UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ALPHONSO K. DIXON
United States Air Force

ACM S32061

04 September 2013

Sentence adjudged 2 April 2012 by SPCM convened at Peterson Air Force Base, Colorado. Military Judge: Scott E. Harding (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 165 days, forfeitures of $994.00 pay per month for 5 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Christopher D. James.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; and Mr. Gerald R. Bruce, Esquire.

Before

HARNEY, SOYBEL and MITCHELL
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MITCHELL, Judge:

A military judge sitting as a special court-martial convicted the appellant, in accordance with his pleas, of two specifications of being absent without leave and one specification each of wrongful use of marijuana and cocaine on divers occasions in violation of Articles 86 and 112a, UCMJ, 10 U.S.C. §§ 886, 912a. The adjudged and approved sentence consisted of a bad-conduct discharge, confinement for 165 days, forfeiture of $994 pay per month for 5 months, and reduction to the grade of E-1.

On appeal, the appellant asserts that the military judge erred when he found that the 117 days the appellant spent in pretrial confinement did not violate his right to speedy

trial under Article 10, UCMJ, 10 U.S.C. § 810. We agree with the military judge and affirm the findings and sentence below.

Background

On 5 October 2011, the appellant failed to show at his squadron at the normal duty time of 0715. Supervisors from his squadron found him at an off-base residence which had an overwhelming marijuana miasma. Based on probable cause, a urine sample was obtained that day. On 27 October 2011, the urinalysis result returned positive for both marijuana and cocaine. That same day a second urine sample was obtained which would later return positive for marijuana and cocaine.

On 9 November 2011, the appellant informed his supervisor that he would be late reporting to work as he was at the Denver airport and his car had been towed. The appellant did not return to his unit on Peterson Air Force Base (AFB), Colorado until a month later on 9 December 2011. When he returned, the appellant smelled of marijuana. He consented to provide another urine sample and remarked, "This will probably come back positive." He was correct and the sample returned positive for marijuana.

The appellant was ordered into pretrial confinement on 9 December 2011 and remained there until his trial on 3 April 2012. He was in pretrial confinement for 117 days.

Article 10 Speedy Trial

At trial, the appellant filed a Motion to Dismiss the charges and specifications for a violation of Article 10, UCMJ.[1] The military judge considered the evidence presented by both trial and defense counsel. After making findings of fact, the military judge denied the defense motion.

"Article 10, UCMJ, ensures a servicemember's right to a speedy trial by providing that upon 'arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.'" *United States v. Cossio*, 64 M.J. 254, 255 (C.A.A.F. 2007) (citing Article 10, UCMJ). Violation of an appellant's speedy trial rights under Article 10, UCMJ, is a question of law which we review de novo; however, we are bound by the facts found by the military judge unless they are clearly erroneous. *Id*. at 256; *United States v. Wilson*, 72 M.J. 347, 350 (C.A.A.F. 2013).

[1] The appellant pled guilty pursuant to a pretrial agreement (PTA). One of the provisions of the PTA required the appellant "to waive all motions." Both trial counsel and the trial defense counsel agreed that this provision did not apply to the Motion to Dismiss for violation of Article 10, UCMJ.

Findings of Fact

The military judge's findings of fact were not clearly erroneous. The appellant was ordered into pretrial confinement on 9 December 2011. A pretrial confinement hearing was held on 12 December. The pretrial confinement review officer finalized a written report on 14 December, which recommended continued pretrial confinement for the appellant.

On Friday, 6 January 2012, the Government received notification of the positive result of the urine sample obtained from the appellant on 9 December 2011. On Tuesday, 10 January 2012, trial counsel requested the urine sample bottle and complete drug testing report from the Air Force Drug Testing Laboratory (AFDTL). These items were received at Peterson AFB on 30 January 2012.

Charges were preferred on 18 January 2012 with a recommendation that the charges be referred to a general court-martial (GCM). On 23 January 2012, an investigation in accordance with Article 32, UCMJ, 10 U.S.C. § 832, was held. On 30 January 2012, the Article 32 Report was completed and recommended trial by GCM.

