UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant ANTHONY F. BILLQUIST
United States Air Force

ACM 35003 (f rev)

30 May 2008

Sentence adjudged 26 October 2006 by GCM convened at Scott Air Force Base, Illinois. Military Judge: Gary M. Jackson.

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-2.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Anthony D. Ortiz

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Roberto Ramirez.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

PER CURIAM:

Contrary to his plea, the appellant was convicted of one specification of possession of child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934. On appeal the appellant raises two issues.[1] First, he claims the military judge erred when he denied his motion to dismiss for denial of his right to a speedy trial under Rule for Courts-Martial (R.C.M.) 707 and the Sixth Amendment.[2] He also claims the military

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[1] Both issues are raised pursuant to *U.S. v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[2] U.S. CONST. amend VI.

judge erroneously restricted the contents of his unsworn statement. For the reasons stated below, we disagree.

Background

This case is before us on further review. The appellant's first court-martial took place on 20 December 2001 when he pled guilty to a charge and specification of possession of child pornography under Clause 3 of Article 134, UCMJ, as a violation of a federal statute; 18 U.S.C. § 2252A(a)(5)(A). He was sentenced to a bad-conduct discharge, confinement for 6 months, and a reduction to the grade of E-1.

The Court of Appeals for the Armed Forces overturned the appellant's conviction and sentence in light of *United States v. Martinelli*, 62 M.J. 52 (C.A.A.F. 2005). The case was returned to The Judge Advocate General and a rehearing was authorized. The convening authority authorized a rehearing on the faulty specification and the sentence. The faulty specification was amended to one that alleged conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces (under Clauses 1 and 2 of Article 134, UCMJ) rather than under Clause 3 of Article 134, UCMJ.

On retrial the appellant was convicted, contrary to his plea, by a mixed panel of officers and enlisted members and received a bad-conduct discharge, reduction to the grade of E-2, confinement for 6 months, and a reprimand. The convening authority approved only the reduction, the confinement and the discharge.

Speedy Trial

Two hundred and seventy-six days elapsed between the time the convening authority initially "received" the record of trial and the opinion authorizing the rehearing and the date the rehearing was held.[3] At trial, the defense filed a motion to dismiss the charge and specification for violation of the appellant's right to a speedy trial under the Sixth Amendment and R.C.M. 707. The Sixth Amendment provides that the "accused shall enjoy the right to a speedy and public trial." R.C.M. 707(b)(3)(D) provides that if a rehearing is authorized by an appellate court, that an accused shall be brought to trial within 120 days of *receipt* of the record of trial by the convening authority and the opinion authorizing the rehearing. After testimony and argument from the parties, the military judge denied the motion and made essential findings of fact concerning the delay, finding that only a total of 85 days were accountable for speedy trial purposes.

In making his findings, the military judge found that the convening authority and the docketing trial judge had not abused their discretion in excluding days between the

[3] The legal office which served the convening authority received the record twice. Initially they received the record on 23 January 2006, and after being directed to return the record to Washington D.C., per a request of the Department of Defense General Counsel, the record was again received on 19 April 2006.

receipt of the record by the convening authority and the retrial. This conclusion included the military judge's finding that the convening authority did not receive the record of trial, within the meaning of R.C.M. 707, until 20 April 2006. This finding was contrary to the defense counsel's assertion that the operative date for the rule was 23 January 2006, the date the record was initially received by USAFE/JA authorizing a rehearing in the case.

Alternatively, as for the disputed "receipt" date of the record, the military judge made a finding that even if the convening authority is credited with receiving the record on the earlier date that period was properly excluded by the convening authority. Thus, however this period is characterized, the trial judge found it was properly excluded under R.C.M. 707, because the government was awaiting the appellate results of cases with issues similar to the appellant's as addressed in *Martinelli* and for a decision whether these cases (including the appellant's) would be appealed to the United States Supreme Court.

In addition to the above, the military judge also found the convening authority did not abuse his discretion when he excluded the following time periods between 20 April 2006 and the arraignment on 25 October 2006: 1) the 40 days it took to locate the appellant, determine his availability, serve him with a copy of the record, provide notice of the order for a rehearing, and receive that notice back;[4] 2) the 18 days necessary for the convening authority's legal staff to determine the availability of witnesses and the evidence;[5] 3) the nine days necessary to allow convening authority's legal staff to investigate whether a rehearing would be impractical and to prepare;[6] 4) the 16 days necessary to secure the availability of the appellant from his excess leave location to the rehearing location.[7] Finally, the military judge found the docketing judge did not abuse his discretion when he excluded the 18 days, agreed to by defense, associated with docketing the case.[8]

We review the military judge's ruling on a speedy trial motion for an abuse of discretion. *United States v. Dooley,* 61 M.J. 258, 262 (C.A.A.F. 2005). The ultimate issue of whether the appellant received a speedy trial is a matter of law that we review de novo. *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999). "Under an abuse of discretion standard, mere disagreement with the conclusion of the military judge who applied the R.C.M 707 factors is not enough to overturn his judgment." *Dooley*, 61 M.J. at 262. *See also United States v. Vieira*, 64 M.J. 524, 527 (A.F. Ct. Crim. App. 2006).

