UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class PATRICK A. MIZGALA
United States Air Force

ACM 34822

23 January 2004

Sentence adjudged 19 September 2001 by GCM convened at Sheppard Air Force Base, Texas. Military Judge: Gregory E. Pavlik.

Approved sentence: Bad-conduct discharge, confinement for 9 months, forfeiture of $695.00 pay per month until the bad-conduct discharge is executed, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Jefferson B. Brown, and Major Jeffrey A. Vires.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major John D. Douglas.

Before

PRATT, ORR, and GENT
Appellate Military Judges

OPINION OF THE COURT

GENT, Judge:

Consistent with his pleas, the appellant was found guilty of two specifications of absence without leave, two specifications of wrongful use of cocaine, wrongful use of marijuana, wrongful appropriation, theft, and attempted theft in violation of Articles 86, 112a, 121, and 80, UCMJ, 10 U.S.C. §§ 886, 912a, 921, 880 respectively. A panel of officer members sentenced the appellant to a bad-conduct discharge, forfeiture of $695.00 per month until the bad-conduct discharge is executed, confinement for 9 months, and reduction to E-1. The convening authority approved the sentence as adjudged. Before us, the appellant renews his claim that the government violated his right to a speedy trial under Article 10, UCMJ, 10 U.S.C. § 810. He also asserts that his

unconditional guilty plea did not waive his right to be heard on this issue on appeal; and if it did, his trial defense counsel was ineffective because she failed to inform him of the consequences of an unconditional plea. Finding no error materially prejudicial to the appellant's substantial rights, we affirm.

I. Facts[1]

On 17 January 2001, the appellant borrowed a car belonging to another airman. He said he needed to go to the hospital and would return the car the next morning. Instead, he kept the car until 19 January 2001. In the interim, he pawned over 40 compact discs and blacklights that were stored in the car and belonged to its owner. He also used cocaine offered to him at a local bar. The appellant's commander placed him in an absence without leave (AWOL) status on 18 January 2001 and terminated that status on 19 January 2001. The appellant admitted to using cocaine and gave a urine sample during a unit inspection on 19 January 2001. On 31 January 2001, the command learned the sample was positive for cocaine.

On 5 February 2001, the appellant went AWOL again and he used both cocaine and marijuana during his absence. He was returned to military control on 28 February 2001 after he was apprehended by the Wichita Falls, Texas, police for attempting to steal two cases of beer from a local civilian convenience store. The appellant consented to a urinalysis and was placed in pretrial confinement that day. On 3 March 2001, a pretrial confinement hearing resulted in the appellant's continued confinement.

On 12 March 2001, the government received the results of the 28 February 2001 urinalysis. It was also positive for cocaine, as well as marijuana. On 13 April 2001, the entire legal office moved from a temporary location in the hospital to a semi-permanent facility. The move was necessitated by a fire that destroyed the entire legal office in October 2000. The defense demanded a speedy trial on 16 April 2001, day 47 for speedy trial calculations. The government did not request a "litigation package," necessary for prosecution of the drug specifications, until 23 April 2001, day 54. On 10 May 2001, day 71, the government received the civilian police report about the attempted theft of beer. It contained the statements taken by the police on the date of the attempted theft.

On 14 May 2001, day 75, charges were preferred against the appellant. On 22 May 2001, an investigating officer was appointed to investigate the charges pursuant to Article 32, UCMJ, 10 U.S.C. § 832. The next day, the government received a signed memorandum releasing the jurisdiction of the civilian prosecuting authority for the 28 February 2001 attempted theft. The Article 32, UCMJ, hearing took place on 24 May 2001, and the report was finished the following day. On 29 May 2001, the government forwarded a copy of the report to the defense. On 20 June 2001, the staff judge advocate

[1] The military judge made findings of fact that we adopt as our own. They are shown in the Appendix.

at Second Air Force completed a pretrial advice and recommended a change to one specification. On 21 June 2001, the convening authority referred the case to trial. On 25 June 2001, day 117, the appellant was released from pretrial confinement. On 26 June 2001, he left his place of duty without permission once again and could not be found. On 28 June 2001, the command located the appellant and served the charges. The military judge attributed delays after 28 June 2001 to the defense, a ruling not challenged on appeal.

