UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic STEVEN A. DANYLO II
United States Air Force

ACM 37916

17 April 2013

Sentence adjudged 31 March 2011 by GCM convened at Sheppard Air Force Base, Texas. Military Judge: Matthew D. Van Dalen (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 10 months.

Appellate Counsel for the Appellant: Major Anthony D. Ortiz and Captain Travis K. Ausland.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Nurit Anderson; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and MARKSTEINER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ORR, Senior Judge:

Consistent with his conditional pleas, a military judge sitting as a general court-martial found the appellant guilty of one specification each of wrongful use of marijuana and cocaine, both on divers occasions, one specification each of wrongful distribution of marijuana and cocaine, both on divers occasions, and one specification of wrongful introduction of marijuana onto a military installation, all in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, and one specification of assault consummated by a

battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928. The approved sentence consists of a bad-conduct discharge and confinement for 10 months.[1]

Background

The general court-martial of Airman Basic Danylo began on 10 August 2010 at Sheppard Air Force Base (AFB), Texas. After arraignment, the appellant's trial defense counsel made a motion to dismiss the charges and specifications, claiming a denial of his right to a speedy trial under Article 10, UCMJ, 10 U.S.C. § 810, a violation of Rule for Courts-Marital (R.C.M.) 707, and a violation of the Sixth Amendment of the Constitution of the United States. The military judge granted the motion with respect to Article 10, UCMJ, and R.C.M. 707, and dismissed the charges and specifications with prejudice. The military judge also dismissed the charges and specifications without prejudice because he found that the Government violated R.C.M. 707.

The Government brought a timely appeal of the military judge's rulings to this Court under Article 62, UCMJ, 10 U.S.C. § 862. On 20 January 2011, we heard oral argument and rendered a decision granting the appeal on 9 March 2011.[2] *United States v Danylo*, Misc. Dkt. No. 2010-15, (A.F. Ct. Crim. App. 9 March 2011), *pet. denied*,70 M.J. 217, No. 11-6006/AF (C.A.A.F. 2011) (mem.).

The appellant's trial resumed on 31 March 2011. Before entering pleas, the appellant's defense counsel filed a second motion to dismiss for the denial of speedy trial based upon the entire length of time it had taken for the case to get to trial. After the military judge denied the motion, the appellant pled guilty to five of the six drug abuse specifications and the specification of an assault consummated by a battery on the condition that he could preserve the issues of the denial of his two speedy trial motions for appellate review. The Government consented to the conditions of the appellant's guilty plea.

Speedy Trial Analysis

The appellant raises two issues on appeal: (1) Whether the military judge erred when he only considered the period of time of appellant's Article 62, UCMJ, appeal for the purpose of his speedy trial motion; and (2) Whether the appellant was denied his Sixth Amendment right to a speedy trial when his court-martial occurred 350 days after he was placed in pretrial confinement. Finding no error prejudicial to the substantial rights of the appellant, we affirm. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

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[1]In a pre-trial agreement, the convening authority agreed not to approve any adjudged confinement in excess of 350 days.

[2] The appellant's petition for grant of review of the Article 62, UCMJ, 10 U.S.C. § 862, decision was denied without prejudice by the Court of Appeals for the Armed Forces on 20 June 2011. *United States v. Danylo*, 70 M.J. 216, 217 (C.A.A.F. 2012) (mem.).

Whether an accused has received a speedy trial is a question of law that is reviewed de novo. *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999). "The military judge's findings of fact are given 'substantial deference and will be reversed only for clear error.'" *Id.* at 465 (citing *United States v. Edmond*, 41 M.J. 419, 420 (C.A.A.F. 1995) (quoting *United States v. Taylor*, 487 U.S. 326, 337 (1988)), *vacated on other grounds by* 516 U.S. 802 (1995) (mem.)). In reviewing claims of a denial of a speedy trial under Article 10, UCMJ, constant motion is not demanded, rather the Government must use "reasonable diligence in bringing the charges to trial." *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005) (quoting *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.A.A.F. 1965)). Brief inactivity in an otherwise active prosecution is not unreasonable or oppressive. *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993) (quoting *Tibbs*, 35 C.M.R. at 325).

Based upon the appellant's assignments of error, we took a second look at the Government's processing of this case prior to 10 August 2010 to determine whether the appellant's rights to a speedy trial were violated. After doing so, we still find they were not. The Government took the immediate steps required by Article 10, UCMJ. The requirement that "immediate steps shall be taken" does not mean the Government must bring court-martial charges against a member being held in pretrial confinement before collecting the evidence to conduct a successful prosecution. Nor does it mean that investigators and prosecutors must busy themselves with case preparation while they are waiting for the evidence necessary to understand the case. "Brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive." *Tibbs*, 35 C.M.R. at 325 (citation omitted).

