UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
R.E. VINCENT, J.E. STOLASZ, D.O. HARRIS
Appellate Military Judges

UNITED STATES OF AMERICA

v.

DOUGLAS M. SULLIVAN
CORPORAL (E-4), U.S. MARINE CORPS

NMCCA 200800774
GENERAL COURT-MARTIAL

Sentence Adjudged: 06 March 2008.
Military Judge: Col S.A. Folsom, USMC.
Convening Authority: Commanding General, 1st Marine Division (Rein), Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: LtCol P.J. Betz, Jr., USMC.
For Appellant: LT Sarah E. Harris, USN.
For Appellee: Capt Robert E. Eckert, Jr., USMC.

14 July 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HARRIS, Judge:

Pursuant to his pleas, a military judge convicted the appellant of involuntary manslaughter in violation of Article 119 of the Uniform Code of Military Justice, 10 U.S.C. § 919. A general court-martial, composed of officer and enlisted members, sentenced the appellant to confinement for 27 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged. A pretrial agreement had no effect on the sentence.

In his sole assignment of error, the appellant asserts that the military judge erred in denying a motion for

administrative credit, and failed to issue a final decision on that motion after the defense moved to reconsider the earlier ruling.[1] *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985). After carefully considering the record of trial, the appellant's briefs and the Government's response, we conclude that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

I. Background

A. Facts

The appellant, while deployed to Camp Trebil, Iraq, in early November 2006, picked up an M-4 rifle from a supposedly safe ("Condition 4") weapons rack, switched the rifle from the "safe" to the "semi-auto" position, aimed it at his friend LCpl W, and pulled the trigger. Tragically, the weapon, which had not been properly cleared by the last person who used it, fired. A single round struck LCpl W in the neck, and he died a short time later. The appellant was quickly transferred to another installation in Iraq, where he made a full confession to investigators.

A charge of involuntary manslaughter was preferred against the appellant on 27 November 2006. He continued to work at forward bases overseas until February 2007, when he returned to Camp Pendleton, California. Immediately upon his return, he was placed in pretrial restriction. The conditions imposed included that he refrain from consuming alcoholic beverages, that he not wear civilian clothing or have visitors, and that he eat only at government messing facilities. Appellate Exhibit V at 14-15. The physical limits of the restriction were the "33 Area" on board Camp Pendleton.[2] The appellant was also required to muster two times per day during the work week and three times per day on weekends. However, he was allowed to continue his normal work duties without an escort. There was a process to request exceptions, and the appellant did request off-base visitation with his family at one point, which was approved subject to some limitations on his activities. Record at 39-40. The appellant remained on restriction for a total of

[1] "WHETHER THE MILITARY JUDGE ACTED IMPROPERLY WHEN HE FIRST DENIED APPELLANT'S MOTION FOR ADMINISTRATIVE CREDIT FOR DAYS SPENT IN PRETRIAL RESTRICTION, LATER SAID HE WOULD RECONSIDER HIS RULING IN THE CONTEXT OF A NEW MOTION TO DISMISS, BUT ULTIMATELY FAILED TO ANNOUNCE A FINAL RULING, THEREBY LEAVING THE ISSUE UNRESOLVED." Appellant's Brief of 13 Jan 2009 at 1.

[2] There was no evidence submitted by the parties describing how large this area was. Evidence did suggest that the area included a Subway restaurant and multiple other buildings and base facilities.

159 days.[3] From July 2007, when the restriction was terminated, until his trial in March 2008, the appellant was not subjected to any additional restraint or conditions upon his liberty. The appellant reached the end of his obligated active duty service on 15 September 2007, and was then involuntarily extended in a legal hold status until trial.

B. Pretrial Motions

The appellant made three motions now at issue on appeal.[4] First, the appellant claimed that his 159 days of pretrial restriction were tantamount to confinement or, alternatively, constituted unlawful pretrial punishment, and thus entitled him to administrative credit against his adjudged sentence. Record at 32; AE V. The then presiding military judge (Judge Meeks) denied the motion, stating his findings of fact and conclusions of law on the record. Record at 64-68.

