UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BROOKHART, PENLAND, and FLEMING
Appellate Military Judges

UNITED STATES, Appellee
v.
Staff Sergeant MICHAEL J. GUINN
United States Army, Appellant

ARMY 20170500

Headquarters, U.S. Army Aviation Center of Excellence
Richard J. Henry, Military Judge
Lieutenant Colonel Leslie A. Rowley, Staff Judge Advocate

For Appellant: Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Captain Thomas J. Travers, JA; Major Alexander N. Hess, JA; Captain Nandor F.R. Kiss, JA (on brief); Colonel Michael C. Friess, JA; Captain Thomas J. Travers, JA; Captain Nandor F.R. Kiss, JA (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Brett A. Cramer, JA; Captain Samantha E. Katz, JA (on brief).

20 August 2021

MEMORANDUM OPINION ON REMAND

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

BROOKHART, Senior Judge:

This is our second time reviewing this case under Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 [UCMJ]. In September 2017, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual abuse of a child, in violation of Article 120b, UCMJ, 10 U.S.C. § 920b. The panel acquitted appellant of one specification of rape of a child. The panel sentenced appellant to a dishonorable discharge, confinement for four years, total forfeiture of all pay and allowances, and reduction to the grade of E1. The convening authority approved the sentence as adjudged.

For the reasons set forth below, we find appellant's sentence was inappropriate due to a confinement facility policy which violated the First Amendment by preventing appellant from having any form of contact with his non-victim biological children without first completing a sex offender treatment program and admitting his guilt. *See United States v. Guinn*, __M.J. __, 2021 CAAF LEXIS 439, at *20 (C.A.A.F. 10 May 2021) (holding Article 66(c), UCMJ, creates a "duty to determine whether Appellant's approved sentence, as executed, was correct in law and was appropriate"). We will grant relief in our decretal paragraph.

BACKGROUND

When appellant began serving his sentence, officials at the military confinement facility notified him that as a sex offender he was barred from having any contact with children. This bar extended to any form of direct or indirect contact with even his own biological children who were not victims of his crime. While exceptions to this policy were available, they first required appellant to complete a sex offender treatment program of indeterminate length. Participation in the program also required appellant to accept responsibility for the sex offenses of which he was convicted regardless of whether his case was still pending appeal. While completion of the program and effectively admitting guilt were prerequisites to an exception to policy, they were not guarantees that one would be granted.[1] Appellant ultimately declined to participate in the sex offender treatment program.

Appellant utilized the system for complaints within the confinement facility, but his requests for contact with his children were denied. Appellant then raised the issue in his post-trial matters submitted to the convening authority pursuant to Rule for Courts-Martial (R.C.M.) 1105. Receiving no relief from the convening authority, appellant again raised the issue of the confinement facility's policy in his first review before this court pursuant to Article 66, UCMJ. Appellant sought sentence relief, arguing the confinement facility's policy barring all forms of contact with his non-victim biological children violated Article 55, UCMJ, and the First, Fifth, and Eighth Amendments. *See United States v. Guinn*, ARMY 20170500, 2019 CCA LEXIS 143, at *7 (Army Ct. Crim. App. 28 Mar. 2019) (mem. op.). This court addressed appellant's Article 55, UCMJ, and Eight Amendment claims, and determined the Eight Amendment's concept of "necessities" did not extend to contact with minors. 2019 CCA LEXIS 143, at *8.

After determining the confinement facility's policy did not violate the Eight Amendment, this court held appellant's First and Fifth Amendment claims were

[1] As our superior court noted, and the parties acknowledge, the original policy at issue in this case has since been amended. *Guinn*, 2021 CAAF LEXIS 439, at *3 n.2.

