UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain BARRY W. BROWN
United States Air Force

ACM 36607

23 April 2008

Sentence adjudged 14 September 2005 by GCM convened at Lackland Air Force Base, Texas. Military Judge: William M. Burd (sitting alone).

Approved sentence: Dismissal, confinement for 18 years, and forfeiture of all pay and allowances.

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

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, Major Matthew S. Ward, Major Kimani R. Eason, and Major Donna S. Rueppell.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

OPINION OF THE COURT

FRANCIS, Senior Judge:

Consistent with his pleas, the appellant was convicted by general court-martial of one specification each of attempted premeditated murder, conspiracy to commit premeditated murder, and violation of a lawful general regulation, in violation of Articles 80, 81, and 92, UCMJ, 10 U.S.C. §§ 880, 881, and 892. A military judge sentenced him to a dismissal, 25 years confinement, and forfeiture of all pay and allowances. Pursuant to the terms of a pre-trial agreement (PTA), the convening authority reduced the period of confinement to 18 years, but otherwise approved the adjudged sentence. The appellant received 173 days credit for pre-trial confinement.

The appellant asserts seven errors:[1] (1) He was denied his right to a speedy trial because the pre-trial delay in his case was excessive; (2) His guilty pleas were improvident because the military judge resolved the issue regarding the possibility of a mandatory minimum sentence in a manner that rendered the appellant's pleas unknowing and unintelligent; (3) He was denied his due process right to a speedy post-trial review; (4) He was denied effective assistance of counsel; (5) The military judge committed plain error and denied the appellant his right to a fair trial when he failed to sequester prospective panel members from media coverage pertaining to the appellant's alleged offenses; (6) The trial counsel committed prosecutorial misconduct by effectively precluding contact between the appellant and his wife during crucial court-martial processing stages; and, (7) He was denied post-trial due process when the United States Disciplinary Barracks, before making a clemency recommendation to the Air Force Clemency and Parole Board, failed to consider mitigating and extenuating circumstances properly submitted by the appellant. Finding no prejudicial error, we affirm.

Background

The appellant was a judge advocate with an impressive past and a promising career ahead of him. After serving several years as a maintenance and munitions officer, he was competitively selected to attend law school under the Funded Legal Education Program. He scored in the 99th percentile on his Law School Admission Test and won a full merit scholarship to Stetson University College of Law, graduating *cum laude*, in the top 7% of his class, in 2004.

The appellant's first assignment as a judge advocate was to the legal office at the 37th Training Wing, Lackland Air Force Base (AFB), Texas, beginning in August 2004. At the time, he was married to Mrs. IB, a civilian lawyer he met and married while they were both attending law school at Stetson University.

Starting in approximately February 2005, the appellant entered into a secret romantic relationship with one of the office paralegals, Staff Sergeant (SSgt) Ramona Greiner.[2] In addition to the Air Force regulatory prohibitions on fraternization, the appellant's existing marriage to Mrs. IB posed an unwanted obstacle to his new relationship. Instead of pursuing something as mundane as a divorce, he and SSgt Greiner decided to have Mrs. IB murdered. To that end, SSgt Greiner contacted Mr. GW, a friend and former neighbor who she thought might be willing to murder Mrs. IB for them.

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[1] All raised pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982).

[2] SSgt Greiner was separately prosecuted and convicted. *See United States v. Greiner,* ACM 36606 (A.F. Ct. Crim. App. 2007) (unpub. op.).

Mr. GW advised the conspirators he would kill Mrs. IB for $25,000. On 25 March 2005, the appellant met with Mr. GW at a local park near Lackland AFB to discuss Mrs. IB's murder. At that meeting, the appellant confirmed that he wanted Mr. GW to murder Mrs. IB and confirmed the agreed upon price of $25,000. To seal and facilitate the deal, the appellant gave Mr. GW a down payment of $280 and provided pictures of his wife, her vehicle, and her workplace. The appellant also suggested a possible method for committing the murder that would help divert attention from himself. Mrs. IB worked for Child Protective Services. The appellant figured that people working at such an agency "make plenty of enemies" and suggested shooting up the workplace, killing Mrs. IB and wounding others, to make it look like a drive-by shooting with no particular person targeted.

