

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

**Before
C.L. REISMEIER, J.K. CARBERRY, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JOHN M. SUTTLE
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201100030
GENERAL COURT-MARTIAL**

Sentence Adjudged: 21 July 2010.

Military Judge: LtCol David M. Jones, USMC.

Convening Authority: Commanding General, 3d Marine Division
(-)(Rein), Okinawa, Japan.

Staff Judge Advocate's Recommendation: LtCol K.J. Estes,
USMC.

For Appellant: LT Michael B. Hanzel, JAGC, USN.

For Appellee: LT Kevin D. Shea, JAGC, USN.

31 October 2011

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

REISMEIER, Chief Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of one specification each of conspiracy to manufacture marijuana, conspiracy to distribute marijuana, disobeying a lawful general order by possessing drug paraphernalia, possession of marijuana with intent to distribute, and manufacture of marijuana, in violation of Articles 81, 92, and 112a, Uniform Code of Military

Justice, 10 U.S.C. §§ 881, 892, and 912a, respectively. The appellant was sentenced to confinement for 60 months, reduction to E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence but, pursuant to a pretrial agreement, suspended all confinement in excess of 18 months. During the suspension period and following a vacation hearing, the CA vacated the suspension of 12 of the suspended 42 months of confinement and ordered the appellant to serve those additional 12 months confinement.¹

The appellant raised two initial assignments of error: that solitary confinement at the brig for 52 days while Japanese authorities investigated his misconduct was a violation of Article 13, UCMJ, and that the military judge's award of 36 days of credit against confinement for being forced to clean the brig in hand-irons was an insufficient remedy. We specified a third issue, asking whether we have jurisdiction to review the conditions of confinement imposed not under the UCMJ, but pursuant to the Status of Forces Agreement (SOFA) between the United States and Japan. The appellant also raised a supplemental assignment of error, claiming a Government breach of the pretrial agreement by withdrawing from the sentence limitation portion of that agreement. Having considered the entire record of trial, to include the vacation proceedings, and the pleadings of the parties, we conclude that the findings and the 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 appellant was ordered into confinement at the Camp Hansen Brig in Okinawa while Japanese authorities investigated his marijuana-growing operation. He does not challenge the decision to confine him during the investigation. Rather, he argues his solitary confinement in special quarters and the instances of his being forced to clean while in hand restraints were unwarranted and amounted to pretrial punishment.

The appellant spent a total of three months in segregation beginning 8 December 2009. His "prevention of injury" status began upon confinement. That status was lifted on 22 December

¹ Report of RULE FOR COURTS-MARTIAL 1109, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) pretrial agreement withdrawal of 12 April 2011. In our decretal paragraph, we will direct that the supplemental court-martial order reflect the action taken by the CA.

2009, but he remained in segregation awaiting Japanese authorities. He was placed in disciplinary segregation on 12 February 2010 and briefly entered the general population in early March 2010. Record at 235-36, 242. Both trial and appellate defense counsel focused their arguments on the 52-day period between the time the appellant's prevention of injury status was lifted and the time he was placed on disciplinary segregation. *Id.* at 379-80; Appellant's Brief of 20 Mar 2011, Assignment of Error 1. We too will focus our discussions on that period of time.

The military judge concluded that during the time period at issue, the appellant was confined in special quarters under the SOFA, not pursuant to the UCMJ. Appellate Exhibit XVIII (Military Judge's Findings of Fact, Motion for Pretrial Punishment Credit). He was placed in the brig on 8 December 2009, while awaiting Japanese jurisdiction for the off-base, drug-related offenses. *Id.*

The military judge also found that the appellant was forced to clean the Camp Hansen Brig while wearing handcuffs, but the military judge made no specific finding regarding whether the complained of instances occurred during or after the appellant's confinement pursuant to the SOFA. The military judge cited Article 55, UCMJ, which provides restraints are only to be used for the purposes of safe custody. The military judge concluded that instead of providing safe custody, the handcuffs "had the effect of punishment," even though punishment was not what the brig staff intended. AE XVIII, Analysis Section. He determined the practice violated Article 13, UCMJ, and awarded 36 days of confinement credit. The appellant asks this court to reconsider this ruling and provide additional relief.