"unsuitable for an [Article 66] sentence appropriateness assessment." 2019 CCA LEXIS 143, at *10 (quoting *United States v. Jessie*, ARMY 20160187, 2018 CCA LEXIS 609, at *13 (Army Ct. Crim. App. 28 Dec. 2018) (mem. op.) (brackets in original)). Accordingly, this court "decline[d] to address appellant's First and Fifth Amendment claims." 2019 CCA LEXIS 143, at *11.

After our initial review, appellant sought review of his case by the Court of Appeals for the Armed Forces (CAAF). The CAAF held "that applicable precedent from [the CAAF] requires the CCA to consider all of Appellant's constitutional claims" related to post-trial confinement. *Guinn*, 2021 CAAF LEXIS 439, at *2. The CAAF reversed this court's decision as to the sentence, and remanded appellant's case to this court to conduct a proper Article 66(c), UCMJ, review of appellant's sentence. *Guinn*, 2021 CAAF LEXIS 439, at *20.

On remand, appellant raises two assignments of error before this court: (1) whether a confinement facility policy that barred appellant from all forms of communication with his minor children unlawfully increased the severity of the sentence or otherwise rendered the sentence inappropriately severe; and, (2) whether the ongoing delay in appellate proceedings warrants relief.

LAW AND DISCUSSION

Article 66, UCMJ, Review

Article 66(c), UCMJ, states this court may only affirm "the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." As our superior court noted, this language creates to two distinct responsibilities when conditions of post-trial confinement are raised on appeal. First, we must assure that appellant's sentence is correct in law. Second, we must decide whether the sentence imposed is appropriate based on the underlying facts and should therefore be approved. The former inquiry requires this court to ensure "the adjudged and approved sentence has not been unlawfully increased by prison officials" and that "the sentence is executed in a manner consistent with Article 55[, UCMJ,] and the Constitution." *Guinn*, 2021 CAAF LEXIS 439, at *8 (citing *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001) (brackets in original)). While the latter obligates this court to consider whether post-trial confinement conditions amount to a legal deficiency in the post-trial process rendering the sentence inappropriate, even where the conditions don't violate the Eight Amendment or Article 55, UCMJ. *Guinn*, 2021 CAAF LEXIS 439, at *11 (citing *United States v. Gay*, 75 M.J. 264, 269 (C.A.A.F. 2016)). As a prerequisite to appellate review of post-trial confinement conditions, an appellant must first exhaust possible administrative remedies through the available grievance system. Appellant must then demonstrate a jurisdictional basis for relief from this

court. Finally, appellant must provide a clear record establishing the legal deficiency at issue. *Guinn*, 2021 CAAF LEXIS 439, at *18–19.

In this case, the supplemented record demonstrates that appellant made complaints through the prison system, filed a complaint pursuant to Article 138, UCMJ, and raised the issue in his post-trial matters submitted to the convening authority.[2] Accordingly, we find that appellant properly exhausted his administrative remedies. We further find that in light of our superior court's direction on remand, this court has jurisdiction to review appellant's challenges to the conditions of his post-trial confinement. The remaining question then, is whether appellant has clearly demonstrated a deficiency in the administration of his confinement.

Appellant contends that the confinement facility policy violated both the First and Fifth Amendments to the constitution thereby unlawfully increasing the severity of his sentence or alternatively rendering his sentence inappropriately severe. As we

