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

BEFORE

C.A. PRICE **W.L. RITTER** **R.W. REDCLIFF**

UNITED STATES

v.

Michael W. FRICKE
Lieutenant Commander (O-4), U.S. Navy

NMCCA 9601293 Decided 9 April 2004

Sentence adjudged 30 August 1994. Military Judge: C.L. Carver. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Base, Norfolk, VA.

ALISON RUTTENBERG, Civilian Counsel
LT ROBERT E. SALYER, JAGC, USNR, Appellate Defense Counsel
LT DEIRDRE BROWN, JAGC, USN, Appellate Defense Counsel
LT DEBORAH S. MAYER, JAGC, USNR, Appellate Government Counsel

REDCLIFF, Judge:

A predecessor panel of this court affirmed the findings and sentence in the appellant's general court-martial. *United States v. Fricke*, 48 M.J. 547 (N.M.Ct.Crim.App. 1998). Afterwards, our superior court affirmed our decision as to the findings, but set it aside as to the sentence. *United States v. Fricke*, 53 M.J. 149, 155-56 (C.A.A.F. 2000). The Court of Appeals for the Armed Forces (CAAF) also directed that the case be remanded to the Judge Advocate General for further proceedings in accordance with its decision and *United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967) on the remaining issue of unlawful pretrial punishment, after which the record was to be returned to this court for review under Article 66(c), Uniform Code of Military Justice, 10 U.S.C. § 866(c).

The proceedings directed by CAAF have been conducted, and the record is now before us for completion of review. Since the findings in this case have already been affirmed by our superior court, our review on remand is limited to the issue of unlawful pretrial punishment, specifically "the conditions actually

imposed on appellant during his pretrial confinement and the intent of detention officials in imposing those conditions." *Fricke*, 53 M.J. at 155; *see United States v. Quiroz*, 57 M.J. 583, 586 (N.M.Ct.Crim.App. 2002)(citing *United States v. Riley*, 55 M.J. 185, 188 (C.A.A.F. 2001)).[1]

We have carefully reviewed the entire record of trial, including the *DuBay* proceedings held pursuant to the mandate of our superior court. We have also considered the pleadings and supplemental briefs of both parties. Finding that the record does not support the appellant's assertions of unlawful pretrial punishment, we conclude that the approved sentence is correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant occurred. Art. 66(c), UCMJ.

Unlawful Pretrial Punishment

The appellant contends that the conditions of his confinement at Naval Brig, Norfolk, prior to trial constituted unlawful pretrial punishment in violation of Article 13, UCMJ, as well as cruel and unusual punishment contrary to Article 55, UCMJ. We disagree.

The appellant first complained about the conditions of his pretrial confinement nearly a year after his trial. The affidavit the appellant submitted to this court three years later described those conditions in greater detail. *Fricke*, 48 M.J. at 550. Specifically, the appellant alleges that he was kept in a lockdown status for 326 days with confined prisoners who were in disciplinary segregation, wherein he was (1) confined to a small 6 foot by 8 foot cell for 23 hours a day, (2) required to sit at attention at a small school-like desk from 0430 hours to 2200 hours each day, (3) allowed very limited access to reading material, (4) was not allowed to participate in any prison programs, and (5) was stripped of his rank insignia. He further contends that his brig counselor told him that he was kept in these conditions to break him and make him confess. The appellant's assertions were partially supported by an affidavit from another officer who was incarcerated in the adjoining cell during a portion of the appellant's pretrial confinement. *Id.* at 551. Finally, the appellant attempts to rebut the untimeliness of his claim by asserting that his desire to raise the issue at trial was thwarted by his ineffective trial defense team, which advised that he should wait to raise it on appeal. *Id*. at 551; *see Dubay* Hearing Record at 65-68.

[1] The appellant challenges his post-trial confinement conditions at the U.S. Disciplinary Barracks, Fort Leavenworth, for the first time in a supplemental brief submitted after this case was remanded by CAAF. He alleges that those conditions "subjected him to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article 55, UCMJ." Based on the narrow mandate of CAAF in remanding the case to this Court, as discussed herein, we decline to expand our review to encompass the appellant's new assignment of error.

Pertinent Facts

We find that the military judge's findings of fact on the conditions of the appellant's confinement are fully supported by the *DuBay* hearing record, and we adopt those findings here. *Dubay* Hearing Exhibit 29. We will address the appellant's principal contentions in sequential order.

