UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic STEPHEN J. LAZAUSKAS
United States Air Force

ACM 34934

19 August 2004

Sentence adjudged 16 November 2001 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Gregory E. Pavlik (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 15 months.

Appellate Counsel for Appellant: Major James M. Winner (argued), Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Patricia A. McHugh.

Appellate Counsel for the United States: Captain Kevin P. Stiens (argued), Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, Lieutenant Colonel Lance B. Sigmon, and Captain Matthew J. Mulbarger.

Before

BRESLIN, ORR, and GENT
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

BRESLIN, Senior Judge:

A general court-martial comprised of a military judge sitting alone found the appellant guilty, contrary to his pleas, of the wrongful use of 3, 4 methylene-dioxymethamphetamine (also known as "ecstasy"), distribution of ecstasy, and introducing ecstasy onto a military installation, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, obstruction of justice, in violation of Article 134, UCMJ, 10 U.S.C. § 934, and attempted disobedience of a no-contact order, in violation of Article 80, UCMJ, 10 U.S.C. § 880. The military judge sentenced the appellant to a bad-conduct discharge and

confinement for 15 months, and the convening authority approved the sentence as adjudged.

The case is before this Court for review under Article 66, UCMJ, 10 U.S.C. § 866. The appellant maintains the military judge erred in denying the appellant's motion to dismiss the charges for lack of a speedy trial, that the appellant was subjected to illegal pretrial punishment, and that the evidence is factually insufficient to sustain the conviction for attempting to violate a no-contact order. We find no error and affirm.

Speedy Trial

At the beginning of the trial, the defense counsel moved to dismiss the charges for lack of a speedy trial under Rule for Courts-Martial (R.C.M.) 707, Article 10, UCMJ, 10 U.S.C. § 810, and the Sixth Amendment to the United States Constitution. The military judge considered the written motions from both sides, took evidence, and heard argument from counsel. The military judge denied the defense motion on the record, and later supplemented his ruling with more extensive findings. The appellant renews on appeal the arguments made at trial.

There are several sources of law assuring a military member's right to a speedy trial. *United States v. Becker*, 53 M.J. 229, 231 (C.A.A.F. 2000); *United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993); *United States v. Vogan*, 35 M.J. 32, 33 (C.M.A. 1992). 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. *United States v. Birge*, 52 M.J. 209, 210 (C.A.A.F. 1999). 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." *Birge*, 52 M.J. at 211. Additionally, our superior court holds that the Sixth Amendment applies to courts-martial, and guarantees "the right to a speedy and public trial." *Id.*

Whether an appellant received a speedy trial is an issue of law, which we review de novo. *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999). However, we give substantial deference to the military judge's findings of fact, and will reverse them only for clear error. *United States v. Taylor*, 487 U.S. 326, 337 (1988); *United States v. Edmond*, 41 M.J. 419, 420 (C.A.A.F. 1995). We review the decision whether to grant a delay for an abuse of discretion and reasonableness. *See* Drafter's Analysis, *Manual for Courts-Martial, United States* (*MCM*), A21-42 (2000 ed.); *United States v. Longhofer*, 29 M.J. 22, 28 (C.M.A. 1989); *United States v. Nichols*, 42 M.J. 715, 721 (A.F. Ct. Crim. App. 1995).

The appellant argues the military judge erred in finding the appellant was not denied his right to a speedy trial under R.C.M. 707, Article 10, UCMJ, and the Sixth Amendment. We will consider each of these arguments.

A. R.C.M. 707.

R.C.M. 707 provides that an accused "shall be brought to trial within 120 days" of the imposition of pretrial confinement. The purpose of the specific time limit in the rule is to protect the appellant's right to a speedy trial under the Sixth Amendment and Article 10, UCMJ, and society's interests in the prompt administration of justice. *MCM*, A21-41.