During a lengthy presentation by counsel concerning the motion to dismiss for lack of a speedy trial under Article 10, UCMJ, the military judge said that it was "inexcusable" for the government to wait a month after the speedy trial request to prefer charges. The military judge asked the trial counsel, "[W]here is the sense of urgency at that point?"

To explain its efforts, the government offered the testimony of the assistant staff judge advocate who acted as the chief of military justice when the appellant's case was prepared for trial. She testified that she drafted charges and sought their approval from her superiors in late March or early April 2001. When they asked her to add a charge for the attempted theft of beer, she immediately instructed security forces personnel to obtain evidence concerning this offense. She needed the name of the civilian witness so she could be interviewed.

The chief of military justice also began efforts to contact the appropriate civilian prosecutorial authorities. She testified that normally charges are not preferred until the command gets at least an oral agreement with the local prosecutor that the Air Force should be the authority to try a case. Because she had difficulty contacting civilian prosecutors, the chief of military justice made a number of phone calls before she reached the proper person and negotiated a release of jurisdiction. Since the charges were preferred on 14 May 2001, the oral approval from the civilian authorities must have been given before that date.

The deputy staff judge advocate also testified concerning the legal office's high workload and lack of personnel between 1 March 2000 and 1 September 2001. He said that 14 airmen at the base were in pretrial confinement and awaiting court-martial during this period. Also, during this period, Sheppard Air Force Base (AFB) had the heaviest military justice workload of any base in the Air Force. The only other comparable installation, in terms of workload was Lackland AFB, and it had one third more attorneys assigned.

II. Legal Analysis

The appellant waived our consideration of his Article 10, UCMJ, claim with his unconditional guilty plea. *United States v. Benavides*, 57 M.J. 550 (A.F. Ct. Crim. App.

2002), *rev. denied*, 57 M.J. 477 (C.A.A.F. 2002). However, it is apparent from the record that while considering the Article 10, UCMJ, issue, the military judge applied legal standards that deviated from those announced by our superior court. We will therefore test for prejudice. Article 66, UCMJ, 10 U.S.C. § 866; *United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998). We may not reverse the findings of a military judge unless an error of law materially prejudices the substantial rights of the accused. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

In the military justice system, an accused's right to a speedy trial flows from various sources, including the Sixth Amendment of the United States Constitution, Article 10, UCMJ, and Rule for Courts-Martial (R.C.M.) 707. *United States v. Cooper*, 58 M.J. 54, 55 (C.A.A.F. 2003). In the instant case, the government complied with the requirements of R.C.M. 707 because the accused was not confined for more than 120 days. We, therefore, will examine for prejudice the protections of the Sixth Amendment and Article 10, UCMJ.

We review speedy trial issues de novo. *Id.* at 59. 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 (C.A.A.F. 1995) (quoting *United States v. Taylor*, 487 U.S. 326, 337 (1988)).

Immediate steps should be taken to try or release, or dismiss the charges against, a person placed in confinement prior to trial. Article 10, UCMJ. Article 10, UCMJ, provides service members with greater rights than the Sixth Amendment provides civilians. *United States v. Kossman*, 38 M.J. 258, 259 (C.M.A. 1993). The test for evaluating whether an appellant's right to a speedy trial pursuant to Article 10, UCMJ, has been violated is whether the government acted with "reasonable diligence" in bringing him to trial. *Id.* at 262.

A. Barker-Kossman Factors

In *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999), our superior court stated that while Article 10, UCMJ, issues cannot be resolved solely by determining whether similar delays would have violated the Sixth Amendment under *Barker v. Wingo*, 407 U.S. 514 (1972), it is appropriate to consider factors set out in *Barker* when deciding whether a particular set of circumstances violates a service member's speedy trial rights. The *Barker* factors are: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's demand for a speedy trial; and (4) prejudice to the appellant. *Id.* at 530.

When considering the reasons for delay, the *Barker* Court said:

> [D]ifferent weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason, such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Id. at 531.

The "prejudice to the defendant" factor "should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect . . . . (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Id.* at 532. The most serious of these factors is the last "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *United States v. Plants*, 57 M.J. 664, 667 (A. F. Ct. Crim. App. 2002) (quoting *Barker*, 407 U.S. at 532), *pet. denied*, 58 M.J. 181 (C.A.A.F. 2003).

