UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant ROBERT D. TIPPIT
United States Air Force

ACM 35624

14 July 2006

Sentence adjudged 9 January 2003 by GCM convened at Peterson Air Force Base, Colorado. Military Judge: Kurt D. Schuman (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 47 days, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Colonel Carlos L. McDade, Colonel Nikki A. Hall, Major Terry L. McElyea, Major Sandra K. Whittington, Major Jennifer K. Martwick, and Major David P. Bennett.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Kevin P. Stiens, and Major Jin-Hwa L. Frazier.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

STONE, Senior Judge:

In accordance with his pleas, the appellant was convicted of dereliction of duty, violation of a lawful general regulation, filing a fraudulent travel voucher, and conduct prejudicial to good order and discipline.[1] A military judge, sitting alone as a general

[1] *See* Articles 92, 132, and 134, UCMJ, 10 U.S.C. §§ 892, 932, 934.

court-martial, sentenced him to a bad-conduct discharge, confinement for 47 days, and reduction to the grade of E-1. The appellant raises the following issues for our review:

I.

WHETHER THE MILITARY JUDGE ERRED IN FINDING THERE WAS A "DE FACTO DISMISSAL" OF THE CHARGES AGAINST APPELLANT ON 6 NOVEMBER 2001 THAT WAS DONE FOR A LEGITIMATE REASON.

II.

WHETHER THE MILITARY JUDGE ERRED IN FINDING THAT APPELLANT WAS NOT DENIED THE RIGHT TO A SPEEDY TRIAL UNDER ARTICLE 10, UCMJ [, 10 U.S.C. § 810].

III.

WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL DEFENSE COUNSEL DID NOT INFORM HIM THAT AN UNCONDITIONAL GUILTY PLEA WAIVED THE SPEEDY TRIAL ISSUE UNDER [RULE FOR COURTS-MARTIAL (R.C.M.)] 707.[2]

IV.

WHETHER APPELLANT'S PLEA WAS IMPROVIDENT WHERE IT WAS ENTERED UPON THE MISTAKEN BELIEF THAT HIS R.C.M. 707 SPEEDY TRIAL ISSUE WOULD BE PRESERVED FOR APPEAL.[3]

Background

The appellant was a Reservist performing inactive duty training as a Security Forces troop at Peterson Air Force Base (AFB), Colorado. On 11 June 2001, the last day of his training tour, he drove his pickup truck onto base and parked it near the Security Forces offices, his duty location. By happenstance, Security Forces personnel were conducting a training exercise involving a military working dog team in the same parking lot. A dog trained in bomb detection alerted on the appellant's truck. When a flight sergeant asked the appellant for permission to search the truck, the appellant consented.

[2] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[3] This issue is raised pursuant to *Grostefon*, 12 M.J. at 431. We have considered this issue and found it to be without merit. *See United States v. Matias*, 25 M.J. 356 (C.M.A. 1987).

The search led to the discovery of a large cache of firearms, ammunition, and related paraphernalia.

Believing that at least some of the weapons and ammunition might be stolen, the local detachment of the Air Force Office of Special Investigations (AFOSI) opened an investigation. The appellant's training tour was extended, and he was ordered to remain within the confines of El Paso County, Colorado, the county in which the base is situated.[4] As a consequence, the appellant was unable to return to his home in Arizona. On 20 August 2001, after more than two months in this status, the appellant made a demand for a speedy trial.

Procedural Background

Charges were preferred against the appellant on four separate occasions. For convenience, we shall refer to the 6 September 2001 charges as the "original charges," and the 10 September 2001 and 10 October 2001 charges collectively as the "2001 charges." The final set of charges in this case, preferred in July 2002, will be referred to as the "2002 charges."