Fortunately, Mr. GW was not the hit man the appellant and SSgt Greiner thought him to be. Soon after being approached by SSgt Greiner, Mr. GW exposed the murder request to the police and thereafter worked as an undercover informant. The 25 March 2005 meeting with the appellant was video and audio tapped and the appellant was arrested as the meeting ended. He was placed in pre-trial confinement the same day and remained there until his trial.

Speedy Trial

The appellant asserts his right to a speedy trial was violated, citing the Sixth Amendment[3], Article 10, UCMJ, 10 U.S.C. § 810, and Rule for Courts Martial (R.C.M.) 707. We find that any potential speedy trial violation was waived at trial.

An unconditional guilty plea which results in a finding of guilty waives any speedy trial issue under both R.C.M. 707 and the Sixth Amendment. *United States v. Tippit*, 65 M.J. 69, 75 (C.A.A.F. 2007); *United States v. Mizgala*, 61 M.J. 122, 125 (C.A.A.F. 2005); R.C.M. 707(e). Further, "a servicemember who enters an unconditional guilty plea may appeal a speedy trial claim under Article 10 only if the accused has invoked Article 10 at trial by filing and litigating an Article 10 motion." *Tippit*, 65 M.J. at 75.

Pursuant to the terms of a favorable PTA, the appellant unconditionally pled guilty to and was found guilty of all charged offenses.[4] He submitted no motion alleging a speedy trial violation and that issue was consequently never litigated. As a result, he voluntarily waived the issue. Having resolved his related ineffective assistance of counsel claim adversely to the appellant, we find no legitimate basis to now relieve him of the consequences of that waiver.

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[3] U.S. CONST. amend. VI.

[4] The appellant's plea, and the trial court's finding, with respect to the Article 92, UCMJ, 10 U.S.C. § 892 offense included minor exceptions, none pertinent to this decision.

Providency of Pleas

Premeditated murder carries a mandatory minimum sentence of life imprisonment. The appellant asserts that prior to trial, his counsel told him they believed the charged conspiracy offense might carry the same mandatory minimum sentence. As a result, when the appellant entered into the PTA and pled guilty, he mistakenly believed he was subject to a mandatory minimum sentence. He only realized that was not the case when the judge ruled to the contrary just prior to announcing sentence, and by then it was too late. The appellant argues that because he misunderstood the imposable punishment, his plea was improvident. We find to the contrary.

A plea of guilty which results in a finding of guilty will not be set aside on appeal "unless there is 'a "substantial basis" in law and fact for questioning [the plea].'" *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). A "substantial misunderstanding" by an accused of the punishment to which he is subject as a result of his plea can render a guilty plea improvident. *United States v. Mincey*, 42 M.J. 376, 378 (C.A.A.F. 1995).[5] We consider "all the circumstances of the case . . . to determine whether the misapprehension of the . . . sentence, [if it occurred,] affected the guilty plea, or whether that factor was insubstantial in [the appellant's] decision to plead guilty". *Id.*

The appellant submitted two personal post-trial affidavits to support his various assertions of error. In those affidavits, the appellant asserts his counsel told him prior to trial that they believed the conspiracy charge might carry a mandatory minimum sentence of life imprisonment. The appellant also asserts he twice asked his counsel to make a motion before trial to determine if the mandatory minimum applied, but counsel refused to do so.

The government also submitted two post-trial affidavits, one from each of the appellant's trial defense counsel. The affidavits from counsel directly dispute both of the appellant's assertions. They collectively aver that given the wording of the Manual for Courts-Martial concerning punishment for conspiracy, they initially advised the appellant that an argument could be made that the mandatory minimum sentence applicable to premeditated murder applied. However, after additional research, they concluded it did not apply, and so advised the appellant. Further, although they discussed the possibility of asking for clarification prior to trial and decided against it for tactical reasons, the appellant never insisted that they do so.

When conflicting affidavits create a factual dispute, we cannot resolve it by relying on the affidavits alone without resort to a post-trial fact finding hearing. *United*

[5] Although *Mincey* specifically addressed a misunderstanding as to the maximum possible punishment, the same logically holds true for a misunderstanding as to whether a mandatory minimum sentence applies. *See United States v. Mincey*, 42 M.J. 376, 378 (C.A.A.F. 1995).

