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

BEFORE

Charles Wm. DORMAN | **C.A. PRICE** | **J.F. FELTHAM**

UNITED STATES

v.

Christopher W. FOURNIER
Major (O-4), U.S. Marine Corps Reserve

NMCCA 200301557 Decided 31 October 2005

Sentence adjudged 25 November 2002. Military Judge: S.F. Day. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Camp Lejeune, NC.

Maj CHARLES R. ZELNIS, USMC, Appellate Defense Counsel
Capt GLEN R. HINES, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRICE, Senior Judge:

Pursuant to his pleas, the appellant was convicted of violation of a lawful general regulation, falsely certifying an official record, conduct unbecoming an officer and gentleman, fraternization (three specifications), indecent language, and wearing unauthorized ribbons on his uniform, in violation of Articles 92, 107, 133, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907, 933, and 934. A military judge sitting as a general court-martial sentenced the appellant to confinement for four months, forfeiture of all pay and allowances, and a dismissal. The convening authority approved the sentence, but, in accordance with the pretrial agreement, suspended confinement in excess of 60 days, and deferred, suspended, and waived all adjudged and automatic forfeitures.

The appellant contends that he was subjected to cruel and unusual punishment due to the conditions of his adjudged confinement. He also asserts that the sentence is inappropriately severe.

We have carefully considered the record of trial, the 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. Articles 59(a) and 66(c), UCMJ.

Cruel and Unusual Punishment

The appellant asserts that he suffered cruel and unusual punishment based on his officer status and the administrative convenience of brig officials, namely the deprivation of food, prescribed medicine, exercise and human interaction, opportunity for worship, and various privileges. We decline to grant relief.

In a detailed affidavit submitted with his brief and assignments of error, the appellant states that he was a minimum custody prisoner for the 50 days he spent at the Marine Corps Brig in Camp Lejeune, North Carolina. However, apparently because he was an officer, he was placed in a cell in the maximum custody cellblock to prevent commingling with enlisted prisoners in the minimum custody spaces.

The appellant complains that brig guards often forgot to: (1) bring him his cholesterol medication; (2) escort him to the chow hall for meals; and (3) take him to his assigned work area, all because he was a minimum custody prisoner not housed with other minimum custody prisoners. Of note, the appellant specifically contends that of 150 meals he should have received during this post-trial confinement, he missed 36.

The Government has not filed an affidavit or other evidence rebutting the appellant's allegations. The Government's brief essentially takes the appellant's affidavit at face value, and then argues that, even if the factual assertions are true, no relief is warranted.

We will likewise take the appellant's affidavit at face value for purposes of our analysis. We review *de novo* the issue of whether the appellant has been punished in violation of Article 55, UCMJ, or the Eighth Amendment to the United States Constitution. *United States v. Smith*, 56 M.J. 290, 292 (C.A.A.F. 2002)(citing *United States v. White*, 54 M.J. 469, 471 (C.A.A.F. 2001). Generally, military courts look to federal case law interpreting the Eighth Amendment to decide claims of an Article 55, UCMJ, violation. *Id.; see also United States v. Avila*, 53 M.J. 99, 101 (C.A.A.F. 2000).

Our superior court has applied the U.S. Supreme Court's interpretation of the Eighth Amendment to Article 55, UCMJ, claims except where they have found a legislative intent to provide greater protections under the statute. *See United States v. Wappler*, 9 C.M.R. 23, 26 (C.M.A. 1953). The appellant's case, however, does not involve a claim that his confinement conditions warrant a wider degree of protection under Article 55 than the protections applicable to civilians under the Eighth Amendment. We will, therefore, apply an Eighth Amendment standard of review.

Failure to provide sufficient food to prisoners may violate the Eighth Amendment, particularly if the prisoner is deprived of nutritious food for several days consecutively. *Hutto v. Finney*, 437 U.S. 678, 687 (1978); *Avila*, 53 M.J. at 101. Similarly, the U.S. Supreme Court has found that the denial of medical treatment can violate the Eighth Amendment. However, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)(footnote omitted). The Supreme Court has also held that "[t]he Constitution 'does not mandate comfortable prisons,'. . . but neither does it permit inhumane ones...." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994)(quoting *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981).

However, before being entitled to relief based on a claim of cruel and unusual punishment, an appellant must demonstrate, absent some unusual or egregious circumstance, that he has exhausted all administrative remedies available, including the prisoner grievance system and the complaint process under Article 138, UCMJ. *White,* 54 M.J. at 472. We find that the appellant has neither made nor attempted such a showing. In his affidavit, the appellant contends that he complained to the guards, but when rebuffed, decided that further complaints would be useless. There is no evidence of written application for relief, either through the prisoner grievance system or the formal process described in Article 138, UCMJ. Thus, we find that the appellant has failed the exhaustion requirement, which exists to encourage the resolution of these issues early and to develop an adequate record upon which reviewing authorities can rely. *See United States v. Miller,* 46 M.J. 248, 250 (C.A.A.F. 1997). Accordingly, we decline to grant relief.

Sentence Appropriateness

The appellant asserts that a dismissal and confinement for four months is inappropriately severe in light of the mitigating circumstances surrounding his crimes. We disagree.

Among his crimes, we note that the appellant, a major of Marines, used indecent language toward a female noncommissioned officer including discussion of deviant sexual activity and sexual slavery. He also posted a photograph of himself in his dress uniform on the internet with a vivid description of his preferred depraved sexual practices.

After reviewing the entire record, including all evidence in extenuation and mitigation, we conclude that the sentence is appropriate for this offender and his offenses. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982).

Conclusion

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

Chief Judge DORMAN and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court