On 6 September 2001, the government preferred the original charges. The precise nature and ultimate disposition of these charges is unclear. According to the trial counsel, they were "withdrawn" because of "an administrative error" on 10 September 2001. The record does not clearly indicate who "withdrew" these charges or under what authority they purported to dispose of them. But at trial and on appeal, the appellant's counsel have not challenged the manner in which these charges were handled.[5]

New charges were preferred on 10 September 2001. Documents in the record of trial suggest these new charges were similar to the original set, but were apparently "redrafted" in ordered to "better state the alleged offenses." The next day, the special court-martial convening authority appointed an investigating officer to conduct what would be the first of two inquiries held pursuant to Article 32, UCMJ, 10 U.S.C. § 832. Because of the terrorist attacks of 11 September 2001, this hearing did not begin until 10 October 2001. On that date, the government preferred an additional charge.

Soon after this initial Article 32 hearing, the local AFOSI detachment prepared a memorandum requesting another AFOSI detachment conduct a forensic media analysis of the appellant's home computer. It provided justification to support the request for investigative support, as well as background information. This memorandum was the

[4] The military judge determined the appellant was subjected to pretrial conditions tantamount to confinement and awarded the appellant 47 days of credit towards his sentence to confinement. *See United States v. Mason*, 19 M.J. 274 (C.M.A. 1985).

[5] Despite the defense's forthright acknowledgement that the original charges posed no problems with the speedy trial issue litigated at trial, the dissent nonetheless presumes the disposition of this preferral was "defective."

cornerstone of the trial defense counsel's claim that the disposition of the 2001 charges was simply a subterfuge to avoid problems with the speedy trial clock. Specifically, the trial participants focused on paragraph 2 of the request, which stated:

> **PRIORITY**: High command, local, and federal agency [Federal Bureau of Investigation and Alcohol, Tobacco, and Firearms] interest. SUBJECT was discovered on base with a large cache of weapons, munitions, communication devices, a full-face hooded mask, and other items. . . . SUBJECT has been brought on active duty and confined to base pending completion of this investigation. *Due to a legal mistake, SUBJECT was [brought] onto active duty under the wrong orders and now his status must be approved by [the Secretary of the Air Force]. The legal office must now drop all charges and refile . . . .*

(Emphasis added.)

On 2 November 2001, the base staff judge advocate (SJA) forwarded the Article 32 investigative report to the special court-martial convening authority. The SJA also provided a written legal opinion entitled, "Recommendation to Withdraw Charges – *United States v. SSgt Tippit*." It laid out a brief history of the case, but did not address any problems with the appellant's active duty status or any "legal mistake," as noted in the AFOSI memorandum. Instead, pursuant to R.C.M. 404(a)-(b), the SJA advised the convening authority as follows:

> The [investigating officer] recommends a trial by general courts-martial.
>
> [] Despite this recommendation I recommend that the charges be *withdrawn* at this time. Information has come to the attention of the AFOSI through very reliable sources that significant weapons related offenses—a joint federal law enforcement investigation is ongoing—involving the subject and gun dealers [sic]. This conduct puts the offenses with which [the appellant] is charged into proper context. *Withdrawing* the charges now will not prohibit *re-preferral* at a later time. . . .
>
> [] Options: Pursuant to RCM 404, as the special court-martial convening authority, you may: (1) *Dismiss* the charges, (2) Forward the charges to a subordinate commander for disposition, (3) Refer charges to a summary or special court-martial, or (4) Forward the Article 32 report with the charges, to the superior commander, 14 AF/CC, for disposition.

[] Recommendation: that you authroize [sic] the SJA to *withdraw* charges by lining through the charge sheet.

(Emphasis added.)

On 5 November 2001, the convening authority initialed the SJA's memo and hand-wrote the single word "Concur." The following day, the SJA lined through charges on both the 10 September 2001 and 10 October 2001 charge sheets, wrote "WITHDRAWAL" on two pages and "WITHDRAWN" on another, and signed all three pages. *See* R.C.M. 401(c)(1), Discussion ("Charges are ordinarily dismissed by lining out and initialing the deleted specifications or otherwise recording that a specification is dismissed"). Some time afterward, the appellant was informed that charges had been dropped. *See id*. ("When all charges and specifications are dismissed, the accuser and the accused ordinarily should be informed"). He was then released from active duty to return to his family in Arizona. He resumed his civilian life, finding new employment and becoming a father.

