UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class NATHANIEL N.F. DASILVA
United States Air Force

ACM 37366

22 March 2010

Sentence adjudged 23 July 2008 by GCM convened at Kadena Air Base, Japan. Military Judge: Mark Allred.

Approved sentence: Dishonorable discharge, confinement for 36 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Jennifer J. Raab, and Captain Nicholas W. McCue.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Lieutenant Colonel Nurit Anderson, Captain Joseph Kubler, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

PER CURIAM:

In accordance with the appellant's pleas, a military judge convicted the appellant of one specification of disobeying the order of a superior commissioned officer, four specifications of willful dereliction of duty, four specifications of aggravated sexual assault of a child who had attained the age of 12 years but who had not attained the age of 16 years, and one specification of sodomy with a child who had attained the age of 12 years but was under the age of 16 years, in violation of Articles 90, 92, 120, and 125,

UCMJ, 10 U.S.C. §§ 890, 892, 920, 925.[1] A panel of officer members sitting as a general court-martial sentenced the appellant to a dishonorable discharge, eight years of confinement, total forfeiture of pay and allowances, and reduction to the grade of E-1.

The convening authority approved the dishonorable discharge, 36 months of confinement, total forfeiture of pay and allowances, and reduction to the grade of E-1. On appeal, the appellant asks this Court to dismiss the charges and specifications with prejudice. As the basis for his request, he opines that the military judge erred by denying the appellant's motion to dismiss the charges for denial of his Article 10, UCMJ, 10 U.S.C. § 810, speedy trial rights. Finding no prejudicial error, we affirm the findings and the sentence.

Background

In January 2008 and again in early February 2008, the appellant invited GN, a 16-year-old girl, and SC, a 15-year-old girl, to his on-base dormitory room and while they were there he offered them alcoholic beverages. On 8 February 2008, the appellant invited RN and VL, two 14-year-old girls, to his on-base dormitory room and while they were there he offered them alcoholic beverages, engaged in sexual intercourse with them, inserted his fingers into their vaginas and anuses, and performed cunnilingus on VL. The next day, the brother of the appellant's girlfriend saw the appellant at an on-base establishment with RN and reported the appellant to RN's mother. The incident was eventually reported to the Air Force Office of Special Investigations (AFOSI).

On 13 February 2008, AFOSI agents summoned the appellant to their office for an interview. After a proper rights advisement, the appellant waived his rights, agreed to answer questions, and confessed to the aforementioned acts. That same day, Major KG, the appellant's commander, issued to the appellant a "no contact" order prohibiting him from having contact with any person on Okinawa, Japan less than 18 years of age. Over the course of several days, the appellant violated his commander's "no contact" order by sending telephone text messages to RN, VL, GN, and SC.

On 27 February 2008, AFOSI agents summoned the appellant to their office for another interview. After a proper rights advisement, the appellant waived his rights, agreed to answer questions, and confessed to violating his commander's "no contact" order. That same day the appellant's commander placed him into pretrial confinement. Two days later the 48-hour probable cause review and the commander's 72-hour review were completed and the decision was made to continue the appellant in pretrial confinement. On 6 March 2008, the appellant's pretrial confinement hearing was held and a decision was made to continue the appellant in pretrial confinement. On 18 March

[1] The appellant and the convening authority entered into a pretrial agreement wherein the appellant agreed, inter alia, to plead guilty to the charges and specifications in return for the convening authority's promise not to approve confinement in excess of 36 months.

2008, the base legal office forwarded the draft charges to its numbered Air Force legal office for review and coordination. Over the next ten days, the trial counsel interviewed various witnesses.