Law

Article 13, UCMJ, prohibits two things: (1) the intentional or purposeful imposition of punishment prior to trial, and (2) conditions of arrest or pretrial confinement that are more rigorous than necessary to ensure the presence of the accused for trial. *United States v. Zarbatany*, 70 M.J. 169, 174 (C.A.A.F. 2011). Whether an appellant was subjected to pretrial punishment on either basis is a mixed question of law and fact. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). We defer to the findings of fact by the military judge when those findings are not clearly erroneous, but we employ independent, *de novo* review when applying these facts to the law. *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005).

The second prohibition of Article 13 is concerned with the objective rather than the subjective goals behind the conditions imposed. Conditions that are reasonably imposed pursuant to legitimate governmental interests are not considered punishment. See *United States v. James* 28 M.J. 214, 216 (C.M.A. 1989) (uniform requirements, intermingling with sentenced prisoners, and visitation policy were rationally related to the orderly operation of the confinement facility). On the other hand conditions that are punitive in nature, imposed without a valid rationale or purpose, are prohibited. See *King*, 61 M.J. at 227 (unexplained, 'arbitrary,' decision to place a detainee in segregation in response to space limitations); *United States v. Anderson*, 49 M.J. 575 (N.M.Ct.Crim.App. 1998) (automatic policy of placing detainees facing more than five years confinement in maximum custody).

The standards for review of Article 13 complaints are "conceptually the same as those constitutionally required by the Due Process Clause of the Constitution." *James*, 28 M.J. at 216 (citing *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)). Courts consider factors including the conditions of confinement, the purpose of the conditions, and the intent of those imposing the conditions. *Id.*

Reviewability of Claims

First, we address the reviewability the appellant's claim stemming from confinement for reasons unrelated to military justice. The United States SOFA with Japan requires each party to assist the other ". . . in the arrest of members of the United States armed forces . . . in the territory of Japan and in handing them over to the authority which is to exercise jurisdiction" Agreement Under Article VI of the Treaty of Mutual Cooperation and Security between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, Jan. 19, 1960, 11 U.S.T. 1652, Art. XVII, 5(a). It simultaneously provides that the United States military will retain control of its members who are accused by Japan, until they are actually charged by Japan. *Id.*, Article XVII, 5(c). Pursuant to these responsibilities, commanders are authorized to order a member into pretrial confinement on behalf of Japanese authorities, even when no

charges are pending under the UCMJ.² *United States v. Murphy*, 18 M.J. 220, 232 (C.M.A. 1984).

We conclude that the appellant's claim for credit based on the conditions of his confinement while held pursuant to the SOFA is not reviewable under Article 13, UCMJ. During the time period at issue, the appellant was confined under the SOFA, not pursuant to the UCMJ. AE XVIII. He was placed in the brig on 8 December 2009, while awaiting Japanese jurisdiction for the off-base, drug-related offenses. *Id.* His status was reviewed on 15 December 2009. *Id.* at 9. A commander's authority under the SOFA exists independently of the UCMJ. *Murphy*, 18 M.J. at 233. In *Murphy*, the Court of Military Appeals addressed a question similar to that which we face, and concluded that executive diplomatic decisions were beyond its purview. *Id.* at 234. The court confined itself to asking only whether the procedures used and conditions imposed comported with constitutional limits. *Id.* at 233. We, like the Court of Military Appeals, are aware that when an offense is against the laws of another nation, primary jurisdiction lies with that nation, such that the provisions of the UCMJ will apply only when jurisdiction is expressly or impliedly waived in favor of the sovereign governing the visiting forces. *Id.* The court in *Murphy* explicitly concluded that "[t]here is discretion to select that form of custody which will suffice to guarantee the appearance of the criminal accused as requested by the foreign government." *Id.*