In January 2002, command and legal staff began processing paperwork to recall the appellant to active duty. The base SJA forwarded the request through legal channels to obtain permission from the Secretary of the Air Force. That request was granted on 23 May 2002, and the appellant was ordered back onto active duty on 5 June 2002 to face court-martial charges. The appellant reported for duty on 7 June 2002. For reasons not explained in the record of trial, charges were not preferred again for almost four more weeks, on 2 July 2002.

On 15 July 2002, a new Article 32 investigating officer was appointed, and a hearing was set for 17 July 2002. The appellant initially requested a delay until 5 August 2002 to permit his civilian counsel to attend the second Article 32 hearing, but eventually elected to waive the hearing. Despite the appellant's waiver, the government chose to proceed with the Article 32 hearing as scheduled. Upon its completion, a copy was served on the appellant and his counsel, who made no objection to the report.[6] Charges were ultimately referred to a general court-martial.

On 19 November 2002, the trial defense counsel filed a motion to dismiss based upon a denial of his right to a speedy trial. He alleged the 2001 charges were not properly withdrawn because they had never been referred to trial.[7] In response, the government argued that the withdrawal of the 2001 charges was not a withdrawal, but was "in essence" a dismissal under R.C.M. 404(a). The appellant countered this argument by suggesting that the dismissal was an improper subterfuge meant to keep the appellant in limbo and avoid the running of the speedy trial clock.

[6] *See generally* R.C.M. 405(j)(4) (objections to the report shall be made within five days of its receipt) and R.C.M. 405(k) (failure to object to the report constitutes waiver of any objection).
[7] *See* R.C.M. 604(a) (charges and specifications may only be "withdrawn" after they have been referred to trial).

The appellant was arraigned on 21 November 2002. During a pretrial session held pursuant Article 39(a), UCMJ, 10 U.S.C. § 839(a), the appellant's counsel sought to compel discovery of records pertaining to the "ongoing" law enforcement investigation cited by the SJA as the rationale for his recommendation to the convening authority to "withdraw" the 2001 charges. The government was ordered to produce the records, and owing to the schedules of the parties, the court-martial then recessed until 8 January 2003.

Armed with their additional discovery, the trial defense counsel vigorously contested the SJA's claim in his 2 November 2001 letter to the convening authority that there was an ongoing "joint" federal investigation of the appellant. The AFOSI case agent and detachment commander both testified that, although there was information sharing between their office and other federal agencies, there was no official joint investigation. Neither party called the SJA to explain the provenance of his claim.

The appellant's counsel argued that the "true" reason for the withdrawal of the 2001 charges was because the legal office had concluded, after preferral, that the appellant, a Reservist, could not properly be tried without approval from the Secretary of the Air Force. Without explicitly claiming that the SJA lied in his memo to the convening authority, the appellant's counsel attacked the factual basis for the memo's claim that there was an "ongoing" investigation. They attempted to cast doubt on the government's explanation of why the government dismissed the 2001 charges, arguing the SJA was merely trying to "rationalize" the lengthy delay, and observing that the government's explanation "doesn't make sense."

Waiver

We begin with a discussion of whether the appellant's speedy trial issues were waived by his unconditional guilty pleas. R.C.M. 707(e) specifically provides that "a plea of guilty which results in a finding of guilty waives any speedy trial issue as to that offense." *See also United States v. Mizgala*, 61 M.J. 122, 125 (C.A.A.F. 2005). On the other hand, a speedy trial motion litigated under Article 10, UCMJ, 10 U.S.C. § 810, "is not waived by a subsequent unconditional guilty plea." *Id.* at 127.

In determining whether we should address the otherwise waived R.C.M. 707 speedy trial issue, we have taken into account the appellant's personal assertion of error that his counsel were ineffective for failing to advise him that his unconditional guilty plea waived his R.C.M. 707 speedy trial claim. To resolve this ineffective assistance of counsel issue, we apply a three-pronged analysis to determine whether a presumption of competence has been overcome:

> (1) Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?

> (2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers"? and
>
> (3) If a defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result.

United States v. Gilley, 56 M.J. 113, 124 (C.A.A.F. 2001) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)).

