

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman First Class ANDREA L. ROWE
United States Air Force**

ACM 34578

28 February 2003

Sentence adjudged 10 February 2001 by GCM convened at Keesler Air Force Base, Mississippi. Military Judge: Thomas G. Crossan Jr.

Approved sentence: Bad-conduct discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Major Jeffrey A. Vires.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Adam Oler.

Before

BURD, PECINOVSKY, and EDWARDS
Appellate Military Judges

OPINION OF THE COURT

EDWARDS, Judge:

The appellant was convicted, pursuant to her pleas, of one specification of divers distributions of methylenedioxymethamphetamine (ecstasy) and of one specification of divers uses of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. She was also convicted, contrary to her plea, of one specification of divers uses of ecstasy in violation of Art. 112a, UCMJ. The adjudged and approved sentence was a bad-conduct discharge, confinement for two years, forfeiture of all pay and allowances, and reduction to the grade of E-1.

The appellant argues that she was denied her right to a speedy trial guaranteed by the Sixth Amendment of the United States Constitution, Article 10, UCMJ, 10 U.S.C. §

810, and Rule for Courts-Martial (R.C.M.) 707. She also argues that she was subjected to illegal pretrial punishment in violation of Article 13, UCMJ, 10 U.S.C. § 813. We find error, set aside the finding as to Specification 2 of the Charge, and reassess the sentence.

Speedy Trial

After an investigation into alleged drug offenses by Air Force members at Keesler Air Force Base, the appellant was apprehended and placed into pretrial confinement on 10 August 2000. Charges were preferred against her on 6 December 2000 and she was arraigned on 5 February 2001 – 179¹ days after she was placed into pretrial confinement.

The trial judge adopted the case event chronology offered by the prosecution as a part of his findings of fact and we adopt them as our own. The chronology of this case is attached to this opinion.

The trial judge concluded that the convening authority's grant of a "delay" pursuant to R.C.M. 707(c)(1) was not an abuse of discretion and that the period of the delay was reasonable. He therefore concluded that there was no violation of R.C.M. 707. We disagree.

"In the military justice system, an accused's right to a speedy trial flows from various sources, including the Sixth Amendment, Article 10 of the Uniform Code of Military Justice, and R.C.M. 707 of the Manual for Courts-Martial." *United States v. Cooper*, No. 02-6001/N-MC, slip op. at 6 (30 Jan 2003). Speedy trial issues are reviewed de novo. *Cooper*, slip op. at 6-7; *United States v. Doty*, 51 M.J. 464, 465 (1999). We give the trial judge's findings of fact substantial deference and will reverse them only for clear error. *United States v. Taylor*, 487 U.S. 326, 337 (1988); *Doty*, 51 M.J. at 465. A decision to grant a delay under R.C.M. 707 is reviewed for abuse of discretion and reasonableness. See *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). We will begin our analysis with R.C.M. 707.

R.C.M. 707(a)(2) requires that an accused "shall be brought to trial within 120 days" of the imposition of restraint under R.C.M. 304(a)(2)-(4). R.C.M. 707(c) provides for the exclusion of certain periods of time from the 120-day rule if such delays are "approved by a military judge or the convening authority." The military judge found the delay granted by the convening authority from 21 November 2000 until 1 February 2001 was reasonable and excluded that time from the R.C.M. 707 calculations. This "delay"

¹ The chronology adopted by the military judge indicated that the appellant was arraigned on day 180. This was in error. The appellant was arraigned on day 179. R.C.M. 707(b)(1) provides that the day of entry into pretrial confinement shall not count but that the day the accused is arraigned does count for R.C.M. 707 calculations. Hence, 10 August 2000 was day 0 and 5 February 2001 was day 179. This error does not impact our decision in this case.

was granted on day 103 for R.C.M. 707 purposes and the accused was arraigned on 5 February 2001 – 4 days after the end of the delay period and well within the 120-day rule of R.C.M. 707 if the decision to exclude the time is upheld.