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[4] 20 April to 30 May 2006.
[5] 30 June to 18 July 2006.
[6] 19 July to 27 July 2006.
[7] 28 July to 12 August 2006.
[8] 7 October to 25 October 2006.

R.C.M. 707(c) permits all pretrial delays approved by the convening authority to be excluded from the count. To be excludable, the reason for the delay must be reasonable. *Cf. United States v. Maresca*, 28 M.J. 328 (C.M.A. 1989) (holding the convening authority acted unreasonably in excluding the 16 days between the date of preferral and the date the accused was notified of the charges by the government). The discussion section of R.C.M. 707(c) gives several examples that would qualify as a reasonable delay. These include time to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused; time to in-process a member of the reserve component for disciplinary action; time to complete other proceedings related to the case; time to secure evidence or witnesses; time requested by the accused; time to obtain security clearances; and for other good causes.

We have reviewed the findings of fact and the exclusions of the convening authority that the military judge evaluated. We find the military judge did not abuse his discretion in finding the delays in this case were reasonable and violated neither R.C.M. 707 nor the Sixth Amendment.

The issues decided by our superior court in *Martinelli* were substantial and had far reaching consequences not only for the military but also for society as a whole. It was entirely reasonable for the government to consider whether to seek a writ of certiorari at the United States Supreme Court. Often such decisions are made in conjunction with attorneys at the Office of the Solicitor General of the United States and attorneys in other Department of Justice offices. Given the complexity of the issues involved, and the several offices potentially involved in the decision making process, the time it took for that decision to be made was reasonable. As for the dates excluded between 20 April 2006 and the arraignment, we agree that the exclusions were reasonable. Finally, while we note the convening authority approved some of the delays post hoc, we have no evidence to suggest these delays were "a rationalization for neglect or willful delay." *See United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F. 1997).

Unsworn Statement

After completing his unsworn statement to the panel, the appellant sought to admit a 37-page document labeled "Unworn Statement of TSgt Anthony Billquist." The document included a nine page, single-spaced statement and 16 attachments. Both the military judge and the trial counsel had concerns with some of the contents of the statement. In particular, the military judge advised the appellant that he would not permit any portion of the document which questions or ask members to question the ruling of the Court on the speedy trial motion. After complying with the military judge's ruling, the statement was reduced to six pages and 13 attachments. All portions removed were directly related to the speedy trial motion and had been lifted almost verbatim from the trial defense counsel's argument section of his speedy trial motion to the court.

The *Manual* provides an accused with the right to "testify, make an unsworn statement, or both in extenuation, in mitigation or to rebut matters presented by the prosecution." R.C.M. 1001(c)(2)(A). While this right has been described as "broadly construed" and "largely unfettered," it is not wholly unconstrained. *United States v. Grill*, 48 M.J. 131, 133 (C.A.A.F. 1998). More recently, in *United States v. Barrier*, 61 M.J. 482, 484 (C.A.A.F. 2005), our superior court affirmed that the information in unsworn statements remains a product of R.C.M. 1001(c), and thus is defined in scope by the rule's reference to matters presented in extenuation, mitigation, and rebuttal. *See also United States v. Johnson*, 62 M.J. 31, 37 (C.A.A.F. 2005); *United States v. Sowell*, 62 M.J. 150, 152 (C.A.A.F. 2005).

We review a military judge's decision to restrict an accused's sentencing statement for abuse of discretion. *Sowell*, 62 M.J. at 152. Here, the appellant sought to present to the panel the same points and arguments he made to the military judge on the speedy trial motion. While the judge did permit the appellant to discuss the impact of the trial delays on his life, he did not permit him to contend that the delays amounted to a violation of R.C.M. 707 and the Sixth Amendment. We find the judge did not abuse his discretion in excluding those portions of the unsworn statement related to the speedy trial claims. These comments went directly to a prior ruling of the court and thus were not relevant sentencing matters.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED

Chief Judge WISE did not participate.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court