

**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.

**STEVEN A. CAMPBELL
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201100079
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 18 October 2010.

Military Judge: Maj Clay A. Plummer, USMC.

Convening Authority: Commanding Officer, 8th Engineer Support Battalion, 2d Marine Logistics Group, Camp Lejeune, NC.

Staff Judge Advocate's Recommendation: Maj J.R. Cherry, USMC.

For Appellant: Maj Rolando R. Sanchez, USMCR.

For Appellee: CAPT James B. Melton, JAGC, USN; Maj William C. Kirby, USMC.

6 September 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.

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of two specifications of violating a general order, four specifications of drug distribution, three specifications of drug use, and one specification of drug possession with intent to distribute,

violations of Articles 92 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 912a. The convening authority approved the adjudged sentence of confinement for eleven months, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant alleges that the military judge committed error when he found that the appellant's inability to receive timely mental health care while incarcerated did not constitute unlawful pretrial punishment under Article 13, UCMJ. After thoroughly examining the record of trial 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 occurred. Arts. 59(a) and 66(c), UCMJ.

Factual Background

Prior to his misconduct, while deployed to Afghanistan, the appellant was injured when his vehicle struck an improvised explosive device. He was awarded the Purple Heart for his injuries and was thereafter diagnosed with traumatic brain injury (TBI) and post-traumatic stress disorder (PTSD). Upon returning to Camp Lejeune, a doctor at the neurology clinic treated the appellant, prescribed medication for him, and scheduled a follow-up appointment for him. On 28 April 2010, the date of the follow-up appointment, the appellant was in pretrial confinement for his numerous offenses and missed his appointment. Despite his many requests, the appellant missed multiple medical appointments, including two neurology appointments and a physical therapy appointment. The appellant met with health care providers many times while incarcerated, but his mental health treatment did not resume until 27 July 2010, three months after he was initially incarcerated.

At trial, the appellant filed a motion requesting administrative credit towards any adjudged sentence, claiming that the deprivation of his medical care during his pretrial confinement constituted unlawful pretrial punishment in violation of Article 13. After receiving evidence and hearing argument on the motion, the military judge denied relief, finding no intentional inaction by the command. The military judge found nothing intentional on the part of the command and noted that "missed appointments are common throughout the military" and that he couldn't find "any unduly, rigorous circumstances" with the appellant's confinement.¹

¹¹ Record at 93.

Discussion

The appellant contends that his command's "deliberate indifference" in failing to bring him to his medical appointments caused him to suffer from TBI and PTSD for three months without proper treatment, which was tantamount to pretrial punishment under Article 13, UCMJ. While the command's inability to bring the appellant to his medical appointments is concerning, we agree with the military judge that the command's actions constituted neither punishment nor unduly rigorous confinement conditions. Consequently, we find no Article 13 violation.

Whether the appellant is entitled to relief for unlawful pretrial punishment in violation of Article 13 is a mixed question of fact and law that we review *de novo*. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). In reviewing the record, we defer to a military judge's findings of fact unless they are clearly erroneous. *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005). The appellant bears the burden of establishing he is entitled to relief for unlawful pretrial punishment. *United States v. Harris*, 66 M.J. 166, 168 (C.A.A.F. 2008).

Article 13 prohibits both the imposition of punishment prior to trial, and conditions of pretrial confinement that are more rigorous than necessary to ensure the accused's presence for trial. *King*, 61 M.J. at 227. As to the first prong, we must determine whether confinement conditions are created with the intent to punish the appellant. *Id.* As to the second prong, we must determine whether the appellant has faced unduly rigorous circumstances during pretrial confinement. *Id.*

Here, the military judge found that "there [were] communication breakdowns"; "there was nothing intentional on the part of the command"; and he did not find "any unduly, rigorous circumstances as a whole."² After reviewing the circumstances and conditions of the appellant's pretrial confinement from the record, we determine that the military judge's findings of fact were not clearly erroneous, and we hereby adopt them. Accordingly, we find intentional neither punishment nor unduly rigorous conditions.

While we are troubled with the command's failure to ensure the appellant made his medical appointments, we find that the command's lack of diligence was neither intentional nor

² *Id.*

punitive. We note that while incarcerated, the appellant was transferred to another unit, which added to the unfortunate lapses in the proper administration of his requests to make his medical appointments. We are convinced by the record in this case that these command oversights do not amount to an intent to punish or what the appellant characterizes as "deliberate indifference" to the his requests.

Similarly, we find that while the appellant was unable to immediately receive the specific medical attention he requested while incarcerated, his circumstances do not rise to the level of being unduly rigorous. The record demonstrates that the delay in rescheduling medical appointments was common at Camp Lejeune during that time period. We note that the appellant was seen by the brig medical staff on a number of occasions and that he has not asserted any actual harm or prejudice from missing his medical appointments. We find no Article 13 violation.

Conclusion

Accordingly, the findings and the sentence, as approved by the convening authority, are affirmed.

For the Court

R.H. TROIDL
Clerk of Court