States v. Ginn, 47 M.J. 236 (C.A.A.F. 1997). However, if the issue can be resolved without resort to the conflicting affidavits, a post-trial hearing may not be required. *Ginn* enunciated several principles for determining whether a hearing is required. The fourth and fifth *Ginn* principles allow resolution of the issue sub judice. The fourth provides that if "the appellate filings and the record as a whole 'compellingly demonstrate' the improbability of [controverted facts asserted in the appellant's affidavit], the Court may discount those factual assertions and decide the legal issue.' *Ginn*, 47 M.J. at 248. Similarly, the fifth principle provides that "when an appellate claim . . . contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal." *Id*; *See also, United States v. Fagan*, 59 M.J. 238, 243 (C.A.A.F. 2004).

Early in the trial, the military judge summarized for the record an R.C.M. 802 session, during which the trial counsel had asserted that the appellant was subject to a mandatory minimum sentence of life imprisonment. The trial defense counsel had disagreed and, after some discussion, the trial counsel had withdrawn the assertion, conceding that, for purposes of the appellant's case, the mandatory minimum did not apply. After getting the trial counsel to repeat that concession for the record, the military judge moved on without further comment. Just before announcing the sentence, the military judge formally ruled that the mandatory minimum did not apply.

Based on the record discussion of the R.C.M. 802 session, during which the trial counsel conceded, consistent with the defense objection, that the mandatory minimum did not apply, it is highly improbable that the appellant, if he ever did so, thereafter still believed he was subject to a mandatory minimum. At the very least, even without a formal ruling from the military judge, the issue was at that point in doubt. That being the case, if application of a mandatory minimum was, as the appellant now asserts, a significant factor in his decision to plead guilty, he had plenty of time to back out of the PTA or otherwise seek resolution of the issue before sentence was announced. He did not. Further, during a discussion of the maximum possible sentence, the appellant, when asked by the military judge if he had "any question as to the sentence that could be imposed as a result of [his] guilty plea", stated "I don't have any questions." Although this exchange arose in reference to the maximum punishment, it was clearly phrased broadly enough to elicit *any* question the appellant might have as to the applicable punishment. If he at that time still maintained any real concern as to whether a mandatory minimum sentence applied, he could have raised it then. Again, he did not.

The appellant's testimony during the *Care*[6] inquiry also repudiates his current position. In response to questions by the military judge, the appellant affirmed he was fully satisfied with his trial defense counsel's advice. Similarly, in his PTA, submitted two weeks prior to trial, the appellant affirmatively stated he was satisfied with his trial defense counsel. In going over the terms of the PTA with the military judge, he affirmed, under oath, that the statement concerning satisfaction with his trial defense counsel was true. If, as he now asserts, the issue of whether a mandatory minimum sentence applied truly was a substantial factor in his decision to plead guilty and he was upset with his trial defense counsel's purported refusal to seek clarification, he could and should have said so in response to the military judge's questions. He did not. The appellant's affirmations under oath at trial carry considerable weight and he has set forth no facts that would rationally explain why he would have made such statements at trial if they were not true. Having considered the evidence of record, we conclude that whether or not a mandatory minimum sentence applied was not a substantial factor in the appellant's decision to plead guilty and that neither the military judge's ruling on that issue nor the timing of the ruling rendered the appellant's pleas improvident.

Appellate Delay

The appellant asserts he has been denied his due process right to speedy post-trial review.

In *United States v. Moreno,* 63 M.J. 129 (C.A.A.F. 2006), our superior court established certain presumptive time standards for post-trial and appellate processing. By its terms, *Moreno* applies to cases completed 30 days after the *Moreno* decision (11 May 2006) or docketed with the service Courts of Criminal Appeals 30 days after that decision. The appellant's trial was completed 14 September 2005 and the case was docketed with this Court on 7 February 2006. As a result, the *Moreno* presumptions do not apply. Nonetheless, we examine the appellant's due process claim using the *Moreno* methodology. Having done so, we find no violation.

At the outset, we find no unreasonable delay in the immediate post-trial processing of the appellant's case. The Convening Authority (CA) proceeded diligently, with action completed 24 January 2006. Although that is 12 days longer than the 120 standard prescribed by *Moreno*, it encompasses a 20-day delay granted the defense in the time to submit clemency matters. The case was thereafter docketed with the Court on 7 February 2006, well within the 30-day time period dictated by *Moreno*.

However, processing of the case after docketing with this Court has taken more than two years, significantly beyond the 18 months envisioned by *Moreno*. We find such a delay to be facially unreasonable and, accordingly, turn to the four factors set forth in

[6] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

Barker v. Wingo, 407 U.S. 514 (1972). They are: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *See United States v. Othuru,* 65 M.J. 375, 380 (C.A.A.F. 2007).