We find the military judge erred in excluding all the time from 21 November until 1 February, because the convening authority did not properly grant a delay for R.C.M. 707 purposes. “Any interval of time between events is a ‘delay’ and, if approved by the appropriate authority, is excluded from the government’s accountable time under R.C.M. 707(a).” *Nichols*, 42 M.J. at 721. It therefore follows that a blanket exclusion of time from one point in time until a date specific (and not an event specific) is not a delay for R.C.M. 707 purposes. Such a “delay” is instead “a blanket exclusion of time while the case would continue to be processed.” *United States v. Proctor*, ACM 34532, slip op. at 5 (A.F. Ct. Crim. App. 27 Jan 2003). We hold that such a blanket exclusion of time is not a delay and therefore the trial judge’s decision was error.²

The staff judge advocate’s request for a delay under R.C.M. 707 was specific enough to establish reasonable grounds for a delay until the next event – in this case, the pretrial investigation under Article 32, UCMJ, 10 U.S.C. § 832 (Art. 32). Therefore, the time between 21 November 2000 and the Art. 32 on 13 December 2000 was properly excluded. For speedy trial purposes, the following calculations apply:

<u>Date</u>	<u>Event</u>	<u>Accountable Day</u>
10 August	Accused placed in pretrial confinement	0
21 November	Delay granted	103
13 December	Art. 32	103
5 February	Arraignment	157

Having determined that the appellant’s R.C.M. 707 speedy trial right was violated, we now address the issue of waiver. At trial, the appellant plead guilty to Specifications 1 and 3 of the Charge and not guilty to Specification 2 of the Charge. Before findings, the trial judge advised the appellant that her plea of guilty to Specification 1 and 3 would result in a waiver of her speedy trial rights. The appellant, after consulting with counsel, acknowledged the waiver and continued with her guilty plea. R.C.M. 707(e) provides

² We are not unmindful of our decision in *United States v. Bray*, 52 M.J. 659, 662 (A.F. Ct. Crim. App. 2000) wherein we noted that “[l]est anyone fear that our decision is overly harsh and impedes the Government’s ability to investigate and prosecute cases, it is important to remember that the prosecution could have saved the case with one easy step. They could have asked the convening authority to approve a pretrial delay in processing the case so the evidence could be scientifically analyzed.” The same guidance applies here. Had the government requested a true delay to a specific event (for example, until the trial of an essential witness) and not a blanket exclusion of time, they might have saved this case. “We take no position on whether or not such a delay would have violated statutory or constitutional speedy-trial provisions.” *Id.*

that “[e]xcept as provided in R.C.M. 910(a)(2)³, a plea of guilty which results in a finding of guilty waives any speedy trial issue as to that offense.” We hold that, with regard to Specifications 1 and 3 of the Charge, the appellant’s unconditional guilty plea waived our consideration of her claims under R.C.M. 707, Art. 10, UCMJ, and the Sixth Amendment. *United States v. Benavides*, 57 M.J. 550, 554 (A.F. Ct. Crim. App. 2002), *pet. denied*, No. 02-0856/AF (13 Nov 2002). We are, however, able to review her speedy trial claim for Specification 2 of the Charge.

R.C.M. 707(d) provides that “[a] failure to comply with the right to a speedy trial will result in dismissal of the affected charges. This dismissal will be with or without prejudice to the government’s right to reinstitute court martial proceedings against the accused for the same offense at a later date.” In determining whether to dismiss with or without prejudice:

[T]he 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 reprosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial.

R.C.M. 707(d).

First, while the use of ecstasy is not a minor offense, it was not the most serious offense for which the accused was found guilty. This mitigates against a retrial. Second, the facts and circumstances that led to dismissal are hard for the government to justify. In this case, the appellant remained in pretrial confinement for 118 days before charges were even preferred against her – and for 179 days until the day of her arraignment. The government was not without other options to ensure that the appellant’s right to a speedy trial was not violated.⁴ These facts also mitigate against a retrial. Third, we find no serious impact on the administration of justice in not retrying the appellant and find that justice would not be frustrated by not retrying the appellant. Finally, the prejudice to the appellant is also hard to assess. We must however, point out the obvious that the appellant spent 179 days in pretrial confinement. Balancing these factors and considering all the factors in this case, we order Specification 2 of the Charge dismissed with prejudice.

Having found that the appellant’s R.C.M. 707 rights were violated with respect to Specification 2 of the Charge, we need not address her allegations of violations of Art. 10, UCMJ, and the Sixth Amendment for that offense.

³ R.C.M. 910(a)(2) provides for conditional guilty pleas thereby preserving the right on appeal to contest any specified pretrial motion. The appellant did not avail herself of this provision.

