSON and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court