The first factor, length of the delay, favors the appellant, in that the amount of time taken to process the appellant's case after docketing with this Court is facially unreasonable. The second factor, reason for the delay, weighs against the appellant. The vast majority of the appellate delay in this case was at the request of, or occasioned by, the defense. Starting in May 2006, the appellant's counsel ultimately requested, and was granted, nine delays in the time to submit his assertions of error, totaling 300 days. After filing of the government's answers, the appellant sought and obtained an additional 33-day delay to file an out of time reply brief.[7]

We find nothing in the record or the appellate filings to indicate that the defense delay requests were objectionable to the appellant or otherwise inappropriate. Indeed, we note that some of the defense delays appear to have been necessitated by changes in appellate defense counsel directly attributable to the appellant. Appellate defense counsel changed three times after the case was docketed with the Court. The last two counsel changes were related, and were the result of the appellant's choice of civilian counsel. In a unique twist, the appellant's wife, who was the target of the attempted murder, briefly acted as his appellate attorney. In that capacity, Mrs. IB on 26 October 2006 filed an Assignment of Errors on the appellant's behalf. On 28 November 2006, the appellant's assigned military defense counsel, at the direction of the appellant, and after citing difficulty contacting Mrs. IB, moved to withdraw from the case, a motion the Court ultimately granted. The same day, the appellee, asserting a conflict of interest between Mrs. IB's status as the victim of the appellant's offenses and her continued service as his attorney, moved to have her disqualified. On 21 December 2006, Mrs. IB, citing the same conflict, moved to withdraw from the case and to withdraw the Assignment of Errors she had previously filed. The Court granted the motion on 8 January 2007. More than seven months later, on 31 July 2007, and after additional defense delay requests, the appellant filed a new Assignment of Errors, asserting five of the errors outlined above. On 4 September 2007, the appellant filed a Supplemental Assignment of Errors, asserting two additional errors. Finally, by motion of 11 February 2008, the appellant sought, and was granted, an additional post-trial delay, until 15 March 2008, to file an out of time reply brief.[8]

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[7] The appellant's reply brief was due 16 November 2007. By motion of 11 February 2008, he requested a delay until 15 March 2008 to file an out of time reply. Although 16 November to 11 February is 120 days, the case was still under consideration by the Court at the time the motion was filed. Out of an abundance of caution, we therefore attribute to the appellant only the time from the date of the 11 February 2008 motion.

[8] *See* fn 7. The Court subsequently denied another motion by the appellant for an additional 60-day delay.

Beyond the defense delays, the appellee sought and was granted three delays to respond to the assertions of error. All were for legitimate reasons and of reasonable duration. The first two were based on a combination of the time needed to review and respond to the numerous issues raised by the appellant and on the time needed to locate and obtain information from the appellant's trial defense counsel concerning the ineffective assistance of counsel claim. While those delays were running their course, the appellant submitted his Supplemental Assignment of Errors. The appellee requested and was granted additional time to respond to the new issues added by the supplemental filing. The Answer to the first Assignment of Errors was filed on 30 October 2007. The Answer to the Supplemental Assignment of Errors was filed on 9 November 2007.

The third *Barker* factor also goes against the appellant. At no time prior to submission of the Supplemental Assignment of Errors on 4 September 2007 did the appellant complain about the post-trial delay in his case. Indeed, the vast majority of the delays were the result of defense requests. Moreover, as noted above, even after the appellant's Supplemental Assignment of Errors was filed raising the post-trial delay issue, he sought and was granted additional delays.

Finally, we find no specific prejudice to the appellant caused by the delay. There is no merit to his other substantive assertions of error and we resolve all against him. Thus, the fourth factor also weighs against the appellant. Balancing all of the *Barker* factors, we conclude there has been no denial of the appellant's due process right to a timely review and appeal.

Ineffective Assistance of Counsel

The appellant raises numerous bases for his ineffective assistance of counsel claim. He asserts counsel failed, *inter alia*, to: 1) Seek illegal pretrial confinement credit based on conditions endured at a civilian confinement facility; 2) Adequately prepare for appellant's court-martial; 3) Assert the appellant's right to a speedy trial or otherwise challenge the convening authority's exclusion of time for speedy trial purposes; 4) Afford the appellant the opportunity to meaningfully assist in the preparation of his own defense; 5) Effectively cross-examine court-martial witnesses; 6) Interview potentially helpful witnesses and gather favorable evidence; 7) Seek pre-trial clarification from the military judge regarding the possibility of a mandatory minimum sentence; 8) Provide the appellant with information necessary to make a more educated plea decision; and 9) Request the military judge to sequester prospective panel members from media coverage pertaining to the appellant's alleged offenses. Because some of the allegations are related, or similar, we combine them in our analysis below.

