

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
MERCK, CURRIE, and NOVAK
Appellate Military Judges

UNITED STATES, Appellee
v.
Private E2 RUDOLPH COLES III
United States Army, Appellant

ARMY 20000215

4th Infantry Division (Mechanized)
J. P. Galligan, Military Judge

For Appellant: Major Mary M. McCord, JA (on brief).

For Appellee: Lieutenant Colonel Edith M. Rob, JA.

12 April 2001

MEMORANDUM OPINION

CURRIE, Judge:

A military judge sitting as a general court-martial convicted appellant, consistent with his pleas, of larceny and housebreaking in violation of Articles 121 and 130, Uniform Code of Military Justice, 10 U.S.C. §§ 921 and 930 [hereinafter UCMJ]. The military judge sentenced appellant to a bad-conduct discharge, confinement for nine months, forfeiture of \$500.00 pay per month for nine months, and reduction to Private E1. Pursuant to a pretrial agreement, the convening authority approved a sentence of a bad-conduct discharge, confinement for six months, forfeiture of \$500.00 pay per month for nine months, and reduction to Private E1. In his action, he stated appellant "will be credited with 326 days of confinement against the sentence to confinement." This case is before us for mandatory review pursuant to Article 66, UCMJ.

Appellant submitted this case to us on its merits, but one issue requires discussion: since the confinement credit granted appellant exceeds his approved sentence of confinement, does Rule for Courts-Martial [hereinafter R.C.M.] 305(k) require that he receive additional relief? We hold it does.

After findings but before sentencing, the military judge awarded appellant "326 days of credit to be applied against any term of confinement": 125 days credit

for time served in pretrial confinement, *see United States v. Allen*, 17 M.J. 126 (C.M.A. 1984), and 201 days of credit pursuant to R.C.M. 305(k). Later, immediately before imposing sentence, the military judge announced that he had considered, among other things, the fact that appellant had spent 125 days in pretrial confinement in a local county jail and “that for other administrative reasons associated with the review of the pretrial confinement the parties have agreed to a total of 326 days of pretrial confinement credit against any term of confinement that might be *adjudged* in this case.” (Emphasis added). After he announced the sentence, the military judge then noted the effect of the pretrial agreement (the convening authority could not approve any sentence to confinement in “excess of six months”) and the earlier award of confinement credit (“in light of the credit that will be given to [appellant], he will not be serving any post-trial confinement . . .”). The military judge and counsel did not discuss whether appellant was entitled to any further relief, even though the confinement credit exceeded both the adjudged sentence to confinement and that which the convening authority could approve.

In his R.C.M. 1106 recommendation, the staff judge advocate (SJA) noted that appellant had received 326 days of credit and recommended that the convening authority approve the maximum sentence allowed under the terms of his pretrial agreement with appellant. Defense counsel did not comment on the issue of confinement credit in his R.C.M. 1105 matters. In his action, the convening authority adopted the SJA’s advice and noted appellant “will be credited with 326 days of confinement credit against the sentence to confinement.”

We are satisfied that, despite the somewhat confusing comments by the military judge before he imposed sentence, the convening authority, by the plain language of his action, applied 326 days of confinement credit against the *approved* sentence.¹

¹ This finding also is consistent with precedent and practice. First, *Allen* credit is applied against the approved sentence. *United States v. Rock*, 52 M.J. 154, 156-57 (if a pretrial agreement exists that limits confinement to less than that adjudged and confinement has already been served, actually or constructively, before trial, confinement credit applies against the sentence as limited by the agreement), *reconsideration denied*, 52 M.J. 482 (1999). Second, credit awarded by a military judge pursuant to R.C.M. 305(k) also is applied against the approved sentence. This is so despite language in the rule that the credit is to be applied against the “adjudged” sentence. *United States v. Gregory*, 21 M.J. 952, 957 (A.C.M.R.), *aff’d on other grounds*, 23 M.J. 246 (C.M.A. 1986); *see also United States v. Beloney*, 32 M.J. 639, 640-41 (A.C.M.R. 1991). *But see Rock*, 52 M.J. at 156-57 (credit against confinement awarded by a military judge applies against the *adjudged* sentence unless a pretrial agreement between accused and convening authority dictates

(continued...)

