UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class HECTOR R. GONZALEZ JR.
United States Air Force

ACM 34691

28 February 2003

Sentence adjudged 31 May 2001 by GCM convened at Sheppard Air Force Base, Texas. Military Judge: Kirk R. Granier (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 148 days, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Lieutenant Colonel Timothy W. Murphy, and Major Jeffrey A. Vires.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Captain Matthew J. Mulbarger.

Before

VAN ORSDOL, BRESLIN, and STONE
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of the wrongful possession of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The military judge also convicted the appellant, contrary to his pleas, of the wrongful use of methylenedioxymethamphetamine (also known as MDMA, or "ecstasy") and carrying a concealed weapon, in violation of Articles 112a and 134, UCMJ, 10 U.S.C. § 912a, 934. The sentence adjudged and approved was a bad-conduct discharge, confinement for 148 days, forfeiture of all pay and allowances, and reduction to E-1. The appellant was credited with 148 days of pretrial confinement against the sentence to confinement.

In this appeal under Article 66, UCMJ, 10 U.S.C. § 866, the appellant raises several allegations of error. He contends: 1) The evidence is legally insufficient to support the finding of guilt for unlawfully carrying a concealed weapon; 2) The prosecution violated his due process rights by failing to disclose material evidence; 3) The military judge erred by admitting testimony as residual hearsay; 4) The appellant was denied his right to a speedy trial; 5) The military judge erred in denying relief for illegal pretrial confinement; and 6) The sentence to total forfeitures may not be approved because the appellant did not actually serve confinement post-trial. We affirm.

Background

The torrent of this litigation began with a tiny trickle. In August 2000, the appellant was a student in a training squadron stationed at Sheppard Air Force Base (AFB), Texas. The appellant's supervisor found a pacifier at the appellant's work center. The supervisor knew that people using ecstasy at "rave" parties often use pacifiers to prevent discomfort from the involuntary grinding of the teeth that is a side-effect of ecstasy use. The supervisor alerted the Air Force Office of Special Investigations (AFOSI), who interviewed the appellant. The appellant consented to a search of his dormitory room, his car, and a rental car, which yielded two more pacifiers and a large number of advertisements for "rave" parties. The appellant also consented to a urinalysis, which was positive for ecstasy.

While the investigation was pending, the appellant took two weeks of leave over the Christmas holiday and visited Dallas, Texas. On 3 January 2000, the appellant's father called authorities at Sheppard AFB, and reported that the appellant was driving back to the base with a loaded .357 magnum handgun that the appellant had taken without permission. Security forces were alerted, and stopped the appellant's vehicle as he attempted to enter the base the following day. The appellant consented to a search of the vehicle. In a zipped bag behind the front seat, the security forces found a baggie of marijuana and a zippered portfolio containing a loaded .357 magnum handgun.

The appellant was ordered into pretrial confinement. The appellant was held in the local civilian jail because Sheppard AFB has no confinement facility. The appellant spent 147 days in confinement before trial.

Sufficiency of the Evidence—Unlawfully Carrying a Concealed Weapon

The appellant maintains the evidence is not legally sufficient to support the finding of guilt to unlawfully carrying a concealed weapon. Specifically, he contends that because the weapon was in a zippered portfolio, within a luggage bag sitting on the floor of the rear passenger compartment of the vehicle, under other pieces of luggage, the

weapon was not carried "on or about" his person or within his "immediate reach" as required for the offense. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 112(c)(3) (2000 ed.). We do not agree.

Returning to Sheppard AFB after the Christmas break, the accused picked up two service members at the Dallas/Fort Worth airport and gave them a ride back to base. The appellant drove, Airman Clouse occupied the front passenger seat, and Private Huynh sat in the backseat, behind the driver. Airman Clouse's luggage was in the vehicle's trunk, and Private Huynh put his large suitcase on the back seat, beside him. The appellant had a small black zippered bag on the floor, behind the front passenger seat.

The security forces were watching for the appellant's vehicle and stopped it at the gate. The appellant consented to a search of his luggage. All the bags were removed from the car, and separated by the owners. Sergeant Hanlin, one of the security forces personnel, specifically recalled that the small black bag in question was behind the front passenger seat, on the floor. A search of the appellant's small black bag revealed a zippered portfolio, which contained a loaded .357 magnum revolver.

At trial, the prosecution asked Sergeant Hanlin whether he could reach the black bag on the right rear floorboard if sitting in the driver's seat. Sergeant Hanlin testified that he thought he could. The defense counsel asked Amn Clouse whether a person the size of the accused, "could have reached back to the very bottom bag, inside two zipped containers, and retrieved something from the bag." Amn Clouse opined that he could not.