It is possible to exclude certain periods of time from the 120-day limit in the rule. A previous version of R.C.M. 707 excluded time periods if they fell into specific categories. The system proved unworkable–and was criticized by appellate courts–because it was not clear what was properly considered a delay until the matter was raised in a motion to dismiss the charges. *See United States v. Dies*, 45 M.J. 376, 377-78 (C.A.A.F. 1996) (and cases cited therein). Under the current version, pretrial delays may be excluded if "approved by a military judge or the convening authority." R.C.M. 707(c). The purpose of the rule change was to "eliminate after-the-fact determinations as to whether certain periods of delay are excludable." *MCM*, A21-41. As this Court has previously noted, "After-the-fact exclusion of time from the government's speedy trial accountability is no longer an option." *Nichols*, 42 M.J. at 721 (citing *United States v. Youngberg*, 38 M.J. 635, 638 (A.C.M.R. 1993); Captain Eric D. Placke, USAF, *R.C.M. 707 and the New Speedy Trial Rules*, THE REPORTER, Vol. 18, No. 4 (December 1991)).

Some of the difficulty in deciding this matter stems from the manner in which the R.C.M. 707 issue was litigated at trial. The defense counsel argued that certain delays should be "attributed to the government" because the government was at fault for the delay. The government counsel responded in kind, and much of the testimony elicited from the witnesses focused on these arguments (instead of whether a delay was requested or approved). While that may have been relevant under the previous version of R.C.M. 707, and may have some bearing upon the Article 10, UCMJ, or Sixth Amendment issues, it is not relevant under the present version of R.C.M. 707. Under the new R.C.M. 707, fault is not the issue; the only question is whether the delay was properly granted by a qualified authority.

Much of the difficulty in deciding this issue arises because neither side prepared a proper chronology, notwithstanding the military judge's instruction to do so.[*] Instead, the parties calculated the gross elapsed time, then debated the periods of approved delay. The parties agreed with several periods of authorized delay. However, the appellant contends the military judge erred in excluding three periods from the calculations.

The appellant argues the military judge erred in excluding the six days between 8 and 13 August 2001. The investigating officer (IO) granted the defense request for a

[*] The Court's chronology detailing the process of this case is included as an appendix to this decision.

delay in the formal investigation under Article 32, UCMJ, 10 U.S.C. § 832, because of a dispute over two witnesses the defense wanted but had not requested. The appellant argues this delay should be attributed to the government for speedy trial purposes.

We find no merit to this argument. As noted above, the issue under R.C.M. 707 is whether the defense request for delay was properly granted—if so, the time is excluded from the speedy trial period. The military judge found that it was properly granted, and we agree. *See United States v. Thompson*, 46 M.J. 472 (C.A.A.F. 1997). In any event, the government's notice to the defense of the witnesses it intends to present at the Article 32 investigation is given so that the defense has notice of the intended witnesses and an opportunity to prepare. The government is not thereafter required to call those witnesses. It is the defense counsel's obligation to notify the government of the witnesses the defense wishes to present at the investigation.

The appellant argues the military judge erred in excluding the time period of 28 August through 30 August 2001, the date of the initial Article 39(a), UCMJ, 10 U.S.C. § 839(a), session spent litigating the appellant's successful effort to set aside the initial referral and re-open the Article 32 investigation. We find the military judge did not abuse his discretion in excluding the time spent in court litigating a pretrial motion before arraignment.

The appellant also argues the military judge erred in excluding the 5-day waiting period of 6 through 10 October 2001 from the speedy trial time attributable to the government. He argues that R.C.M. 602 provides that an accused cannot be brought to trial within the 5-day waiting period following the service of charges, therefore the time must be attributed to the government. *See also* Article 35, UCMJ, 10 U.S.C. § 835. Our superior court has already rejected the argument that the appellant could have refused to go to trial for five days after referral and at the same time demanded a speedy trial. *United States v. Cherok*, 22 M.J. 438, 440 (C.M.A. 1986). On 5 October 2001, the chief circuit military judge (CCMJ) set a trial date of 15 November 2001, with the agreement of both parties. This scheduling was an approved delay under R.C.M. 707(c). The trial judge did not err in excluding this time for speedy trial purposes.

For these reasons, we conclude the appellant was brought to trial within 120 accountable days. The military judge did not err in denying the defense motion to dismiss on grounds of a violation of R.C.M. 707.

B. Article 10, UCMJ.

The appellant also argued at trial that the processing of the appellant's case violated the appellant's right to a speedy trial under Article 10, UCMJ. During discussions on the motion, the military judge indicated that a violation of Article 10 required "gross negligence" or "spiteful conduct" on the part of the government, and

rejected the notion that simple negligence may suffice. The military judge denied the requested relief.

The appellant argues that the military judge applied an incorrect legal standard in evaluating whether the government complied with the requirements of Article 10, UCMJ. The appellant insists that simple negligence is the proper standard, and that any showing of negligence requires a finding that Article 10, UCMJ, was violated.