We now must determine the relief appellant is due. The following practices help guide our resolution of this issue.²

First, if *Allen* credit exceeds the approved sentence, the accused is not entitled to additional relief. *United States v. Belmont*, 27 M.J. 516, 517-18 (N.M.C.M.R. 1988).

Second, unlike *Allen* credit, if the confinement approved “is insufficient to offset all the [R.C.M. 305(k)] credit to which the accused is entitled, the credit shall be applied against hard labor without confinement, restriction, fine, and forfeiture of pay, in that order The credit shall not be applied against any other form of punishment.” R.C.M. 305(k); *see also United States v. Rosendahl*, 53 M.J. 344, 347 (2000) (Rule for Courts-Martial 305(k) does not authorize application of post-trial confinement credit against reduction or punitive separation).

Third, if both *Allen* and R.C.M. 305(k) credit are granted, *Allen* credit is applied first against the approved sentence. Rule for Courts-Martial 305(k) credit then is applied to any remaining approved confinement and other eligible punishments. R.C.M. 305(k) (“[Rule for Courts-Martial 305(k)] credit is to be applied in addition to any other credit the accused may be entitled as a result of pretrial confinement served.”).

We now apply these practices to the facts at hand. Appellant’s approved sentence of six months confinement converts to 184 days (15 March to 14 September 2000). One hundred and eighty-four days less 125 days of *Allen* credit leaves fifty-nine days. Applying 201 days of R.C.M. 305(k) credit to the remaining fifty-nine days results in 142 days of uncompensated confinement credit, which must be applied against appellant’s approved sentence of forfeiture of \$500.00 pay per month for nine months. Rule for Courts-Martial 305(k) directs that “1 day confinement shall be equal to 1 day total forfeiture.” In this case, each day of confinement would equal \$33.52 at the 2000 pay rate for a Private E1, for a total credit of \$4,759.84 for 142 days. *Cf. United States v. Stuart*, 36 M.J. 746, 748 (A.C.M.R. 1993); *United*

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otherwise); *United States v. Southwick*, 53 M.J. 412, 419 (2000) (Crawford, C.J., concurring in part and concurring in the result), *explaining Rock*, 52 M.J. 154.

² *See* Major Michael G. Seidel, *Giving Service Members the Credit They Deserve: A Review of Sentencing Credit and Its Application*, *Army Law*. 1 (1999), Dep’t of Army Pam. 27-50-321 (August), for a discussion of these practices.

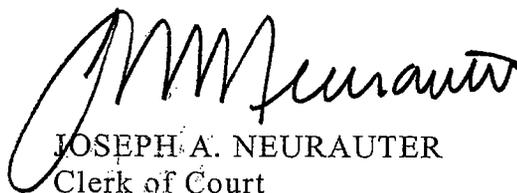
States v. Ponzi, 29 M.J. 601, 603 (A.C.M.R. 1989). This credit exceeds the approved sentence to forfeitures, which totals \$4,500.00. As the only remaining components of appellant's sentence are the reduction and the discharge, appellant is entitled to no relief beyond application of the credit to the approved forfeitures. We will take corrective action in our decretal paragraph.³

We have carefully considered the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982); they are without merit.

The findings of guilty and the sentence are affirmed. An administrative credit consisting of nine months forfeitures of \$500.00 pay per month will be applied against the forfeitures affirmed by this court.

Senior Judge MERCK and Judge NOVAK concur.

FOR THE COURT:



JOSEPH A. NEURAUTER
Clerk of Court

³ Judge Effron, in a recent case involving post-trial confinement credit at a rehearing, proposed a practice that is equally applicable in cases such as ours:

After the sentence is adjudged and the terms of any applicable pretrial agreement have been examined, the military judge should consider the matter of proper credits, including necessary equivalencies, and announce on the record how those credits shall be applied. Thereafter, it is the responsibility of the convening authority to apply those credits to the approved sentence. If action by the convening authority requires some modification of the announced credits in order to provide complete credit, the convening authority can ensure proper and complete credit with the advice of his or her staff judge advocate.

Rosendahl, 53 M.J. at 348.