We may affirm only those findings of guilty that we find are correct in law and fact and determine, on the basis of the entire record, should be approved. Article 66(c), UCMJ. The test for legal sufficiency is whether any rational trier of fact, when viewing the evidence in the light most favorable to the government, could have found the appellant guilty of all elements of the offense, beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319(1979); *United States v. Reed*, 54 M.J. 37, 41 (2000). Our superior court has determined that the test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, this Court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

It is an offense under Article 134, UCMJ, to unlawfully carry a dangerous weapon concealed on or about the person. *MCM*, Part IV, ¶112b (2000 ed.). "'On or about' means the weapon was carried on the accused's person or was within immediate reach of the accused." *Id.* at ¶112b(3). "[T]he offense of carrying a concealed weapon in violation of Article 134 is committed by one who has possession of such a weapon, concealed from immediate view in an automobile, at a place where it is readily available to him." *United States v. Detuccio*, 29 C.M.R. 879, 886 (A.F.B.R. 1960).

Whether a weapon in a vehicle is within "immediate reach" is a question of accessibility, not the speed with which the weapon could be employed. *See United States v. Grimm*, 51 M.J. 254, 257 (1999) (the fact that a 9mm pistol was carried disassembled does not preclude conviction for carrying a concealed weapon under Article 134); *United States v. Booker*, 42 M.J. 267, 268-69 (1995) (where the accused pled guilty to carrying a concealed weapon by having a .380 automatic pistol in a zippered bag within a locked glove compartment, the court held that the pistol was sufficiently accessible as a matter of law for the plea to be provident); *United States v. Ballesteros*, 29 M.J. 14 (C.M.A. 1989) (where the weapon was concealed in a locked briefcase in the cab of a pickup truck, it was not so inaccessible as to be outside the accused's immediate reach as a matter of law).

Applying the law to the facts in this case, we are convinced that the evidence is legally sufficient to show that the weapon was within the appellant's immediate reach. Sitting in the driver's seat, the appellant could easily reach the bag on the floorboard behind the passenger seat—indeed, that area of the car may be more accessible to a driver than the typical glove box. We find the appellant could have reached the black bag and brought it to himself; whether the appellant could have retrieved the weapon from the bag without moving it, as argued by the appellant, is not controlling. The fact that Private Huynh's suitcase was on the rear seat of the vehicle did not make the smaller bag on the floor inaccessible to the accused. The handgun was sufficiently near the appellant to be "on or about" his person for the purposes of the charged offense. Viewing the evidence in the light most favorable to the government, a rational trier of fact could have found the appellant guilty of all elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. at 319; *Reed*, 54 M.J. at 41. Moreover, we are ourselves convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41.

Discovery

The appellant consented to provide a sample of his urine for drug testing. The Air Force Drug Testing Laboratory, Brooks AFB, Texas, tested the sample in late August and early September 2000, and reported finding the metabolite of ecstasy in the urine at a concentration level of 4,131 nanograms per milliliter (ng/mL), above the Department of Defense cut-off of 500 ng/mL.

Prior to trial, the defense made several extensive requests for discovery of background information relevant to the drug-testing program, and the prosecution provided responses. At trial, the defense counsel made no motion to compel discovery. The military judge found the appellant guilty of the wrongful use of ecstasy, contrary to his pleas.

On appeal, the appellant alleges the government violated his due process rights by failing to disclose an "analytical false positive" test result from the Brooks AFB

laboratory. The appellant offered copies of the defense discovery requests and the laboratory report of the test at issue. This Court accepted the documents for the purpose of reviewing this allegation of error. *See United States v. Dixon*, 8 M.J. 149, 151 (C.M.A. 1979). Thereafter, this Court ordered the government to provide copies of the prosecution's responses to the discovery requests and certain specific documents relevant to the issue. The government provided the required documents. This included a letter from 311 HSW/JA, Brooks AFB, dated 12 December 2000, indicating the disclosure of the quality assurance monthly reports for the months prior to the appellant's testing, and the quality control branch monthly report for July 2000, dated 10 August 2000, reflecting "BQC Unacceptable - 1," and "Technician Error - 1" for testing of the metabolite of cocaine.

In *United States v. Brozzo*, 57 M.J. 564 (A.F. Ct. Crim. App. 2002), we considered a similar claim of error regarding the identical internal blind quality control sample. There, as here, the prosecution provided the documents requested by the defense counsel, and the documents that referred to the internal blind quality control sample at issue. For the reasons discussed in *Brozzo*, we find that the government disclosed information that would have led diligent counsel to the analytical data in question. As in *Brozzo*, we also hold that the evidence was not material to either guilt or punishment. Even if it had been produced at trial, we are convinced it would not have put the whole case in such a different light that it would have undermined confidence in the verdict. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

Residual Hearsay

The appellant contends that the military judge erred in admitting, over defense objection, a statement made by the appellant's father that the appellant was traveling to Sheppard AFB with a stolen weapon. We find no material prejudice to the appellant's substantial rights.