The gravamen of the appellant's complaint stems from his assignment to special quarters in Block "B", Naval Brig Norfolk, for most of the duration of his confinement prior to trial. The appellant asserts that his allegedly improper treatment was motivated by a desire of brig officials to "break him into confessing" and to punish him because of his status as an officer. The appellant is only partly correct--his assignment to special quarters was necessary because, as an officer, he was required to be housed separately from enlisted detainees and there was no other place to put him at Naval Brig Norfolk until its staffing increased. *Dubay* Hearing Record at 116-18, 138-40.

The appellant further alleges that he was kept in a lockdown status for 326 days with confined prisoners who were in disciplinary segregation, wherein he was (1) confined to a six foot by eight foot cell for 23 hours a day, (2) required to sit at attention at a small school-like desk from 0430 hours to 2200 hours each day, (3) allowed very limited access to reading material, (4) was not allowed to participate in any prison programs, and (5) was stripped of his rank insignia.

The record partially supports the appellant's contentions. Although detainees in a disciplinary status were assigned to special quarters and deprived of privileges as a punitive measure, special quarters were also utilized for detainees with medical needs, for detainees under protective custody, and for officer detainees and prisoners. *Id.* at 139-41. The record does support the appellant's claim that he was basically secured in his cell for nearly 23 hours per day (while assigned to Block "B"). However, this contention ignores the fact that the appellant was released for a daily shower, regular haircuts, attorney consultations, recreation and library privileges, and visits with his family and friends. *Id.* at 9-11, 29. Additionally, the appellant was permitted to sit outside his cell, eat his meals at a table, play cards, watch television, and converse with other officer detainees/prisoners after the brig's staff moved him to Block "A" with several recently confined officer detainees and prisoners. *Id*. at 11.

Contrary to his claims, the appellant was not required to remain seated in his cell at attention during daytime hours. Although all detainees were precluded from resting on their racks during the day (unless medically necessary), the appellant could freely walk or exercise in his cell, as he desired. *Id*. at 126, 130. He could also read, correspond, or listen to tapes if he

elected to do so. Overall, the appellant enjoyed many of the same privileges as other detainees. *Id*. at 103, 154-55.

Although the appellant perceived he was initially limited to reading only the Bible in his cell, his reading materials were not so restrictive nor were his library privileges limited more so than other detainees. *Id*. at 121.

The appellant next contends that he was precluded from participating in religious worship and other unspecified brig programs. While this was true in part, the rationale for the appellant's preclusion was not to punish him, but arose from the necessity to segregate officer from enlisted detainees and the lack of adequate staff to run parallel programs. Additionally, the appellant was never denied access to visiting chaplains or precluded from practicing his chosen religion. *Id*. at 48.

Although the appellant was prohibited from wearing his collar insignia inside the brig as a safety/security precaution (as were all others with similar insignia), he was permitted to wear a complete uniform while under escort outside the brig and at trial. *Id*. at 18-19, 123, 137-38.

Standard of Review and Article 13

Whether a pretrial detainee suffered unlawful punishment is a mixed question of law and fact that qualifies for independent review. *See United States v. Pryor*, 57 M.J. 821, 825 (N.M.Ct. Crim.App. 2003), *rev. denied*, 59 M.J. 32 (C.A.A.F. 2003). The burden is on the appellant to show a violation of Article 13, UCMJ. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002).

Article 13, UCMJ, provides:

> **Art. 13. Punishment prohibited before trial**
>
> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

Accordingly, Article 13 prohibits two things: (1) the intentional imposition of punishment before the accused has been adjudicated guilty at trial, and (2) arrest or pretrial confinement conditions that are more rigorous than those necessary to ensure presence at trial. *See United States v. Inong*, 58 M.J. 460, 463 (C.A.A.F. 2003). Moreover, our superior court recognized that the purposeful denial of the constitutional rights

of a service member while in pretrial confinement might constitute illegal pretrial punishment permitting sentence credit. *United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997).

Waiver Issue

In its decision on this case, CAAF noted that, absent affirmative waiver at trial, claims under Article 13 may be raised for the first time on appeal. *Fricke*, 53 M.J. at 154 (citing *United States v. Huffman*, 40 M.J. 225, 227 (C.M.A. 1994)); *see United States v. Combs*, 47 M.J. 330, 333-34 (C.A.A.F. 1997). The majority opinion declined to apply waiver, concluding that "[i]n view of appellant's unrebutted assertion that no motion for sentence credit based on unlawful pretrial punishment was made at his trial on advice of defense counsel that it could be raised on appeal, we do not find a knowing and intelligent waiver of this issue." *Fricke,* 53 M.J. at 154 n.5.