If we were to assume—without deciding—that the appellant has met his burden as to the first two prongs, we would be required to address the R.C.M. 707 claim to determine if there was any prejudice to the appellant. Because we elect to resolve the appellant's ineffective assistance of counsel claim by relying on the merit, or rather the lack of merit, of the R.C.M. 707 claim, in the interest of judicial economy, we decline to apply waiver.

Discussion

A trial court's conclusion that an accused received a speedy trial for R.C.M. 707 purposes is a legal question that is reviewed de novo on appeal. *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999). The trial court's findings of fact are given "substantial deference and will be reversed only for clear error." *Id.* (quoting *United States v. Taylor*, 487 U.S. 326, 337 (1988)). Similarly, for speedy trial questions involving the Sixth Amendment and Article 10, UCMJ, we conduct a de novo review of the legal question of whether the government has exercised "reasonable diligence in discharging its duty . . . to try an accused." *United States v. Cooper*, 58 M.J. 54, 59 (C.A.A.F. 2003). We accord the lower court's factual determinations deference and reject them only if they are clearly erroneous. *Id.* at 58 (citing *United States v. Brown*, 285 F.3d 959, 961 (11th Cir. 2002)). The burden of persuasion is on the government to justify a delay. *United States v. Cook*, 27 M.J. 212, 215 (C.M.A. 1988).

We turn to the appellant's first contention relating to the speedy trial provisions of R.C.M. 707. This Rule requires an accused to be brought to trial within 120 days after the earlier of preferral of charges, imposition of restraint, or entry on active duty. The appellate contends the 2001 charges were never properly dismissed and thus the speedy trial clock was not reset. Thus, if the charges were not properly dismissed on 10 September 2001, 363 days passed (after allowing a deduction for delays attributable to the defense) from preferral to arraignment.

Unfortunately, military appellate courts have often been called upon to determine whether charges were properly dismissed or merely withdrawn. *See, e.g., United States v. Underwood*, 50 M.J. 271, 272-75 (C.A.A.F. 1999); *United States v. Britton*, 26 M.J.

24, 26 (C.M.A. 1988); *United States v. Gray*, 26 M.J. 16, 21 (C.M.A. 1988) (Everett, C.J., concurring in the result); *United States v. Mickla*, 29 M.J. 749, 751-52 (A.F.C.M.R. 1989); *United States v. Robinson*, 47 M.J. 506, 509-11 (N.M. Ct. Crim. App. 1997); *United States v. Weatherspoon*, 39 M.J. 762, 766 (A.C.M.R. 1994); *United States v. Bolado*, 34 M.J. 732, 737-38 (N.M.C.M.R. 1991), *aff'd*, 36 M.J. 2 (C.M.A. 1992); *United States v. Lorenc*, 30 M.J. 619, 620-23 (N.M.C.M.R. 1990). These courts have applied the concept of "de facto dismissal" whenever: (1) there has been substantial compliance with the Rules for Courts-Martial; (2) the intent to dismiss is clear despite faulty draftsmanship; (3) the government's conduct was consistent with a dismissal; and (4) the dismissal was done for a proper purpose.

After making extensive findings of fact, the judge below concluded there had been a "de facto dismissal" of the charges on 6 November 2001. In making this conclusion, he relied on (1) the convening authority's concurrence with the SJA's recommendation to withdraw the charges; (2) the lining out of all of the charges and specifications by the SJA; (3) the government's notification to the accused and counsel that charges had been "dropped"; and (4) the release of the appellant from active duty. *Cf. United States v. Mucthison*, 28 M.J. 1113, 1114-15 (N.M.C.M.R. 1989).

We likewise conclude that the convening authority's 2 November 2001 concurrence with the SJA's recommendation to "withdraw" charges was a "de facto dismissal." The convening authority's decision could not legally have been a withdrawal because there had been no referral, and thus there was no court-martial from which to withdraw the charges and specifications. *See id.* In the universe of options, that only leaves dismissal, and the actions taken after the convening authority's concurrence on 2 November 2001 are the types of things that would have been done in a technically sound dismissal.