At trial, the prosecution called as a witness Staff Sergeant (SSgt) Denton, an investigator for the security forces squadron. The prosecution wanted SSgt Denton to testify that someone who claimed to be the appellant's father called Air Force authorities and warned that the appellant had taken his .357 magnum revolver without his permission, and that the appellant was on his way to the base with the weapon. Trial defense counsel objected to the testimony as hearsay. Trial counsel argued two bases for admission of the testimony. First, he argued that "the biggest portion of it is not hearsay because it is not being offered for the truth of the matter asserted." Secondly, he argued that the evidence of unlawfulness of the taking was admissible under the residual hearsay rule to prove the element of "wrongfulness" for the charged offense.

After hearing proffers of expected testimony from counsel, the military judge admitted the testimony under Mil. R. Evid. 807 as residual hearsay. The military judge

determined that the circumstantial guarantee of trustworthiness was that the caller was the accused's father, noting that, "I have nothing before me to suggest that the accused's father would say anything which would be against the interest of his son, if it were not true."

Trial counsel then called the witness to the stand. As SSgt Denton began to relate the substance of a call she received, the trial defense counsel again objected on hearsay grounds. The military judge overruled the objection, stating, "This is not hearsay." SSgt Denton reported what she learned from another Air Force member—that the appellant had taken a weapon from his father's home and was driving back to Sheppard AFB with it. The military judge explained that the evidence was not being considered for the truth of the matter asserted, but only to show its effect on the security forces and to explain what the security forces did in response.

The witness, SSgt Denton, then testified that she called the appellant's father, and further testified about their discussion concerning the disappearance of the handgun. The witness was also an evidence custodian and later received the seized weapon and placed it in the evidence locker.

Trial counsel then attempted to elicit testimony about a subsequent telephone call by SSgt Denton to the appellant's father, but trial defense counsel again objected on hearsay grounds. The military judge inquired about the relevance of the subsequent discussion, and trial counsel indicated that the wrongfulness of the taking of the weapon proved the wrongfulness of the appellant's possession and concealed carrying of the weapon. The military judge disagreed and sustained the objection, ruling that the means by which the appellant obtained the weapon was not relevant.

The prosecution presented further evidence, showing that the appellant's vehicle was stopped at the gate on 4 January 2001. As noted above, the appellant consented to a search of his luggage, and identified the bags that belonged to him. A search of one of the appellant's bags disclosed the loaded handgun that was the subject of this charge.

The appellant now maintains the military judge erred in admitting the testimony about the statement made by the appellant's father under Mil. R. Evid. 807. Specifically, the appellant contends that the evidence was not material, as required by the rule, because the way in which the appellant acquired the weapon was not relevant to an element of the offense. The government responds that the challenged statement was material, and thus admissible under Mil. R. Evid. 807, because it showed the handgun was registered to the appellant's father, and not to the appellant.

The standard of review for a military judge's decision to admit or exclude evidence is whether the military judge abused his or her broad discretion. *United States v. Hyder*, 47 M.J. 46, 48 (1997); *United States v. Kelley*, 45 M.J. 275, 279 (1996); *United*

States v. Ayala, 43 M.J. 296, 298 (1995). We review findings of fact under a clearly-erroneous standard, and conclusions of law under a de novo standard. *Kelly*, 45 MJ at 279-80. A military judge's ruling on the admissibility of residual hearsay is entitled to considerable deference. *United States v. Haner*, 49 M.J. 72, 78 (1998); *United States v. Pollard*, 38 M.J. 41, 49 (C.M.A. 1993).

It is helpful to first sort out the actual theory upon which the military judge admitted the challenged evidence. The prosecution offered two bases: 1) that it was not hearsay because it was not offered for the truth of the matter asserted, and 2) that it was admissible as residual hearsay, because it had circumstantial guarantees of trustworthiness. However, it is not completely clear on what basis the military judge admitted the challenged evidence.

At first, the military judge expressly admitted it as residual hearsay under Mil. R. Evid. 807. Later, it appears he effectively reversed that ruling. He clearly explained that he was considering the testimony about the original telephone call as non-hearsay for a limited purpose. Certainly, he did not consider it for the purpose offered by the prosecution, i.e. to prove the "wrongfulness" of the original taking. Furthermore, it would have been logically inconsistent to admit the evidence for a limited purpose as non-hearsay, and simultaneously admit it for all purposes under Mil. R. Evid. 807 as an exception to the hearsay rule. Later, the military judge rejected the proffered evidence showing the wrongfulness of the taking because it was not relevant. On the other hand, the military judge did not expressly reverse his original ruling. In any event, it was not made clear to the parties, for the government argued it as though it was admitted without limitation. Considering all this, we are left with two possible bases for his ruling. We will review each theory.

A. Non-hearsay.

"Hearsay" is often defined as an out-of-court assertion, offered to prove the truth of the matter asserted. 2 John W. Strong et al., *McCormick on Evidence* § 246 (5th ed. 1999); Mil. R. Evid. 801(c). A statement that is not offered for the truth of the matter asserted, but for some other reason, is not hearsay. Thus, where investigators act upon a tip, they may provide some explanation for their investigative activity, without violating the rule against hearsay. Strong, et al., at § 249.

