UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic BRADLY S. EARLS
United States Air Force

ACM 34840

24 March 2003

Sentence adjudged 24 August 2001 by GCM convened at Sheppard Air Force Base, Texas. Military Judge: Steven B. Thompson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 9 months, and forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Colonel Beverly B. Knott and Major Jeffrey A. Vires.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Major Jennifer R. Rider, and Major Thomas Taylor.

Before

BURD, EDWARDS, and ORR, W.E.
Appellate Military Judges

OPINION OF THE COURT

EDWARDS, Judge:

The appellant was convicted, pursuant to his pleas, of two specifications of absence without leave, in violation of Article 86, UCMJ, 10 U.S.C. § 886 and ten specifications of dishonorable failure to maintain sufficient funds in his checking account to cover checks written, in violation of Article 134, UCMJ, 10 U.S.C. § 934. He was also convicted, contrary to his plea, of one specification of absence without leave in violation of Art. 86, UCMJ. Finally, the appellant was charged with one specification of making and uttering worthless checks with intent to defraud on divers occasions, in violation of Article 123a, UCMJ, 10 U.S.C. § 923a. He pled guilty to the lesser-included offense of "uttering" worthless checks, in violation of Art. 134, UCMJ. The government attempted to prove the greater offense under Art. 123a, UCMJ, but the military judge found the

appellant guilty of the lesser-included offense of "making and uttering" worthless checks, in violation of Art. 134, UCMJ. The adjudged and approved sentence was a bad-conduct discharge, confinement for 9 months, and forfeiture of all pay and allowances.

The appellant argues that he was denied his right to a speedy trial guaranteed by the Sixth Amendment to the United States Constitution, Article 10, UCMJ, 10 U.S.C. § 810, and Rule for Courts-Martial (R.C.M.) 707. We find no error and affirm.

Background

The parties stipulated to the significant dates involved in the appellant's case. On 20 April 2001, the appellant was placed into pretrial confinement after his return from an alleged absence without leave that began on 26 March 2001 and ended on 20 April 2001. On 24 April 2001, a pretrial confinement hearing was conducted pursuant to R.C.M. 305. The appellant was ordered to remain in pretrial confinement until his trial that began on 23 August 2001.

On 13 May 2001, the appellant made a demand for speedy trial. Charges were preferred on 22 June 2001 and an investigation officer was appointed on 3 July 2001 in accordance with Article 32, UCMJ, 10 U.S.C. § 832. The original charges were withdrawn, and on 18 July 2001, new charges were preferred. On 19 July 2001, the Art. 32, UCMJ, hearing was conducted and the appellant again made a demand for speedy trial. Charges were referred to trial on 9 August 2001 and trial was held on 23 August 2001. The military judge excluded the time from 15 – 23 August 2001 for speedy trial purposes due to defense counsel unavailability.

The military judge made findings of fact on the record that "[f]rom the date of the pretrial hearing on 24 April 2001, to the preferral of charges on 22 June 2001, the government was engaged in gathering evidence, drafting charges, and other pretrial preparation." The judge then concluded that "[t]aking 58 days to prepare the case does not on its face seem to be the model of efficiency, but it is not unreasonable or negligent under the circumstances." The judge further found that during the period between the appellant's placement in pretrial confinement and preferral of charges, the government worked on 14 other courts-martial and was reasonably diligent in preparing the preferral of the appellant's charges. The judge also found that the delay in the actual Art. 32, UCMJ, hearing was "based in part on the schedule of the defense counsel." It was also based in part on the addition of recently discovered evidence that led to new charges against the appellant. In conclusion, the judge held that "the government kept this case moving forward at a somewhat slow, but overall reasonable, pace. None of the time periods referred to by the accused, either alone or taken together, amounts to complete inactivity by the government that warrants dismissal." We concur.

Analysis

The right of a military member to receive a speedy trial arises from several sources. First, R.C.M. 707 requires that a military member must be brought to trial within 120 days of imposition of pretrial restraint. The appellant mentions the speedy trial provisions of Rule R.C.M. 707 in the opening paragraph of his appellate brief, but does not discuss it further. The appellant was in pretrial confinement for 125 days. Eight of those days were properly excluded by the military judge. Therefore, there were 117 days of accountability under R.C.M. 707 – within the 120 days provided for in R.C.M. 707. We hold there was no R.C.M. 707 violation. Second, Art. 10, UCMJ, requires that, if a military member is in arrest or confinement, immediate steps must be taken to try the individual, or dismiss the charges and release him from confinement. In addition, the Sixth Amendment also applies to military members, giving them the right to "a speedy and public trial". *United States v. Birge,* 52 M.J. 209, 211 (1999). Having held that no R.C.M. 707 violation occurred, we will now focus on the other two sources of speedy trial that the accused alleges have been violated.

Whether an accused received a speedy trial is a legal question that we review de novo. *United States v. Cooper*, 58 M.J. 54 (2003). We give the trial judge's findings of fact substantial deference and will reverse them only for clear error. *United States v. Taylor*, 487 U.S. 326, 337 (1988); *United States v. Edmond*, 41 M.J. 419, 420 (1995), *aff'd on other grounds*, 520 U.S. 651 (1997). The decision of whether to grant a delay is reviewed for an abuse of discretion. *United States v. Hatfield*, 44 M.J. 22, 23 (1996).

