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

BEFORE

Charles Wm. DORMAN **M.J. SUSZAN** **R.C. HARRIS**

UNITED STATES

v.

Jessie R. MORALES
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200200490 Decided 30 July 2004

Sentence adjudged 13 March 2001. Military Judge: A.W. Keller, Jr. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Aircraft Wing, Cherry Point, NC.

LT MARCUS FULTON, JAGC, USN, Appellate Defense Counsel
LT IAN THORNHILL, JAGC, USNR, Appellate Government Counsel
Capt WILBUR LEE, USMC, Appellate Government Counsel

DORMAN, Chief Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of forcible sodomy and committing indecent liberties and acts, all with the same 3-year-old female victim. The appellant's crimes violated Articles 125 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925 and 934. Ruling that the appellant's crimes were multiplicious for sentencing purposes, the military judge sentenced the appellant to confinement for 17 years, reduction to pay grade E-1, and a dishonorable discharge. In taking action on the case the convening authority approved the sentence as adjudged. Consistent with the terms of the appellant's pretrial agreement, the convening authority deferred execution of automatic forfeiture of pay and then waived execution for a period of 6 months following the date of the action.

We have carefully reviewed the record of trial, the appellant’s sole assignment of error, and the Government’s response. Following our detailed review, 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.

Illegal Pretrial Punishment

Before this court the appellant asserts for the first time that he was subjected to illegal pretrial punishment. By post-trial declaration he alleges that during his pretrial confinement at Camp Lejeune, NC, he spent most of the time alone in a cell that measured 8 x 10 feet. He also complains of extreme temperatures in his cell. At times in the winter it "was so cold I could see my breath condense." Appellant's Declaration of 15 Dec 2003. In the summer it was so hot that "one could not stand barefoot on the deck." *Id*. As relief, the appellant seeks administrative credit to be applied to his approved sentence to confinement. Appellant's Brief of 31 Dec 2003 at 4. In response the Government argues that the appellant has failed to establish that the conditions of his confinement were illegal.

In resolving the issue of whether the appellant has suffered a violation of Article 13, UCMJ, we must first determine whether the appellant has met the minimal requirements for raising the issue. To raise the issue, the burden is on the appellant to present evidence to support his claim of illegal pretrial punishment. Once an appellant successfully does that, the burden then shifts to the Government to present evidence to rebut the allegation. *United States v. Scalarone*, 52 M.J. 539, 543-44 (N.M.Ct.Crim.App. 1999). Although we accept the appellant's declaration as true, the declaration itself does not necessarily establish that the appellant was subjected to illegal pretrial confinement.

First, we note the declaration's lack of specificity. Second, in assessing whether these now complained of conditions constituted illegal pretrial confinement, the fact that the appellant failed to complain of those conditions at the time he was experiencing them is "strong evidence" that he has not been subjected to pretrial punishment. *United States v. Huffman*, 40 M.J. 225, 227 (C.M.A. 1994); *United States v. Palmiter*, 20 M.J. 90, 97 (C.M.A. 1985).

In deciding this case, we have not applied waiver. *See Huffman*, 40 M.J. at 225. Rather, we have examined the evidence before us, and find that the appellant has failed to meet his burden to present evidence of **illegal** pretrial confinement in violation of Article 13, UCMJ. In examining the "evidence" before us, we find that the "strong evidence" of the appellant's failure to raise this issue while confined is far more compelling than is the appellant's imprecise post-trial declaration.

Record of Trial

Although not raised as an error, in our review of the record we noted that the first 10 pages of the record of trial were not authenticated. Since virtually everything conducted in that brief and largely "administrative" session of the court-martial was later replicated on the record, we find this error to be harmless. We note the error to emphasize that we do not condone it.

Conclusion

We affirm the findings and sentence, as approved by the convening authority.

Judge SUSZAN and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court