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

Before
F.D. MITCHELL, J.A. MAKSYM, D.O. HARRIS
Appellate Military Judges

UNITED STATES OF AMERICA

v.

MICHAEL A. GERWICK
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS

NMCCA 200900547
GENERAL COURT-MARTIAL

Sentence Adjudged: 20 May 2009.
Military Judge: LtCol R.Q. Ward, USMC.
Convening Authority: Commanding Officer, Center for Naval Aviation Technical Training, Marine Unit Cherry Point, MCAS Cherry Point, NC.
Staff Judge Advocate's Recommendation: Maj S.D. Schrock, USMC.
For Appellant: CAPT Johnathan W. Bryan, JAGC, USN.
For Appellee: LCDR Sergio F. Sarkany, JAGC, USN.

29 June 2010

OPINION OF THE COURT

IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HARRIS, Judge:

Pursuant to his pleas, a special court-martial composed of a military judge alone convicted the appellant of making a false official statement and larceny in violation of Articles 107 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 921. The military judge sentenced the appellant to confinement for six months, forfeiture of $933.00 pay per month for six months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged. Pursuant to a pretrial agreement, all confinement in excess of 120 days was

suspended for the period of confinement served, plus twelve months.

The appellant raises two assignments of error. First, he alleges that his conditions of pretrial restraint constituted unlawful pretrial punishment. *See* Art. 13, UCMJ, 10 U.S.C. § 813. Second, he asserts that he is entitled to administrative credit for restriction tantamount to confinement. *See generally United States v. Mason*, 19 M.J. 274 (C.M.A. 1985)(summary disposition). After carefully considering the record of trial, the appellant's brief, 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

The facts surrounding the appellant's pretrial restraint are largely undisputed. The appellant stole a laptop computer and several other personal items from Private First Class M, his roommate at Naval Air Station Pensacola, in late October 2008, shortly before both Marines transferred to new commands. Record at 63-64. The appellant brought the stolen property with him when he reported on board the Center for Naval Aviation Technical Training (CNATT) Marine Unit in Cherry Point, North Carolina, on 27 October 2008. By early November, he had been identified as a suspect in the larceny. Appellate Exhibit VIII at 1. On 10 January 2009, the appellant completed the Ordinance course at CNATT. *Id.*

Because he was facing legal action, upon completion of his class, the appellant was assigned to the Barracks Support Platoon within CNATT. *Id.* The Barracks Support Platoon is comprised of personnel unable to attend classes due to legal or medical reasons, or those between assignments. Record at 11. Personnel can be in the platoon for time periods ranging from a couple of days to several months. *Id.* The number of personnel assigned to the platoon on a given day can range from 5 to 175. *Id.* at 16. The Barracks Support Platoon assists a variety of on-base organizations and activities. *Id.* at 11. When fewer Marines are assigned to the platoon, the corresponding individual workloads intensify. *Id.* at 16. The normal work day for Barracks Support Platoon is 0630 to 1600. *Id.* at 12-13.

CNATT is required to maintain a certain percentage of Marines in a duty section each day in addition to the Marines' daily activities. *Id.* at 14. The duty section provides fast reaction support in the event of an emergency. *Id.* They perform additional tasks as assigned by the duty NCO. *Id.* The duty section musters at 1800 for evening

duties. *Id.* at 13. Members also frequently stand a fire watch for two hours between the hours of 2200 and 0600. AE VIII at 2. All CNATT students are assigned to one of four duty sections and participate in these tasks. Record at 15. Personnel assigned to the duty section must remain in their utility uniform. AE VIII at 2. They must remain in the barracks area, except for approved physical training and one hour of on-base liberty per day. *Id.* When a Marine is not assigned to the duty section, he or she has liberty from 1600 to 2400, is free to wear civilian clothes, and may travel anywhere within a 30-mile radius after checking out. Record at 13; AE VIII at 1-2.