Article 10, UCMJ, provides that when a service member is confined prior to trial, "immediate steps shall be taken . . . to try him or to dismiss the charges and release him." Our superior court holds that Article 10, UCMJ, provides broader rights than R.C.M. 707. *Kossman*, 38 M.J. at 261. The test for compliance with the requirements of Article 10, UCMJ, is whether the government has acted with "reasonable diligence." *Birge*, 52 M.J. at 211; *Kossman*, 38 M.J. at 262. In *Kossman*, our superior court set out the test to be used in evaluating compliance with the requirements of Article 10, UCMJ. The Court decided, "For want of a better verbal formula, the pre-*Burton* standard of 'reasonable diligence' seems appropriate." *Id.* The Court then cited with approval the language from *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965):

> It suffices to note that the touch stone for measurement of compliance with the provisions of the Uniform Code is not constant motion, but reasonable diligence in bringing the charges to trial. Brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive.

Kossman, 38 M.J. at 262.

Neither the military judge nor the defense counsel cited the proper legal standard for review of this matter. Contrary to the military judge's stated belief, we hold that simple negligence may give rise to an Article 10, UCMJ, violation. The *Kossman* Court observed that where "the Government could readily have gone to trial much sooner than some arbitrarily selected time demarcation but *negligently* or spitefully chose not to, we think an Article 10 motion would lie." *Id*. at 261 (emphasis added). We note that in Sixth Amendment situations, federal courts consider simple negligence as a factor in deciding whether a defendant received a speedy trial.

> Between diligent prosecution and bad-faith delay, official negligence in bringing an accused to trial occupies the middle ground. While not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him. It was on this point that the Court of Appeals erred, and on the facts before us, it was reversible error. . . . Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense,

> it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun.

Doggett v. United States, 505 U.S. 647, 656-57 (1992). *See also Taylor*, 487 U.S. at 338 ("We do not dispute that a truly neglectful attitude on the part of the Government reasonably could be factored against it in a court's consideration" to dismiss charges under the Speedy Trial Act).

Similarly, our superior court has cited negligence as a factor to be considered in deciding whether an accused received a speedy trial.

> The Federal Courts have looked at similar factors, such as "intentional dilatory conduct," *United States v. Kottmyer*, 961 F.2d 569, 573 ¶ 18 (6th Cir.1992); a "pattern of neglect," *id.* at 573 ¶ 18 and *United States v. Giambrone*, 920 F.2d 176, 182 (2d Cir.1990); and simple inadvertence, *United States v. Wright*, 6 F.3d 811, 814 ¶ 12 (D.C.Cir. 1993).

Edmond, 41 M.J. at 421-22.

Contrary to the defense counsel's argument, a finding of simple negligence does not prohibit a finding that, overall, the government acted with "reasonable diligence" in bringing an accused to trial. In assessing "reasonable diligence," reviewing courts consider all the circumstances affecting the entire period required to bring the appellant to trial. It is possible that, even where there was some negligence on the part of the government, a court could find that the prosecution proceeded with reasonable diligence overall.

We give the military judge's findings of fact "substantial deference" and will reverse "only for clear error." *Id.* at 420 (quoting *Taylor*, 487 U.S. at 337). However, the legal standard for reviewing compliance with Article 10, UCMJ, and the conclusion whether an accused received a speedy trial is a legal question we review de novo. *Thompson*, 46 M.J. at 475. We examine this case for "reasonable diligence."

Considering the issue de novo, we find the government demonstrated "reasonable diligence" in bringing the appellant to trial. While this case is not a model for emulation, the government did not violate the appellant's rights under Article 10, UCMJ.

C. Sixth Amendment.

The test for determining whether there was a violation of an accused's right to a speedy trial under the Sixth Amendment was set out in *Barker v. Wingo*, 407 U.S. 514 (1972). *Becker*, 53 M.J. at 233. Courts should consider four factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant demanded a speedy trial;

and (4) any prejudice to the appellant resulting from the denial of a speedy trial. *Barker v. Wingo*, 407 U.S. at 530. We have considered all the circumstances and find no violation of the appellant's right to a speedy trial under the Sixth Amendment.

