

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
SQUIRES, MERCK, and TRANT
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist DEMETRIOUS D. HARRIS
United States Army, Appellant

ARMY 9601822

U. S. Army Test and Evaluation Command
L. K. Webster and P. L. Johnston, Military Judges

For Appellant: Lieutenant Colonel Michael L. Walters, JA; Major Holly S.G. Coffey, JA; Captain Jodi E. Terwilliger-Stacey, JA (on brief); Colonel John T. Phelps II, JA; Colonel Adele H. Odegard, JA; Captain Kirsten V. Campbell-Brunson, JA; Captain Jodi E. Terwilliger-Stacey, JA (on supplemental brief);

For Appellee: Colonel Russell S. Estey, JA; Major Patricia A. Ham, JA; Captain Troy A. Smith, JA (on brief).

17 September 1999

MEMORANDUM OPINION

TRANT, Judge:

A general court-martial composed of officer and enlisted members convicted appellant, contrary to his pleas, of possession of cocaine with intent to distribute, and pursuant to his pleas, of wrongful use of marijuana in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a [hereinafter UCMJ]. The approved sentence was a dishonorable discharge, confinement for two years, forfeiture of all pay and allowances and reduction to Private E1. Appellant was credited with 183 days of pretrial confinement credit.

Appellant asserts that the military judge abused her discretion in not ordering his release from pretrial confinement. We agree. Appellant further avers that the evidence is factually insufficient to sustain his conviction for possession of cocaine with intent to distribute. We again agree.

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FACTS

Appellant, a single parent of a six-year-old daughter, lived in government quarters for about one year prior to being arrested on the charges that were the subject of this court-martial. During most of that year, appellant had two unauthorized roommates. S.R., a civilian female friend, lived with appellant and slept in the second bed in appellant's bedroom. Paul Smith, a civilian friend of appellant's from high school, also lived with appellant during most of the year. Smith used the laundry room as his bedroom. Both friends assisted appellant in taking care of his daughter.

The charged offenses occurred on 7 May 1996. Between 27 April and 7 May 1996 appellant was absent from his quarters almost the entire time. He and his daughter were in Tennessee from 27 April 1996 to 2 May 1996 on emergency leave due the death of his grandfather. When they returned from emergency leave, they were picked up at the airport by B.W., appellant's girl friend, and spent the next five days (3-7 May 1996) with B.W. On 4 May 1996, appellant borrowed a car from another friend, Corporal H., and drove to his quarters on two occasions, 4 and 6 May 1996, where he stayed just long enough to shower and change clothes.

On the afternoon of 7 May 1996, military law enforcement agents approached appellant at his place of work and asked for consent to search his quarters. The police had obtained a search warrant earlier that day based on a neighbor's report of burning marijuana emanating from appellant's quarters the night before. Appellant readily agreed and accompanied the police to his quarters. When the police entered appellant's quarters, they discovered Smith and two of Smith's civilian friends, Mr. Malloy and Mr. King. The three men were apprehended and searched. Mr. Malloy had money, baggies of crack cocaine and a razor blade on his person. An extensive search of the quarters uncovered drugs and paraphernalia throughout the quarters, mostly in Smith's bedroom. No drugs were found in appellant's daughter's bedroom. A sole piece of cocaine was found in appellant's bedroom in an ashtray on a dresser.

Sergeant B., the upstairs neighbor who reported the smell of burning marijuana the night before the search, also testified that he had not seen appellant's car for about a month until one day shortly before the search when he saw Smith drive the car into the carport and place a tarpaulin over it. When the police inspected the car, it had what appeared to be several bullet holes in it. Sergeant B. also testified as to what he considered an unusually large number of visitors that came to appellant's quarters.

Appellant testified that he was unaware of any drug dealings by his roommate, Smith, and that he never saw any drugs about the quarters. Mr. Jose Lopez testified

that he worked as an analyst, "for the Drug Support in Washington, D.C., Drug Enforcement Activity." Mr. Lopez also testified that he "was the post basketball coach," and that appellant was on his team. He went on to testify that he was a visitor at appellant's quarters about three times a week and that other members of the team would also visit appellant at the quarters with him. Finally, Mr. Lopez testified that he never saw anything criminal in appellant's quarters or anything that would have lead him to believe that something illegal was happening there. Special Agent Jackson, a forensic latent prints examiner, testified that he examined 300 pieces of evidence in this case and found thirty-three identifiable latent prints. Eight of the prints belonged to Smith, none belonged to appellant, and twenty-five belonged to unidentified individuals.