A few weeks later, the appellant filed a motion to dismiss the charge based upon actual unlawful command influence. Record at 98; AE XIII. The factual basis for this motion involved the Government's mishandling of trial scheduling and witness travel matters, which ultimately led to the trial being delayed for several months. The appellant argued that these actions "usurped the court's authority" and violated Article 37, UCMJ. AE XIII at 1; *see generally Vanover v. Clark*, 27 M.J. 345 (C.M.A. 1988). The trial counsel had previously been chastised in considerable detail by Judge Meeks at an Article 39(a), UCMJ, session regarding the Government's actions. Record at 71-88. In his argument on the motion to dismiss, the civilian defense counsel made the following request for alternate relief:

> If the court feels – using the terms of the appellate courts – that dismissal is too draconic, then I would ask the court to, at a minimum, *reconsider its motion* [sic] with respect to providing Corporal Sullivan with some amount of credit for days awaiting trial.

Record at 125 (emphasis added). This statement is somewhat inconsistent with the appellant's written motion, which requested the following relief:

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[3] There were several lengthy delays in this case; however, much of it was excludable delay pursuant to R.C.M. 707 based upon defense continuance requests, and there is no speedy trial issue before the court.

[4] The pretrial stage of the proceedings was marked by a great deal of confusion. Five different military judges presided over various sessions of court. The logistics of the trial were in a constant state of flux, and tempers were often short.

> In the alternative [to dismissal], *since Cpl Sullivan is being held past his EAS*, the defense requests that Corporal Sullivan receive day for day administrative credit towards any sentence he receives for every day from 29 October 2007 until trial commences on 28 April 2008.

AE XIII at 3 (emphasis added).

In actuality, the two motions were wholly independent of each other. The first motion for administrative credit sought a remedy for the 159 days the appellant spent in pretrial restriction, occurring months before the motion hearings or the events giving rise to the command influence allegations. The alternative remedy requested in the unlawful command influence motion, however, requested prospective credit based upon the appellant's involuntary extension on active duty until the date of trial. Accordingly, nothing in the motion to dismiss would suggest a reconsideration of the earlier motion; rather, it requested a distinct remedy for a separate alleged violation occurring at a different time.

This distinction was again lost when the civilian defense counsel later asked if the military judge had "ruled out the possibility of any credit" for the appellant. Record at 154. Judge Meeks, apparently forgetting the details of the earlier motion hearing, replied, "I have not. I don't believe I have issued a formal ruling on the credit issue. I have that under advisement, and I will deal with that separately." *Id.* In addressing the scheduling and witness issues raised at that session of court, Judge Meeks did award relief in the form of travel reimbursement for one witness and an order for the Government to produce the appellant's mother for any subsequent trial or sentencing proceeding. Record at 152.

At the next session of court several weeks later, a different military judge (Judge Robinson) presided. He first read into the record Judge Meeks' findings of fact and conclusions of law regarding the motion to dismiss from the last session. Record at 157-58. Judge Meeks found no actual unlawful command influence, but did find, *sua sponte*, apparent unlawful command influence based upon the actions of the convening authority's staff judge advocate [SJA]. *Id.* Although dismissal was not granted, in addition to the relief previously stated, Judge Meeks ordered the SJA to have no further involvement in the case. Record at 158. In particular, Judge Meeks found that "[a]ppointing another judge advocate not subordinate to [the SJA] will remedy in [sic] the appearance of unlawful, command influence and ensure continued public confidence in the military justice

system." *Id.* Judge Robinson further stated that Judge Meeks intended to provide written findings of fact and conclusions of law prior to authentication of the record, but no such document is attached the record on file with this court. *Id.* at 157.

Further complicating matters, in the interim the defense had filed a second, more extensive motion to dismiss based upon apparent unlawful command influence. Record at 159; AE XIX. Notwithstanding defense counsel's assertions to the contrary, there was considerable overlap between the two motions to dismiss. *Id.* at 159-61. The scope of the second motion was ostensibly broader, although it encompassed much of the same evidence and many of the same events that Judge Meeks had addressed *sua sponte* at the previous session of court. Those events were likewise reflected in his findings of fact and conclusions of law. *Id.* Judge Robinson believed that the entire issue had been resolved by Judge Meeks' ruling. *Id.* at 160. The trial counsel likewise asserted the issue was closed. *Id.* at 162. From his comments on the record, it appears that the trial defense counsel was primarily interested in supplementing the record to better preserve the issue for later review. *Id.* at 161. Based on that, Judge Robinson did allow the defense to put a proffer of additional testimony on the record, and heard additional argument. *Id.* at 161-69. Again, it appears that no written essential findings were added to the record. Nor does it appear that either counsel submitted proposed findings of fact and conclusions of law in accordance with Judge Robinson's direction. *Id.* at 169.

At the next session of court, approximately two months later, before yet another military judge (Judge Leuning), there was no discussion of the second motion to dismiss. The parties addressed various scheduling issues, which resulted in moving the trial date to the first week of March 2008. *Id.* at 174-75.