The appellant contends that it was error for the military judge to focus only upon the delays that occurred after the Article 62, UCMJ, appeal in his 31 March 2011 ruling denying his speedy trial motion. We disagree.

We examined the military judge's findings of fact and they are not clearly erroneous. His findings encompass a time frame beginning with the appellant's submission of a urine sample on 12 March 2010 through this Court's ruling on 9 March 2011. He then gave two reasons why he focused upon the delays after the Article 62, UCMJ, appeal. First, he considered the time period preceding the Article 62, UCMJ, appeal as moot because this Court had previously determined that the Government's actions were reasonable. Next, he determined that the time period from bringing the case to trial to the Article 62, UCMJ, appeal should not be attributable to the Air Force Court of Criminal Appeals because it did not have control over the proceedings. Although the military judge focused his written ruling during the time period up to the appeal, it is clear that he considered the entire period of the appellant's pretrial confinement. He balanced the four factors enunciated by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972), and found no Article 10, UCMJ, violation.

While we understand that the appellant would have preferred a faster ruling on the Government's Article 62, UCMJ, appeal, the military judge properly excluded the time when he denied the appellant's motion to dismiss. Article 62(c), UCMJ, states: "Any period of delay resulting from an appeal under this section shall be excluded in deciding any issue regarding denial of a speedy trial unless an appropriate authority determines that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit." Although this provision appears to preclude any further speedy trial analysis, the military judge determined that it did not. He stated "Article 62(c), UCMJ, appears to preclude an analysis for a speedy trial violation under RCM 707 and Article 10, but a ruling regarding a violation under the Fifth and Sixth Amendments of the Constitution may nonetheless be performed under a similar analysis." After conducting this analysis, he properly found no Constitutional violation.

In his second assignment of error, the appellant asserts that he was denied his Sixth Amendment right to a speedy trial because his court-martial reconvened 350 days after he was placed in pretrial confinement. We disagree. In our previous ruling, we found that there was no speedy trial violation in this case under Article 10, UCMJ, R.C.M. 707, or under the Sixth Amendment of the Constitution of the United States prior to the appellant's arraignment on 10 August 2010. After receiving this Court's ruling on 9 March 2011, the Government was ready to proceed to trial on 21 March 2011, but the military judge approved a defense request to schedule the trial at a later date. As a result, the court-martial reconvened on 31 March 2011.

We conducted an analysis of the entire 350 days the appellant was in pretrial confinement, as required by *Barker v. Wingo*. Those factors are: "(1) the length of the delay; (2) the reasons for the delay; (3) whether the appell[ee] made a demand for a speedy trial; and (4) prejudice to the appell[ee]." *Mizgala*, 61 M.J. at 129 (citing *Barker*, 407 U.S. at 530). The Supreme Court pointed out that the four factors are related and must be considered together with other relevant circumstances in the "difficult and sensitive balancing process." *Barker*, 407 U.S. at 533.

Clearly, the first and third factors weigh against the Government. Both parties have equally compelling arguments to support the second factor. In completing our balancing test, we turn to the issue of prejudice to the appellant as a result of the delay. The Supreme Court has identified the following appellant's interests which must be considered when testing for prejudice in the speedy trial context:

> (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.

Barker, 407 U.S. at 532 (footnote omitted), *as quoted in Mizgala*, 61 M.J. at 129.

During the trial, the appellant's defense counsel argued that the appellant suffered some anxiety while in pretrial confinement without some definite time line, but "I can't say that the defense on the merits has been particularly impacted." As a result, we find there was no loss of evidence or impact on case preparation to the defense as a result of the pretrial delay. Additionally, we find that the appellant suffered no obvious prejudice aside from his anxiety awaiting trial while confined. The appellant entered into two separate pretrial agreements and had a reasonable idea that his confinement would not exceed 14 months. While we recognize that his incarceration caused him to miss significant family events, missing family or other social obligations is a common occurrence for military servicemembers. We also note that some of the appellant's anxiety can be attributed to his own misconduct while in pretrial confinement. In sum, we find that any prejudice caused by the pretrial delay did not skew the fairness of his trial.

After reviewing the record before us and considering the nature and scope of the appellant's pretrial confinement over a period of 350 days, we hold there was no speedy trial violation in this case under Article 10, UCMJ, R.C.M. 707, or under the Fifth or Sixth Amendments of the Constitution of the United States.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred.[3] Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[3] We note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).