UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DAVID J. VON BERGEN
United States Air Force

ACM 34817 (f rev)

9 January 2008

Sentence adjudged 24 October 2006 by GCM convened at Scott Air Force Base, Illinois. Military Judge: Gary M. Jackson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 28 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Brendon K. Tukey.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

PER CURIAM:

Consistent with his plea, the appellant was found guilty of one specification of distribution of child pornography by means of a computer, in violation of Article 134, UCMJ, 10 U.S.C. § 934. Contrary to his plea, he was convicted of one specification of possession of child pornography in violation of Article 134, UCMJ.

The appellant raises two issues. First, he asserts the military judge erred when he found the appellant had waived his right to a pretrial hearing under Article 32, UCMJ, 10 U.S.C. § 832. He also claims the military judge erred when he denied his motion to dismiss one specification for denial of his right to a speedy trial under Rule for Courts-Martial (R.C.M.) 707. For the reasons stated below, we disagree.

Background

This case is before us on further review. The appellant was first court-martialed on 20 September 2001 when he pled guilty to the charge and both specifications in exchange for the convening authority's promise not to approve a sentence that included confinement in excess of 36 months. The pretrial agreement (PTA) also included a provision whereby the appellant agreed to waive his right to a pretrial hearing under Article 32, UCMJ.

At his first trial, the appellant kept his part of the agreement and pled guilty to the charge and its two specifications. As noted, one specification was for distribution of child pornography over his computer and the other for possession of child pornography. The specification alleging possession of child pornography was charged under Clause 3 of Article 134, UCMJ, as a violation of a federal statute; 18 U.S.C. § 2252A(a)(5)(A). He was sentenced to reduction to the grade of E-1, confinement for 28 months, and a dishonorable discharge. Because his sentence contained an amount of confinement below that specified in the PTA, the convening authority was free to approve the sentence as adjudged, which he did.

The Court of Appeals for the Armed Forces overturned the appellant's conviction as to the specification alleging possession of child pornography in light of *United States v. Martinelli*, 62 M.J. 52 (C.A.A.F. 2005). That court also set aside the appellant's sentence. The case was returned to The Judge Advocate General (TJAG) and a rehearing on the faulty specification and the sentence was authorized. On 27 July 2006, the convening authority authorized a rehearing on both the faulty specification and the sentence. The faulty specification was amended to one that alleged conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces (under Clauses 1 and 2 of Article 134, UCMJ) rather than under Clause 3 of Article 134, UCMJ.

Prior to the rehearing, the appellant withdrew from his PTA, filed the motions which are at issue on appeal, and pleaded not guilty to the amended charge and specification. Contrary to his plea, the appellant was found guilty of the amended charge and specification, and was sentenced, for both specifications, to a reduction to the grade of E-1, forfeiture all pay and allowances, confinement for 3 years, and a dishonorable discharge. The convening authority approved only so much of the sentence as provided for a dishonorable discharge, confinement for 28 months, and reduction to E-1.[1]

[1] The convening authority could approve no sentence greater than that imposed at the appellant's first trial. R.C.M. 810(d)(1).

Denial of Motion for Article 32, UCMJ, Investigative Hearing

In support of the motion for an Article 32 investigation, trial defense counsel argued that the waiver of the Article 32 investigation "was conditioned upon the PTA he entered into with the convening authority." Since the appellant withdrew from the PTA, trial defense counsel asserted he was entitled to a new Article 32 investigation. Based on this one assertion the military judge found the appellant had not shown good cause as required under R.C.M. 405(k). We agree and will not overturn his decision.

Once a pretrial investigation has been waived, relief from that waiver can be obtained only for "good cause shown." *United States v. Stone*, 37 M.J. 558, 566 (A.C.M.R. 1993) (citing R.C.M. 405(k)). A military judge's ruling in this matter is one involving his discretion and will not be disturbed unless it is clearly erroneous. *United States v. Nickerson*, 27 M.J. 30, 31 (C.M.A. 1988). His ultimate ruling concerning good cause is a matter of law. *Id.* at 32.

The appellant contends good cause was shown, and the military judged erred in finding otherwise, because relief from the waiver was needed to secure an interest intended to be protected by the pretrial investigation and Article 32, UCMJ. Further he argues under *Nickerson*, if the decision to waive the Article 32 investigation was in some way connected to the appellant's decision to plead guilty, good cause to receive relief from the waiver exists. According to the appellant, that situation exists in this case because waiving the Article 32 investigation was an express condition contained in the pretrial agreement. However, *Nickerson* does not stand for the proposition that withdrawal from a PTA automatically establishes good cause. The appellant presented no other reason as a basis. Without more, he did not show good cause.

On appeal the appellant raises, for the first time, two additional matters in support of his argument that he was entitled to an Article 32 investigation. First, the appellant notes some evidence from the first trial was destroyed by the government prior to the rehearing.[2] His second argument concerns changes to the specification at issue prior to the rehearing. As these arguments were not presented to the military judge, we analyze these under a different standard. These arguments were waived by the trial defense counsel's failure to raise them at trial, and the appellant is entitled to relief only if his case at trial was harmed by this waiver. *See United States v. Chuculate*, 5 M.J. 143 (C.M.A. 1978) (stating "where a defense counsel fails to timely urge appellant's substantial pretrial right . . . with no adverse affect at trial, then '. . . there is no good reason in law or logic to set aside his conviction'") (quoting *United States v. Mickel*, 26 C.M.R. 104 (C.M.A. 1958)).

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[2] Despite the destruction of evidence such as the photographs taken from the appellant's computer allegedly depicting children engaging in sexually explicit conduct, the appellant's confession, an investigator who was involved in taking the appellant's confession, and testimony from witnesses who saw the photographs were still available.