Moreover, the government's actions reflect an intent to dismiss the charges. In *Britton*, our superior court noted there are "substantial differences" between dismissal and withdrawal of charges. 26 M.J. at 26. Chief among these are that with a proper dismissal, an accused no longer faces charges, and to bring them anew "requires the command to start over. The charges must be re-preferred, investigated, and referred in accordance with the Rules for Courts-Martial, as though there were no previous charges or proceedings." *Id*.

Despite the government's repeated use of the word "withdrawal" when it meant "dismissal," the government's actions consistently comported with an intent to dismiss charges, to include a new preferral, investigation,[8] and referral. Thus, the appellant was

[8] Our dissenting colleague suggests that the second Article 32 investigation was inadequate because the investigating officer used summarized testimony from the prior report and incorporated by reference the conclusions of the first investigating officer. The dissent applies an extremely narrow interpretation of *Britton.* The use of prior statements is permitted under R.C.M. 405(g)(4)(A). Moreover, the investigating officer's report clearly indicates she took a

arraigned within 120 days of being brought back on active duty to face charges, as required by R.C.M. 707.

We next consider whether the charges and specifications were dismissed for a proper purpose. Once charges are dismissed, absent subterfuge, the speedy trial clock is restarted. *United States v. Anderson*, 50 M.J. 447 (C.A.A.F. 1999). *See also United States v. Thomas*, 41 M.J. 665 (A.F. Ct. Crim. App. 1994) (dismissal must be for a "satisfactory" reason). The nonbinding Discussion to R.C.M. 401(c)(1) states, "A charge should be dismissed when it fails to state an offense, when it is unsupported by available evidence, or when there are other sound reasons why trial by court-martial is not appropriate." The Discussion goes on to state, "It is appropriate to dismiss a charge and prefer another charge anew when, for example, the original charge failed to state an offense, or was so defective that a major amendment was required . . . or did not adequately reflect the nature or seriousness of the offense."

This list is by no means exhaustive. Nothing in the record of trial leads this Court to believe the decision to dismiss the charges and specifications was a subterfuge to avoid speedy trial problems. The record does provide two valid reasons for the dismissal. First, although the SJA was, once again, inartful when he referred to a "joint investigation" between Air Force investigators and other federal agencies, there was, in fact, interest in the appellant's case by other federal agencies that led to information sharing. Moreover, it was proper to seek Secretarial approval to recall the appellant to active duty. These concerns served legitimate command purposes.

Having found no merit to the appellant's claim that his right to a speedy trial under R.C.M. 707 was violated, we further find the appellant has failed to meet his burden of establishing prejudice under the third prong of our superior court's test for resolving ineffective assistance of counsel issues. *See Gilley*, 56 M.J. at 124; *Polk*, 32 M.J. at 153.

We turn now to the appellant's claim that the government violated his rights under Article 10, UCMJ. This statute provides, "When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him." At trial, the judge below sua sponte considered whether the appellant's Article 10, UCMJ, rights were violated; he also considered those rights to a speedy trial found in the Sixth Amendment to the United States Constitution. In doing so, he applied the proper balancing test and concluded the government acted with due diligence in bringing the appellant to trial. We agree. *See Barker v. Wingo*, 407 U.S. 514 (1972); *Mizgala*, 61 M.J. at 129; *United States v. Plants*, 57 M.J. 460 (C.A.A.F. 2002). The

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fresh look at the evidence, rendered a thorough and comprehensive report, and made independent conclusions and recommendations.

appellant's rights to a speedy trial under Article 10, UCMJ, and the Sixth Amendment to the Constitution were not violated.

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 findings and sentence are

AFFIRMED.

Judge Smith participated in this decision prior to his reassignment.

MATHEWS, Judge (dissenting):

The majority opinion rests on the premise that because there is no merit to the appellant's speedy trial complaints, his claims of ineffective assistance of counsel are likewise without merit. Because I am unable concur with the majority's premise, I cannot join in its conclusion.

As the majority notes, the appellant was served with three discrete sets of charges: the charges preferred on 6 September 2001 (referred to by the majority as the "original charges"); those preferred on 10 September 2001 and joined by an additional charge on 10 October 2001 (the "2001 charges"); and the charges preferred on 2 July 2002 (the "2002 charges"). These charges were, in essence, successive iterations of the same allegations: the 2002 charges on which the appellant was convicted were simply new versions of the 2001 charges, which in turn were redrafted versions of the original charges. By the time the appellant was finally arraigned in 2002, he had been facing the same charges for over 14 months -- well beyond the 120-day limit of R.C.M. 707.

