UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CHRISTOPHER J. KELLY
United States Air Force

ACM 36897

25 June 2008

Sentence adjudged 07 June 2006 by GCM convened at Patrick Air Force Base, Florida. Military Judge: W. Thomas Cumbie (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 21 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Lieutenant Colonel Darla G. Orndorff, and Major John N. Page.

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

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

OPINION OF THE COURT

HEIMANN, Senior Judge:

The appellant was tried at Patrick Air Force Base (AFB), Florida before a military judge alone. Contrary to his pleas, he was convicted of one specification of failure to go on divers occasions, two specifications of false official statements, three specifications of false claims against the United States, and one specification of mailing false documents in support of an insurance claim through the mail. The charges were in violation of Articles 86, 107, 132, and 134, UCMJ, 10 U.S.C. §§ 886, 907, 932, 934; and 18 U.S.C. §1341, respectively. He was found not guilty of three other charges and specifications.

The adjudged sentence consisted of a bad-conduct discharge, confinement for 21 months, reduction to E-1 and a fine of $1,199.00 with an additional three months confinement imposed if the fine was not paid. The convening authority approved only the bad conduct discharge, confinement for 21 months, and the reduction to E-1.

The appellant raises three issues on appeal. The first issue is whether the military judge erred in failing to dismiss, with prejudice, a portion of the charges after concluding that the appellant's speedy trial rights under Rule for Courts-Martial (R.C.M.) 707 had been violated. The second issue is whether the military judge erred in failing to suppress the appellant's numerous statements to security force investigators. The final issue, raised for the first time on appeal, is whether the appellant was subject to pre-trial punishment while working in a transitional unit prior to trial. For the reasons set forth below we find against the appellant and grant no relief.

Background

The appellant was a 33-year old airman who had served approximately 6 years on active duty by the time his court-martial was completed. He was a maintenance technician of complex airborne and ground-based particulate and gaseous data collection equipment used by the Air Force worldwide.

The appellant had served in Texas, Korea and Florida during the course of his career. The most significant charges arise out of personal property claims he submitted at Wonju Air Station, Korea and at Patrick AFB, Florida via the Air Force claims program and a claim he submitted to United States Automobile Association insurance company. All of the claims were for loss or damage to personal property. The most significant items claimed included computers and computer related accessories totaling over $40,000.

Speedy Trial

During a preliminary trial session, the appellant argued and the military judge agreed that the appellant's right to a speedy trial under R.C.M. 707 had been violated.[1] Specifically, the military judge found R.C.M. 707 was violated when the government took 141 accountable days in bringing the appellant to trial regarding a portion of the charges.[2] We agree with the military judge's finding that R.C.M. 707 was violated.

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[1] The appellant does not assert a violation of his Sixth Amendment, U.S. CONST. amend VI, right to a speedy trial or a violation of Article 10, UCMJ, 10 U.S.C. § 810. We agree that there has been no violation of these rights as well.

[2] Rule for Courts-Martial (R.C.M.) 707(a) provides, in part, that a military accused must be brought to trial within 120 days after the earlier of: (1) preferral of charges; or (2) the imposition of restraint under R.C.M. 304(a)(2)-(4). *United States v. Anderson*, 50 M.J. 447, 448 (C.A.A.F. 1999).

Having successfully argued that his R.C.M. 707 rights had been violated, the appellant next argued that the proper remedy for the violation should be dismissal with prejudice of the impacted charges. The military judge disagreed with this assertion and dismissed without prejudice. Subsequently, the government re-preferred and referred the challenged charges. Having been convicted of some of these re-referred charges, the appellant renews his claim on appeal that the charges should have been dismissed with prejudice.[3]

At trial the appellant argued that the military judge should have dismissed with prejudice those charges affected by the R.C.M. 707 violation because the charges were not serious, and because the speedy trial violation was a direct result of "inaction or improper action" by the government. Included in this latter assertion is the claim that the "decision to withdraw charges was at least impart [sic] motivated by 'metrics.'" The appellant asserts this metrics-based motivation constituted an improper justification that undermines the administration of justice. Finally, the appellant argued, at trial, that the delay harmed the appellant on a "personal, professional, and tactical" level. Despite this final assertion, we note that the appellant offered no evidence at trial to support his claim of harm but simply argued, in his brief, that the appellant and his family suffered "stress and tension" awaiting trial.