In this case, the prosecution indicated its primary theory of admissibility was that the evidence was not offered for the truth of the matter asserted. At first, the military judge made no mention of this basis for admissibility in his ruling on the defense counsel's initial objection to the witness. However, as the witness testified, the military judge made it clear that he was admitting the evidence because it was not offered for the truth of the matter asserted.

We find that the military judge properly admitted the testimony about the report from the appellant's father under the government's first theory of admissibility—that the statement was offered only to show why the security forces personnel were waiting for the appellant's vehicle to return to Sheppard AFB. It was not offered to prove the truth of the matter asserted, therefore it was not hearsay.

We note that such statements should not include extensive details about the information received, because the relevance of the additional information is slight and its potential for abuse is great. *See* Strong, et al., at § 249. Instead, a statement that the officers "acted on a tip," or words to that effect, should be sufficient. *Id.* However, this was a trial by military judge alone. We presume that a judge can disregard evidence that is not admissible, and will properly consider evidence admitted only for a limited purpose. *United States v. Raya*, 45 M.J. 251, 253 (1996); *United States v. Prevatte*, 40 M.J. 396, 398 (C.M.A. 1994).

B. Residual Hearsay.

We turn to the second asserted basis for admissibility—residual hearsay—to determine whether the military judge relied upon this theory in admitting the evidence. As noted above, the prosecutor offered the evidence of the statements by the appellant's father to prove the "wrongfulness" of the possession and carrying of the weapon under the alternate theory that the evidence was admissible as residual hearsay under Mil. R. Evid. 807. The military judge, acting upon the proffers from counsel, first ruled that the challenged evidence was admissible under Mil. R. Evid. 807. However, when the military judge actually heard the testimony and considered the renewed objection by defense counsel, he ruled that evidence of the "wrongfulness" of the taking was not relevant to the charged offense. Thereafter, the military judge refused to admit evidence that the appellant's father had "identified" the recovered handgun as his own.

The so-called "residual hearsay" rule is Mil. R. Evid. 807, which allows admission of evidence "not specifically covered" by Mil. R. Evid. 803 or 804, "but having equivalent circumstantial guarantees of trustworthiness . . . ." The residual hearsay rule has three requirements for admissibility: 1) materiality, 2) necessity, and 3) reliability. *See Kelley*, 45 M.J. at 280; *Pollard*, 38 M.J. at 49.

We first consider whether the evidence was material under Mil. R. Evid. 807. Evidence that is not relevant may not meet the requirement for materiality in Mil. R. Evid. 807(A). *See* Strong, et al., at § 324 ("Provision (A) [of Rule 807], requiring that the statement be offered as evidence of a material fact, is a restatement of the general requirement that evidence must be relevant.").

The government asserts the evidence was material, because it proved that the firearm was registered to the appellant's father and not the appellant, thereby showing the

wrongfulness of his carrying of the weapon. We reject this theory; the evidence of how the appellant acquired the handgun did not relate at all to whether, or to whom, it was registered. On the other hand, the appellant now argues that the evidence was not material, because the manner in which the firearm was acquired was not an element of the offense. We find this theory unpersuasive as well. The evidence was material because it proved the appellant's criminal state of mind, that is, that his possession of the handgun was both knowing and intentional. If the appellant intentionally took the weapon, then he knew he possessed it. If he knew that he possessed it at the beginning of his trip, it may be inferred that he knew he still possessed it when he arrived at Sheppard AFB.

The evidence was also necessary. The necessity prong "essentially creates a 'best evidence' requirement." *Kelley*, 45 M.J. at 280 (citing *Larez v. City of Los Angeles*, 946 F.2d 630, 644 (9th Cir. 1991)). Evidence that the appellant intentionally took the handgun from another was the very best proof of the appellant's criminal state of mind at the time he entered Sheppard AFB in possession of the weapon. To be sure, there was other circumstantial evidence of knowledge, specifically the presence of the large, heavy item in the luggage the appellant identified as his own, along with the testimony of the other passengers that the handgun did not belong to them. But, even if the evidence is "somewhat cumulative, it may be important in evaluating other evidence and arriving at the truth." *Kelley*, 45 M.J. at 280 (citing *United States v. Shaw*, 824 F.2d 601, 610 (8th Cir. 1987)).

It is the reliability of the evidence that gives us pause. For a statement to be admissible as residual hearsay, there must be circumstantial guarantees of trustworthiness arising from the circumstances under which the statement was made. *Idaho v. Wright*, 497 U.S. 805 (1990); *Ohio v. Roberts*, 448 U.S. 56 (1980). A military judge may consider many factors surrounding the making of the statement in assessing its trustworthiness. *Kelley*, 45 M.J. at 281; *United States v. Powell*, 22 M.J. 141, 145 (C.M.A. 1986).