By the time trial commenced, with Judge Meeks again presiding, the situation had changed dramatically. The parties had negotiated a pretrial agreement, and the appellant changed his plea to guilty. *Id.* at 177-79. Significantly, prior to the entry of that plea, the trial defense counsel stated, "the defense has no motions." *Id.* at 179. Judge Meeks then continued with the providence inquiry through the entry of findings. *Id.* at 212. At no time did any of the trial participants discuss the unlawful command influence motions, or any other outstanding business from the earlier sessions of court.

After a recess, Judge Meeks was excused from the case and was replaced by Judge Folsom. Record at 225. Judge Folsom initially summarized an R.C.M. 802 conference held just prior to going on the record. *Id.* at 226. Included in

that summary was that "[w]e discussed the fact there are no motions before the Court or requests for judicial notice." *Id*. Both parties concurred with Judge Folsom's summary of the R.C.M. 802 conference. *Id*. at 227. A short time later, Judge Folsom calculated the amount of pretrial restraint, specifically referencing the 159 days of pretrial restriction. *Id*. at 228. No one from the defense inquired about a potential reconsideration of Judge Meeks' earlier ruling on the motion for administrative credit. The remainder of the trial proceeded without any mention of the earlier motions.

II. Sufficiency of the Record

As an initial matter, we address the appellant's assertion that the record is insufficient for appellate review because the military judge failed to rule on all interlocutory questions and questions of law raised during the court-martial, as well as issue essential findings of fact. Appellant's Brief at 4. We disagree. The military judge entered findings of fact and conclusions of law on the record for both the administrative credit motion and the first unlawful command influence motion. Record at 64-68, 152, 157-58. Therefore, the appellant's reliance upon R.C.M. 801(a)(4) and *United States v. Postle*, 20 M.J. 632 (N.M.C.M.R. 1985), is misplaced. The factual record in this case is sufficiently developed to permit appellate review. The omission claimed here is the determination on a request for reconsideration, which does not require new evidence or findings of fact. *See generally United States v. Copening*, 32 M.J. 512, 515 (A.C.M.R. 1990)(holding that a military judge may hear additional evidence on a request for reconsideration), *aff'd*, 34 M.J. 28 (C.M.A. 1992).

Although the military judge intended to attach written essential findings to the record for the latter motion and apparently did not do so, that omission does not render the record unsuitable for appellate review. *See United States v. Villareal*, 52 M.J. 27, 31-32 (C.A.A.F. 1999); *see also* R.C.M. 1103(b)(2)(D)(3)(requiring attachment to the record of written special findings, *if any*, by the military judge)(emphasis added). Even were we to conclude that such an omission made this record non-verbatim, which we do not, reversal is not mandated for every failure to comply with R.C.M. 1103. *See United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999). In this case, the military judge and counsel engaged in a lengthy colloquy about the witness travel, scheduling matters, and earlier pretrial negotiations underlying the unlawful command influence claims. Many of those facts are undisputed; instead, the appropriate remedy was the central issue behind the motion, and that is adequately addressed in the military judge's findings of fact and conclusions of law.

Likewise, we have found no authority for the proposition that failure to issue a ruling on a request for reconsideration necessitates a remand. The applicable rule, by its own terms, is discretionary rather than directive. R.C.M. 905(f)("the military judge *may* . . . reconsider any ruling")(emphasis added); *see also United States v. Ruppel*, 49 M.J. 247, 253 (C.A.A.F. 1998). The appellant made his motions, the military judge ruled, and the findings of fact and conclusions of law are set forth in the record. The substance of those motions is now before this court for review on appeal. The appellant reads too much into the military judge's statement that "I don't believe I have issued a formal ruling on the credit issue." Record at 154. With respect to administrative credit for restriction, he had issued a ruling. With respect to a proper remedy for the unlawful command influence motions, administrative credit for the appellant's time on legal hold was not included in the relief granted by the military judge. In neither case do we require additional factual information or findings to complete our review.