In reviewing ineffective assistance of counsel claims, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Tippit,* 65 M.J. at 76.

To prevail, the appellant must show both: (1) that any deficiency in counsel's performance was "so serious that counsel was not functioning as the "counsel" guaranteed . . . by the Sixth Amendment"; and (2) that counsel's deficient performance prejudiced the defense to such an extent that it "[deprived] the [appellant] of a fair trial . . . ." *Strickland*, 466 U.S. at 687. With regard to the first prong, an error in counsel's performance, if it occurred, does not per se amount to ineffective assistance of counsel. Rather, the real question is whether, considering any perceived error, "the level of advocacy [fell] measurably below the performance . . . [ordinarily expected] of fallible lawyers." *United States v. Polk,* 32 M.J. 150, 153 (C.M.A. 1991) (quoting *United States v. DiCupe*, 21 M.J. 440 (C.M.A. 1986)). In making this assessment, we generally "will not second-guess the strategic or tactical decisions made at trial by defense counsel." *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006). With regard to the second prong, an appellant in a guilty plea case "must also show that 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Tippit,* 65 M.J. at 76 (internal citations omitted). Applying these standards, we find no merit in the appellant's assertions.

1. Failure to Seek Article 13 Credit

The appellant spent 173 days in pretrial confinement, the bulk of which was in the local county jail. Through personal affidavits, the appellant lists a host of perceived deficiencies in his treatment while confined in the county jail, asserts that such deficiencies warrant Article 13 credit, and argues that his attorneys improperly refused to seek such credit.[9] Affidavits from both of his trial defense counsel confirm the appellant was unhappy with life in the county jail, but indicate that he never brought any condition to their attention that would have warranted Article 13 credit.

At the outset, we note that "failure at trial to seek sentence relief for violations of Article 13 waives that issue on appeal absent plain error." *United States v. Inong*, 58 M.J. 460, 465 (C.A.A.F. 2003). The appellant did not raise the issue at trial and we find no plain error. As a result, we will only consider the appellant's Article 13 assertion within the context of his ineffective assistance of counsel claim.

Faced with potentially competing post-trial affidavits concerning what the appellant told his lawyers about the conditions of his confinement, we turn again to the fifth *Ginn* factor and determine the issue can be resolved from the existing record. In response to a specific inquiry by the military judge as to whether he had in any way been subjected to illegal pre-trial punishment prohibited by Article 13, the appellant said he had not. Although the military judge used the words "pre-trial punishment", and made no explicit reference to the potential conditions of the appellant's confinement, it is clear

[9] The appellant's *Grostefon* submissions generically refer to the asserted bases for his claimed Article 13 credit as "pre-trial punishment". Article 13 precludes both pre-trial punishment and unduly harsh treatment while in pre-trial confinement. We have considered both prohibitions in assessing the appellant's claim.

from the context that the inquiry was intended to determine if there had been *any* Article 13, UCMJ violation. We find the appellant's explicit affirmation at trial that he was not subjected to treatment prohibited by Article 13 persuasive, and he has set forth no facts that would rationally explain why he would have made such a statement had it not been true. In making this assessment, we are mindful of the appellant's own legal training and background. By no means does the appellant's status as a lawyer reduce the legal protections afforded him. However, the record as a whole, including the evidence of his legal training, compellingly demonstrates that the appellant fully understood the import of the military judge's questions and his own responses when he personally, in addition to his trial defense counsel, told the military judge that no Article 13 violation had occurred. That in-court affirmation belies his current claim to the contrary. In the absence of known conditions that might constitute Article 13 violations, there was obviously no legitimate basis for trial defense counsel to seek Article 13 confinement credit.

Notwithstanding the above, one aspect of the post-trial affidavits submitted on this issue warrants brief additional discussion. The appellant asserts, and one trial defense counsel confirms, that the appellant was not allowed to wear his military uniform while confined in the county jail.[10] His trial defense counsel's affidavit states that he knew Air Force Instruction (AFI) 31-205, *The Air Force Corrections System* (7 Apr 2004) required that pre-trial confinees wear military uniforms. However, he did not pursue an Article 13 motion because the appellant was in the county jail and, in counsel's view, the county facility was not governed by Air Force uniform requirements.