The military judge cited two factors in his analysis: that the caller was the appellant's father, and the lack of evidence of a motive to fabricate. Although not mentioned by the military judge, it also appears that the initial call to Air Force authorities was spontaneous, voluntary, and unprompted, and that the declarant repeated the same statement several times, which are also factors that may be considered in determining the reliability of the statement under the circumstances. *Kelley*, 45 M.J. at 281; *United States v. Grant*, 42 M.J. 340, 343 (1995).

At the same time, other factors weigh on the opposite side of the scale. The statements in question were made to a military training leader and to a law enforcement agent. Both were done for the purpose of reporting a crime to authorities. An ex parte statement to a police officer does not lack reliability per se, but neither does it create a

presumption that it is highly reliable, standing alone. *Pollard*, 38 M.J. at 49; *United States v. Giambra*, 33 M.J. 331, 334 (C.M.A. 1991); *United States v. Barror*, 23 M.J. 370, 372 (C.M.A. 1987); *United States v. Hines*, 23 M.J. 125, 137 (C.M.A. 1986). The statement was not under oath, or tested by probing questions. Although the appellant's father apparently made the statement, the nature of their relationship was not made clear. Any presumption that the declarant would keep the interests of his child paramount is speculative.

Finally, there was no evidentiary hearing in this case, through which this Court could assess the indicia of reliability. Instead, the military judge based his rulings on proffers of counsel. As a result, there is "no meaningful basis for assessing the candor of the declarant or the accuracy of the statement." *Barror*, 23 M.J. at 372.

Balancing all these factors, and giving great deference to the military judge, we nonetheless conclude that the circumstantial guarantees of trustworthiness were lacking in this case. Other than the somewhat speculative nature of the relationship between the appellant and his father, there is little to distinguish this statement from any report to law enforcement. Simply put, we are not convinced that the ex parte statement reporting a crime to a law enforcement officer (or one acting in a similar role) possessed sufficient guarantees of trustworthiness to make the statement so reliable as to obviate the necessity of cross-examination. If the military judge considered the evidence as residual hearsay, it was error.

We must also determine whether the appellant suffered prejudice. Article 59(a), UCMJ, 10 U.S.C. § 859(a); *United States v. Powell*, 49 M.J. 460, 462 (1998); *United States v. Weeks*, 20 M.J. 22, 25 (C.M.A. 1985). The other evidence of the appellant's guilt was overwhelming. The appellant identified his luggage and consented to the search. The weapon was large and heavy—easily noticeable in the small black bag. The other passengers denied possessing the weapon. The theory of the defense was that the weapon was not "on or about" the appellant, which we considered, above. Finally, the evidence was admissible for a limited purpose. Reviewing the entire record, we are convinced the error, if any, in considering the evidence as residual hearsay was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, (1967); *United States v. Ferdinand*, 29 M.J. 164, 168 (C.M.A. 1989).

Speedy Trial

The appellant argues that the military judge erred in denying his motion to dismiss the charges for denial of his right to a speedy trial. Specifically, he alleges that the government did not act with reasonable diligence in bringing his case to trial, in violation of Article 10, UCMJ, 10 U.S.C. § 810, even though he was brought to trial within 120 days of being placed in pretrial confinement. We find no error.

The parties stipulated to the significant dates involved in the appellant's case.[1] The appellant was ordered into pretrial confinement on 4 January 2001, when he was apprehended entering Sheppard AFB in possession of a loaded .357 magnum handgun and marijuana. Authorities conducted a pretrial confinement hearing on 5 January 2001, and the report was completed on that date. The appellant's squadron commander preferred court-martial charges against the accused on 5 February 2001, and the formal investigation under Article 32, UCMJ, 10 U.S.C. § 832, was conducted the following day. The Article 32, UCMJ report was completed on 13 February 2001 and served on the accused two days later. The defense counsel acknowledged receipt of the report on 26 February 2001, and filed objections on that same day. The legal office forwarded the charge sheet and the report of investigation to the special court-martial convening authority on 2 April 2001, however, that commander was on temporary duty until 6 April 2001. The referral package was subsequently forwarded to the higher headquarters, Second Air Force at Keesler AFB, Mississippi, on 10 April 2001. The staff judge advocate completed his formal pretrial advice on 12 April 2001, and the convening authority referred the charges to trial in 21 April 2001.

On 23 April 2001, the government requested trial on 30 April 2001. On that same date, the appellant submitted a request for speedy trial. Trial was scheduled for 29 May 2001 to accommodate trial defense counsel's schedule, then later slipped to 30 May 2001. The military judge approved the delay from 30 April until 30 May 2001.

The chief of military justice testified about the unusually heavy workload facing the base legal office at the time the appellant was placed in pretrial confinement, including the extra burdens arising from the destruction of the base legal office by fire in October 2000. The appellant testified on the motion concerning the conditions of confinement at the civilian confinement facility. The military judge made findings of fact and conclusions of law, and denied the defense motion to dismiss.