We also note that the appellant shares some responsibility for any confusion regarding the status of the pretrial rulings in this case. The civilian defense counsel at trial referred to the period of pretrial restriction and the appellant's time on legal hold almost interchangeably even though they related to separate motions. *Id.* at 125, 169. Additionally, the appellant's second unlawful command influence motion was largely duplicative of his first, on which Judge Meeks had already issued findings and granted some relief. Judge Robinson made quite clear his belief, understandably, that Judge Meeks' ruling disposed of both defense motions to dismiss. *Id.* at 156-57. Finally, the appellant did not seek to clarify the issue despite several obvious opportunities to do so, most notably when Judge Folsom inquired as to whether there were any outstanding motions before the court. *Id.* at 226-27. On these facts, we are convinced that any resulting error was harmless.[5] *See Abrams*, 50 M.J. at 363; *Villareal*, 52 M.J. at 32. Accordingly, we now turn to the substance of the motions.[6]

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[5] Our decision today should not be read as condoning the manner in which the record of trial in this case was assembled. The lack of written findings on the unlawful command influence motion was an omission that should have been addressed by the military judge or the trial counsel prior to authentication. Likewise, the confusion regarding the two similar unlawful command influence motions could easily have been resolved at an Article 39(a) session. The importance of tracking any pending issues, particularly when multiple military judges handle various sessions of court, cannot be overstated.

[6] The Government has not asserted that the appellant's unconditional plea of guilty waived any of the motions at issue. *See generally United States v. King*, 30 M.J. 59, 70 (C.M.A. 1990)(stating that "in the normal situation a plea of guilty waives all motions"). We hold that the

III. Pretrial Punishment and Administrative Credit

In the appellant's sole assignment of error, the issues of administrative credit for his time in pretrial restriction and the proper remedy for apparent unlawful command influence are again unnecessarily conflated. Because we see those issues as distinct, we will address each individually.

We review *de novo* the ultimate legal question of whether pretrial restriction is tantamount to confinement. *United States v. King*, 58 M.J. 110, 113 (C.A.A.F. 2003)(citing *United States v. Guerrero*, 28 M.J. 223 (C.M.A. 1989)). "'The determination whether the conditions of restriction are tantamount to confinement must be based on the totality of the conditions imposed.'" *Id.* (quoting *United States v. Smith*, 20 M.J. 528, 530 (A.C.M.R. 1985)). The military judge's underlying findings of fact on the issue are not to be disturbed unless they are clearly erroneous. *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000).

We have reviewed the military judge's findings of fact, find them supported by the record and not clearly erroneous, and adopt them as our own. Applying the law to those facts, we agree with the military judge's conclusions, and hold that the conditions of the appellant's pretrial restriction were not tantamount to confinement. The appellant was assigned to his normal work duties, allowed to travel to and from work unescorted, and maintained the privileges of his rank as a noncommissioned officer during his time on restriction. Record at 67. Although he was subject to various limitations on where he could go and what he could do within the 33 Area, there was a mechanism in place to request exceptions. *Id.* at 66. The appellant even took advantage of that process to spend time off-base with visiting family members. *Id.* Undoubtedly, some of the pretrial conditions were isolating and frustrating for the appellant, but the testimony at trial established those conditions as reasonably related to the legitimate command objective of ensuring the appellant's presence for trial. Record at 65. Based upon the totality of the conditions imposed, we conclude that these conditions were not tantamount to confinement, and thus the appellant is not entitled to *Mason* credit. *See generally United States v. Christian*, 63 M.J. 205, 210 (C.A.A.F. 2006)(holding that revocation of off-post privileges is not tantamount to confinement).

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issues were properly preserved for appellate review and decline to invoke waiver on these facts.

We next consider whether the conditions of the appellant's pretrial restriction constituted unlawful pretrial punishment. This is also a mixed question of law and fact that qualifies for independent review. *See United States v. Pryor*, 57 M.J. 821, 825 (N.M.Ct.Crim.App. 2003). The burden of proof is on the appellant to show a violation of Article 13, UCMJ. *See United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). We hold that the appellant's pretrial restriction was not unlawful pretrial punishment.

Article 13 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. *See United States v. Inong*, 58 M.J. 460, 463 (C.A.A.F. 2003).

The "punishment prong" of Article 13 focuses on intent, while the "rigorous circumstances" prong focuses on the conditions of pretrial restraint. *See Pryor*, 57 M.J. at 825 (citing *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997). Conditions are not deemed "unduly rigorous" if, under the totality of the circumstances, they are reasonably imposed pursuant to legitimate governmental interests. *See McCarthy*, 47 M.J. at 168. *See United States v. Singleton*, 59 M.J. 618, 621 (Army Ct.Crim.App. 2003), *aff'd*, 60 M.J. 409 (C.A.A.F. 2005). Similar to the question of restriction tantamount to confinement, if conditions of pretrial restraint were reasonably related to a legitimate government objective, an appellant will not be entitled to relief. *See McCarthy*, 47 M.J. at 167; *see also United States v. Sittingbear*, 54 M.J. 737, 741 (N.M.Ct.Crim.App. 2001).

