UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class LESLIE G. GUSTAFSON III
United States Air Force

ACM 36918

03 June 2008

Sentence adjudged 30 September 2006 by GCM convened at Lackland Air Force Base, Texas. Military Judge: John E. Hartsell (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 14 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Sandra K. Meadows, Lieutenant Colonel Mark R. Strickland, and Captain Timothy Cox.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Jefferson E. McBride.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with his pleas, the appellant was convicted of one specification of willful dereliction of duty, one specification of divers wrongful uses of cocaine, one specification of divers wrongful distributions of cocaine, one specification of wrongful introduction of cocaine onto a military installation, one specification of divers wrongful possessions of cocaine, and one specification of wrongful possession of heroin, in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892 and 912a. The approved sentence consists of a dishonorable discharge, confinement for 14 months, total forfeiture of all pay and allowances, and reduction to E-1.

The issues on appeal are whether there was an Article 10, UCMJ, 10 U.S.C. § 810, speedy trial violation; whether the appellant was denied credit for restriction tantamount to confinement and illegal pretrial confinement; and whether a sentence which includes a dishonorable discharge is inappropriately severe.[1]

Background

In February 2006, the appellant used cocaine which he purchased off base and transported onto Lackland Air Force Base, Texas. He used the cocaine in his dormitory room. After he finished, he distributed the remainder of the cocaine to another airman who consumed it in the appellant's dormitory room. In March 2006, the appellant purchased cocaine from a civilian. He then went to a movie with friends. Some time after the movie, the group returned to the civilian's house, where the appellant used his cocaine and then distributed what remained to the others.

On a separate occasion in February 2006, the appellant was driving around with two other airmen. During a stop at a local gas station, one of the other airmen purchased balloons of heroin. She then gave one of the balloons to the appellant.

In March 2006, the appellant, who already had one positive urinalysis for cocaine, was tasked to provide another sample. Although the collection monitor noticed the sample was cold to the touch, the monitor packaged up the sample and forwarded it to the testing laboratory. There it was determined the sample was not urine.[2]

The appellant pled providently to the charges and specifications. During the pre-sentencing phase of the court, the trial judge found all the specifications involving cocaine to be multiplicious for sentencing purposes.[3] The government counsel argued for a bad conduct discharge, confinement for 24 months, and reduction to E-1. The trial defense counsel argued for less.

Speedy Trial

The trial defense counsel made a speedy trial motion which was denied by the trial judge after he made extensive findings and conclusions.[4] The defense argued that the speedy trial clock began running when the appellant was placed in Transition Flight as that was tantamount to pretrial confinement. Additionally, the defense claimed there was illegal pretrial punishment. The trial judge did not find the time spent in Transition Flight tantamount to pretrial confinement. However, he did find several separate and distinct incidents during Transition Flight warranted additional pretrial confinement credit.

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[1] The final issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[2] This was the basis for the dereliction of duty charge and specification.
[3] This reduced the maximum imposable confinement by 15 years.
[4] His written ruling is 18 pages long.

According to his ruling he awarded the appellant nine days of additional credit.[5] The trial judge found the appellant's speedy trial rights were not violated.

We review speedy trial issues de novo. *United States v. Proctor*, 58 M.J. 792, 794 (A.F. Ct. Crim. App. 2003); *United States v. Cooper*, 58 M.J. 54, 57 (C.A.A.F. 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.

Several authorities give rise to an accused's right to a speedy trial. This right has been recognized under the Fifth and Sixth Amendments to the U.S. Constitution; Article 10, UCMJ; Rule for Courts-Martial (R.C.M.) 707; and case law. *United States v. Vogan,* 35 M.J. 32, 33 (C.M.A. 1992). The appellant has raised the issue under two of these authorities.[6]

Article 10, UCMJ, is triggered when a service member is placed under pretrial arrest or in confinement. From that point on, the government is compelled to take "immediate steps" to either "try him or to dismiss the charges and release him." "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 (citing *United States v. Birge*, 52 M.J. 209, 211 (C.A.A.F. 1999)). *See also United States v. Benavides*, 57 M.J. 550, 551 (A.F. Ct. Crim. App. 2002); *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993). Our superior court has often said 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); *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965). Each of these prior cases maintains that while Article 10, UCMJ, provides greater rights than does the Speedy Trial Clause of the Sixth Amendment, the four-part test set out in *Barker v. Wingo,* 407 U.S. 514 (1972), is a proper analytical tool for deciding Article 10, UCMJ, issues.

The Supreme Court established the test for Sixth Amendment speedy trial violations in the case of *Barker*. In applying this four-part test, we look at the length of the delay in bringing the appellant to trial, the reasons for the delay, whether the appellant asserted his right to a speedy trial prior to trial, and the extent of any prejudice to the appellant. *Barker*, 407 U.S. at 530. *See also United States v. Becker*, 53 M.J. 229, 233 (C.A.A.F 2000); *Proctor*, 58 M.J. at 798.

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[5]Although the trial judge stated he was awarding the appellant nine days of additional credit, his enumeration of each awarded day in fact equals ten days of credit.

[6]Although the issue raised by the appellant specifically lists Article 10, UCMJ as the basis, the brief also discusses the Sixth Amendment.

Reviewing the record, the briefs, the trial judge's findings and conclusions, and the applicable law, we find the appellant was not denied a speedy trial under Article 10, UCMJ or the Sixth Amendment.

Conditions Tantamount to Confinement/Illegal Pretrial Confinement

Whether an appellant is entitled to credit for a violation of Article 13, UCMJ, presents a "mixed question of law and fact." *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997) (quoting *Thompson v. Keohane*, 516 U.S. 99, 113 (1995)). We will not overturn a military judge's findings of fact unless they are clearly erroneous. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). We "review *de novo* the ultimate question whether an appellant is entitled to credit for a violation of Article 13." *Id.* The totality of the circumstances is used to determine if conditions of restriction are tantamount to confinement. *See United States v. Regan*, 62 M.J. 299 (C.A.A.F. 2006); *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985).

The trial judge made extensive findings and conclusions on the issues of illegal pretrial punishment and restriction tantamount to confinement. He found the appellant was entitled to nine days of additional credit.[7] His findings are clearly not erroneous. Further, in reviewing this issue de novo, we find the find appellant is not entitled to additional credit under any theory.[8]

Sentence Severity

We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 2007). Our superior court has concluded that the Courts of Criminal Appeals have the power to, "in the interests of justice, substantially lessen the rigor of a legal sentence." *United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002)(quoting *United States v. Lanford*, 20 C.M.R. 87, 95 (C.M.A. 1955)).

After reviewing the record of trial, to include the appellant's post-trial submissions, we conclude the appellant's sentence to a dishonorable discharge is inappropriately severe.

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[7]See footnote 5.

[8]We decline to find the trial judge erred when his ruling was "potentially" contradictory to findings made by other trial judges.

Conclusion

The findings and the 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). However, we affirm only so much of the sentence as includes a bad conduct discharge, confinement for 14 months, total forfeitures of all pay and allowances, and reduction to E-1. Accordingly, the findings, and sentence, as modified, are

AFFIRMED.

OFFICIAL

CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court