Subsequent to issuing its opinion in this case, our superior court decided *Inong*. In a decision authored by Chief Judge Crawford, CAAF held that in the future, “failure at trial to seek sentence relief for violations of Article 13 waives that issue on appeal absent plain error." *Id.* at 465. Accordingly, the "raise or waive" rule announced in *Inong* does not apply to this case.

Legal Analysis

Under earlier existing precedent, the appellant's failure to raise a claim of unlawful pretrial punishment at the trial level did not waive the issue, but it was "strong evidence that [he was] not being punished in violation of Article 13 [UCMJ]." *Huffman*, 40 M.J. at 227. The timeliness of the claim, therefore, is but one factor -- albeit a significant factor -- which we consider with all other evidence before this court.

Thus, we start our analysis of the appellant's contentions by noting the absence of any request by him to be transferred to the brig's general population. *Dubay* Hearing Record at 34, 123. We also note that the appellant never complained about his treatment conditions to brig officials at any time during the period of his pretrial detention, or to the military judge at his trial. *Id*. at 43, 55. Finally, we note the appellant's objection to being co-mingled with enlisted prisoners upon his transfer to the U.S. Disciplinary Barracks at Fort Leavenworth. *Id*. at 36.

We are convinced that the purpose of the appellant's assignment to special quarters with its attendant conditions was proper; namely, the mandate for brig officials to prevent fraternization between enlisted and officer detainees. We are likewise convinced that government officials, either separately or in concert, did not impose these conditions on the appellant

for the purpose of punishing him or overbearing his will to obtain a confession. As with many of the complained of conditions, it appears to us that the appellant simply decided not to make pertinent requests or failed to question what he perceived to be unreasonable limitations.

With regard to the conditions of the appellant's pretrial confinement, his claims of unnecessarily rigorous conditions are not supported by credible evidence. Although the appellant was assigned to special quarters for the duration of his pretrial confinement, he received many of the same privileges as enlisted detainees: (1) he followed essentially the same daily routine; (2) he was offered the same quality and quantity of food; (3) he showered daily; (4) he could receive and send mail; (5) he had unrestricted access to his defense attorneys; (6) he was provided grooming items and regular haircuts; and, (7) staff permitting, he had a daily recreational period. The appellant also enjoyed better conditions than enlisted detainees, namely, (1) he had substantially greater visitation privileges, meeting with family members outside established visiting hours, in a private setting in which personal contact was allowed; (2) he was permitted to eat several meals with his family members while visiting with his defense counsel; and (3) he received a tape player with religious tapes that he could listen to in his cell.

On the other hand, some of the conditions imposed on the appellant certainly were more onerous because of his assignment to special quarters: (1) he was isolated from the general population, limiting his ability to converse with fellow detainees until other officers were confined at Naval Brig Norfolk and Block "A" was opened; (2) his cell's floor space was smaller than that enjoyed by detainees in the general population (but equivalent to others assigned to special quarters); and (3) he was generally precluded from participating in certain brig programs such as group religious worship, work details, and counseling activities.

We find the record devoid of credible evidence that any of the conditions of the appellant's pretrial confinement were motivated by a punitive intent of government officials. Nor do we find credible the appellant's assertions that these conditions were imposed because brig officials sought to induce or coerce the appellant to confess. Simply put, the accused was assigned to special quarters solely because of his status as an officer and the requirement imposed by regulation and long-standing Naval tradition precluding fraternization between officer and enlisted personnel. We find it somewhat ironic that the appellant complains about his isolation from the general enlisted population at the Naval Brig while he vigorously protested the prospective co-mingling of officer and enlisted prisoners upon his transfer to the U.S. Disciplinary Barracks, Fort Leavenworth.

Conclusion

If the confinement conditions complained of by the appellant were true and the motivation behind them improper, we would soundly condemn those practices and award the appellant the confinement credit he seeks. However, his claims simply are not supported, and in some measure are directly contradicted, by the 173-page *DuBay* hearing record and its 29 exhibits. Additionally, we have considered and reject the appellant's assertion that his treatment violated the UCMJ Article 55 prohibition against cruel and unusual punishment. For the reasons stated above, we find that the military judge properly concluded that the appellant was not entitled to relief under Article 13, UCMJ. We further find the assigned error without merit and decline to provide the requested relief. *See United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Accordingly, we affirm the sentence as approved by the convening authority.

Senior Judge PRICE and Senior Judge RITTER concur.

For the Court

R.H. TROIDL
Clerk of Court