On appeal the appellant essentially renews his arguments for dismissal with prejudice but particularly emphasizes the claim that metrics contributed to the violation. He argues that the military judge erred when he did not make a "finding as to whether administrative military justice 'metrics' was a proper reason for withdrawing charges." All parties agree that on the issue of prejudice, R.C.M. 707(d) governs. It provides:

> In determining whether to dismiss charges with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a re-prosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial.

In denying the appellant's claim that the dismissal should be with prejudice, the military judge made lengthy findings of fact and law. In particular, the military judge found that the charges are "very serious" because they "reflect a systematic attempt by the accused to wrongfully obtain a large sum of money, on two different occasions, from the government." In looking at the circumstances leading to the dismissal, the judge concluded: "[w]hile the decision to withdraw the charges may have been driven, in part, by the metrics, the convening authority clearly indicated his intent to try all charges at a single court-martial." Further the military judge found, "[t]he court finds no evidence that

[3] The appellant argues that the three specifications alleging false claims under Article 132, UCMJ, and the Article 134 charge for mailing false claims paperwork should have been dismissed with prejudice.

the convening authorities [sic] decision to withdraw the charges were made for an improper reason." These conclusions are supported by the judge's finding of fact that the convening authority references additional misconduct in his memorandum withdrawing the charges, and the fact that additional charges were ultimately referred against the appellant and joined with the original charges.[4] The military judge also found that sixty-one of the accountable days were necessary for the appellant's new counsel to prepare for trial after he had relieved his prior counsel on the eve of the original trial date.[5]

As for the impact of re-prosecution on the administration of justice, the military judge concluded that despite the processing errors by the government, the appellant was brought to trial close to the same date he would originally have been tried. He also concluded that a single trial most likely operated to the appellant's best interest. Finally, on the issue of impact on the accused, the military judge found that the majority of the delays were at the request of the appellant. He concludes his discussion of this factor by finding "any prejudice to the accused was of his own making."

We review a military judge's ruling on whether a case is dismissed with or without prejudice for a violation of R.C.M. 707 for an abuse of discretion. *United States v. Dooley,* 61 M.J. 258, 262 (C.A.A.F. 2005). In addition, our superior court in *Dooley*, noted "[u]nder an abuse of discretion standard, mere disagreement with the conclusion of the military judge who applied the R.C.M 707 factors is not enough to overturn his judgment." *Id.*; *See also*, *United States v. Vieira*, 64 M.J. 524, 527 (A.F. Ct. Crim. App. 2006). Finally, the Court noted in *Dooley*, a "military judge's decision . . . should be affirmed unless his factual findings are clearly erroneous or his decision in applying the R.C.M. 707 factors was influenced by an incorrect view of the law." *Dooley*, 61 M.J. at 263.

Looking to the specifics of this case, we find none of the military judge's findings of fact were clearly erroneous. As for the application of the R.C.M. 707 prejudice factors, we believe the military judge properly applied the first three criteria. However, in regards to the final factor, "prejudice to the accused resulting from the denial of a speedy trial," we believe the military judge's analysis was improper. The question, in this final factor, is not who is to blame for the prejudice to the accused but "what is the prejudice to the accused." While we agree with the military judge that delays caused by the accused are relevant to analysis of the other factors, it is not the question in evaluating this final factor. Despite the misapplication of the final factor, we still conclude that the

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[4] The new charges included two specifications of false statements, failure to go, fraudulent enlistment, wrongful use of marijuana, and violating a regulation. The appellant was only found guilty of the first two of these "new" specifications. The charges and specifications for fraudulent enlistment and wrongful use of marijuana were withdrawn by the convening authority prior to trial, and the appellant was found not guilty of the Article 92, UCMJ, 10 U.S.C. § 892 violation.

[5] Despite being directly attributable to a defense delay request, the military judge still found the days accountable because the judge granting the request did not have the authority to do so after the convening authority withdrew the pending charges.

military judge was correct in dismissing without prejudice. The charges are significant, the length of the delay was fairly minimal, the circumstances surrounding the delay do not suggest any intentional dilatory conduct on the part of the government, and we see nothing to suggest that the administration of justice suffered any harm. Further, we find no prejudice to the accused. He was not in pretrial confinement, and there is no indication that his ability to defend against the charges was in any way hampered. *See United States v. Mizgala*, 61 M.J. 122, 129 (C.A.A.F. 2005).