By decision issued 3 May 2007, our superior court held that, under the version of AFI 31-205 then in effect,[11] members in pre-trial confinement at civilian facilities were subject to the same requirements as detainees in Air Force facilities. As a result, violation of those requirements could, under the right circumstances, entitle a member to Article 13 credit through operation of R.C.M. 305. *United States v. Adcock*, 65 M.J. 18, 25 (C.A.A.F. 2007). One of the violations found by the court in *Adcock* included clothing the member in prison garb instead of his military uniform. The same version of AFI 31-205 was in effect at the time of the appellant's trial. [12]

The *Adcock* decision does not render trial defense counsel's prior inconsistent analysis deficient. When assessing an ineffective assistance of counsel claim, we measure counsel's performance based on his perspective at the time, without the "distorting effects of hindsight." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). The

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[10] The appellant does not assert, nor does the record otherwise indicate, that he was co-mingled with convicted prisoners, only that he was forced to wear prison attire.

[11] Version dated 7 April 2004.

[12] Subsequent to the *Adcock* decision, AFI 31-205 was changed to make clear that pre-trial detainees housed in other than Air Force facilities are subject to the rules, regulations and clothing requirements of the non-AF facility. *See* Air Force Instruction 31-205, *The Air Force Corrections System* (7 Apr 2004), Change 1 (6 July 2007).

appellant was tried well in advance of *Adcock*. Trial defense counsel's conclusion that Air Force confinement guidance, and specifically guidance on uniform wear, did not govern members held in civilian facilities was reasonable based on the law in existence at that time. We also note that a key factor in the *Adcock* decision was that the confinement officials there had knowingly and deliberately violated the provisions of the governing Air Force instruction. The appellant has set forth no facts to suggest that is the case here.

2. Lack of Adequate Trial Preparation

The appellant asserts his trial defense counsel did not adequately prepare for his case, in that they did little until 2-3 weeks before trial and told him when he asked that they intended to "wing it". His trial defense counsel deny lack of adequate preparation.

The record negates this claim. There is no magic formula for determining how much time is needed to prepare for a criminal trial. A wide variety of factors, including things such as the experience and number of assigned counsel, nature and complexity of the charges, nature of the evidence, perceived defenses or lack thereof, and trial strategy all affect what must be done and how long it will take. The only true measure of whether trial preparation was adequate is the quality of counsel's performance at trial. We find nothing in the record to indicate less than professional representation.

As in other areas, we also find the appellant's responses during the *Care* inquiry telling. If the appellant's assertions were true, then he must have known about, and been dissatisfied with, his counsel's trial preparation efforts well in advance of trial. As a result, he had plenty of opportunity before and during the trial to say so. He did not, but in both his PTA offer and at trial affirmatively stated that he was well satisfied with his trial defense counsel's representation. He has set forth no facts that would rationally explain why he would have made such representations if his counsel had truly told him they were unprepared and were going to "wing it." *See Ginn*, 47 M.J. at 248.

3. Failure to Make a Speedy Trial Motion

Citing the Sixth Amendment, Article 10, UCMJ, and R.C.M. 707, the appellant asserts his trial defense counsel should have made a speedy trial motion.[13]

To establish prejudice under the second prong of *Strickland,* the appellant must demonstrate that he would have prevailed on his speedy trial issue had the desired motion been filed. *Tippit*, 65 M.J. at 77. We conclude the appellant would not have prevailed under any speedy trial theory. As a result, trial defense counsel's failure to make such a motion is of no consequence.

[13] The appellant does not assert that his counsel should have raised a Fifth Amendment due process speedy trial violation and the record does not support such a claim. *United States v. Lavasco*, 431 U.S. 783 (1977); *United States v. Reed,* 41 M.J. 449 (C.A.A.F. 1995).