Illegal Pretrial Punishment

At trial, the appellant alleged that he suffered illegal pretrial punishment, in violation of Article 13, UCMJ, 10 U.S.C. § 813. The military judge denied the request for relief. The appellant alleges the military judge erred. We find no illegal pretrial punishment.

After the appellant threatened potential witnesses, the appellant's commander ordered him into pretrial confinement. The military confinement facility at Lackland Air Force Base was full, so the appellant was held at the Bexar County jail under the terms of a contract between the government and the local authorities. The confinement facility kept the appellant in administrative segregation in order to avoid commingling the appellant with adjudged prisoners. The appellant asserts this administrative segregation was tantamount to solitary confinement and constituted illegal pretrial punishment.

Article 13, UCMJ, 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.* 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). Whether conditions constitute unlawful pretrial punishment "presents a 'mixed question of law and fact' qualifying for independent review." *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997) (citing *Thompson v. Keohane*, 516 U.S. 99, 113 (1995)).

The appellant concedes the government had no intent to punish him, but argues that the conditions were more onerous than required to assure his presence for trial. We find the appellant's pretrial confinement was lawful under the circumstances. Due to the lack of room in the military facility, housing the appellant at the local confinement facility was authorized. The government had a legitimate interest in keeping the appellant in administrative segregation in order to avoid commingling him with adjudged prisoners. We find no violation of Article 13, UCMJ, in this case.

Factual Sufficiency of the Evidence

The appellant avers the evidence is factually insufficient to support the conviction for attempting to violate the no-contact order issued by his commander. We considered carefully the circumstantial evidence admitted at trial, and find it legally and factually sufficient to support the conviction.

Conclusion

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court

APPENDIX

Date	Event	Julian Date	Elapsed Days	Acct. Days
10 May 01	- Placed in pretrial confinement	130	0	0
11 May 01	- 48-hr. probable cause determination	131	1	1
15 May 01	- Pretrial confinement (PTC) hearing	135	5	5
16 May 01	- Pretrial Confinement Review Officer's report	136	6	6
11 Jun 01	- Lab results received	162	32	32
22 Jun 01	- AFOSI conducts last interview	173	43	43
27 Jun 01	- SA Johnson forwards OSI report	178	48	48
12 Jul 01	- AFOSI report finished	193	63	63
13 Jul 01	- 1st Request for release from PTC and speedy trial - Appellant attempts to violate no-contact order w/telephone call	194	64	64
17 Jul 01	- Charges preferred/forwarded	198	68	68
20 Jul 01	- 2d Request for release from PTC	201	71	71
24 Jul 01	- Appointment of IO - IO sets 27 Jul hearing date	205	75	75
26 Jul 01	- Civ DC enters appearance; - Civ DC requests delay in Art 32; - IO grants delay in Art 32 until 7 Aug 01	207	77	77
7 Aug 01	- Art 32 hearing	219	89	77

8 Aug 01	- Civ DC files objections to Art 32; requests delay/reopening on 13 Aug 01	220	90	78
13 Aug 01	- Gov't rep opposes Art 32 delay - IO reopens Art 32	225	95	78
14 Aug 01	- IO Report	226	96	79
21 Aug 01	- SJA's Pretrial Advice	233	103	86
22 Aug 01	- Charges referred to trial	234	104	87
24 Aug 01	- CCMJ orders Art 39a hearing for 28 Aug 01	236	106	89
28 Aug 01	- Art 39a session	240	110	93
30 Aug 01	- Art 39a session	242	112	93
4 Sep 01	- IO orders Art 32 reopened on 5 Sep 01; - Civ DC requests delay until 10, 11, 14 or 21 Sep 01; - IO grants delay until 17 Sep 01	247	117	98
17 Sep 01	- Art 32 reopened	260	130	98
20 Sep 01	- Art 32 report completed	263	133	101
25 Sep 01	- 2d request for speedy trial	268	138	106
1 Oct 01	- 2d SJA pretrial advice	274	144	112
2 Oct 01	- Charges referred to trial by general court-martial	275	145	113
4 Oct 01	- Charges served	277	147	115
5 Oct 01	- CCMJ sets trial date for 15 Nov 01	278	148	116

30 Oct 01	- Request for testimonial immunity-Balsamo	303	173	116
31 Oct 01	- Testimonial immunity for Balsamo granted	304	174	116
15 Nov 01	- Trial convenes; - Appellant arraigned	319	189	116