To affirm the appellant's conviction, this Court must find that the speedy trial clocks that commenced with the preferral of the original charges and the 2001 charges both stopped and were reset to zero. Under the rationale embraced by the majority it is necessary, first, to altogether ignore the defective disposition of the original charges, and next, to retroactively cure the improper handling of the 2001 charges by judicially converting the convening authority's direction to "withdraw" those charges into a dismissal of the same charges. In effect, we are asked to rescue the government from its own ineptitude not once, but twice. Because I do not believe the facts support such a double-barreled salvage operation, I respectfully dissent.

The Original Charges

The military judge did not enter findings of fact concerning the disposition of the original charges. The record of trial, however, contains parallel averments from trial counsel and trial defense counsel that these charges were preferred on 6 September 2001 and served on the appellant the same day. They were purportedly "withdrawn" four days later by the local trial counsel, Capt D,[9] for reasons that are unclear from the record.[10] The charges preferred on 10 September 2001 were "basically the same" as the original charges.

The parties at trial stipulated that the date of preferral of the original charges was one of the first dates "relevant to compliance with the speedy trial rules." Under the Rules for Courts-Martial, they were correct. Once the original charges were preferred, the appellant's first speedy trial clock began running. R.C.M. 707(a); *United States v. Gray*, 26 M.J. 16, 20 (C.M.A. 1988). Capt D's action did not stop that clock, much less reset it to zero. *See United States v. Britton*, 26 M.J. 24, 26 (C.M.A. 1988). The majority opinion concludes that the disposition of the 2001 charges amounted to a "de facto dismissal" that reset the appellant's second speedy trial clock, without ever addressing the one that began running with the preferral of the original charges. Unless Capt D's purported "withdrawal" can somehow be converted into yet another "de facto dismissal," that clock continued to run.

The record does not support such a conversion. As the majority opinion rightly concludes, the "convening authority's concurrence" is a necessary prerequisite for finding a "de facto dismissal" of charges. There is no evidence of such concurrence with regard to the original charges. The facts presented at trial were that the convening authority withdrew the 2001 charges, but that Capt D withdrew the original ones.[11] Such an error is not particularly surprising in this case. The disposition of the original charges was handled by the same cast of characters who, a few weeks later, bungled the disposition of the 2001 charges.

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[9] A circuit trial counsel later joined the prosecution team, but does not appear to have played any part in the disposition of the original charges.

[10] The parties agreed to allow the military judge to consider their offers of proof as fact when deciding the appellant's speedy trial motion. Both parties agreed that the original charges were properly preferred by the appellant's commander, Lt Col A, a person subject to the UCMJ, on 6 September 2001 and "withdrawn" four days later. Capt D asserted that the original charges suffered from an unspecified "administrative error" necessitating their withdrawal. The defense team noted that the error was apparently one of draftsmanship, and that the original charges were simply put aside in favor of better-written ones. Neither asserted that the convening authority was in any way involved.

[11] Indeed, the record does not even suggest that the convening authority was aware of the existence of the original charges, let alone Capt D's disposition of them. None of the voluminous correspondence or reports provided to or originating from the convening authority make any mention the original charges, let alone their purported "withdrawal."

When, as here, the trial counsel simply puts the charge sheet in his back pocket, the speedy trial clock does not stop. The appellant was not arraigned on the offenses alleged in the original charges until 21 November 2002, more than 14 months after preferral and long after his demand for a speedy trial. The majority opinion gives short shrift to these facts, noting merely that the defense counsel "have not challenged" the disposition of the original charges.[12] The majority thus infers that there was no speedy trial violation because competent counsel would have alleged it, while disposing of the appellant's allegations that his trial counsel were ineffective by concluding there was no speedy trial violation.