The question of whether an accused has received a speedy trial is a question of law that is reviewed de novo. *United States v. Cooper*, No. 02-6001/NMC (30 Jan 2003); *United States v. Doty*, 51 M.J. 464, 465 (1999). "The military judge's findings of fact are given 'substantial deference and will be reversed only for clear error.' *See United States v. Edmond*, 41 M.J. 419, 420 (1995), *aff'd*, 520 U.S. 651 (1997), quoting *United States v. Taylor*, 487 U.S. 326, 337, 101 L. Ed. 2d. 297, 108 S. Ct. 2413 (1988)." *Id.*

A military member's right to a speedy trial arises from several sources. First, Rule for Courts-Martial (R.C.M.) 707, promulgated by the President, requires that a person must be brought to trial within 120 days of preferral of charges, imposition of pretrial restraint, or activation of a reservist for court-martial purposes. *Birge*, 52 M.J. at 210.

[1] The method used to count the days of pretrial confinement did not comport with R.C.M. 707(b)(1), however, which provides that the date pretrial confinement is imposed shall not count, and that the date of trial shall count in computing time under the rule.

Secondly, Article 10, UCMJ, requires that, if a person is placed in arrest or confinement, "immediate steps shall be taken . . . to try him or to dismiss the charges." Finally, our superior court holds that the Sixth Amendment applies to courts-martial, and guarantees "the right to a speedy and public trial." *Id.* at 211.

An unconditional guilty plea waives any speedy trial issue. *See United States v. Benavides*, 57 M.J. 550 (A.F. Ct. Crim. App. 2002); *United States v. Bruci*, 52 M.J. 750, 754 (N.M. Ct. Crim. App. 2000). In this case, the appellant pled guilty to the wrongful possession of marijuana, thus waiving any speedy trial issue with regard to that offense.

The appellant pled not guilty to the charges of wrongful use of ecstasy and carrying a concealed weapon, which preserved any speedy trial issue for those charges. The appellant now maintains that his rights under Article 10, UCMJ, were violated.

Article 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." *United States v. Birge*, 52 M.J. 209, 211 (1999) (citing *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993)). Our superior court has determined that the speedy trial requirement of Article 10, UCMJ, is more stringent than either the Sixth Amendment or R.C.M. 707. *Birge*, 52 M.J. at 211-12. Nonetheless, in determining whether a service member's right to a speedy trial under Article 10, UCMJ, has been violated, it is appropriate to consider the four factors employed by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), specifically: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." We recognize, of course, that none of these factors have "talismanic qualities"; instead, "courts must still engage in a difficult and sensitive balancing process." *Barker v. Wingo*, 407 U.S. at 533. We will consider each of these factors as they apply in this case.

A. Length of delay.

We note that the military judge found that the appellant had been in confinement 150 days before trial. This was clearly erroneous--apparently the military judge misread the parties' stipulation regarding the date of trial, and confused the Julian date with the number of days that had elapsed. Based upon the stipulation of the parties, we find that the appellant was arraigned 147 days after being placed into pretrial confinement. We

also find that the last 30 days were excluded from the speedy trial calculation because the military judge approved a delay to accommodate trial defense counsel's schedule. At the time of trial, 117 days chargeable to the government had elapsed.

The appellant argues that, even though the government brought the appellant to trial within the 120 day period prescribed by R.C.M. 707, the government did not proceed with "reasonable diligence," and thus violated Article 10, UCMJ. The appellant points to two specific periods of time to support their argument.

The first period was about one month between the time the appellant was placed into pretrial confinement and the date charges were preferred. However, it does not appear that there was actually one month of inactivity by the government. Instead, during this time the security forces completed their investigation, the government attorneys investigated the case, and arrangements were made for a reserve judge advocate to serve as the investigating officer.

The appellant also complains that it took over two months from the date the Article 32, UCMJ investigation was completed until the charges were referred to trial. However, this was not two months of inactivity. During this time the report was served on the appellant, the report of investigation was forwarded through channels, and the parties pursued discovery relevant to the case. "Brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive." *Cooper*, slip. Op. at 6, (citing *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965).

B. The reason for the delay.

The appellant acknowledges that some of the delay was attributed to the fact that, about four months before the appellant was placed into pretrial confinement, the base legal office "caught on fire." However, this description does not fully describe the situation.

In fact, the Sheppard AFB legal office was completely destroyed by fire in October 2000, including all the documents, reports, records, and files for all the military justice actions pending at that time. The military judge found that the base legal office was "one of, if not the busiest legal office in the United States Air Force in terms of military justice/adverse actions," processing over 600 nonjudicial punishment actions pursuant to Article 15, UCMJ, 10 U.S.C. § 815, conducting 38 courts-martial, and 600 administrative discharge actions in the year 2000. It was necessary to relocate the legal office twice after the fire, and to re-create destroyed files in order to prosecute the pending cases, thus creating a significant backlog. The office prosecuted 25 other courts-martial, including cases of others held in pretrial confinement, while the appellant's case was pending.