We must first determine whether there are any speedy trial issues to consider since an unconditional guilty plea waives our consideration of any speedy trial issues under R.C.M. 707, Art. 10, UCMJ, and the Sixth Amendment. *United States v. Benavides*, 57 M.J. 550, 554 (A.F. Ct. Crim. App. 2002), *pet. denied*, 57 M.J. 477 (2002). In this case, with the exception of Specification 3 of Charge I, the appellant was found guilty of all specifications and charges in accordance with his pleas.[1] Therefore, the speedy trial issue discussed herein relates only to Specification 3 of Charge I.

Given that we have decided that there is no R.C.M 707 violation, we will look at Art. 10, UCMJ, and the Sixth Amendment. Art. 10, UCMJ, provides, in pertinent part, "When any person subject to this chapter is placed in 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." "The test for assessing an alleged violation of Article 10 is whether the Government has acted with 'reasonable diligence' in proceeding to trial." *Birge*, 52 M.J. at 211 (citing *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993)). Our superior court has held that even though there may be no Sixth Amendment speedy trial violation in a particular case, that does not

[1] The appellant plead not guilty and was found not guilty of Specification 2 of Charge I.

resolve the Art. 10, UCMJ, issues. *Id.* at 211-12. In addition, while Art. 10, UCMJ, is more stringent than the Sixth Amendment, it is appropriate "to consider the *Barker v. Wingo* factors--in the context of Article 10's 'immediate steps' language and 'reasonable diligence' standards--in determining whether a particular set of circumstances violates a servicemember's speedy trial rights under Article 10." *Id.* at 212 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). The *Barker v. Wingo* factors are: "[l]ength of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo*, 407 U.S. at 530. In considering whether a member's speedy trial rights have been violated, the Court of Military Appeals noted in *Kossman* that

> Undoubtedly, military judges are far more sensitive than are we to the realities of military practice. Some cases are obviously more convoluted than others and necessarily take longer to process. In addition, the logistical challenges of a world-wide system that is constantly expanding, contracting, or moving can at times be daunting. Often operational necessities add a further layer of complexity unimagined by the civilian bar. Even ordinary judicial impediments, such as crowded dockets, unavailability of judges, and attorney caseloads, must be realistically balanced.

Kossman, 38 M.J. at 261-62.

Applying these factors to this case, we look at the length of the delay and the reason for the delay together. The accused was in pretrial confinement for 125 days before trial. The appellant focuses his argument on the time between his placement into pretrial confinement and the preferral of charges and the appointment of an Art. 32, UCMJ, investigating officer. Charges were preferred on 22 June 2001, two months after the appellant was placed into pretrial confinement.

We concur with the military judge that this period was not "unreasonable or negligent under the circumstances." The two months in question were not a period of inactivity. During this time, the government worked to obtain evidence of the appellant's crimes from on and off base sources, prepared the charges, conducted their proof analysis, and prepared for the pretrial investigation. These matters by themselves justify the time required to prefer the charges, but there was more. First, the government selected a reserve officer to conduct the Art. 32, UCMJ, investigation, and after his appointment, the government and defense mutually agreed to 19 July 2001 as the date for the Art. 32, UCMJ, investigation. Second, during the period between the appellant's placement in pretrial confinement and the preferral of charges, the legal office at Sheppard Air Force Base moved into a temporary facility as a result of destruction to the legal office caused by a fire a year earlier. Finally, the legal office also handled 14 other courts-martial cases, some of which involved other military members placed in pretrial

confinement before the appellant, and a large number of other military justice actions. As *Kossman* directs, we must realistically balance "ordinary judicial impediments, such as crowded dockets, unavailability of judges, and attorney caseloads" with a military member's right to a speedy trial. *Kossman*, 38 M.J. at 261. We find that the period of time between the placement of the appellant into pretrial confinement and the Art. 32, UCMJ, investigation was reasonable and the government acted with reasonable diligence in proceeding to trial.

Under the third factor set forth in *Barker v. Wingo,* we examine whether the appellant asserted his right to a speedy trial. In this case, the appellant demanded speedy trial on both 13 May 2001 and 19 July 2001. But, as noted above, there was a valid explanation by the government to justify the time it took to investigate and prefer the charges in this case. Further, although the appellant demanded speedy trial on 19 July 2001 (the date of the Art. 32, UCMJ investigation), the appellant later requested a defense delay from 15 August 2001 to 23 August 2001 due to defense counsel's schedule. A demand for speedy trial followed by defense delay requests reduces the weight we give to this factor.

The final factor to be addressed is prejudice to the accused.

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (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 v. Wingo, 407 U.S. at 532. We concur with the military judge's finding that "[e]xcept for the ordeal of confinement itself, there was no prejudice to the accused as a result of the delay." The appellant alleges that the conditions of his pretrial confinement constituted "unusually harsh circumstances" and that this factor mitigates in favor of a finding of a violation of the Art. 10, UCMJ speedy trial provisions. We first note that the military judge awarded the appellant three-for-one credit for four days where the appellant was improperly classified and placed in a segregation cell. However unfortunate such an error is, we hold that these four days do not amount to "oppressive pretrial incarceration." The appellant raises no other prejudice, and we hold there is none.

Considering all these factors set forth above, we hold that there was no violation of R.C.M. 707, Art. 10, UCMJ, or the Sixth Amendment in the prosecution of the appellant's case. The 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 (2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

DEIRDRE A. KOKORA, Major, USAF
Chief Commissioner