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[2] In *United States v. Willman*, our superior court clarified the limits on what materials outside the record of trial can be considered by service courts in making sentence appropriateness determinations under Article 66(c), UCMJ. *Willman*, __MJ. __, 2021 CAAF LEXIS 697, at *2 (C.A.A.F. 21 Jul. 2021). The CAAF held that service courts may not consider materials outside the record of trial when evaluating sentence appropriateness, even where those materials are considered in evaluating an Eighth Amendment/Article 55 claim in the same case. *Willman*, 2021 CAAF LEXIS 697, at *2. The exception to this rule is when appellant has previously raised the same sentence appropriateness matter challenged on appeal in his post-trial submissions to the convening authority which makes those submissions part of the record. *Willman*, 2021 CAAF LEXIS 697, at *6 (citing R.C.M. 1103(b)(3)(C) and R.C.M. 1103(b)(2)(D)(iv)); *see also United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007). That happy circumstance opens the barn door, so to speak, and allows all manner of extra-record evidentiary beast to nose its way into our consideration. *Willman*, 2021 CAAF LEXIS 697, at *6 (stating the CAAF's precedents "authorize the CCAs to supplement the record to decide any issues that are raised, but not fully resolved, by evidence in the record"). Here, appellant raised the confinement policy to the convening authority in his post-trial matters, accordingly, we have permitted the parties to supplement the record with a number of exhibits, to include declarations from appellant, appellant's spouse, prison officials, and other experts, as well as a collection of prison regulations/policies and academic articles related to sex offender treatment. We note that a similarly situated appellant who, perhaps as a consequence of timing, could not raise the confinement policy in his post-trial matters would be wholly unable to meet the "clear record" requirement for sentence appropriateness relief. *Guinn*, 2021 CAAF LEXIS 439, at *19.

resolve appellant's claim under the First Amendment, we need not address appellant's Fifth Amendment claim.

Application of the First Amendment to Confinement

"Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 (1987). "Because prisoners retain these rights, 'when a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.'" *Id.* (quoting *Procunier v. Martinez*, 416 U.S. 396, 405–406 (1974)). In terms of the First Amendment, "[c]ourts have generally concluded that the First Amendment rights retained by convicted prisoners include the right to communicate with others beyond the prison walls." *Heyer v. United States Bureau of Prisons*, 849 F.3d 202, 213 (4th Cir. 2017) (citations omitted). At the same time, we must remain mindful of the intractability of challenges in prison administration, with which courts are "ill equipped to deal." *Shaw v. Murphy*, 532 U.S. 223, 229 (2001). As such, we must grant great deference to the policies adopted and executed by prison administrators. *Bell v. Wolfish*, 441 U.S. 520, 531, 547 (1979). Accordingly, "[o]nly in very rare circumstances" will we grant sentence relief based on allegations that actions by prison officials unlawfully increased an appellant's adjudged punishment or rendered his sentence inappropriately severe. *Guinn*, 2021 CAAF LEXIS 439, at *18 (citation omitted) (brackets in original).

In this case, we find that the prison policy in question did not infringe on appellant's First Amendment right to familial association to the extent that it unlawfully increased his punishment. *See United States v. Pena*, 64 M.J. 259, 264 (C.A.A.F. 2007). In determining whether post-trial conditions increased the adjudged sentence, military courts limit consideration to "matters that constitute 'punishment' within the meaning of the criminal law." *Id.* at 265. "As a general matter, the collateral administrative consequences of a sentence, such as early release programs, do not constitute punishment for the purposes of criminal law." *Id.* In this case, we find that the policy in question was not punitive in nature based upon the factors adopted by our superior court in *United States v. Fischer*. *See Fischer*, 61 MJ 415, 420 (C.A.A.F. 2005) (citing *Kennedy v. Mendoza-Marinez*, 372 U.S. 144, 168 (1963)). Nor do we find that that appellant's situation represents a "carve-out," where an otherwise permissible administrative policy was manipulated to single out appellant for punishment. *Guinn*, 2021 CAAF LEXIS 439, at *15. Accordingly, we are confident appellant's sentence, as executed, was correct in law.

However, our determination that the challenged policy did not constitute punishment does not end our inquiry. We must still consider whether the prison policy denying all forms of contact with appellant's non-victim biological children so violated his First Amendment right to association that appellant's sentence should not be approved. On the specific facts of this case, we find that it does.

"[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89.[3] When assessing the reasonableness of prison regulations, courts must consider several factors: (i) whether there is a valid and rational connection between the regulation and a legitimate government interest forming the basis for the regulation; (ii) whether there are alternative means of exercising the right at issue that remains open to prison inmates; (iii) the impact allowing an accommodation would have on prison guards, other inmates, and on prison resources; and, finally, (iv) the existence of other "ready alternatives." *See Turner*, 482 U.S. at 89–91.

