UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JACINTA-MARIE R. TOMPKINS
United States Air Force

ACM 37627

18 April 2013

Sentence adjudged 05 October 2009 by GCM convened at Goodfellow Air Force Base, Texas. Military Judge: Michael J. O'Sullivan.

Approved sentence: Bad-conduct discharge, confinement for 24 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; and Captain Travis K. Ausland.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel C. Taylor Smith; Major Deanna Daly; Major Rhea A. Lagano; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and SOYBEL
Appellate Military Judges

PER CURIAM:

A general court-martial composed of officer members convicted the appellant in accordance with her pleas of: attempted larceny, in violation of Article 80, UCMJ, 10 U.S.C. § 880; making a false official statement, in violation of Article 107, UCMJ, 10 U.S.C. § 907; using marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a; larceny, in violation of Article 121, UCMJ, 10 U.S.C. § 921; making checks with the intent to defraud, in violation of Article 123a, UCMJ, 10 U.S.C. § 923a; and passing worthless checks, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The court

sentenced her to a bad-conduct discharge, confinement for 24 months, total forfeitures, and reduction to the grade of E-1. The convening authority approved the sentence adjudged. The appellant assigned five errors concerning: (1) the completeness of the record of trial, (2) the military judge's refusal to recuse himself, (3) the conditions of pretrial confinement, (4) the military judge's denial of a motion to dismiss based on speedy trial, and (5) post-trial processing delay.[1]

Disqualification of the Military Judge

The appellant asked the military judge to disqualify himself based on a prior supervisory relationship with the detailed trial counsel. The military judge candidly responded to extensive questioning by trial defense counsel concerning the matter and stated that nothing about the prior supervisory relationship would affect his fairness and impartiality in the appellant's case. The military judge entered detailed findings of fact and conclusions of law to support his denial of the motion.

We review the military judge's decision on disqualification for an abuse of discretion. *United States v. Wright*, 52 M.J. 136, 141 (C.A.A.F. 1999). In *Wright*, the Court found no abuse of discretion in a military judge's refusal to disqualify himself based on a past working relationship with a law enforcement agent who was a material witness and for whom the judge had high regard. The Court emphasized the judge's full disclosure, sound analysis, and sensitivity to public perception in finding that "the judge's impartiality could not reasonably be questioned." *Id*. at 142. Such is the case here. The judge stated that the reason he raised the issue on the record was to ensure a public perception of fairness and, in his conclusions of law, stated that a reasonable person with knowledge of all the circumstances would not reasonably question his impartiality. We find no abuse of discretion in his decision.

Pretrial Punishment

The appellant argues that the military judge erred by denying additional pretrial confinement credit based on unlawful pretrial punishment. The appellant cited four bases to support her claim for additional credit: (1) denial of necessary medical care, (2) failure by the unit to visit her monthly, (3) failure to segregate her from adjudged prisoners, and (4) failure to provide clothing distinct from adjudged prisoners. The military judge entered detailed findings and conclusions to support his denial of the motion.

Article 13, UMCJ, 10 U.S.C. § 813, prohibits purposefully imposing punishment before conviction as well as imposing pretrial confinement conditions more rigorous than

[1] After the appellant submitted her assignment of errors, we ordered that the record be returned to the convening authority for a certificate of correction and new post-trial processing to address the concerns raised by the appellant regarding the completeness of the record of trial. The convening authority complied with the order and returned the completed record. This action renders the first issue moot.

necessary to ensure presence at trial. *United States v. Fricke*, 53 M.J. 149, 154 (C.A.A.F. 2000) (citing *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997)). Where the request for relief is based on a claim that the conditions imposed were more rigorous than necessary, the appropriate inquiry is whether the conditions are reasonably related to a legitimate governmental objective or operating policy of the facility; if not, such conditions may show an intent to punish. *United States v. James*, 28 M.J. 214, 216 (C.M.A. 1989). Unduly rigorous conditions must be so egregious as to give rise to an inference of punishment or so excessive as to constitute punishment. *McCarthy*, 47 M.J. at 165 (citations omitted).

We review the issue as a mixed question of law and fact, and defer to the findings of fact by the military judge unless clearly erroneous. *McCarthy*, 47 M.J. at 164-65; *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005). We review de novo the conclusions based on those facts. *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000); *United States v. Mosby*, 56. M.J. 309, 310 (C.A.A.F. 2002); *United States v. Zarbatany*, 70 M.J. 1769, 174 (C.A.A.F. 2011). Violations of service regulations prescribing treatment of pretrial prisoners do not trigger a per se right to additional credit, but credit may be warranted when such violations are deliberate and knowing. *United States v. Adcock*, 65 M.J. 18, 25 (C.A.A.F. 2007). The appellant has the burden of establishing his entitlement to relief under Article 13, UCMJ. *Mosby*, 56 M.J. at 310.

Applying the above standards, we do not find that the appellant is entitled to additional pretrial confinement credit based on unlawful pretrial punishment under Article 13, UCMJ. Further, we do not find the conditions to be an abuse of discretion or unusually harsh such that additional credit is warranted under Rule for Courts-Martial (R.C.M.) 305(k). Although some conditions violated Air Force Instructions regarding treatment of pretrial prisoners, we agree with the military judge that the evidence does not show the violations to be deliberate and knowing nor does the evidence show intent to punish. Finally, considering the violations in the overall context of the case, we do not find additional relief warranted under Article 66(c), UCMJ, 10 U.S.C. § 866(c). *See Zarbatany*, 70 M.J. 169.