Appellant was placed in pretrial confinement the day of his apprehension. The military magistrate found adequate probable cause to believe that appellant committed the offenses. The magistrate further found that appellant was likely to engage in future serious criminal misconduct, based on "the volume of the telephonic pages . . . that continued to be received during and after" appellant's apprehension, and a speculative and unsubstantiated conclusion that, "the seizure of drugs and cash may encourage SPC Harris to pursue further sales in order to recoup his financial losses." The magistrate also found that appellant was likely to flee because a rental car key was found in the quarters, and appellant, having lost custody of his daughter, had no ties to the community. Finally, the magistrate's conclusion that lesser forms of restraint were inadequate appeared to be based on the inconvenience to the command of having to monitor appellant if he were not confined and on concerns for appellant's personal safety.¹

At trial, the defense counsel sought appellant's release from pretrial confinement based upon the inadequacy of the original justification and due to new evidence, i.e., proof that neither the rental car key nor pager belonged to appellant. Appellant's First Sergeant also testified that lesser forms of restraint would suffice. The company commander testified that the unit did not have adequate manpower to "guard" appellant if he was not in pretrial confinement. The military judge conducted a de novo review and denied the defense request with a conclusory statement that "confinement is necessary for certain reasons, and less severe forms of restraint are inadequate." The military judge, expounding at length regarding her concerns for appellant's personal safety, stated:

¹ Ironically, Smith, the obvious principal dealer, and his two civilian cohorts, Malloy and King, were arraigned in U.S. District Court and immediately released on personal recognizance.

I still do have a concern for the accused's safety based on what I've heard. The fact that the other individuals who were found in this set of quarters are, if you will, out on the street and available, if you will, to, I'll say reach the accused if he were released from pretrial confinement is something that concerns me. . . . these particular individuals have a potential motive to come after him so that he doesn't . . . narc on them. . . . He could still be a witness against them, with his safety in issue. So I have questions about that, and that concerns me, and I would rather be safe than sorry and I don't want the accused to get hurt. . . . So safety is a concern from my viewpoint. . . . that's another reason I did not release him from pretrial confinement. . . . But I'd rather be safe than sorry, as I said, and do not want this accused to be shot or otherwise.

Prior to the military judge's ruling, appellant had spent 120 days in pretrial confinement. After the military judge's ruling, appellant spent an additional sixty-three days in pretrial confinement.

DISCUSSION

I. Pretrial Confinement

Upon motion for appropriate relief, the military judge must review de novo the propriety of pretrial confinement. *See* Rule for Courts-Martial 305(j) [hereinafter R.C.M.]. The military judge must order a prisoner released if:

1. The military magistrate's decision is an abuse of discretion and the information presented to the military judge does not justify the continuation of pretrial confinement under R.C.M. 305(h)(2)(B),² *see* (R.C.M. 305(j)(1)(A));

² There must be reasonable grounds to believe that:

- (i) An offense triable by court-martial has been committed;
- (ii) The prisoner committed it; and
- (iii) Confinement is necessary because it is foreseeable that:

(continued...)

2. New evidence established that the prisoner should be released, *see* R.C.M. 305(j)(1)(B); or

3. The 48-hour or 7-day reviews were deficient, and information presented to the military judge does not establish sufficient grounds for continued confinement, *see* R.C.M. 305(j)(1)(C).

Appellant's counsel requested release based upon both R.C.M. 305(j)(1)(A) & (B). The military judge found that the magistrate did not abuse his discretion and the new evidence did not persuade her that release was warranted. Our review is limited to examining the military judge's ruling on appellant's motion for appropriate relief. *See United States v. Hitchman*, 29 M.J. 951, 953 (A.C.M.R. 1990). In so doing, we consider two issues:

[F]irst, whether there was an abuse of discretion when [the military judge] found no abuse of discretion by the magistrate; and

[S]econd, whether [the military judge] abused [her] discretion when taking into consideration all matters presented at the *de novo* hearing.

Hitchman, 29 M.J. at 954. The answer to both issues is yes.

