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

BEFORE

J.W. ROLPH **J.D. HARTY** **J.F. FELTHAM**

UNITED STATES

v.

Wayne D. MCKENZIE
Staff Sergeant (E-6), U. S. Marine Corps

NMCCA 200101937 Decided 10 July 2006

Sentence adjudged 31 January 2001. Military Judge: E.W. Loughran. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Quantico, VA.

LT MARCUS FULTON, JAGC, USN, Appellate Defense Counsel
MR. DAVID P. SHELDON, Civilian Appellate Defense Counsel
MS. KAREN L. HECKER, Civilian Appellate Defense Counsel
Capt ROLANDO SANCHEZ, USMC, Appellate Defense Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel

FELTHAM, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of rape, sodomy, three specifications of committing indecent acts, three specifications of taking indecent liberties, all with a child under age 16, committing service discrediting conduct on land owned by the United States Government by video-recording himself masturbating for the express purpose of viewing by others, receiving child pornography, possessing child pornography, and two specifications of mailing or transporting child pornography. The appellant's crimes violated Articles 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, and 934, and 18 U.S.C. § 2252A. The appellant was sentenced to confinement for 22 years, reduction to pay grade E-1, total forfeiture of pay and allowances, and a dishonorable discharge. The convening authority approved the adjudged sentence.[1]

[1] Although not raised as an assignment of error before this court or our superior court, we note that the convening authority did not suspend all

We have carefully considered the record of trial; our superior court's decision remanding this case to us; the appellant's six original assignments of error; the Government's response; the appellant's reply; and the appellant's notice of intent not to file an additional brief, asking that we consider his original arguments in support of the single remanded issue. 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. See Articles 59(a) and 66(c), UCMJ.

Appellate History

This case is before us for the second time. We originally affirmed the findings and sentence in an unpublished decision on 29 March 2004. *United States v. McKenzie*, No. 200101937, unpublished op. (N.M.Ct.Crim.App. 29 Mar 2004). On 23 March 2005, our superior court affirmed our decision as to findings, set it aside as to sentence, and returned the record to the Judge Advocate General of the Navy for remand to this court for further consideration of the appellant's contention that he was subjected to illegal pretrial punishment. *United States v. McKenzie*, 61 M.J. 64, 66 (C.A.A.F. 2005). "In light of the ambiguity in the lower court's resolution of this case and its erroneous reliance on [*United States v. Inong*, 58 M.J. 460 (C.A.A.F. 2003)], we remand the case to the lower court to evaluate Appellant's illegal pretrial punishment claim under [*United States v. Huffman*, 40 M.J. 225 (C.M.A. 1994)]." *Id*.

The appellant was placed in pretrial confinement on 25 May 2000. Appellate Exhibit II. On 31 May 2000, an initial review officer conducted a hearing to determine whether he should remain in pretrial confinement. *Id*. The appellant's civilian defense counsel represented him at this proceeding. *Id*. After receiving evidence, the initial review officer ordered the appellant to remain in pretrial confinement because he determined it was foreseeable that the appellant would engage in serious criminal misconduct.[2]

At trial, the appellant's civilian defense counsel made an oral motion alleging abuse of discretion in the decision to place the appellant in pretrial confinement and in the initial review officer's decision to keep him there. Record at 15; 39. For purposes of the motion, the appellant testified that he was confined in the Special Quarters section of the brig, and that the only other personnel billeted in that area, aside from pretrial detainees, were prisoners being punished for infractions of the rules. Record at 32. The appellant presented no other

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confinement in excess of 20 years, as he was obligated to do by the terms of a pretrial agreement. We will address this matter in our decretal paragraph.

[2] *See* RULE FOR COURTS-MARTIAL 305(h)(2)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.).

evidence about the conditions of his pretrial confinement, and no evidence to show that he had ever complained about the conditions of his confinement to brig officials, his chain of command, or the initial review officer.

The military judge denied the appellant's pretrial confinement motion, adding that he was not ruling on pretrial punishment. Record at 53. He said he expected to receive a pretrial punishment motion at "some point," and the civilian defense counsel replied that "there may be a motion down the road for additional administrative credit as a result of the conditions of pretrial confinement and we'll probably re-raise the issue of whether or not there was an abuse of discretion for purposes of additional administrative credit." *Id*.