Speedy Trial

The military judge denied the appellant's motion to dismiss based on denial of speedy trial. When an accused is held in pretrial confinement, the Government must show reasonable diligence in moving toward trial. Article 10, UCMJ, 10 U.S.C. § 810; *United States v. Schuber*, 70 M.J. 181 (C.A.A.F. 2011) (citation omitted). Alleged violations of Article 10, UCMJ, are evaluated using the four factors identified in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) length of delay, (2) reasons for delay, (3) demand for speedy trial, and (4) prejudice. *Schuber*, 70 M.J. at 188 (citations omitted). We review de novo whether the appellant was denied the right to a speedy trial as a

matter of law and are bound by the facts found by the military judge unless they are clearly erroneous. *Id*.

Applying the first of the four *Barker* factors, we do not find the length of delay facially unreasonable. In his findings of fact, the military judge noted that the case involved 66 criminal acts involving 21 named victims, 5 corporations, and several banking institutions. We agree with the military judge that this was a complex case requiring many steps to get to trial and that the Government "treated the case with urgency." Having found the length of delay reasonable, we need not inquire into the remaining *Barker* factors. *Id*. at 189. Nevertheless, analysis of the remaining factors confirms that the appellant was not denied her right to a speedy trial under Article 10, UCMJ.

First, unlike the relatively straightforward urinalysis case at issue in *Schuber*, where the Court found 71 days from pretrial confinement to trial not facially unreasonable, this is a complex theft and financial crimes case with multiple victims and items of physical and documentary evidence that required examination. Second, the appellant's demand for speedy trial the day before her counsel went on convalescent leave does not favor the appellant when those demands are viewed in the context of trial defense counsel's statements of unavailability. Third, we find that neither the length of delay nor the lawfully imposed pretrial confinement during that delay prejudiced the appellant to such an extent as to tip the balance toward finding a violation of Article 10, UCMJ. Having reviewed de novo whether the appellant was denied her right to a speedy trial under Article 10, UCMJ, we conclude that she was not. Nor do we find a violation of R.C.M. 707's requirement that an accused be brought to trial within 120 days of the imposition of restraint: the appellant was arraigned 122 days after imposition of pretrial confinement, but 24 days are properly excluded for speedy trial accountability by the convening authority's approval of a defense delay request. R.C.M. 707(c).

Post-Trial Delay

Citing *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002), the appellant argues that the post-trial processing time in his case is sufficiently long to require relief absent a showing of prejudice. In *Tardif*, our superior court determined that Article 66(c), UCMJ, empowered the service courts to grant sentence relief for excessive post-trial delay without showing actual prejudice as is required by Article 59(a), UCMJ, 10 U.S.C. § 859(a). Having reviewed the legislative and judicial history of both Articles, the Court concluded that the power and duty to determine "sentence appropriateness" under Article 66(c), UCMJ, is distinct from and broader than that of determining "sentence legality" under Article 59(a), UCMJ:

> Article 59(a) constrains the authority to reverse "on the ground of an error of law." Article 66(c) is a broader, three-pronged constraint on the court's

> authority to affirm. Before it may affirm, the court must be satisfied that the findings and sentence are (1) "correct in law," and (2) "correct in fact." Even if these first two prongs are satisfied, the court may affirm only so much of the findings and sentence as it "determines, on the basis of the entire record should be approved."

Id. at 224 (citing *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998). The Court remanded the case to the lower court to determine whether relief was warranted for excessive post-trial delay notwithstanding the absence of prejudice: "[A]ppellate courts are not limited to either tolerating the intolerable or giving an appellant a windfall. The Courts of Criminal Appeals have authority under Article 66(c) . . . to tailor an appropriate remedy [for post-trial delay], if any is warranted, to the circumstances of the case." *Id*. at 225.

In *United States v. Brown*, 62 M.J. 602 (N.M. Ct. Crim. App. 2005), our Navy and Marine Court colleagues identified a "non-exhaustive" list of factors to consider in evaluating whether Article 66(c), UCMJ, relief should be granted for post-trial delay. Among the non-prejudicial factors are the length and reasons for the delay, the length and complexity of the record, the offenses involved, and the evidence of bad faith or gross indifference in the post-trial process. *Id*. at 607. Finding gross negligence in a delay of almost 30 months from adjournment of trial until receipt of the record for review, the court disapproved the adjudged bad-conduct discharge. *Id*. at 607-08.

The post-trial processing of the present case has been less than exemplary. The convening authority took action 91 days after the conclusion of trial, but the case was not docketed with the court until 89 days later. The period from action to docketing is presumptively unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). The appellant submitted her assignment of errors and brief approximately one year after docketing, and in her first assigned error identified that certain appellate exhibits were added to the record after authentication. Without opposition, we granted the Government's motion to return the record for a certificate of correction and new post-trial processing on 27 June 2011. The completed record was docketed on 6 March 2012. The appellant filed a supplemental assignment of error requesting *Tardif* relief on 31 October 2012, and the Government filed an answer to all the assigned errors on 30 November 2012.

The appellant does not articulate any specific prejudice, but argues that the bad-conduct discharge should be disapproved because of "unexplained and unreasonable delay." Although the post-trial processing violates the *Moreno* standards, we find no evidence of bad faith or gross indifference to the post-trial processing of the appellant's case sufficient to prompt sentence relief nor do the other suggested factors in *Brown* cause us to exercise our power under Article 66(c), UCMJ, to provide a windfall remedy to the appellant by disapproving an otherwise legal sentence. The court reporter

submitted an affidavit explaining the email communications problem that resulted in the military judge's rulings not being initially included as appellate exhibits. A second affidavit from a paralegal in the base legal office explains the difficulty the office had in serving the corrected record of trial on the appellant. While these events are unfortunate, they do not show bad faith or gross indifference to the processing of the appellant's case such that sentence relief is warranted.

Conclusion

The approved findings and the sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ. Accordingly, the approved findings and the sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court