R.C.M. 707(a) provides in part that a military accused must be brought to trial within 120 days after placement in pretrial confinement. *United States v. Anderson*, 50 M.J. 447, 448 (C.A.A.F. 1999). Thus, the appellant's speedy trial clock for R.C.M. 707 purposes started 25 March 2005. Although the appellant remained in pre-trial confinement for 173 days, not all of that time counts for R.C.M. 707 purposes. R.C.M. 707(c) provides that delays authorized by a military judge or the convening authority are excludable. When reviewing such delays, the focus is on whether a qualified authority approved the delay, not on which party is responsible for it. *United States v. Lazauskas*, 62 M.J. 39, 41 (C.A.A.F. 2005). As long as the length of the delay is reasonable and the approving official did not abuse his discretion, it is excluded from the 120-day speedy trial clock. *Id.* In this case, the military judge approved a delay from 11 July 2005 until 13 September 2005, a total of 64 days, to accommodate a defense delay request. That exclusion alone brought the accountable time well below the 120-day standard. The appellant has set forth no facts to indicate that the period of delay was unreasonable or that the judge abused his discretion by approving it. Having reached this conclusion, we need not consider an additional 21-day delay excluded by the convening authority, seven of which were also based on defense requested delay.

The record also does not support the appellant's claim to a Sixth Amendment speedy trial violation. Within the context of military courts-martial, Sixth Amendment speedy trial protections are triggered by preferral of charges. *United States v. Grom*, 21 M.J. 53 (C.M.A. 1985). Here, charges were preferred 5 May 2005. He was arraigned on 13 September 2005, 131 days later.

We measure Sixth Amendment speedy trial claims balancing the same *Barker v. Wingo* factors discussed above in connection with the appellant's post-trial delay claim. *Tippit,* 65 M.J. at 73. The first factor, length of delay, weighs in favor of the appellant. The third factor, assertion of a speedy trial right, is neutral. Although the appellant did not assert such a right until appeal, the crux of his current claim is that the fault lies with his ineffective counsel. Within the context of such an assertion, we will not count the failure to raise an earlier speedy trial claim against the appellant.

The second and fourth *Barker* factors, reasons for the delay and prejudice, both heavily weigh against the appellant and, on balance, carry the day. Defense delays in scheduling the Article 32, UCMJ investigation and the trial accounted for more than half of the time between preferral of charges and arraignment. Although the appellant speculates that such delays were largely due to lack of adequate defense counsel manning, and therefore should not be attributable to him, we find nothing in the record to support such speculation. On the contrary, we note the appellant was assigned two military trial defense counsel, an unlikely circumstance if the trial defense offices were truly understaffed.

We assess prejudice by considering the interests speedy trial rights seek to protect, namely: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Mizgala*, 61 M.J. at 129. The appellant spent 173 days in pre-trial confinement (131 after preferral) and as a result undoubtedly suffered some anxiety and concern. However, despite his current assertions to the contrary, there is no evidence in the record to indicate the conditions of that confinement were oppressively harsh. Indeed, the appellant's affirmative denial of any Article 13, UCMJ violation at trial repudiates such a claim. Further, the appellant has set forth no facts to indicate that the case processing time prejudiced his defense, either on the merits or sentencing. Balancing all of these factors, we find that any prejudice was at best minimal. *Id.*

We also find no Article 10 violation. Article 10, UCMJ requires that the government proceed with "reasonable diligence" in bringing a defendant to trial. *Mizgala*, 61 M.J. at 127. Recognizing that Article 10 imposes a more stringent speedy trial standard than the Sixth Amendment, the *Barker* factors provide an appropriate framework for assessing such claims. *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007); *Mizgala*, 61 M.J. at 125. Having considered those factors, including the extensive defense delays and lack of significant prejudice, we find no evidence that the government failed to exercise reasonable diligence in bringing the appellant to trial. On the contrary, given the severity of the charges, the government moved with remarkable alacrity. The appellant was arrested and placed in pre-trial confinement on 25 March 2005, charges were preferred on 5 May, and the government, notwithstanding defense delays in the Article 32 investigation, was ready for trial on 6 July 2005.

4. Failure to Consult and Inform

The appellant asserts his trial defense counsel failed to let him meaningfully participate in his own defense and failed to give him the information necessary to make an educated plea decision. The appellant's responses during the *Care* inquiry belie both assertions. When asked by the military judge if he needed more time to discuss the evidence with his counsel, the appellant said no, explaining that he had seen all of the exhibits through discovery and the Article 32 proceeding and was satisfied. Similarly, the military judge at one point noticed the appellant was reading some responses from a document, and asked who had prepared it. The appellant indicated that *he* had, along with his counsel. The appellant's response to a later question concerning the elements of the premeditated murder offense is particularly telling. When asked if he had discussed the elements with his counsel, he replied that he had, and then elaborated as follows:

> Appellant: Your honor, we discussed this at great and painful length. My biggest hang-up wasn't the way the UCMJ worded some of that, but in the

way that we referenced cases and looked at what was meant by the wording, I'm admitting to that.

