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

BEFORE

W.L. RITTER **C.L. SCOVEL** **J.J. MULROONEY**

UNITED STATES

v.

Andrew F. MARQUEZ
Seaman Recruit (E-1), U. S. Navy

NMCCA 200201852 Decided 27 April 2006

Sentence adjudged 28 December 2001. Military Judge: C. Gaasch. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commander, Fleet Activities, Yokosuka, Japan.

LT ROBERT SALYER, JAGC, USNR, Appellate Defense Counsel
LT CRAIG POULSON, JAGC, USNR, Appellate Government Counsel

MULROONEY, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, contrary to his pleas, of unauthorized absence (UA), violation of a lawful order, drunk and disorderly conduct, assault upon a patrolman in the execution of military law enforcement duties, and communicating a threat, in violation of Articles 86, 92, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 892, 928, and 934. The appellant was sentenced to a bad-conduct discharge, confinement for 73 days, and forfeiture of $600.00 pay per month for 3 months. The convening authority approved the sentence as adjudged.

The appellant claims that the military judge erred in refusing to grant pretrial credit for a period of time he was held in a Japanese civilian jail. The appellant also avers that the evidence was factually and legally insufficient with respect to a segment of the UA specification, as well as the specification alleging an orders violation.

We have carefully reviewed the record of trial, the appellant's three assignments of error, 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 was committed. Arts. 59(a) and 66(c), UCMJ.

Pretrial Confinement Credit

In a summary assignment of error, the appellant avers that the military judge erroneously denied his request for pretrial confinement credit. *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). Specifically, the appellant argues that although he was incarcerated in a Japanese civilian facility, based on a civilian charge of illegal possession of marijuana, and no court-martial charges were pending, administrative credit should have been afforded from the date the Japanese court fixed a bail amount.

On 26 July 2001, the appellant began a period of UA. Four days later, on 30 July, he was arrested by Japanese authorities for possession of marijuana. Conditions in the Japanese detention facility were not optimal. He shared living quarters with five other inmates, was permitted to shower once every five days, and because he was without cigarettes, was not able to avail himself of a daily five-minute break to smoke. While in this facility, the appellant did not have the benefits of numerous liberties available at comparable military detention facilities.

On 24 August, the appellant's counsel on the Japanese marijuana possession case requested that bail be set. On 7 September, bail was set by the Japanese authorities and notification was made to the Office of the Staff Judge Advocate (SJA), Commander, Fleet Activities Yokosuka (CFAY).

On 11 September, locations in the continental United States were attacked by terrorist hijackers. On that date, tensions became strained at the Japanese detention facility when a group of Iranian detainees began to vocalize anti-American sentiment in the facility. The area was also experiencing a typhoon. As a result of the 911 attacks and the typhoon, Yokosuka Naval Base (NAVBASE) was locked down from 10-12 September 2001.

The order setting bail was written in Japanese. In addition to the NAVBASE lockdown, the individual tasked with translating the Japanese bail order into English for the SJA was hampered in her ability to get to the office from 10-12 September by personal illness as well as the weather conditions occasioned by the typhoon.

On 13 September, NAVBASE reopened, and as a result of telephone requests made by the appellant, the SJA and his Japanese criminal liaison met with the appellant at the Japanese detention facility. Prior to this meeting, the SJA's office had been informed by the appellant's civilian counsel on the Japanese charges that the appellant was not sure he wanted CFAY to post his bail. The SJA testified that he was reluctant to commence

measures to authorize the payment of the bail money until the appellant's preferences were clarified. At the meeting, the appellant was informed that, if he so requested, CFAY would consider posting the bail set in the Japanese criminal matter, but that it was likely that he would be detained in the CFAY brig until the Japanese matter was completed. The SJA told the appellant that the events of September 11 would probably result in some additional delay in processing any request for CFAY to post bail. There were no military charges pending. When the appellant asked, the SJA explained that it was unlikely that he would face military charges based on the marijuana possession pending in the Japanese court, but there could be some military charges related to the UA and/or his breaking of restriction.

On 17 September, the SJA notified the CFAY comptroller that bail was authorized for the appellant's Japanese criminal case. On 24 September, the SJA's criminal liaison converted the bail funds to Japanese currency. The next day, 25 September, bail was posted and the appellant was returned to United States custody to await the outcome of the Japanese criminal matter. The SJA orally advised the appellant that he had the right, either directly or through his military counsel, to request a hearing on the issue of his military detention.