After announcing the findings, and prior to hearing sentencing arguments, the military judge conducted the colloquy in which the appellant and his civilian counsel advised him that there was no pretrial punishment issue in the case, and which our superior court held that we erroneously interpreted as waiving the issue.

Although he had the opportunity to do so, and his civilian defense counsel was well aware of the existence of a possible pretrial punishment issue, the appellant never raised an illegal pretrial punishment motion at trial. He asked the military judge to consider the conditions of his pretrial confinement in determining the sentence, but never presented any evidence to show what those conditions were. In fact, the appellant did not describe, or complain about, the conditions of his pretrial confinement until he challenged them before this court.[3]

Illegal Pretrial Punishment

The appellant alleges he was subjected to unlawful pretrial punishment, constituting cruel and unusual punishment, when the conditions of his pretrial confinement violated Article 13, UCMJ. He also claims he should have been provided personal access to a law library. He seeks 4-days credit for each day of the 251 days he spent in pretrial confinement under these conditions. Alternatively, he claims we should order a fact-finding hearing in accordance with *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967) into this matter.[4] Having been told by our superior court

[3] The appellant's brief was supported, in part, by an undated affidavit in which he described eight alleged aspects of his pretrial confinement that he challenged in his second assignment of error. Our superior court enumerated these aspects in its decision. *McKenzie*, 61 M.J. at 64-65.

[4] The issue on remand is the second of six assigned errors the appellant originally raised before this court. On 25 July 2005, the appellant, by and through his civilian appellate counsel, informed us that he will not file an additional brief; that he resubmits his Brief, Reply Brief, and Motion to Attach initially filed with this court; and that he asks the court to consider the arguments as to "Issue II."

that we must evaluate the appellant's claim under *Huffman*, we will do so.

"If an accused fails to complain of the conditions of his pretrial confinement to the military magistrate or his chain of command, that is strong evidence that the accused is not being punished in violation of Article 13. Similarly, in *United States v. James*, 28 M.J. 214 (C.M.A. 1989), [our superior court] stated that 'while failure to present the question to a military magistrate does not amount to waiver of the issue, it strengthens the Government's argument that it has not violated Article 13.'" *Huffman*, 40 M.J. at 227.

"Article 13 prohibits punishment of pretrial detainees. While there is no single standard as to what constitutes 'punishment,' the Supreme Court has stated that one significant factor in that judicial calculus is the intent of the detention officials." *Id.* (Citing *Bell v. Wolfish*, 441 U.S. 520 (1979) (footnote omitted)).

The appellant was zealously and effectively represented before, and during, his court-martial by capable counsel. Nonetheless, he failed to complain about the eight aspects of pretrial confinement he described in the affidavit supporting his appellate brief (and enumerated by our superior court in its decision remanding this case) to brig officials, his chain of command, the initial review officer, or the military judge. Applying *Huffman*, we find this failure to be "strong evidence" that he was not "punished in violation of Article 13." The appellant, having failed to demonstrate that any aspect of his pretrial confinement was intended as punishment, has not met his burden to demonstrate that he was subjected to pretrial punishment. Therefore, he is not entitled to additional credit for the days he spent in pretrial confinement.

Convening Authority's Action

We note that the convening authority failed to suspend confinement in excess of 20 years for a period of 12 months from the date of the trial, as required by the terms of the pretrial agreement. The staff judge advocate's recommendation noted the relevant provision of the pretrial agreement, but the convening authority failed to follow the recommendation. There is nothing in the record to indicate that the appellant lost this benefit of his pretrial agreement (e.g., by committing misconduct) prior to the date of the convening authority's action. We note that there is no allegation that this error prejudiced the appellant, and that the suspension period has now run. Therefore, we find no remedial action is required.

Conclusion

The findings having been affirmed, we now affirm the sentence, as approved by the convening authority.

Chief Judge ROLPH and Judge HARTY concur.

For the Court

R.H. TROIDL
Clerk of Court