MJ: So, you're satisfied then, after all that discussion and apparently soul-searching on this and your own research, that your acts amounted to more than mere preparation.

Appellant: Yes your honor . . . .

These exchanges, taken together with the appellant's responses throughout what was a very thorough *Care* inquiry, make crystal clear he had ample consultations with his attorneys, actively participated in his own defense, and by time of trial fully understood the elements of each offense to which he pled guilty. We also again note the appellant's affirmation, both in the PTA and at trial, of satisfaction with his counsel's representation. He has again set forth no facts which would rationally explain why he would have made such representations at trial if he truly had not had the opportunity to engage in full and effective discussions with his trial defense counsel. *Ginn*, 47 M.J. at 248.

5. *Interview and Cross-Examination of Witnesses*

The appellant asserts his counsel failed to timely interview witnesses and failed to effectively cross-examination government witnesses at trial. We find no deficiency.

The appellant avers, and the affidavits of his trial defense counsel confirm, that counsel did not interview three government sentencing witnesses, including the victim and the victim's mother and sister, until two days before trial. As with other aspects of trial preparation, there is no preordained schedule for interviewing witnesses. Such matters are left to the professional judgment of counsel, based on the circumstances of the case at hand. Here, the witnesses at issue were to provide victim impact testimony and none lived locally. The affidavit of the appellant's lead trial defense counsel indicates that because of the emotional nature of the witnesses' testimony, they wanted to interview them in person rather than over the telephone. For that reason, they waited until the witnesses arrived, which was a few days prior to trial. The decision was a reasonable one which we will not now second-guess. *See Perez*, 64 M.J. at 243. Nor do we perceive any prejudice to the appellant arising from the timing of the interviews.

The government called five sentencing witnesses. The defense conducted limited cross-examination of two of the witnesses, and no examination of the others. The trial defense counsel affidavits indicate that limiting cross-examination was a tactical decision designed to preclude opening the door to negative information concerning the appellant's past behavior and to limit the appellant's exposure by getting very sympathetic witnesses off the stand as quickly as possible. This too was a reasonable tactical decision, born out by the testimony at trial, which we do not in hind-sight fault. *Id.*

6. *Clarification of Mandatory Minimum Sentence*

The appellant asserts that his trial defense counsel improperly failed to seek clarification from the judge in advance of trial as to whether he was subject to a mandatory minimum sentence of life imprisonment, which may have affected his decision to plead guilty. The appellant's trial defense counsel aver that while they recognized that an argument could have been made for application of a mandatory minimum sentence, they did not believe it applied. Since the prosecution had not raised the issue prior to trial, they intentionally opted not to raise it either. This again was a sound tactical decision, and one that ultimately worked to the appellant's advantage, for when the prosecution belatedly raised the issue during an R.C.M. 802 session at trial the defense successfully opposed application of a mandatory minimum sentence. Further, as more fully discussed above, it is clear from the record that the existence or non-existence of a mandatory minimum sentence was not a significant factor in the appellant's decision to plead guilty. Given this factor, and the favorable ruling of the military judge, he cannot in any event have been prejudiced by counsel's decision not to raise the matter.

7. *Sequestration of Prospective Panel Members*

The appellant asserts that given widespread media coverage of his offenses, his counsel should have asked the military judge to sequester prospective panel members. The argument fails on two counts. First, it is purely speculative. There is no evidence that any prospective panel member actually saw or was influenced by media accounts of the appellant's offenses. Second, the appellant elected trial by military judge alone. There were no panel members. Whether or not prospective panel members were biased by media coverage of the appellant's offenses is therefore of no consequence.

Remaining Issues

We have considered the appellant's other assignments of error, along with all of the additional matters personally raised by the appellant in his *Grostefon* submissions, and find them to be without merit. None warrant separate written analysis. *United States v. Matias,* 25 M.J. 356, 363 (C.M.A. 1987).

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.

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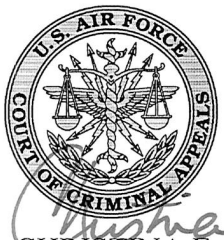

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