However, as both parties point out in their briefs on the issue we specified, regardless of the reviewability of the *decision* to confine a service member pursuant to the SOFA, the **conditions** of confinement imposed pursuant to the SOFA³ are still reviewable. The Constitution applies limits to a commander's authority even absent Article 13. *See Murphy*, 18 M.J. at 232 ("American officials having custody of appellants are fully subject to constitutional commands"). Conditions of confinement

² *But see*, Major William K. Lietzau, *A Comity of Errors: Ignoring Constitutional Rights of Service Members*, ARMY LAW. 3 (1996) (questioning whether this practice is compatible with R.C.M. 305 and due process).

³ We note that the record is unclear as to whether the instances of cleaning in irons occurred during the initial confinement pursuant to the SOFA, during later confinement in special quarters due to disciplinary infractions, or during both times. Because we conclude that the substance of the analysis - focusing on pretrial punishment - remains the same in this case whether we review pursuant to Article 13 or pursuant to the Constitution, we need not consider the timing further. The distinction may be of minimal importance to this case; it may be critical in other cases, where the lack of UCMJ jurisdiction over the underlying case might prove fatal to a similar complaint.

or procedural aspects of the confinement decision may "raise both fourth- and fifth-amendment problems." *Id.* at 234.

Pretrial Punishment Claims

The appellant was housed in segregation in order to keep him isolated from others while the Japanese continued their investigation. Whether contact with the general population would have in fact compromised the investigation may be a matter of dispute, but the purpose of the isolation was stated in the record. Whether motivated by a desire to avoid inmates potentially influencing the appellant's statements, level of cooperation, or availability, the purpose indicated in the record was to ensure that the appellant did not have contact with other detainees or prisoners out of concern for the Japanese investigation. That concern is not inconsistent with the commander's obligations under the SOFA, and is not, in and of itself, enough to suggest intent to punish. Isolation was "reasonably related to legitimate, governmental objectives" *Mosby*, 56 M.J. at 310. The conditions in special quarters were neither so onerous, nor lingered so long, as to constitute punishment, and were imposed only so long as confinement pursuant to the SOFA was imposed (suggesting that the condition was not imposed as punishment).

However, we agree with the military judge's conclusion that subjecting the appellant to cleaning in irons was punishment, whether reviewed under Article 13 or under the Constitution. While we consider the military judge's determination of whether the appellant is entitled to credit for a violation of Article 13 or the Constitution *de novo*, we review the remedy given by a military judge for a violation under an abuse of discretion standard. See *United States v. Williams*, 68 M.J. 252, 257 (C.A.A.F. 2010). Witnesses gave varying accounts of whether the appellant had to clean in handcuffs, and if so, how many times, and for how long. The military judge was in a better position than us to form an overall impression of the frequency and severity involved. He described the practice as unnecessary, dangerous, and humiliating, but imposed without malice. AE XVIII, Analysis Section. We add to the military judge's findings that the irons were placed on the appellant because of a mistaken belief on the part of junior brig staff that irons were required any time a confinee in special quarters was

removed from a cell.⁴ While the practice of forcing the appellant to clean while shackled may have been the result of poor oversight, it nonetheless resulted in punishment.

To calculate the amount of credit that would be appropriate, the military judge estimated that it occurred approximately 36 times, and awarded one day of additional credit against confinement for each instance. *Id.* Both the estimate and the relief awarded are reasonable and supported by the record. Therefore, the military judge did not abuse his discretion, and the appellant's request for additional relief on this basis is denied.

As the appellant was granted credit against confinement adjudged for the 52 days he was held pursuant to the SOFA, and was credited for 36 additional days because he was forced to clean in shackles, we are satisfied that the appellant's punishment claims were adequately addressed by the military judge's crediting those days against confinement adjudged.