The evidence that appellant was a flight risk was minimal at the time the magistrate made his decision and nonexistent at the time the military judge made her decision. Likewise, there were no reasonable grounds, apart from wanton speculation, that appellant was likely to commit additional serious criminal misconduct. The presumptive evidence of appellant's flight-means, i.e., the rental car key, and future crimes capability, i.e., the pager, were shown not to be those of appellant. Even appellant's company commander and First Sergeant admitted that appellant was a good soldier, one of the best in the unit, and a good single parent to

(... continued)

(a) The prisoner will not appear at trial, pretrial hearing, or investigation, or

(b) The prisoner will engage in serious criminal misconduct; and

(iv) Lesser forms of restraint are inadequate.

his daughter. The government's theory that when drug dealers lose their stash, they are likely to engage in more drug dealing to make up for the financial loss, was obviously pulled from thin air without empirical support. We further find that lesser forms of restraint were not adequately considered in this case. The focus was on the inconvenience to the command, not whether appellant's presence could be assured by lesser forms of restraint. "A person should not be confined as a mere matter of convenience or expedience." R.C.M. 305(h)(2)(B) discussion.

Finally, the overarching consideration appeared to be appellant's personal safety. While it is a noble concern, it simply is not a basis for depriving an individual of his or her freedom pending trial. "Protective custody" by incarceration³ is not among the reasons enumerated in R.C.M. 305(h)(2)(B) justifying pretrial confinement. The military has far less intrusive measures available, such as relocation to other military bases, for the protection of accused or witnesses whose personal safety is threatened. Putting them in jail is not an option. The military judge abused her discretion when she approved continuation of appellant's pretrial confinement on this basis.

II. *Factual Sufficiency*

The test for factual sufficiency is whether, after weighing the evidence in the record and making allowances for not having personally observed the witnesses, this court is convinced of appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). We have reviewed the factual sufficiency of the evidence of appellant's conviction for possession of cocaine with intent to distribute and find it to be insufficient to sustain his conviction. Appellant presented un rebutted evidence that for about two weeks prior to the search, he was not at his quarters, with the exception of two brief stops to shower and change clothes. He readily consented to the search of his quarters. Three other individuals, all obviously involved with drugs, were present at the house. These three individuals and S.R., who shared appellant's bedroom for almost a year, were all at least equally likely to be the owner of the one piece of cocaine found in an open ashtray on a dresser. A urinalysis of appellant on the day of the search did not reveal the presence of cocaine. There was a total lack of appellant's fingerprints on any of the 300 pieces of evidence examined in this case. The government has failed to establish beyond reasonable doubt that appellant possessed the cocaine or had any intent to distribute the same.

³ This is distinguishable from "protective custody" as an administrative segregation within a confinement facility for one properly confined, pretrial or post-trial.

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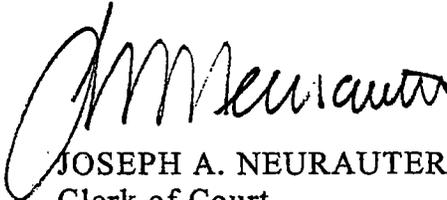
We have considered the remaining assignments of error, including those personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982) and find them to be without merit.

Reassessing the sentence on the basis of the errors noted, presents this court with a unique set of circumstances. Appellant stands convicted, pursuant to his guilty plea, of a single use of marijuana, an offense normally disposed of under Article 15, UCMJ. For this offense, he has already served two years confinement (the maximum allowable), minus good time. He served at least sixty-three days of pretrial confinement that he should not have had to serve. His military career has been derailed and his personal life seriously disrupted, including the apparent loss of custody of his daughter. This court must assure "that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986)(quoting *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985)). When an inappropriately severe sentence has already been served, simply reducing that sentence will not do justice. Even after reassessment we must determine that the sentence affirmed is appropriate. UCMJ art. 66(c); *Sales*, 22 M.J. at 308. We cannot give Specialist Harris back any of the time he has spent in prison, but we can ensure that he suffers no further punishment. Appellant has paid his debt to society.

The findings of guilty of Specification 1 of Charge II and Charge II are set aside and Specification 1 of Charge II and Charge II are dismissed. The remaining findings of guilty are affirmed. Reassessing the sentence on the basis of the errors noted, the entire record, and applying the principles of *Sales*, 22 M.J. 305, the court affirms a sentence of no punishment.

Senior Judge SQUIRES and Judge MERCK concur.

FOR THE COURT:


JOSEPH A. NEURAUTER
Clerk of Court