The appellant argues that "being 'busy' is not any excuse for this delay." However, in *Kossman*, our superior court discussed factors that military judges should consider in determining whether the government has been "foot-dragging" in a particular case. The Court held that "ordinary judicial impediments, such as crowded dockets, unavailability of judges, and attorney caseloads, must be realistically balanced." *Kossman*, 38 M.J. at 261-62. *See also Barker v. Wingo*, 407 U.S. at 531 (indicating a court may consider the cause of the government's inability to move forward). It appears the backlog of cases was due to the fire, not government mismanagement. The prosecution's efforts to process all the cases do not reflect any intentional foot-dragging or negligence.

C. The request for a speedy trial.

One of the significant factors we must consider is whether the appellant requested a speedy trial, for it is well known that at times the defense does not desire a speedy trial. *See Barker v. Wingo*, 407 U.S. at 521. "Whether and how a defendant asserts his right" is a factor we will consider. *Id*. at 531. "Stratagems such as demanding a speedy trial now, when the defense knows the Government cannot possibly proceed, only to seek a continuance later, when the Government is ready, may belie the genuineness of the initial request." *Kossman*, 38 M.J. at 262.

Here, we note the appellant did not request a speedy trial during the two periods about which the appellant now complains. Instead, his request for a speedy trial came on 23 April 2001, two days after the referral of charges. On that same date the prosecution requested a trial date of 30 April 2001. Two days later, the defense counsel negotiated a trial date of 29 May 2001. The appellant's late request for a speedy trial, followed almost immediately by the acceptance of another 30 days of delay, greatly reduces the weight we give this factor.

D. Prejudice to the accused.

In *Barker v. Wingo*, 407 U.S. at 532, the Supreme Court held that, when considering any prejudice to the accused, a court should consider three interests. Of these the most significant interest is the defense's ability to adequately prepare for trial, weighed against the risk that witnesses may die, disappear, or be unable to recall events. In this case, the appellant makes no argument that the delay hindered his ability to present a defense, and we find no impairment.

Other defense interests recognized by the Supreme Court in *Barker v. Wingo* are the prevention of oppressive pretrial incarceration and the anxiety and concern suffered by an accused. The appellant testified that the conditions in the civilian confinement facility were onerous. Consistent with the evidence presented at trial, the military judge found that that the appellant was not treated any differently than any other pretrial

detainee, and that he did not suffer any unusual hardship while in pretrial confinement. Doubtlessly the appellant was uncomfortable in civilian pretrial confinement, as anyone would be, but the circumstances were not so onerous as to make this a compelling factor in this case. Considering all these factors, we find no violation of Article 10, UCMJ, in the prosecution of the appellant's case.

Pretrial Confinement Credit

The appellant contends the military judge erred in refusing to grant additional credit for illegal pretrial confinement. Specifically, he claims that the pretrial confinement review officer (PCRO) was not "neutral and detached" as required by R.C.M. 305, and that the appellant suffered illegal pretrial punishment, in violation of Article 13, UCMJ 10 U.S.C. § 813. We find no error.

A. The Pretrial Confinement Review Officer

After the appellant's apprehension at the front gate on 4 January 2001, his commander ordered him into pretrial confinement. The convening authority detailed Lieutenant Colonel (Lt Col) Finchum, the Deputy Commander of the 82nd Support Group, as the PCRO. Lt Col Finchum convened the pretrial confinement hearing the next day. At the outset of the hearing, Lt Col Finchum disclosed to the appellant and his detailed defense counsel that he had already been advised of the 4 January 2001 search of the appellant and the evidence obtained. He received this information through a routine notification to commanders and by reading the daily security forces report known as the "blotter." Lt Col Finchum revealed that he had not seen or reviewed the evidence, nor had he sought out any additional information. He inquired whether either party objected to his service as the PCRO. The appellant and his counsel indicated they had no objection.

At the conclusion of the trial, defense counsel requested additional credit for illegal pretrial confinement, asserting that Lt Col Finchum was not "detached," as required by R.C.M. 305(i)(1). Trial defense counsel put on no evidence in support of this motion. The prosecution offered, without objection, the affidavit of Lt Col Finchum, setting forth the facts discussed above. The military judge found that Lt Col Finchum was neutral and detached as required by R.C.M. 305(i)(1), and denied the appellant's request for additional pretrial confinement credit.

The appellant now renews his argument that Lt Col Finchum's advanced knowledge of some facts relating to the search and apprehension at the gate prevented him from being neutral and detached. We find no merit in this argument.

