UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman AUSTIN W. HANSKNECHT
United States Air Force

ACM S31865

08 November 2012

Sentence adjudged 9 September 2010 by SPCM convened at Sheppard Air Force Base, Texas. Military Judge: J. Wesley Moore.

Approved sentence: Bad-conduct discharge, confinement for 3 months, forfeiture of $964.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Michael S. Kerr; Captain Luke D. Wilson; and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel C. Taylor Smith; Captain Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

STONE, GREGORY, and HARNEY
Appellate Military Judges

PER CURIAM:

A special court-martial composed of officer members convicted the appellant in accordance with his pleas of wrongfully using cocaine, marijuana, and methamphetamine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, and theft of military property valued at more than $500.00, in violation of Article 121, UCMJ, 10 U.S.C. § 921. The court sentenced him to a bad-conduct discharge, confinement for three months, forfeiture of $964.00 pay per month for three months, and reduction to the lowest enlisted grade. The convening authority approved the adjudged sentence. The appellant assigns four errors: (1) the military judge erroneously denied a challenge for cause; (2) the military judge erroneously denied an Article 10, UCMJ, 10 U.S.C § 910,

speedy trial motion; (3) the military judge erred by instructing the members that pretrial conditions did not amount to arrest; and (4) post-trial delay requires sentence relief.[*]

The Challenge for Cause

During individual voir dire, defense counsel asked Major BA about his knowledge of a prior unrelated theft case in which he had preferred charges. Major BA stated that at the time, he and the defense counsel who represented the accused were friends and that, after the trial, the counsel mentioned to him that she should have conceded more confinement was appropriate because her client "had definitely not learned his lesson." Based on his dealings with the accused, Major BA agreed. In response to follow-up questions by trial counsel and the military judge, Major BA explained that the case was "a long time ago" and agreed unequivocally that he could separate the circumstances of that case from the present and would give both the appellant and the Government a fair trial. The defense counsel challenged him for cause on the basis of the conversation with the defense counsel about the earlier theft case.

In denying the challenge, the military judge made detailed findings on both actual and implied bias. He stated that it was "abundantly clear," based on his observations, that Major BA decides each case "on its own merits." Considering implied bias in light of the liberal grant mandate, the military judge found the Major's absolute willingness to consider each case individually reflected positively on the military justice system.

A member shall be excused for cause whenever it appears that the member "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." Rule for Courts-Martial (R.C.M.) 912(f)(1)(N). This rule applies to both actual and implied bias. *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996). "The test for actual bias is whether [the member] 'will not yield to the evidence presented and the judge's instructions.'" *United States v. Schlamer*, 52 M.J. 80, 92 (C.A.A.F. 1999) (quoting *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997)). With implied bias, we focus on the perception or appearance of fairness of the military justice system as viewed through the eyes of the public. *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998); *United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995). Simply stated, "[i]mplied bias exists 'when most people in the same position would be prejudiced.'" *Daulton*, 45 M.J. at 217 (quoting *United States v. Smart*, 21 M.J. 15, 20 (C.M.A. 1985)). For both types of challenges, military judges must apply the liberal grant mandate which recognizes the unique nature of the court member selection process. *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002). We review a military judge's ruling on a challenge based on actual bias for abuse of discretion; we review challenges based on implied bias with less deference than abuse of discretion by using an objective standard of public perception. *Id*.

[*] The second and third assigned errors are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982) .

Applying the standards described above, we find the military judge did not err in denying the challenge for cause. The responses of Major BA support the conclusion of the military judge that it was "abundantly clear" Major BA would decide the case "on its own merits." Viewing the ruling on implied bias using an objective standard of public perception and considering the liberal grant mandate, the unequivocal responses of Major BA objectively allay any concern that his participation would cause the public to somehow perceive the trial as unfair.

Speedy Trial

The appellant moved at trial to dismiss the charges on the basis of an Article 10, UCMJ, speedy trial violation. In support of his motion, he argued that the conditions of his pretrial assignment to a transition flight were tantamount to arrest, which triggered the running of the speedy trial clock under Article 10, UCMJ. The military judge denied the motion, finding that the conditions of the appellant's pretrial restrictions did not amount to arrest – a necessary prerequisite to an analysis under Article 10, UCMJ. The appellant renews the issue before us pursuant to *Grostefon*.

Thus, we focus on whether the conditions of the appellant's assignment to the transition flight were sufficient to trigger the requirements of Article 10, UCMJ. Both the appellant and the Government cite our previous unpublished order in *United States v. Danylo*, Misc. Dkt. No. 2010-15 (A.F. Ct. Crim. App. March 9, 2011), *pet. denied*, 70 M.J. 217, No. 11-6006/AF (Daily Journal 20 June 2011), which addressed the same conditions in the transition flight to which the appellant was assigned and determined that the restrictions did not amount to an arrest. The extensive findings of fact and conclusions of law entered by the military judge are entirely consistent with that order. We find no denial of the right to speedy trial under Article 10, UCMJ, because the conditions of the appellant's assignment to transition flight were not sufficient to trigger its requirements.

Instructing the Members Concerning Transition Flight

The appellant discussed the conditions of transition flight in his unsworn statement:

> Just a week ago, the Conditions system at T-Flight went away. When AB Danylo was brought to trial, the judge ruled that Condition 1 at T-Flight was arrest under the Uniform Code of Military Justice. In response, the base got rid of the Conditions system at T-Flight. While I have enjoyed the freedoms of a normal Phase 1 airman over the last week, it frustrates me to know that I sat around T-Flight for the last five months, enduring restrictions I believe I shouldn't have been made to endure.