⁴ We are compelled to remind counsel and staff judge advocates that one option to avoid a violation of R.C.M. 707 is to release the accused from pretrial confinement for a “significant period” of time before preferral. R.C.M. 707(b)(3)(B).

Illegal Pretrial Punishment

The appellant next alleges that she was subjected to illegal pretrial punishment prohibited by Art. 13, UCMJ, and that therefore she should be granted 109 days additional credit against her sentence to confinement.

Art. 13, UCMJ, provides:

No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

“[T]he ultimate issue of unlawful pretrial punishment ‘presents a ‘mixed question of law and fact’ qualifying for an independent review.’” *United States v. McCarthy*, 47 M.J. 162, 165 (1997) (quoting *Thompson v. Keohane*, 516 U.S. 99, 113 (1995)). Questions of unlawful pretrial punishment can be broken into two types of activities: (1) those that involve punishment or penalty before trial and (2) those that involve the “infliction of unduly rigorous circumstances during pretrial detention which, in sufficiently egregious circumstances, may give rise to a permissible inference that an accused is being punished, or may be so excessive as to constitute punishment.” *Id.*

The appellant concedes that she was not intentionally subjected to illegal pretrial punishment, but that “the ‘rigorous’ nature of the conditions, as a whole, amounted to illegal pretrial punishment.” Our own review of the record discloses no evidence that the appellant was subjected to any illegal pretrial punishment nor was there any “infliction of unduly rigorous circumstances during pretrial detention” that would amount to unlawful pretrial punishment. *Id.*

Sentence Reassessment

Having ordered Specification 2 of the Charge dismissed with prejudice, we “may purge the prejudicial impact of an error at trial if [we] can determine that ‘the accused’s sentence would have been at least of a certain magnitude.’” *United States v. Harris*, 53 M.J. 86, 88 (2000) (quoting *United States v. Jones*, 39 M.J. 315, 317 (C.M.A. 1994); citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). “No sentence higher than that which would have been adjudged absent error will be allowed to stand.” *Id.* (quoting *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); citing *Jones*, 39 M.J. at 317).

We are confident that the appellant would have received a bad-conduct discharge, forfeiture of all pay and allowances, reduction to E-1, and some period of confinement even absent the one specification of use of ecstasy. The appellant initially faced a

maximum confinement of 22 years. Absent the one specification for use of ecstasy, she would have faced a maximum confinement of 17 years. The specification of distribution of ecstasy was clearly the most serious of the offenses charged – carrying a maximum punishment of 15 years.

Having dismissed Specification 2 of the Charge with prejudice, we affirm only so much of the sentence as provides for a bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1. The findings, as modified, and the sentence, as reassessed, are correct in law and fact. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (2000). Accordingly, the findings as modified, and the sentence, as reassessed, are

AFFIRMED

Judge PECINOVSKY participated in this opinion before his retirement.

OFFICIAL

HEATHER D. LABE
Clerk of Court

DATE	CASE EVENT	DAY
10 Aug 00	336 th TRS/CC orders accused into pretrial confinement.	0
15 Aug 00	Pretrial confinement hearing held. PCR orders accused to remain in pretrial confinement until trial.	5
30 Aug 00	AFOSI completes Report of Investigation of Amn Larsen and Amn Gillmore, witnesses against the accused.	20
13 Sep 00	AFOSI completes Report of Investigation of Amn Dillon, a witness against the accused.	34
26 Sep 00	AFOSI completes Report of Investigation of Amn Caddy, a witness against the accused.	47
27 Sep 00	AFOSI completes Report of Investigation of accused.	48
28 Sep 00	AFOSI completes Report of Investigation of Amn Stevens, a witness against the accused.	49
3 Oct 00	81 TRW/JA mails copy of ROI to defense.	54
11 Oct 00	Defense submits initial request for information regarding accused's case.	62
12 Oct 00	<u>U.S. v. AB Hammond</u> court-martial held. AB Hammond agrees pursuant to pretrial agreement to testify against the accused. AB Hammond was in pretrial confinement beginning 9 September 2000, prior to her court-martial.	63
17 Oct 00	<u>U.S. v. AB Hernandez</u> court-martial held. AB Hernandez agrees pursuant to a pretrial agreement to testify against the accused. AB Hernandez was in pretrial confinement, beginning 14 September 2000, prior to her court-martial.	68
18 Oct 00	<u>U.S. v. AB Dillon</u> court-martial held. AB Dillon agrees pursuant to a pretrial agreement to testify against the accused. AB Dillon was in pretrial confinement, beginning 14 September 2000, prior to his court-martial.	69
24 Oct 00	AFOSI completes Report of Investigation of Amn Kelly, a witness against the accused.	75
8 Nov 00	AFOSI forwards "link analysis" pertaining to accused's case to 81 TRW/JA.	90
13 Nov 00	Capt Winner TDY to SAF/PAZ for media training for anthrax case.	95
14 Nov 00	<u>U.S. v. Amn Caddy</u> court-martial held. Amn Caddy agrees pursuant to a pretrial agreement to testify against the accused.	96
15 Nov 00	Capt Winner returns from TDY to SAF/PAZ.	97
16 Nov 00	81 TRW/JA drafts discovery response.	98
17 Nov 00	81 TRW/JA requests 81 TRW/CC exclude time for Speedy Trial purposes under R.C.M. 707. Copy of request faxed to defense.	99
20 Nov 00	81 TRW/JA faxes discovery response to defense and includes	102