The 2001 Charges

Unlike the original charges, there is evidence that the 2001 charges were disposed of with the concurrence of the convening authority. However, the disposition authorized by the convening authority -- *withdrawal* of the 2001 charges -- was not permissible under the Rules for Courts-Martial. Like Capt D's disposition of the original charges, this action, too, was a nullity for speedy trial purposes.

As noted above, converting the convening authority's improper withdrawal of charges into a "de facto dismissal" amounts to an act of judicial grace, saving the government from its own error. No gift is totally without cost, of course, and in this instance our largesse is bestowed at the expense of the appellant. Despite the government's consistent characterization of its action as "withdrawal" of the 2001 charges,[13] the majority concludes that "the government's conduct was consistent with a dismissal," and therefore entitled to the same legal effect. As appellate counsel for the government put it: "If it walks like a duck, talks like a duck, and looks like a duck, even if you call it a cow, it's still a duck."

But the disposition of the 2001 charges was an odd beast, neither fish nor fowl, and therefore not entitled to the same legal effect as a proper dismissal. Contrary to the dictates of our superior appellate court in *Britton*, the government did not investigate and refer the 2002 charges "as though there were no previous charges or proceedings." 26 M.J. at 26. Instead, the Article 32 investigation of the 2002 charges relied on evidence from the previous hearing[14] and incorporated by reference the conclusions of the first investigating officer. The SJA's advice to the general court-martial convening authority

[12] The majority opinion suggests the defense made a "forthright acknowledgement" that there was nothing wrong with the handling of the original charges. In fact, however, the appellant's trial defense counsel merely noted, in the context of challenging the disposition of the 2001 charges, that the four-day period between preferral of the original charges and the 2001 charges might "arguably" be omitted from the speedy trial clock for the latter.

[13] Indeed, documents in the record of trial show that the trial counsel continued to refer to the 2001 charges as having been "withdrawn" even *after* the appellant's trial.

[14] Including the testimony of five witnesses from the first proceeding who did not testify at the second.

recommended referral of the charges with modifications, subsequently adopted, based on evidence obtained at the earlier proceeding.

As noted in the majority opinion, the appellant did not object to the second Article 32 report, thus waiving any defects *in the investigation.* The issue before us, however, is not whether the investigation was defective, but whether it was conducted in a manner consistent with the government's belated claims of dismissal. Because the government did *not* act in such a manner, I would reject appellate government counsel's barnyard analogy and conclude that there was no proper dismissal. The appellant's speedy trial right under R.C.M. 707 was violated.

Ineffective Assistance of Counsel

Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000)). We analyze claims of ineffective assistance of counsel under the framework established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel are presumed to be competent. Where there is a lapse in judgment or performance alleged, we ask first whether their conduct of the defense was actually deficient, and, if so, whether that deficiency prejudiced the appellant. *Id.* at 687. *See also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). The presumption of competence is rebutted by a showing of factual errors unreasonable under prevailing professional norms. The appellant bears the burden of establishing that his trial defense counsel were ineffective. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001).

Here, the appellant's trial defense counsel knew or should have known of the defects in the government's disposition of the first two sets of charges. The appellant's trial defense team was aware that Capt D withdrew the original charges, and the second Article 32 report, along with its recycled witness testimony and conclusions, was served on the appellant's counsel on 19 August 2002. The briefs and arguments of counsel show that both sides understood the speedy trial issue hinged on whether the government had properly dealt with the earlier charges. Indeed, more than half of the trial transcript revolves around the speedy trial motion and related discovery matters. This issue was not peripheral to the appellant's defense; it *was* his defense.

According to a post-trial affidavit filed by the appellant's military trial defense counsel, the defense team was hampered in proving their speedy trial claims "without . . . all of the preferral and referral documents" which, he reports, the SJA "would not allow us to review." Yet the trial defense counsel did not move to compel production of those documents, either in the initial Article 39(a) session or in the months that followed between the appellant's arraignment and trial. Instead, according to the appellant's

military trial defense counsel, they passively waited for "appellate discovery." Nor did the trial defense team address the government's failure to start anew, as required by *Britton*, after the purported dismissal of the 2001 charges.