First, the PCRO informed the parties about his prior knowledge of the facts at the outset of the hearing, and the appellant declined to raise any objection. This affirmatively

waived any issue of disqualification of the PCRO at the hearing. Having affirmatively waived the issue when meaningful relief could have been granted, we will not hear the appellant complain now.

Secondly, the appellant has failed to show the PCRO was not neutral and detached. The simple fact that he heard some of the facts beforehand through routine informational sources does not suggest that he was so involved in the investigative or prosecutorial process that he was not "detached." *United States v. Rexroat*, 38 M.J. 292, 298 (C.M.A. 1993).

B. Article 13, UCMJ.

Article 13, UCMJ, 10 U.S.C. § 813, provides that no person being held for trial may be subjected to punishment other than arrest or confinement, and that the arrest or confinement may not be more rigorous than necessary to assure his presence. This provision is conceptually the same as that required by the Due Process Clause of the Constitution. *United States v. James*, 28 M.J. 214, 215-16 (C.M.A. 1989). To determine whether official action is prohibited punishment, courts first look for some intent to punish on the part of detention facility officials. *Bell v. Wolfish*, 441 U.S. 520, 538 (1979). Absent express evidence of intent, courts may infer the intent to punish if a restriction or condition is sufficiently onerous and is not reasonably related to a legitimate governmental goal. *Id.*; *United States v. McCarthy*, 47 M.J. 162, 165 (1997).

Pretrial punishment includes public denunciation and degradation. *United States v. Stringer*, 55 M.J. 92, 94 (2001); *United States v. Cruz*, 25 M.J. 326, 330 (C.M.A. 1987). "De minimis" impositions on a pretrial detainee do not require credit under Article 13. *United States v. Corteguera*, 56 M.J. 330, 331 (2002); *United States v. Fricke*, 53 M.J. 149, 155 (2000). An appellant's failure to complain about the conditions before trial is strong evidence that he was not punished illegally. *United States v. Palmiter*, 20 M.J. 90, 97 (C.M.A. 1985). An accused may affirmatively waive any issue of illegal pretrial punishment. *United States v. Huffman*, 40 M.J. 225, 227 (C.M.A. 1994). A tactical decision to present pre-trial punishment issues as a matter in mitigation instead of asking the military judge for relief may be tantamount to an affirmative waiver. *United States v. Southwick*, 53 M.J. 412, 416 (2000).

The burden is on appellant to establish entitlement to additional sentence credit because of a violation of Article 13, UCMJ. *See* RCM 905(c)(2); *United States v. Mosby*, 56 M.J. 309, 310 (2002). Whether conditions constitute unlawful pretrial punishment "presents a 'mixed question of law and fact' qualifying for independent review." *McCarthy*, 47 M.J. at 165 (citing *Thompson v. Keohane*, 516 U.S. 99, 113 (1995)). We will not overturn a military judge's findings of fact, including a finding of no intent to punish, unless they are clearly erroneous. *Corteguera*, 56 M.J. at 334; *Mosby*, 56 M.J. at

310. We review de novo the ultimate question whether appellant is entitled to credit for a violation of Article 13, UCMJ. *Corteguera*, 56 M.J. at 334.

We reviewed carefully the evidence presented on this issue, the arguments of counsel, and the military judge's findings of facts. The military judge's factual findings are supported by the evidence and are not clearly erroneous. The military judge concluded that the appellant had not been treated any differently than any other pretrial detainee at the Wichita County Confinement Facility, and that the conditions about which the appellant complained were not unduly harsh so as to constitute unlawful pretrial punishment. Considering the matter de novo, we find the appellant is not entitled to credit for a violation of Article 13, UCMJ.

Sentence to Forfeitures

The appellant argues that his sentence to total forfeitures of all pay and allowances could not be lawfully approved by the convening authority because the appellant was not in confinement at the time the convening authority approved the sentence.

It has long been military policy that an accused may only forfeit all pay and allowances when in confinement–an accused who is in duty status should receive at least one-third pay for the necessities of daily living. *See* R.C.M. 1107(d)(2), Discussion. In *United States v. Warner*, 25 M.J. 64, 67 (C.M.A. 1987), our superior court extended that policy into law, holding that a service court "should not affirm as appropriate a sentence which imposes total forfeitures, when confinement has not been adjudged."

Of course, confinement was adjudged in this case. Because of the credit for pretrial confinement, the appellant was not in confinement at the time the convening authority approved the sentence. Thus it was error for the convening authority to approve total forfeitures as part of the sentence.

We may not hold a sentence "incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Article 59(a), UCMJ. *United States v. Powell*, 49 M.J. 460, 464 (1998); *United States v. Craze*, 56 M.J. 777, 779 (A.F. Ct. Crim. App. 2002), *pet. denied*, No. 02-05251/AF (26 Nov 2002). The appellant has made no showing that he forfeited more than two-thirds pay per month for the period in question. We are convinced that no relief is necessary or appropriate in this case.

Conclusion

The approved findings are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *Reed*, 54 M.J. at 41. Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court