	AFOSI case notes and interview logs.	
21 Nov 00	81 TRW/CC excludes period from 21 Nov 00 to 1 Feb 01 from Speedy Trial accountability under R.C.M. 707. Defense faxes to 81 TRW/JA Response to Government's Request for Information, which includes notice of intent to raise a speedy trial motion.	103
27 Nov 00	Capt Winner TDY to Maxwell AFB for Justice Workshop.	109
29 Nov 00	Capt Winner meets with defense counsel while TDY to Maxwell to discuss cases: <u>U.S. v. Rowe</u> and <u>U.S. v. Proctor</u> .	111
4 Dec 00	Capt Winner returns from TDY to Maxwell. Capt Scott TDY to Army JAG School for training. AFOSI begins investigation of misconduct in confinement facility involving a confinement guard and a number of confinees, including the accused.	116
5 Dec 00	Draft charge sheet and additional evidence sent by email to defense.	119
6 Dec 00	Charges preferred against accused.	118
7 Dec 00	81 TRW/CC appoints Article 32 investigating officer for accused's case.	119
11 Dec 00	Capt Scott returns from TDY to Army JAG School.	123
13 Dec 00	Accused's Article 32 hearing held.	125
14 Dec 00	<u>U.S. v. Amn Stevens</u> court-martial held. Amn Stevens agrees pursuant to a pretrial agreement to testify against the accused. Amn Stevens was in pretrial confinement, beginning 9 September 2000, prior to his court-martial. <u>U.S. v. AB Gillmore</u> court-martial held. AB Gillmore agrees pursuant to a pretrial agreement to testify against the accused.	126
17 Dec 00	Defense faxes to 81 TRW/JA a demand for speedy trial and an objection to the government's 17 Nov 00 request for exclusion of time for speedy trial accountability. The defense states that they had not received a copy of any response to the government's request.	129
26 Dec 00	Article 32 report completed and assembled.	138
28 Dec 00	Copy of Article 32 report faxed to defense.	140
10 Jan 01	<u>U.S. v. A1C Larsen</u> court-martial is held. A1C Larsen agrees pursuant to a pretrial agreement to testify against the accused. <u>U.S. v. Amy Kelly</u> court-martial is held. Amn Kelly agrees pursuant to a pretrial agreement to testify against the accused.	153

17 Jan 01	81 TRW/CC recommends 2 AF/CC refer case to GCM.	160
24 Jan 01	In related case of <u>U.S. v. Matli</u> , Article 32 hearing held. AB Matli is a witness against the accused. 81 TRW/JA contacts defense to discuss possible trial dates for accused's case.	167
25 Jan 01	Defense faxes to 81 TRW/JA demand for speedy trial. 81 TRW/JA faxes response to defense that referral is expected 29 Jan 01; will set trial date as soon as possible. 81 TRW/JA includes copy of 81 TRW/CC exclusion.	168
26 Jan 01	81 TRW/JA and defense request docket date for 5 Feb 01.	169
29 Jan 01	Accused's case is referred to a general court-martial. Accused is served with a copy of the referred charge sheet. CCMJ confirms trial date of 5 February 2001.	172
5 Feb 01	Accused is arraigned.	179