"Familiarity with the facts and applicable law are fundamental responsibilities of defense counsel." *Davis*, 60 M.J. at 475. The trial defense team here had ample time to address the government's pocketing of the original charges and to compare the trial counsel's "de facto dismissal" claims with the government's post-"dismissal" conduct. The record shows that the trial defense team was so fixated on proving that the SJA deliberately misled the convening authority about *why* the charges should be disposed of that they clearly neglected the more fundamental question: Did the government actually dispose of the charges at all? There was no reasonable strategic or tactical reason for such neglect. The performance of the trial defense team "fell measurably below the performance standards ordinarily expected of fallible lawyers." *See Polk*, 32 M.J. at 153.

Prejudice

On finding that the trial defense team erred, this Court would ordinarily turn to the question of prejudice, asking whether there is a reasonable probability that, absent the error, the appellant would have received a better result. *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000). The remedy for a violation of R.C.M. 707 is dismissal of the affected charges. Had the trial defense team focused on fundamentals, it is reasonably probable that they would have secured such a result.

Dismissal under R.C.M. 707 may be with or without prejudice. Factors to be considered include the seriousness of the offenses, the facts and circumstances leading to the dismissal, the impact of a re-prosecution on the administration of justice, and any prejudice resulting to the accused from the denial of his right to a speedy trial. R.C.M. 707(d). Where appropriate, we rely on the military judge's findings of fact, but otherwise evaluate these factors de novo. *United States v. Cooper*, 58 M.J. 54, 57-58 (C.A.A.F. 2003). The military judge made no findings on the first three R.C.M. 707(d) factors; but examining the record in its entirety, each either favors dismissal with prejudice or is neutral.

Three of the four offenses to which the appellant pled guilty (failure to properly secure his privately-owned firearms for his last day of training, using a government computer to conduct online business, and filing a false travel voucher) are legitimate offenses under the UCMJ, but none are so serious as to demand trial by court-martial as their only disposition. In fact, the appellant was originally offered nonjudicial punishment for the travel voucher offense under Article 15, UCMJ, 10 U.S.C. § 815, but that action was withdrawn when the additional investigation got underway. The final charge, which alleges that the appellant, a Security Forces noncommissioned officer,

wrongfully possessed an instrument purporting to be "Security Police" credentials, does not, on its face, appear to be a serious offense -- if indeed it is an offense at all.[15]

The facts and circumstances supporting dismissal for speedy trial violations in this case are grounded entirely in the government's persistent ineptitude. Having preferred charges against the appellant no less than four times already, the government should not rightfully be heard to complain about being denied a fifth bite at the apple. Nor would there be any negative impact on the administration of justice in bringing this case, finally, to a close.

Concerning the final R.C.M. 707(d) factor, prejudice to the appellant: The military judge found that both the appellant and his family were adversely impacted by the lengthy delay. Relying on this Court's decision in *United States v. Plants*, 57 M.J. 664 (A.F. Ct. Crim. App. 2002), *aff'd*, 62 M.J. 397 (C.A.A.F. 2005), he initially concluded that this impact was not enough to warrant a finding of prejudice. Subsequent to that ruling, after hearing further evidence, the military judge found that the appellant was subjected to "punitive" conditions of restraint while awaiting trial. *See United States v. Dooley*, 61 M.J. 258, 264-65 (C.A.A.F. 2005); *see also Plants*, 57 M.J. at 667 (citing *Barker v. Wingo*, 407 U.S. 514, 532 (1972) (speedy trial right intended to prevent prejudice in the form of "oppressive" conditions)). Taking this additional finding into account, along with the appellant's unrebutted testimony that he lost his civilian job while being kept at Peterson AFB awaiting trial,[16] a majority of this Court -- while disagreeing as to the validity of the government's "de facto dismissal" claims -- agree that the appellant was prejudiced by the lengthy delay in bringing him to trial.

Conclusion

For all of the foregoing reasons, I respectfully dissent.

OFFICIAL

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Chief Court Administrator

[15] The appellant was also charged with forging such credentials, but the appellant pled not guilty to that offense and the government did not attempt to prove it.

[16] This factor was not considered in the military judge's ruling, although he did consider evidence that, owing to the lengthy trial delay, the appellant was not promoted in a subsequent job.