To clarify for the members the factual and legal status of transition flight in the appellant's case, the military judge instructed the members:

> The accused's written unsworn statement referred to a ruling by the trial judge in another case that Condition 1 at Transition Flight was arrest under the Uniform Code of Military Justice. In that connection, you are advised that I conducted an extensive hearing in this case and determined that the accused's assignment to Transition Flight, including periods in which he was subject to Condition 1 restrictions, did not constitute arrest under the Uniform Code of Military Justice.
>
> An unsworn statement is a proper means to bring information to your attention and you must give it appropriate consideration. Your deliberations should focus on an appropriate sentence for this accused for the offenses of which he stands convicted. You should not speculate about conclusions reached in other cases. As I stated previously, you may consider the accused's time in Transition Flight as a matter in extenuation and mitigation.

The appellant objected to the instruction at trial and, pursuant to *Grostefon*, renews his argument on appeal.

"The unsworn statement is not subject to cross-examination; however, it is subject to rebuttal, comment during the Government's closing argument, and it may be tempered by appropriate instructions from the military judge." *United States v. Barrier*, 61 M.J. 482, 484 (C.A.A.F. 2005) (*citing* R.C.M. 1001(c)(2)(C); *United States v. Grill*, 48 M.J. 131, 133 (C.A.A.F. 1998)). "Military judges have broad authority to give instructions on the 'meaning and effect' of the accused's unsworn statement, both to ensure that the members place such a statement 'in the proper context' and 'to provide an appropriate focus for the members' attention on sentencing.'" *United States v. Tschip*, 58 M.J. 275, 276 (C.A.A.F. 2003) (quoting *Grill*, 48 M.J. at 133).

Without commenting on the accuracy of the appellant's statement regarding the ruling in the prior case, the military judge correctly advised the members that he had determined the conditions in transition flight did not amount to arrest. He nevertheless instructed that the members could consider those conditions along with all the other facts and circumstances in reaching a decision on sentence. We find the instruction well within the military judge's prerogative to instruct the members. *See United States v. Hopkins*, 56 M.J. 393, 395 (C.A.A.F. 2002) (A military judge has substantial discretionary authority in determining what instructions to give, and sentencing instructions are reviewed for an abuse of discretion.).

Post-Trial Delay

Citing *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002), the appellant argues that the post-trial processing time in his case is sufficiently long to require relief absent a showing of prejudice. In *Tardif*, our superior court determined that Article 66(c), UCMJ, 10 U.S.C. § 866(c), empowered the service courts to grant sentence relief for excessive post-trial delay without showing actual prejudice as is required by Article 59(a), UCMJ, 10 U.S.C. § 859(a). Having reviewed the legislative and judicial history of both Articles, the Court concluded that the power and duty to determine "sentence appropriateness" under Article 66(c), UCMJ, is distinct from and broader than that of determining "sentence legality" under Article 59(a), UCMJ:

> Article 59(a) constrains the authority to reverse "on the ground of an error of law." Article 66(c) is a broader, three-pronged constraint on the court's authority to affirm. Before it may affirm, the court must be satisfied that the findings and sentence are (1) "correct in law," and (2) "correct in fact." Even if these first two prongs are satisfied, the court may affirm only so much of the findings and sentence as it "determines, on the basis of the entire record should be approved."

Id. at 224 (citing *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998)). The Court remanded the case to the lower court to determine whether relief was warranted for excessive post-trial delay, notwithstanding the absence of prejudice: "[A]ppellate courts are not limited to either tolerating the intolerable or giving an appellant a windfall. The Courts of Criminal Appeals have authority under Article 66(c) . . . to tailor an appropriate remedy [for post-trial delay], if any is warranted, to the circumstances of the case." *Id*. at 225.

In *United States v. Brown*, 62 M.J. 602, 606-07 (N.M. Ct. Crim. App. 2005), our Navy and Marine Court colleagues identified a "non-exhaustive" list of factors to consider in evaluating whether Article 66(c), UCMJ, relief should be granted for post-trial delay. Among the non-prejudicial factors are the length and reasons for the delay, the length and complexity of the record, the offenses involved, and the evidence of bad faith or gross indifference in the post-trial process. *Id*. at 607. Finding gross negligence in a delay of almost 30 months from adjournment of trial until receipt of the record for review, the court disapproved the adjudged bad-conduct discharge.

The appellant argues that the *Brown* factors support setting aside the punitive discharge in this case. We disagree. The convening authority took action 35 days after the conclusion of trial and the case was docketed with the court 18 days later, periods that are well below the presumptively unreasonable periods of more than 120 days for action or 30 days for docketing after action established in *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). The appellant submitted his assignment of errors and brief ten

months after docketing, and the Government answered a month later for a total briefing time of about 331 days – again, far less than the 925 days which contributed to the unreasonable delay in *Moreno*. Although the appellant's case has been pending before this court for six months longer than the facially unreasonable 18-month period established in *Moreno*, we find no evidence of bad faith or gross indifference to the post-trial processing of the appellant's case sufficient to prompt sentence relief nor do the other suggested factors in *Brown* cause us to exercise our power under Article 66(c), UCMJ, to provide a windfall remedy to the appellant by disapproving an otherwise legal sentence.

Conclusion

The approved 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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court