On 28 January 2012, trial defense counsel made a speedy trial demand to the prosecution. On 7 February 2012, the prosecution contacted AFDTL to arrange for an expert witness. The next available date for an expert was 3 April 2012. On 9 February 2012, the General Court-Martial Convening Authority decided to not refer the charges to a GCM and returned them to the Special Court-Martial Convening Authority (SPCMCA). The SPCMCA referred the charges and specifications to a special court-martial on 14 February 2012. Those charges were served on the appellant the next day.

On 16 February 2012, a docketing conference was held; trial defense counsel indicated his next available date was 27 February 2012. Trial counsel explained that due to the availability of an expert, the earliest they would be ready for trial was 3 April 2012. The trial was docketed for 3 April 2012.

The record of trial also contains the following information: The appellant experienced "some anxiety and stress" due to the pretrial confinement. However, there was no evidence that his preparation for trial, defense evidence, trial strategy, or ability to present witnesses was compromised. Trial defense counsel requested the appointment of an expert consultant in forensic toxicology on 26 January 2012. The convening authority approved the request on 29 February 2012. By 23 March 2012, the appellant had consulted with his appointed expert and as part of the pretrial agreement offered to waive any future funding of that expert. [2]

[2] Presumably, as trial defense counsel stated his case ready date was two days prior to the appointment of the expert consultant, he was prepared to litigate the case without the benefit of expert assistance.

Article 10 Analysis

The right to a speedy trial is a fundamental constitutional right under Article 10, UCMJ, imposing on the military prosecution a more stringent standard than that required by the Sixth Amendment.[3] *Wilson*, 72 M.J. at 350-51; *United States v. Kossman*, 38 M.J. 258, 259 (C.M.A. 1993).

"The standard of diligence under which we review claims of a denial of speedy trial under Article 10[, UCMJ,] 'is not constant motion, but reasonable diligence in bringing the charges to trial.'" *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005) (citing *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965)). "Short periods of inactivity are not fatal to an otherwise active prosecution." *Id*. "Our framework to determine whether the Government proceeded with reasonable diligence includes balancing the following four factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant." *Wilson*, 72 M.J. at 351 (citing *Mizgala*, 61 M.J. at 129; *Barker v Wingo*, 407 U.S. 514, 530 (1972) (alterations and internal quotations omitted)). The first factor is to some extent a triggering mechanism. *Barker*, 407 U.S. at 530. *See also Cossio*, 64 M.J. at 258.

We find when a speedy trial request was in fact made by the appellant that 117 days of continuous pretrial confinement is sufficient to trigger the full *Barker* analysis and therefore analyze the remaining two factors. There is only one period of significant inactivity which warrants special focus: the time from the appellant's putative trial ready date of 27 February 2012 to the Government's case ready date of 3 April 2012. This short delay due to the unavailability of a forensic toxicologist from AFDTL was reasonable. *See Cosio*, 64 M.J. at 257. Although the appellant argues the Government could have sought out the services of an independent forensic toxicologist, given the issues of testimonial hearsay[4] it is reasonable for the Government to wait for an expert from the facility that performed the drug tests as long as the delay is not excessive. To evaluate the prejudice factor, our superior court explained, "we are concerned not with the normal anxiety and concern experienced by an individual in pretrial confinement, but rather with some degree of particularized anxiety and concern greater than [that]." *Wilson*, 72 M.J. at 354. The military judge found that the appellant experienced only that normal level of anxiety incident to confinement. We agree and find there was no prejudice.

We weigh all the factors collectively before deciding whether an appellant's right to a speedy trial has been violated. *Id*. Based on the findings of fact and after our de

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

[4] *See United States v. Tearman*, 72 M.J. 54 (C.A.A.F. 2013); *United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011); *United States v. Blazier*, 69 M.J. 218 (C.A.A.F. 2010).

novo review of the Article 10, UCMJ, factors, we conclude that the appellant's right to a speedy trial was not violated.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and the sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court