Finally, as to the appellant's assertion at trial and on appeal that military justice processing "metrics" contributed to the speedy trial violation, we agree with the military judge's finding that there is no evidence the convening authority withdrew the charges for an improper purpose. The appellant's reliance on the email of a prosecutor simply does not support his assertion. There being no evidence that the convening authority ever considered "metrics" in making his decision we need not address the appellant's assertion before this court that the judge erred in not making a ruling on the point.

Suppression Motion

On a Friday afternoon, the appellant was called into security forces investigators' offices under suspicion that had he submitted a false claim to the legal office. He was properly advised of his rights and after approximately two and a half hours, the appellant ended the interview and requested counsel. Two days later, on Sunday afternoon, the appellant called the law enforcement desk and asked to speak with one of the police investigators. The appellant had not obtained counsel in the intervening two days.

The investigator returned the appellant's phone call to find out why he called. At no time during this call was the appellant read his rights. The military judge adopted the appellant's statement of facts on the summary of that call and found essentially that after engaging in small talk for five minutes, the parties discussed the "reason" why the appellant had called. The appellant indicated that he had some things he wanted to provide the investigators regarding his claim, and that he continued to look for some items substantiating his claims. The investigator indicated that he "appreciated" the appellant's efforts but there remained things that "were left unclear." Ultimately, the investigator asked the appellant, "Do you still want to talk to us?" and if so, do you want to "withdraw your right to your military lawyer." The appellant replied yes to these questions and indicated that if he needed a lawyer he would get one.

A little more than an hour after this conversation, the appellant voluntarily presented himself to the security forces investigators for a follow up interview. The appellant was initially presented with a statement acknowledging that he had reinitiated the contact with the investigators and that he was withdrawing his invocation of rights to counsel. This statement makes no mention of the earlier phone conversation. He was then read his rights, acknowledged them, indicated he understood them and indicated he

did not want an attorney. The appellant completed a statement that day which contained both inculpatory and exculpatory statements. The appellant was interviewed again three and five days later and made further comments after rights advisement.

At trial and on appeal, the appellant contends the statements he made to security police investigators during a telephone conversation and all subsequent statements, made after Article 31, UCMJ, rights advisement to these same investigators should be excluded as fruits of statements made without proper rights advisement. At trial, the military judge concluded that Article 31 rights advisement was not required during the phone conversation because the appellant initiated the call and he was seeking to provide exculpatory evidence. Alternatively, the military judge concluded that even if the accused was entitled to rights advisement during the phone conversation, the accused statements at all three subsequent interviews were "voluntarily" given and there was no evidence that the investigators "used coercion, duress, or unlawful inducement to compel the interview or the statements made by the accused."

This Court reviews a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). An abuse of discretion occurs when the military judge's findings of fact are clearly erroneous or if the decision is influenced by an erroneous view of the law. *United States v. Quintanilla*, 63 M.J. 29, 35 (C.A.A.F. 2006); *United States v. Bethea*, 61 M.J. 184 (C.A.A.F. 2005).

The military judge made findings of fact which are supported by the record. We disagree, however, with the military judge's finding that the law does not "require[] law enforcement agents to read the accused his rights if they suspect he will give exculpatory information," but for the reason outlined below we find no error.

Article 31(b), UCMJ, 10 U.S.C. § 831, provides that "[n]o person subject to [the UCMJ] may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial." In this case, the issue centers on the scope of the phrase "interrogate or request any statement from an accused."

As our superior court noted recently in *United States v. Cohen*, 63 M.J. 45, 49 (C.A.A.F. 2006), "[w]here the questioner is performing a law enforcement investigation . . . and the person questioned is suspected of an offense, then Article 31 warnings are required." (Citing *United States v. Swift*, 53 M.J. 439, 446-47 (C.A.A.F. 2000)). Whether the questioner is performing an investigation is determined by assessing all the facts and circumstances at the time of the interview to determine whether the military questioner was acting or could reasonably be considered to be acting in an official law-enforcement or disciplinary capacity. *Swift*, 53 M.J. at 446.

In this case, there is no doubt that the security police investigator was acting in a official law-enforcement capacity and performing an investigation when he returned the appellant's call. Therefore, the appellant was entitled to rights advisement the minute the investigator began asking the appellant questions pertinent to the crime of which he was suspected. *See generally United States v. Gardinier*, 65 M.J. 60, 62 (C.A.A.F. 2007). In this case the investigator asked at least one question about the offenses during the phone conversation, and therefore rights advisement was required. While we agree with the military judge that the appellant did not incriminate himself during the phone conversation, that is not the question. Article 31(b) does not trigger based upon on the nature of the appellant's responses to the investigator's questions, but on the point at which the investigator begins to question a known suspect of suspected offenses.