This does not end our inquiry, however. Our statutory mandate requires that we consider, "on the basis of the entire record," the sentence that "should be approved." Art. 66(c), UCMJ; *Zarbatany*, 70 M.J. at 169. We will, therefore, consider the entirety of his claim regarding the conditions of his confinement under Article 66(c).

Article 66(c) Review

Regardless of the propriety of the brig's determination to house the appellant in special quarters pursuant to his confinement under the SOFA, it did result in a degree of isolation that, as noted, warrants consideration as to the sentence that "should be approved." Art. 66(c), UCMJ. Likewise, we have considered the instances of cleaning in hand restraints. The military judge provided meaningful relief to the appellant by crediting him with one day of confinement for each instance of cleaning. This credit was in addition to one day of credit pursuant to *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984) for each day pretrial confinement, including the 52 days he was held pursuant to the SOFA in special quarters. We conclude that no further credit is warranted beyond what was ordered by the military judge.

⁴ Apparently, it did not occur to some of the junior staff members that the requirement that special quarter's residents be in shackles when outside of the cells might suggest that the residents not be involved in cleaning outside the cells.

Vacation Proceedings

The appellant request that we "set aside" the vacation hearing for what he terms "substantive and procedural reasons." Substantively, he argues that the evidence offered at the hearing failed to demonstrate by a preponderance of the evidence that he violated Article 134, UCMJ. He argues that his threatening comments were not wrongful because they were made in jest, and, because they were made by a convicted felon with a dishonorable discharge, were not prejudicial to good order and discipline or service discrediting because no one would associate the appellant with the Marine Corps under these circumstances. Procedurally, he argues that the hearing officer failed to adequately summarize the appellant's position or to evaluate the contested facts. He argues that the primary allegation against him - espionage - was not noticed in the notification letter, and that the hearing officer made his recommendation in part because the appellant was suffering from a personality disorder. Appellant's Supplemental Brief of 28 Sep 2011 at 7-8.

The appellant's pretrial agreement provided that misconduct, defined as a violation of the UCMJ, could serve as a basis to vacate the period of suspension agreed to in the pretrial agreement. AE III at 3. He was advised accordingly by the military judge. Record 109-11. Despite this misconduct provision, on 12 February 2011, the appellant was surreptitiously recorded in the brig stating, in pertinent part:

My wife comes home from deployment and found [my 32 marijuana plants]. . . . I guess she just didn't know me. Married for four years, and then that was it. It was stupid. I'm gonna f***in waste her. I swear to God. I'm gonna get my money back one way or the other. She cost me \$175,000, that's a Lamborghini. I'm gonna get back up with her and like maybe we just didn't know each other and then I'm gonna take her to Thailand and sell her organs. . . . She was the only one who knew. Even the people I sold to didn't know it was there.

Government's Response to Court Order filed on 1 Aug 2011, Exhibit 15 to Report of Vacation Proceeding at 2 (Government's Response); Audio recording.⁵ On 28 February 2011, the appellant

⁵ The audio recording, attached to the record, includes a recording of the recording being played for the hearing officer. The audio is exceedingly difficult to understand. An agent from the Naval Criminal Investigative

was notified by the appropriate authority that a proceeding would be held on 3 March 2011 to determine whether to execute the confinement portion of his sentence (vacate). Government's Response, Exhibit 1.⁶

As the appellant rightly points out, we have the authority to review a vacation proceeding to ensure that an appellant was afforded due process pursuant to R.C.M. 1109 and Article 72, UCMJ. See, e.g., *United States v. Miley*, 59 M.J. 300, 302 (C.A.A.F. 2004). While the full scope and standard of our review has never been clearly articulated in the case law, we need not probe the limits in this case.⁷ The special court-martial convening authority (SPCMCA) must conduct a hearing as to the alleged violations of the conditions of suspension, and transmit the record of the hearing as well as his recommendations to the general court-martial convening authority (GCMCA). The GCMCA is then to review the record and recommendation, and determine whether the appellant violated a condition of suspension, and whether to vacate the suspension. If the GCMCA determines to vacate, he must prepare a written report indicating the evidence he considered and the reasons for the decision.