In this case, the military judge made a specific finding that there was no intent to punish the appellant. Record at 68. That finding of fact is supported by the record and is not clearly erroneous. Accordingly, there is no basis for relief under the first prong of Article 13. Likewise, for the reasons previously stated, the conditions imposed on the appellant were reasonably related to the legitimate governmental interest of ensuring his presence at trial. On these facts, we hold there was no violation of Article 13, UCMJ.

IV. Unlawful Command Influence

"Unlawful command influence is the mortal enemy of military justice." *United States v. Lewis*, 63 M.J. 405, 407 (C.A.A.F. 2006)(internal quotations omitted)(quoting *United States v. Gore*, 60 M.J. 178, 178 (C.A.A.F. 2004)). "The 'appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of

any given trial.'" *Id.* (quoting *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003). We review an allegation of unlawful command influence *de novo*. *See Villareal*, 52 M.J. at 30 (citing *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994)). Findings of fact underlying a motion at trial regarding unlawful command influence are reviewed under a clearly erroneous standard. *Id.*

We have carefully reviewed all of the pleadings, proffers, and evidence submitted on this issue in support of both motions to dismiss. We again find the military judge's findings of fact to be supported by the record and not clearly erroneous, and adopt them here. Record at 157-58. After applying the law to those facts *de novo*, we likewise concur that apparent unlawful command influence occurred. We further hold that the relief awarded by the military judge at trial was sufficient to cure the appearance of any unlawful command influence, and decline to grant further relief.

A military judge has broad discretion to fashion a remedy for unlawful command influence. *United States v. Harvey*, 64 M.J. 13, 21 (C.A.A.F. 2006)(citing *United States v. Gore*, 60 M.J. 178, 186-89 (C.A.A.F. 2004)). It is well-settled that dismissal is a drastic remedy, and courts must look to whether alternate forms of relief are available. *Id.* For this court to find that the appearance of command influence has been sufficiently alleviated to be harmless beyond a reasonable doubt, we must be convinced that "the disinterested public would now believe" the appellant received a trial free of unlawful command influence. *Lewis*, 63 M.J. at 415. We consider several factors in making this determination, including the nature of the error, alternative remedies, and possible prejudice to the appellant. *Harvey*, 64 M.J. at 21.

To say the Government's handling of pretrial proceedings in this case was less than ideal would be a significant understatement. However, the military judge found no actual unlawful command influence, apparently attributing the witness travel and logistics mishaps to negligence rather than to malice. The finding of apparent unlawful command influence focused on a single email sent by the SJA in which he made intemperate remarks about the appellant's trial defense team. Record at 157-58. The military judge specifically found that there was no evidence this taint extended to the convening authority. *Id. at 158*; *see United States v. Hamilton*, 41 M.J. 32, 37 (C.M.A. 1994)(holding that not every action of a staff judge advocate can be attributed to the commander).

Our superior court has held that removal of tainted personnel can sufficiently cure the appearance of unlawful

command influence. *Villareal*, 52 M.J. at 31. That was the alternative to dismissal employed in this case. We also note that, notwithstanding his finding of no actual unlawful command influence, the military judge directed additional relief in the form of travel reimbursement for one witness, and an order to produce the appellant's mother for any merits or sentencing phase of the trial. Record at 152. In addition, we are aware of no authority, and the appellant supplied none at trial or on appeal, suggesting that administrative credit is an acceptable remedy for unlawful command influence. *Id.* at 169. Even assuming an award of administrative credit would be appropriate in certain cases, there is nothing requiring such a remedy. Declining to provide that relief is within the bounds of the military judge's discretion.

Finally, we find the possible prejudice to the appellant to be remote. The SJA was removed from further involvement in the appellant's case. The military judge attempted to make whole the appellant's witnesses who were inconvenienced by the travel mishaps. Although the appellant was forced to remain on active duty for several additional months while awaiting trial (in large part due to scheduling difficulties for his civilian defense counsel), he was not subjected to restrictions on his liberty during that time, and presumably received all pay and allowances to which he was entitled. We conclude that dismissal of the charge would be too drastic of a remedy, and that the relief awarded by the military judge was sufficient to cure the appearance of unlawful command influence beyond a reasonable doubt.

V. Conclusion

Accordingly, the findings and the approved sentence are affirmed.

Senior Judge VINCENT and Judge STOLASZ concur.

For the Court

R.H. TROIDL
Clerk of Court