On 11 April 2008, the appellant submitted an offer for a pretrial agreement (PTA). Approximately six days later the convening authority rejected the PTA offer. On 28 April 2008, charges were preferred against the appellant. On 7 May 2008, an Article 32, UCMJ, 10 U.S.C. § 832, investigation was held and approximately nine days later the Article 32, UCMJ, investigating officer recommended referring the charges to a general court-martial. On 18 June 2008, after the referral package was coordinated with the numbered Air Force legal office, the general court-martial convening authority referred the charges against the appellant to a general court-martial. On 24 June 2008, the appellant was arraigned and the trial was continued until 21 July 2008. At trial, the appellant moved to dismiss the charges for denial of his Article 10, UCMJ, speedy trial rights. After hearing argument of counsel, the military judge denied the appellant's motion. In so doing, the military judge made extensive findings of fact and conclusions of law.

Discussion

We review speedy trial issues de novo. *United States v. Cooper*, 58 M.J. 54, 57 (C.A.A.F. 2003); *United States v. Proctor*, 58 M.J. 792, 794 (A.F. Ct. Crim. App. 2003). While doing so, we give substantial deference to the trial judge's findings of fact and will not overturn them unless they are clearly erroneous. *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005); *Proctor*, 58 M.J. at 795.

Article 10, UCMJ, is triggered when a service member is placed under pretrial arrest or in pretrial confinement. From that point, the government is required to take "immediate steps" to either "try him or to dismiss the charges and release him." Article 10, UCMJ. "The test for compliance with the requirements of Article 10[, UCMJ,] is whether the government has acted with 'reasonable diligence.'" *Proctor*, 58 M.J. at 798 (quoting *United States v. Birge*, 52 M.J. 209, 211 (C.A.A.F. 1999); *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993)). Our superior court has often said that it does "not demand 'constant motion [from the government], but reasonable diligence in bringing the charges to trial.'" *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F 2007) (quoting *Mizgala*, 61 M.J. at 127 (quoting *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965))). "Brief inactivity is not fatal to an otherwise active, diligent prosecution." *Id.* (citing *Tibbs*, 35 C.M.R. at 325).

While Article 10, UCMJ, provides greater rights than does the Speedy Trial Clause of the Sixth Amendment,[2] the four-part test enunciated in *Barker v. Wingo*, 407

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

U.S. 514 (1972), is a proper analytical tool for deciding Article 10, UCMJ, issues. *Cossio*, 64 M.J. at 256 (citing *Mizgala*, 61 M.J. at 127). In applying this four-part test, we consider: (1) the length of the delay in bringing the appellant to trial; (2) the reasons for the delay; (3) whether the appellant asserted his right to a speedy trial prior to trial; and (4) the extent of any prejudice to the appellant. *Barker*, 407 U.S. at 530; *see also Cossio*, 64 M.J. at 256; *United States v. Becker*, 53 M.J. 229, 233 (C.A.A.F. 2000).

In the case at hand, it took the prosecution a total of 118 days from the date the appellant was placed in pretrial confinement to bring him to trial.[3] While a delay of 118 days is sufficient to trigger an Article 10, UCMJ, inquiry, we find that the appellant was not denied his speedy trial rights under Article 10, UCMJ, even though the appellant asserted his speedy trial rights prior to trial. Of key importance to the military judge, as reflected in his findings and conclusions—findings and conclusions which are correct, clearly supported by the record, and adopted by this Court—are the government's reasons for the delay and the lack of prejudice to the appellant.

With respect to the government's reasons for the delay, we agree with the military judge that given the complexity of the case and the requirement to coordinate all actions with the numbered Air Force legal office, the government's reason for the delay is reasonable. Concerning prejudice, the delay did not affect the appellant's ability to prepare and present his case. It is clear that the government took immediate steps to inform the appellant of the charges against him, and thereafter exercised reasonable diligence in accomplishing those tasks necessary to try him. In short, the military judge did not err in denying the appellant's motion to dismiss.

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).

[3] For speedy trial purposes, "[a]n accused is brought to trial at arraignment, when he is 'called upon to plead.'" *United States v. Bray*, 52 M.J. 659, 661 (A.F. Ct. Crim. App. 2000) (quoting *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999)).

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court