As to the appellant's first argument, the destruction of some evidence does not entitle the appellant to relief based on the facts of this case. The appellant's confession, which was corroborated by eyewitness testimony, was more than sufficient to sustain a conviction at trial. *See United States v. Arnold*, 61 M.J. 254, 257 (C.A.A.F. 2005) (holding that the amount of evidence needed to corroborate a confession is "very slight"). The appellant was not adversely affected by the failure to assert the destruction of evidence used in the first trial as good cause for demanding an Article 32, UCMJ, investigation in the second trial.

With respect to the second argument, the amendment to the specification would not entitle the appellant to an Article 32 investigation. Changing the allegation from an Article 134, UCMJ, Clause 3 specification to one containing elements under Clauses 1 and 2 does not amount to a "significant" change to the specification.[3] *See United States v. Sullivan*, 42 M.J. 360, 365 (C.A.A.F. 1995) (stating the "element of conduct prejudicial to good order and discipline or of a service-discrediting nature is an implied element of every offense in the military justice system"). Therefore, it does not establish good cause, and the appellant was not harmed at trial by trial defense counsel's failure to assert it.

Moreover, in a sense, the appellant has already received the benefit of his PTA from the first trial. The convening authority did not back out of his obligation at the previous trial and the sentence of that trial forms the basis of the maximum sentence that the convening authority can approve in this trial. The fact that the appellant beat the confinement cap in the previous trial does not change this. We hold the military judge did not err when he determined the appellant failed to establish good cause, and the appellant was not harmed by trial defense counsel's failure to raise any of the matters the appellant raises on appeal.

Speedy Trial

Two hundred and seventy days elapsed between the time the convening authority received the record of trial and the opinion authorizing the rehearing and the date the rehearing was held. At trial the defense filed a motion to dismiss the charge and specification for violation of the appellant's right to a speedy trial under R.C.M. 707 and the Sixth Amendment to the United States Constitution. The military judge made essential findings of fact concerning this delay.

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[3] The appellant states, without further explanation, that there were "significant changes" to the specification at issue. If we were to conclude that these were "major changes," the appropriate relief would be to require the charge to be dismissed and preferred anew. R.C.M. 603(d). However, we conclude, based on case precedent, that the change was neither significant nor major.

The military judge found that the convening authority properly excluded all but 81 days. This conclusion involved the assumption that the convening authority did not receive the record of trial until 20 April 2006. However, the military judge made an alternate finding that even if the convening authority can be credited with receiving the record on 16 November 2005 (the date the record was received by TJAG for further action consistent with our superior court's ruling in a similar case), that period was properly excluded. Thus, however this four-month period was characterized, it was properly excluded because the government was awaiting the appellate results of cases with issues similar to the appellant's as addressed in *Martinelli* and for a decision whether these cases (including the appellant's) would be appealed to the United States Supreme Court. Another month was excluded by the convening authority because it took that amount of time for the notice that the case would not be appealed to be forwarded to the proper legal offices within the Air Force, to complete the appellate processing, and to return the record of trial to USAFE/JA to determine whether a rehearing would be directed.

We review the military judge's ruling on a speedy trial motion for an abuse of discretion. *United States v. Hatfield*, 44 M.J. 22 (C.A.A.F. 1995); *United States v. Edmond*, 41 M.J. 419 (C.A.A.F. 1995). The ultimate issue of whether the appellant received a speedy trial is a matter of law that we review de novo. *United States v. Doty*, 51 M.J. 464, 466 (C.A.A.F. 1999).

R.C.M. 707(a) provides that an accused shall be brought to trial within 120 days of preferral of charges. R.C.M. 707(c) permits all pretrial delays approved by the convening authority to be excluded from the count. To be excludable, the reason for the delay must be reasonable. *Cf. United States v. Maresca*, 28 M.J. 328 (C.M.A. 1989) (holding the convening authority acted unreasonably in excluding the 16 days between the date of preferral and the date the accused was notified of the charges by the government). The discussion section of R.C.M. 707(c) gives several examples that would qualify as a reasonable delay. These include time to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused; time to in-process a member of the reserve component for disciplinary action; time to complete other proceedings related to the case; time to secure evidence or witnesses; time requested by the accused; time to obtain security clearances; and for other good causes.

We find the military judge did not abuse his discretion in finding the delay in this case was reasonable. The issues decided by our superior court in *Martinelli* were substantial and had far reaching consequences not only for the military but also for society as a whole. It was entirely reasonable for the government to consider whether to seek a writ of certiorari at the United States Supreme Court. Often such decisions are made in conjunction with attorneys at the Office of the Solicitor General of the United States and attorneys in other offices of the Department of Justice. In this regard it is common to await the outcome of similar cases because their outcome may effect the

ultimate decision as to whether certiorari would be sought. Given the complexity of the issues involved and the several offices potentially involved in the decision making process, the time it took for that decision to be made was reasonable. This period covered 16 November 2005 – 23 March 2006, a period of 131 days, and was properly excluded.

The convening authority also excluded the time it took to locate the appellant, determine his availability, serve him with a copy of the record, provide notice of the order for a rehearing, and receive that notice back. This took 47 days. He excluded another 19 days to determine the availability of witnesses, their military status and locations, and the availability of evidence. Trial defense counsel concurred with another 17 days of excluded time associated with the trial docketing process. We find all of these delays to be reasonable. The military judge found that a total of 81 days were accountable for speedy trial purposes. We have reviewed his findings of fact and the exclusions of the convening authority that the military judge evaluated. We find his analysis and calculation to be reasonable.

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 approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court