The notification letter specifically informed the appellant that the hearing would be conducted to determine if he committed an act or omission in violation of the UCMJ by committing an assault or by communicating a threat.⁸ After a one-week delay at

Service (NCIS) discussed the content of the recording, and excerpts of the recording were provided in attachments to the record based on our order to produce.

⁶ The appellant questions the timing of the hearing, claiming that it was "strange" because he was notified one week before he was to be released, yet the alleged misconduct happened "much earlier." The recording quoted herein was made just 16 days before the notification was issued.

⁷ *Miley* and *United States v. Englert*, 42 M.J. 827 (N.M.Ct.Crim.App. 1995) suggest a due process review. The Coast Guard, in *United States v. Bulla*, 58 M.J. 715 (C.G.Ct.Crim.App. 2003) suggests a substantive review of the evidence offered, as does our own unpublished case of *United States v. Burchett*, NMCCA 200200121, 2004 CCA LEXIS 39. While the substantive review of evidence might prove problematic in some vacation cases where only a summary of the evidence is offered, we are aided in this case with a complete record, including documents and a recording of the proceeding itself. We save for another day whether the scope of review must always include a sufficiency review of the factual determinations made in cases where the record would fail to support an independent review of the factual sufficiency of the evidence offered.

⁸ The assault was not substantiated.

the request of the appellant, the hearing was held on 10 March 2011. The appellant was afforded his rights, in accordance with R.C.M. 1109, to notice, presence, representation, and an opportunity to be heard. Notwithstanding the appellant's argument that his comments were only prison puffery intended to ward off other prisoners, the evidence established by preponderance that the appellant communicated a threat, in violation of Article 134, UCMJ. Indeed, even taking the appellant's argument at face value, the argued intent - to convince the listener that he was an aggressive person not to be trifled with - requires one to communicate what the listener would understand to be a valid threat. It is not necessary that the appellant actually intended to do the injury threatened. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 110(c). It was not made in jest, nor was it made for some valid purpose. It was intended to be perceived by a third party as a real threat, irrespective of whether he actually intended to carry it out. While the appellant argues that "none of the statutory elements of Article 134 were proven," we disagree. We, like the SPCMCA and the GCMCA, find the alleged violation of the UCMJ.

We have considered the appellant's assignment of error, and have ourselves listened to the entire vacation proceeding. Notwithstanding the appellant's argument regarding discussions of additional misconduct sounding in alleged plans to commit espionage in the future,⁹ the report of the investigation addressed only communication of a threat as a basis for concluding that a violation of the PTA occurred. Following argument of counsel at the hearing, the only questions asked by the SPCMCA were for clarification of the elements of communicating a threat, and a definition of "third party" as it related to the elements. Likewise, in vacating a portion of the suspended sentence, the GCMCA's only reference to misconduct was the violation of Article 134 for communicating a threat.

As for the appellant's claim that the hearing officer used the appellant's personality disorder as a basis for the vacation, the report states that the appellant violated the terms of his PTA by communicating a threat. The SPCMCA explicitly referenced the appellant's intent to carry out the threat if released. He further stated that the 18 months in

⁹ The testimony at the hearing was that NCIS became involved in this post-trial matter because of the appellant's access to information and his purported claims to a future intent to commit espionage, narcotics trafficking, and harm to his wife. Discussions regarding these other matters were included on the tape but, contrary to the appellant's suggestion, were not bases for the vacation proceeding.

confinement thus far had not proven effective, and that "it is [the investigating officer's] recommendation that the suspended portion of the Probationer's sentence be vacated for violation of the pretrial agreement and to ensure additional treatment for the diagnosed personality disorder." We note that the appellant's diagnosis, contained within brig reports and his own unsworn statement that he didn't "like people very much," were properly before the investigating officer.