In *Barker*, the Supreme Court also observed that a "balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis." *Barker*, 407 U.S. at 530. The Court said that it could do "little more than identify *some* of the factors which courts should assess in determining whether a particular defendant has been deprived of his right." *Id.* (emphasis added). Our superior court has recognized, among other factors, the logistical challenges of a world-wide system, operational necessities, and crowded dockets, that must be realistically balanced. *Kossman*, 38 M.J. at 261-62.

The touchstone for compliance with Article 10, UCMJ, is not constant motion, but reasonable diligence in bringing the charges to trial. *Id*. at 262 (quoting *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965)). "Brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive." *Id*. Our superior court concluded that "[j]udges . . . can readily determine whether the Government has been foot-dragging on a given case, under the circumstances then and there prevailing." *Id*.

In *Plants*, our Court examined the legislative history of Article 10, UCMJ. We concluded that the language "immediate steps shall be taken" does not mean the government must bring court-martial charges against a member being held in pretrial confinement before collecting the evidence to conduct a successful prosecution. *Plants*, 57 M.J. at 669. Nor does it mean that investigators and prosecutors must busy themselves with case preparation while they are waiting for the evidence necessary to understand the case. *Id.* Moreover, when cases involve multiple specifications, to ensure

efficiency in the court-martial system, the better practice is to refer all charges to a single court-martial. R.C.M. 601(e)(2).

In *Kossman*, our superior court overturned its previous ruling in *United States v. Burton*, 44 C.M.R. 166 (C.M.A. 1971), that pretrial confinement for more than 90 days attributable to the government presumptively violated Article 10, UCMJ. The Court, nevertheless, observed that speedy trial motions could still succeed for periods less than 90 days, while there are circumstances that justify even longer periods of delay. *Kossman*, 38 M.J. at 261. Our superior court added, "However, where it is established that 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.*

B. Application of Barker-Kossman Factors

Turning to the case before us, we note that the defense concedes that the military judge correctly attributed to the defense the period between 28 June 2001 and the date of trial, 18 September 2001. Our review, then, is of the period from 28 February 2001 until 27 June 2001. Since the appellant was absent on 26 and 27 June 2001, we will examine the actions of the government until 25 June 2001.

During the motion to dismiss for lack of a speedy trial, the trial defense counsel conceded that the government's actions were not the result of spite or intentional efforts to impede the appellant's right to a speedy trial. However, trial defense counsel pointed to several periods of what she described as "governmental inactivity." After examining the chronology of events stipulated to by both parties, the military judge voiced his concern that the appellant was confined for several weeks before charges were preferred. He concluded, however, that so long as the R.C.M 707 standard of 120 days had not been exceeded, the defense could not make a prima facie case for violation of speedy trial rights under Article 10, UCMJ. This conclusion is starkly at odds with our superior court's view, expressed in *Kossman. Kossman*, 38 M.J. at 261. In addition, the military judge considered the *Barker* factors, but contrary to the guidance in *Birge*, he apparently believed they would apply only within the context of a Sixth Amendment analysis. In both these instances, then, the military judge's error was plain. Having concluded that the military judge erred in his legal analysis, we will examine the record to determine whether there was prejudice under Article 59(a), UCMJ.

Applying the *Barker-Kossman* factors, we note that the appellant requested a speedy trial on 16 April 2001. A considerable amount of delay from the date of pretrial confinement until the appellant's release was necessitated by the fact that the government had to investigate numerous offenses. Evidence of these offenses included civilian eyewitness testimony as well as two urinalyses. In addition, evidence concerning the attempted theft was in the possession of civilian authorities. Given the facts before us, it

was reasonable for the government to wait to complete its investigation before preferring charges so they could be consolidated in a single court-martial. However, the military judge apparently concluded that the government was negligent in its efforts to gather evidence.

The military judge did not indicate in his findings of fact what precisely constituted negligence by the government. We surmise from his colloquy with counsel during the motion that he was concerned that the government knew of the attempted theft of beer on 28 February 2001, but did not begin efforts to obtain evidence of that offense until late in March or early in April 2001. However, only a month elapsed from the time the government first sought evidence of this offense until it received oral approval from civilian authorities to proceed to trial and shortly thereafter preferred charges. Furthermore, a heavy workload, including that caused by 13 other airmen who were in pretrial confinement, contributed to the legal office's delay in obtaining evidence of the appellant's attempt to steal beer. This delay should be considered a neutral factor that weighs less heavily in the balance than would a delay caused by spiteful conduct. The necessity to prepare the legal office for its move into semi-permanent facilities on 13 April 2001 obviously contributed to the delay as well. This should also be considered a neutral, or operational, factor. There is no evidence whatsoever that improper motives, such as spite, led the chief of military justice to delay her inquiry into the facts concerning the attempted beer theft. We also find that the government's efforts following preferral demonstrated due diligence as well. In sum, we find that from early April on, the government's actions clearly demonstrated due diligence.