Here, with regard to the first factor, the policy at issue is rationally related to legitimate penological interests. Affidavits from prison officials indicate that the policy was intended to both ensure the safety of children and to further appellant's rehabilitation by eliminating exposures to potential triggers that might set-back his treatment. These are clearly important and legitimate government interests. We also find that both of those goals are appropriately furthered by a policy which requires screening confinees for risk and the provision of focused counseling to address adverse behavior prior to allowing physical, or unmonitored remote, contact with children, regardless of whether the children were victims or are related to the confinee.

However, even granting great deference to the expertise of prison officials, we find that a policy which was so broad as to allow no form of contact with a confinee's biological, non-victim children, for potentially indefinite periods of time, strayed too far from its stated objectives and thereby violated appellant's constitutional right to association. In spite of ample post-trial supplementation of the record, there is no evidence that any alternatives to the policy's complete bar on contact were available, even through the authorized exception process. The record does not explain why possible alternatives, such as monitored phone calls and/or censored epistolary exchange, were not available to protect the constitutional interests of confinees in appellant's situation. This is not to suggest that prison officials might not justify the absence of such exceptions, only that, on the facts of this case, there is simply no evidence that such ready alternatives would have had any adverse impact on prison resources or otherwise undercut the safety and

[3] We recognize that *Turner's* origins may lie in another purpose, nonetheless, we find the principles established therein perfectly apt for the constitutional question presented by appellant. *See Jessie*, 2018 CCA LEXIS 609, at *23, (Febbo, J., concurring) (stating the *Turner* test was designed for courts empowered to grant injunctive relief).

rehabilitative objectives of the no contact policy.[4] *See Turner*, 482 U.S. at 90 ("[T]he existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns."); *see also Overton v. Bazzetta*, 539 U.S. 126, 135 (2003) ("Alternatives . . . need not be ideal, however; they need only be available.").

Accordingly, we find that the former policy barring appellant from all forms of contact with his biological, non-victim children violated appellant's First Amendment right to association and rendered his adjudged sentence inappropriate, entitling appellant to relief.[5]

Relief

With their numerous post-trial submissions as reference, the parties dispute the length of time the unconstitutional policy was applied to appellant. Nonetheless, we are satisfied that the policy impacted the appropriateness of appellant's sentence a period of eighteen months. In recognition of the paramount importance of the constitutional right which was violated by the confinement policy, we will disapprove eighteen months of appellant's sentence to confinement in our decretal paragraph. We recognize that given appellant's pending release date, the relief is largely pyrrhic, however, we are convinced that it is fair and appropriate under the circumstances.

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[4] Our ruling is limited to the particular facts of this case. We make no judgment on the constitutionality of the policy in question as it might have been applied to differently situated prisoners, such as those who victimized their biological children or other children living in their households. Nor do we suggest that monitored phones calls or letters are either the best or only possible alternative means of contact that might satisfy a prisoner's right to association. *See, e.g., Samford v. Dretke*, 562 F.3d 674, 680–81 (5th Cir. 2009) (holding that relaying messages to children through their mother was acceptable alternative to prisoner denied mail privileges).

[5] We have given full and fair consideration to appellant's second assignment of error related to delay during the appellate review process, and to the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and determine they merit neither discussion nor relief. However, even assuming the claims were meritorious, we would not grant additional relief above that provided for the first assignment of error.

CONCLUSION

The findings of guilty, and only so much of the sentence as provides for a dishonorable discharge, confinement for two years and six months, total forfeiture of all pay and allowances, and reduction to the grade of E1, are AFFIRMED.

Judge PENLAND and Judge FLEMING concur.

FOR THE COURT:

[redacted]

JOHN P. TAITT
Acting Clerk of Court