We recognize that standing alone, reference to vacating a suspension because of a personality disorder would be legally problematic at best. Suffering from a diagnosed personality disorder is not a violation of the UCMJ and is not a basis for vacating a suspended sentence. However, the reference to the appellant's disorder does not stand alone. The SPCMCA stated explicitly that he concluded that the appellant violated the terms of his agreement by communicating a threat, a violation of the UCMJ. He concluded that he believed that the appellant communicated intent to carry out the threat of violence upon release. He stated that the 18 months of rehabilitation had proved ineffective. Only after stating those determinations did he note that he recommended vacation for violation of the PTA "and to ensure additional treatment for the diagnosed personality disorder" that appeared to fuel the appellant's statement at the hearing that he "didn't like people very much" and the appellant's threat against his wife for revealing his criminal behavior. Read in context, we are satisfied that the point the SPCMCA made was not that vacation was predicated on the appellant's disorder, but that treatment would benefit the appellant's further rehabilitation.

Likewise, it does not appear that the GCMCA vacated because of the need for further treatment. The final Report of R.C.M. 1109 proceedings states that the GCMCA found that the appellant violated the PTA by communicating a threat, and that vacation was appropriate. The GCMCA made no reference to a personality disorder in his action dated 12 April 2011. Instead, his chief of staff, acting on 18 March 2011 in the absence of the GCMCA, in the addendum to the report, concurred with the investigating officer's assessment that the appellant was not sufficiently rehabilitated and may require additional treatment for his personality disorder. The chief of staff concluded by vacating the entire suspended sentence, a conclusion that was revisited by the GCMCA a few weeks later at the request of the appellant.

As we do with the SPCMCA's reference to the appellant's personality disorder, we conclude that the chief of staff did

not order additional confinement in order to treat a mental condition. Rather, the chief of staff concluded, explicitly, that the appellant made credible threats to his wife in direct violation of Article 134 and in violation of his PTA. The chief of staff specifically found that he did not believe the appellant's threats were in jest, and that he believed that the appellant would act upon those threats. He specifically stated that the appellant's wife's safety was in question. Only after making those conclusions did he end his statement regarding his "reasons for vacating the suspended sentence" by concurring that the appellant "is not sufficiently rehabilitated and may require additional treatment for his diagnosed personality disorder." Our read of the reference to treatment when reviewing the report in its entirety is that the chief of staff considered the appellant to remain a danger, that the danger manifested itself in a threat that violated the UCMJ, that the appellant's threats formed the basis for vacation, and that the appellant had still not been sufficiently rehabilitated. While the reports related to the vacation decision may have been in artfully drafted, we do not agree with the appellant that the reference to the benefits of continued treatment during the course of additional rehabilitation was intended to be a stated reason for vacating the suspended sentence.

Regardless, as noted above, the 18 March 2011 decision of the chief of staff did not have the last word on the matter. The appellant requested mast following the chief of staff's decision, and the GCMCA heard the appellant's request for consideration telephonically while deployed. After reviewing all of the evidence and considering the appellant's complaint, on 12 April 2011, the GCMCA found that the appellant violated the agreement by violating Article 134 (communicating a threat), making no reference to the appellant's personality disorder. The GCMCA then withdrew from the agreement and ordered the appellant to serve an additional 12 months confinement rather than the entire amount ordered by the chief of staff. We find no prejudicial error in this matter.

Conclusion

We note that the court-martial order (CMO) fails to reflect correctly the consolidated list of paraphernalia originally included within Specifications 1 (a glass marijuana pipe), 2 and 3 (various items used to cultivate the marijuana) of Charge II. The CMO refers only to the pipe. The supplemental CMO shall correctly reflect the findings of the specification as

consolidated for trial. The findings and sentence as otherwise approved by the convening authority are affirmed. We direct

that the supplemental promulgating order also correctly reflect that an additional 12 months of confinement was ordered executed.

Senior Judge CARBERRY and Judge PAYTON-O'BRIEN concur.

For the Court

R.H. TROIDL
Clerk of Court