On 15 October, the SJA's Japanese criminal liaison was notified that the appellant's trial was in progress and would be concluded later in the day. The SJA immediately informed the convening authority [CA] that the appellant was "coming back" and the CA determined that the military offenses would be referred to a special court-martial. That same day, the appellant received a suspended sentence at the Japanese court and was returned to the CFAY brig where he was confined based upon the military offenses. An initial reviewing officer (IRO) hearing was conducted on 18 October, and charges were preferred on 24 October.

At the CFAY brig,[1] the appellant wore a detainee badge (as opposed to a prisoner badge) and was berthed in a separate area of the open bay from the adjudged prisoners. Inmates at the CFAY brig do not perform hard labor, as the facility is not set up for that activity. The relevant instruction does permit both detainees and adjudged prisoners to perform some light brig maintenance work. Detainees perform fewer work hours, have greater latitude in assembling a complete sea bag, and receive more visiting hours on more days than adjudged prisoners.

This court reviews *de novo* the question of whether an appellant is entitled to pretrial confinement credit. *United States v. Smith*, 56 M.J. 290, 292 (C.A.A.F. 2002). Pretrial credit will be granted for incarceration in civilian or foreign

[1] The senior chief petty officer in charge of the brig testified that technically, the CFAY brig is not really a brig, but a pretrial detention facility that also houses adjudged prisoners for confinement sentences of no more than 30 days.

jails only where the confinement was at the direction of military authorities or where the accused was confined in connection with charges that were ultimately disposed of at court-martial. *United States v. Davis*, 22 M.J. 557 (A.C.M.R. 1986)(*Allen* credit applied for time spent in pretrial custody at the insistence of Federal authorities in connection with an offense that was disposed of at court-martial); *See United States v. Huelskamp*, 21 M.J. 509 (A.C.M.R. 1985)(soldier was entitled to *Allen* credit for time spent in pretrial confinement in a civilian jail under the direction of military authorities).

From the date of his arrest (7 September 2001) until the date the Japanese court concluded his trial with a suspended sentence and returned him to the Navy (15 October 2001), the appellant was held exclusively to ensure his presence for the Japanese criminal proceedings and not for the benefit of the United States. No administrative credit was appropriate for this period and the military judge committed no error in this regard.[2]

A significant line of cases has held that application of the prior custody credit provisions of 18 U.S.C. § 3568 were required by Department of Defense (DOD) Instruction. *Allen*, 17 M.J. 128; *United States v. Chaney*, 53 M.J. 621, 623-24 (N.M.Ct.Crim.App. 2000); *United States v. Pinson*, 54 M.J. 692, 694-95 (A.F.Ct.Crim. App. 2001); *United States v. Murray*, 43 M.J. 507, 513-14 (A.F.Ct.Crim.App. 1995). These cases were squarely rooted in the application of the statute by the DOD instruction. There was no other statutory, due process or Constitutional basis relied upon, and none exists. Inasmuch as the relevant guidance, DOD Instruction 1325.7 (July 17, 2001), no longer contains the requirement that this statute be applied to military prisoners, this line of cases is not controlling here. *See Chaney*, 53 M.J. at 622 n.3.

Articles 12 and 13, UCMJ, apply only to service members in the custody of the United States. From 30 July through 25 September, the appellant was awaiting trial on Japanese civilian criminal charges in a Japanese civilian jail. These articles do not apply to members in foreign custody.

From 25 September until the date of his court-martial, the appellant was confined in the CFAY brig. He was treated as a pretrial detainee, received no punishment, and was not in association with enemy prisoners or foreign nationals. Accordingly, neither of these UCMJ articles provide this appellant a basis upon which relief will be granted.

[2] At the time sentence was announced, the military judge informed the parties that in determining an appropriate sentence, she considered "the lengthy amount of time that the [appellant] spent in pretrial confinement, both in Japanese and U.S. pretrial confinement awaiting resolution of the Japanese charges." Record at 285.

Factual and Legal Sufficiency

The appellant argues that the evidence was legally insufficient to find him guilty of unauthorized absence from 7-25 September 2001 because he was available for release to the military. The appellant also argues that his conviction for violation of a lawful order was legally and factually insufficient. We disagree.

The test for legal sufficiency is well-known. It requires this court to review the evidence in the light most favorable to the Government. In doing so, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987)(citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)).