While the government delayed several weeks in seeking a litigation package concerning a cocaine charge, that delay did not postpone the preferral of charges. This is so because the government was also waiting for evidence and a decision on whether the Texas authorities would assert jurisdiction concerning the attempted theft of beer.

In reviewing whether the appellant was prejudiced by the delay, we will take into account, as did the Supreme Court in *Barker*, that the appellant undoubtedly suffered anxiety and embarrassment during his confinement. However, we find no evidence of additional prejudice. There is no indication that evidence was lost or defense witnesses' memories diminished. The appellate defense counsel assert - without presenting evidence - that the length of the appellant's confinement somehow caused his 26 – 28 June 2001 absence and the necessity for the defense counsel thereafter to delay his trial. We do not find this argument persuasive.

III. Conclusion

Thus, while the military judge erred in his legal analysis of the appellant's speedy trial motion, the appellant's substantial rights were not materially prejudiced by the error. Article 59(a), UCMJ. We hold the government did not violate the appellant's right to a

speedy trial under the Sixth Amendment, Article 10, UCMJ, or R.C.M. 707. Furthermore, inasmuch as the appellant's speedy trial issue has been considered on appeal despite his unconditional guilty plea, his claim of ineffective assistance of counsel is moot.

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

AFFIRMED.

OFFICIAL

LAQUITTA SMITH
Documents Examiner

APPENDIX

Date	Event	Julian Date	Elapsed Days	Acct Day
18-19 Jan 01	Appellant (App.) absent w/o leave; admitted using cocaine while gone	18	0	0
5 Feb 01	App. absent w/o leave again	36	0	0
28 Feb 01	App. returned to military control & placed in pretrial confinement (PTC); Returned to AF because of off-base incident where he tried to leave a store without paying for beer;admitted using cocaine & marijuana while gone.	59	0	0
1 Mar 01	Speedy trial accountability begins[2]	60	1	1
3 Mar 01	PTC hearing conducted, results in continued PTC	62	3	3
12 Mar 01	Government't received 12 Feb urinalysis results	71	12	
13 Apr 01	Entire legal office moved from a temporary offices to semi-permanent facility	103	44	44
16 Apr 01	Defense demands speedy trial	106	47	47
23 Apr 01	Gov't requests litigation package & specimen bottle	113	54	54
10 May 01	Gov't receives police report from Witchita Falls Police Department concerning off-base theft; consists of statements taken on 28 Feb 01	130	71	71
14 May 01	Charges preferred	134	75	75
22 May 01	Investigating Officer (IO) appointed for Article 32, UCMJ hearing	142	83	83

[2] This entry was added by the Air Force Court of Criminal Appeals.

Date	Event	Julian Date	Elapsed Days	Acct Day
23 May 01	Gov't receives memo releasing jurisdiction from Witchita Falls prosecution authority for 28 Feb theft incident	143	84	84
24 May 01	Art. 32 hearing conducted by Lt Col Graves	144	85	85
25 May 01	Art. 32 report completed	145	86	86
29 May 01	Gov't forwards copy of Art. 32 report to defense	149	90	90
20 Jun 01	2 AF/JA completes pretrial advice & recommended changing one specification to attempt	171	112	112
21 Jun 01	The convening authority referred this case to trial	172	113	113
25 Jun 01	App. released from pre-trial confinement	176	117	117
26 Jun 01	App. leaves place of duty w/o permission & could not be located	177	118	118
28 Jun 01	Charges served on App. after he was returned	179	120	120

The military judge also made the following findings of fact:
The Sheppard Air Force Base Legal Office has six military attorneys, two of which are the Staff Judge Advocate and Deputy Staff Judge Advocate. It has the heaviest military justice workload in the Air Force. The only comparable base, in terms of workload is Lackland Air Force Base, and they have nine military attorneys assigned to the base.