Having found that rights were required during the initial phone conversation we next turn to the question of impact. Generally, with few exceptions, statements obtained in violation of Article 31(b) may not be received in evidence against an accused in a trial by court-martial. Article 31(d), UCMJ, *United States v. Ruiz*, 54 M.J. 138, 140 (C.A.A.F. 2000). Our superior court recently addressed a similar situation regarding the admissibility of subsequent statements when an earlier statement is "involuntary" *only* because "the accused had not been properly warned of his Article 31(b), UCMJ, rights." *Gardinier*, 65 M.J. at 64. In *Gardinier*, they found "the voluntariness of the second statement is determined by the totality of the circumstances," and that "the earlier unwarned statement is a factor in this total picture, but it does not presumptively taint the subsequent statement." "If a 'cleansing statement' is not given, however, its absence is not fatal to a finding of voluntariness." *Id.*; *See also United States v. Brisbane*, 63 M.J. 106, 114 (C.A.A.F. 2006).

On this final point, we are in agreement with the military judge. As our superior court did in *Gardinier*, when considering the totality of the circumstances, we find that the military judge properly concluded that the subsequent statements were "voluntarily" given, following a proper Article 31 rights advisement. Here, the appellant initiated the contact with the investigators, had previously demonstrated his willingness to invoke his rights if he deemed it necessary, and made no incriminating statements during the suspect phone conversation. Further, we agree with the military judge's conclusion there was no evidence that the investigators "used coercion, duress, or unlawful inducements to compel the [subsequent] interviews which resulted in statements made by the accused." Thus the subsequent statements were "voluntary" after proper rights advisement.

Pretrial Punishment[6]

On appeal the appellant claims, for the first time, he was subjected to illegal pretrial punishment while awaiting trial.[7] In support of this claim he references his

[6] This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

clemency submission to the convening authority. In these submissions he states, "[d]uring the three years I awaited trial I spent one in the Patrick AFB Honor Guard, which was worth while, but should have been voluntary. For the rest of the time I spent my days performing tasks like digging holes and filling them back in, creating sand bags just to empty them later, and other busy work tasks that did little to benefit anything in particular." In addition to these comments we note that at trial his defense counsel opened his sentencing argument by highlighting to the military judge that the appellant had waited two and a half years for trial.

Contrary to appellant's assertions, we note that prosecution exhibit 22 includes performance appraisals for much of the time period in question. A review of these documents clearly indicate the appellant was performing productive and meaningful duties while awaiting trial. Finally, we note the testimony of his supervisor at trial who testified that without a Top Secret – Special Compartmented Information Clearance the appellant was not eligible to perform the duties for which he was trained.

Article 13, UCMJ, 10 U.S.C. § 813, prohibits intentional imposition of punishment on an accused before his or her guilt is established at trial. *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005); *United States v. Inong*, 58 M.J. 460, 463 (C.A.A.F. 2003) (citations omitted). Whether the appellant is entitled to credit for a violation of Article 13, UCMJ, is a mixed question of fact and law. *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000); *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997). Whether the facts amount to a violation of Article 13, UCMJ, is a matter of law the court reviews de novo. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002); *United States v. Crawford*, 62 M.J. 411, 414 (C.A.A.F. 2006) (citations omitted).

"[F]ailure at trial to seek sentence relief for violations of Article 13 waives that issue on appeal absent plain error." *Inong*, 58 M.J. at 465. Considering all of the information identified above, we find no plain error here. The appellant obviously knew about his work duties prior to trial. His defense counsel highlighted the long wait for trial in his argument in support of his plea for leniency. Despite his claim, the appellant not only failed to raise the issue at trial, but both he and his trial defense counsel responded negatively to specific questions by the military judge as to whether the appellant had been subjected to illegal punishment in violation of Article 13, UCMJ. Based upon all of these facts, we find no plain error.

Post-trial Processing

In this case, the overall delay of 749 days between the trial and completion of review by this Court is facially unreasonable.[8] Because the delay is facially

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[7] He was never in pretrial confinement.

[8] In calculating the time we did not consider the post-trial session in October 2006. Sentence was announced on 7 June 06.

unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances and entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt and that no relief is warranted.

Conclusion

The approved 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 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court