Individuals with pending legal matters are permanently assigned to the duty section every day. Record at 15-16. Testifying for the Government during the motion hearing, Gunnery Sergeant [GySgt] Anthony Jarona stated that the purpose for this ongoing assignment is to provide those Marines with closer supervision, and give them fewer opportunities to get into more trouble. Record at 21. This policy went into effect in December 2008. Record at 28, 30; Appellate Exhibit VIII. As a result, the appellant was in a duty status every day for several months prior to trial. The appellant also stood a fire watch nearly every night during February and March of 2009. Appellate Exhibits V and VIII. According to GySgt Jarona, the command tried to use Barracks Support Platoon members to cover as many fire watch shifts as possible, as those Marines did not have classes during the day. Record at 16-17. During that time period, the Barracks Support Platoon was down to only a handful of Marines, including the appellant. *Id.* Eventually, the fire watch policy was changed in April 2009, and the appellant no longer had nightly watch shifts. Appellate Exhibit VIII.

At trial, the appellant requested relief for illegal pretrial punishment and administrative credit for restriction tantamount to confinement. Appellate Exhibit VI. The military judge denied both motions, but did determine that the time the appellant spent in the permanent duty section constituted pretrial restriction pursuant to RULE FOR COURTS-MARTIAL 304(a)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) and considered that pretrial restraint during his deliberations on sentencing. Record at 90.

II. Pretrial Punishment

We first address whether the conditions of the appellant's pretrial restriction constituted unlawful pretrial punishment. This presents 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). After a careful review of the

record, 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 or to prevent additional misconduct, i.e., illegal pretrial confinement. *See United States v. Mack*, 65 M.J. 108, 110 (C.A.A.F. 2007); *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. Legitimate governmental interests include protection of the morale, welfare and safety of the unit or the accused, protection of victims or witnesses, or to ensure the accused's presence at trial. *See Mack*, 65 M.J. at 109 (quoting *United States v. Blye*, 37 M.J. 92, 94 (C.M.A. 1993)). 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 90. That finding of fact is supported by the record, specifically the testimony of GySgt Jarona, and is not clearly erroneous. *See United States v. Harris*, 66 M.J. 166, 168 (C.A.A.F. 2008). Accordingly, there is no basis for relief under the first prong of Article 13.

Whether the conditions imposed on the appellant were reasonably related to legitimate governmental interests is a closer call, but we likewise agree with the military judge's conclusion that no violation of Article 13 occurred. It is undisputed that the command was required to maintain a duty section, and that all students at CNATT participated. The only distinction between the appellant and the other students was the *frequency* of that duty. Assigning Marines with pending legal matters to the duty section every day served two purposes: first, it afforded those Marines greater supervision; and second, it reduced the duty and fire watch burdens on students studying and attending classes. On these facts, we hold there was no violation of Article 13, UCMJ.

III. Administrative Credit

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 routine work duties during the day as part of the Barracks Support Platoon, was allowed to travel unescorted, and received at least one hour of on-base liberty each day, not counting physical training time. Although he was subject to the physical limitation of the barracks area the rest of the day, there was a mechanism in place to request exceptions. Appellate Exhibit IX. The appellant even took advantage of that process on three occasions to go off-base to a local department store. *Id.*

We also note that the barracks area to which the appellant was restricted while a member of the duty section included two lounges with large screen televisions and DVD players, indoor and outdoor recreation facilities, a smoke pit, and a grilling area. The appellant was free to utilize any of these amenities, and had no restrictions on his movement or activities within the barracks area, except for a prohibition on consuming alcohol.

Undoubtedly, some of the pretrial conditions were burdensome for the appellant, particularly the frequent fire watch shifts, but the testimony at trial established those conditions as reasonably related to the legitimate command objectives of ensuring the appellant's presence for trial and maintaining a viable duty section, while minimizing the impact on school operations. Contrary to the appellant's assertion, the fact that CNATT ultimately modified its policy regarding the fire watches does not equate to a finding of unlawfulness. *See United States v. Corteguera*, 56 M.J. 330, 332 (C.A.A.F. 2002).

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). In addition, the military judge expressly considered the circumstances of the appellant's pretrial restraint in arriving at an appropriate sentence. On these facts we decline to grant any further relief.

V. Conclusion

Accordingly, the findings and the approved sentence are affirmed.

Senior Judge MITCHELL and Senior Judge MAKSYM concur.

For the Court

R.H. TROIDL
Clerk of Court