The test for factual sufficiency, however, is more favorable to the appellant. It requires this court to be convinced of the appellant's guilt beyond a reasonable doubt, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses. *Turner,* 25 M.J. at 325. Reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). "The factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). So, too, may we. In resolving the question of factual sufficiency, we have carefully reviewed the record of trial, but have given no deference to the factual determinations made at the trial level. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Unauthorized Absence

A period of UA of a military accused in the custody of civilian authorities terminates when the civilian authorities have notified the appropriate military official that the accused is "immediately available" for turnover to the military. *United States v. Lanphear*, 49 C.M.R. 742, 744 (C.M.A. 1975); *United States v. Cummings,* 21 M.J. 987, 988 (N.M.C.M.R. 1986); MANUAL FOR COURTS-MARTIAL, UNITED STATES, (2000 ed.), Part IV, ¶ 10c(10)(e). Once notified, the military cannot, by its own inaction, prolong the period of UA. *Lanphear*, 49 C.M.R. at 744. However, the offer to return the accused must be unconditional. *See United States v. Asbury*, 28 M.J. 595 (N.M.C.M.R. 1989). An offer to turnover the military accused subject to some condition, such as a guarantee that he be made available for the civilian trial, does not terminate a period of UA.

In this case, the Japanese court set a bail amount and turned over the appellant to the Navy conditioned upon the Navy's obligation under the applicable Status of Forces Agreement to return him to stand trial in the Japanese court. This type of

conditional return does not terminate a period of UA. The appellant's UA terminated on 15 October 2001, the date that his Japanese criminal trial was completed and he was returned to the Navy without conditions.

We are convinced that all the elements of the charged UA were established beyond a reasonable doubt and the conviction is legally and factually sufficient.

Orders Violation

In order to convict the appellant of the offense of violating a lawful order under Article 92(2), UCMJ, the Government was required to prove beyond a reasonable doubt that the appellant violated a written order, that he had actual knowledge of the order, and that he had a duty to obey the order. Actual knowledge may be proved by either direct or circumstantial evidence. *United States v. Estrella*, 35 M.J. 836, 839 (A.C.M.R. 1992); *United States v. Dover*, 3 M.J. 764, 765 (A.F.C.M.R. 1977); MCM, Part IV, ¶ 16c(2)(b). The appellant's specific complaint regarding the sufficiency of his conviction relates to whether the evidence establishes, beyond a reasonable doubt, that he received actual knowledge of the restriction order that formed the basis of his conviction.

The evidence establishes that the appellant was provided with a copy of the written restriction order, and had the portions of it addressing restriction read to him twice by Boatswain's Mate Second Class (BM2) Quinola at the CFAY Transient Personnel Unit (TPU.) The appellant had been returned to the TPU during the previous evening in an intoxicated state. In his intoxicated state, he behaved in a disorderly manner (Charge IV, Specification 1) and assaulted a CFAY security officer (Charge III, Specification 2).

The two CFAY security officers who brought the appellant back to TPU both testified that the appellant had sobered up and apologized for his behavior before the officers checked out at the end of their shift at approximately 0630 the next morning. Later that afternoon, somewhere between 1330 and 1400, the appellant woke up in one of the open berthing racks. He was permitted to sleep as long as he wished. When the appellant arose from his slumber, BM2 Quinola, a TPU staff member, provided him with a copy of the order, highlighted several sections, including the restriction portions, and asked him to sign.[3] When

[3] Although not specifically raised on appeal, we note that while voluntary intoxication could negate the specific intent required for the order violation in issue, *see United States v. Anderson*, 25 M.J. 342 (C.M.A. 1987); *United States v. Oisten*, 33 C.M.R. 188 (C.M.A. 1963), there was no evidence here that at the time the restriction order was served upon and read to him that the intoxication was of a severity to have had the effect of rendering the appellant incapable of understanding those portions of the order. *United States v. Box*, 28 M.J. 584, 585 (A.C.M.R. 1989); s*ee United States v. Peterson*, 47 M.J. 231, 233-234 (C.A.A.F. 1997).

the appellant declined to sign the order, BM2 Quinola contacted the CFAY legal office, and based on the advice he received, he typed the words “member refused to sign” in the signature block of the order. Although the command duty officer did not affix his signature to the document for two days, the notation reflecting the appellant’s refusal to sign was entered on the same day the refusal occurred.

The evidence showed that the appellant had knowledge of the order regarding the nature of his restrictions, the order was lawful, it was his duty to obey the order, and that at the time and place set forth in the specification, he violated that order. In short, we are convinced that all the elements of the offense were established beyond a reasonable doubt and the conviction is legally and factually sufficient.

Conclusion

Accordingly, we affirm the findings of guilty and sentence as approved by the convening authority.

Senior Judge RITTER and Senior Judge SCOVEL concur.

For the Court

R.H. TROIDL
Clerk of Court