UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JOHN F. ALLEY III
United States Air Force

ACM 36404

30 April 2007

Sentence adjudged 10 June 2005 by GCM convened at Tyndall Air Force Base, Florida. Military Judge: Christopher A. Santoro (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 16 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Bryan A. Bonner, and Major Anniece Barber.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Donna S. Rueppell.

Before

BROWN, MATHEWS, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

THOMPSON, Judge:

The appellant was tried by a military judge sitting as a general court-martial at Tyndall Air Force Base (AFB), Florida. Pursuant to the appellant's pleas, he was found guilty of breaking restriction, wrongful use of ecstasy, cocaine and marijuana, wrongful distribution of ecstasy, and writing bad checks; in violation of Articles 134, 112a, and 123a, UCMJ, 10 U.S.C. §§ 934, 912a, 923a. He was found not guilty of one specification of wrongful use of methamphetamine. The military judge sentenced the appellant to a

bad-conduct discharge, confinement for 16 months, and reduction to the grade of E-1. The convening authority approved the findings and sentence as adjudged.

The appellant does not challenge the findings of his court-martial; instead, he contends: (1) the military judge erred when he found the appellant had not been subjected to illegal pretrial punishment, in violation of Article 13, UCMJ, 10 U.S.C. § 813,[1] and (2) the military judge erred in denying appellant's motion to dismiss all charges and specifications for denial of his right to a speedy trial.

Illegal Pretrial Punishment

At trial, the appellant alleged that he suffered illegal pretrial punishment, in violation of Article 13, UCMJ, 10 U.S.C. § 813. He brought a motion for appropriate relief asserting: (1) the pretrial confinement review officer (PCRO) abused his discretion; (2) neither the PCRO nor the appellant's commander released the appellant from pretrial confinement when the circumstances justifying his confinement changed; and (3) the conditions of the appellant's confinement in a local civilian jail were so onerous as to constitute punishment. The military judge denied the request, and the appellant now alleges the military judge erred. We find no illegal pretrial punishment.

On 23 January 2005, the appellant was arrested by civilian law enforcement authorities and charged with domestic battery and false imprisonment. Upon his release from civilian confinement on 11 February 2005, the appellant's commander restricted him to base, although the appellant was allowed to leave the base with prior approval from his first sergeant. The appellant did in fact leave the base on several occasions after receiving such permission. On 4 March 2005, the appellant failed to appear at his place of duty. He was subsequently apprehended, and placed into pretrial confinement on 5 March 2005. He was held in the Bay County, Florida jail, a civilian confinement facility, because two witnesses against the appellant were already being held in the Tyndall AFB confinement facility. Between 7 March and 12 March 2005, the appellant was afforded all the proper hearings and reviews required by Rule for Courts-Martial (R.C.M.) 305. On 12 March 2005, the PCRO conducted a hearing to review the necessity for continued pretrial confinement of the appellant. Following the hearing, the PCRO prepared a memorandum in which he concluded that the appellant should be continued in pretrial confinement. The appellant remained in pretrial confinement from 5 March 2005 to 13 May 2005 at the Bay County jail, and from 13 May 2005 until 9 June 2005 at the military confinement facility on Tyndall AFB.

[1] The appellant raises both issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). The appellant spent 97 days in pretrial confinement. The military judge awarded one day of credit for each of these days pursuant to *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984).

In support of his claim of error, the appellant first contends that the PCRO abused his discretion, alleging the facts before the PCRO did not support continuing appellant's pretrial confinement.

We review a determination regarding the legality of an appellant's pretrial confinement under an abuse of discretion standard. *United States v. Gaither,* 45 M.J. 349, 351-52 (C.A.A.F. 1996). Although this Court is authorized to find facts under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we normally defer to the military judge unless the lower court's findings are clearly erroneous. *United States v. Hall*, 54 M.J. 788, 790 (A.F. Ct. Crim. App. 2001) (citing *United States v. Vaughters*, 42 M.J. 564, 566 (A.F. Ct. Crim. App. 1995)). In the present case the military judge made extensive findings of fact which are fully supported by the evidence and not clearly erroneous; we adopt these findings of fact as our own.

The military judge reviewed the evidence available to the PCRO and concluded that the PCRO did not abuse his discretion in ordering the appellant's continued confinement. We agree. After considering all the matters contained in the record, including all testimony and the report of the PCRO with its attachments, we conclude that the PCRO did not abuse his discretion in continuing the appellant's pretrial confinement.

The appellant next asserts the military judge erred by not granting relief for illegal pretrial confinement when neither the appellant's commander nor the PCRO released the appellant from pretrial confinement when the circumstances justifying his confinement changed. The appellant asserts that because he did not use illegal drugs which were readily available in the Bay County jail during his confinement, and did not attempt to flee when he was left unattended during various appointments outside the confinement facility, his continued confinement was not necessary. R.C.M. 305 (i)(2)(E) provides for reconsideration of continued pretrial confinement, and states that the reviewing officer "shall upon request, and after notice to the parties, reconsider the decision to confine the prisoner based on any significant information not previously considered." The military judge found that the appellant never petitioned the PCRO or his commander for release from confinement. A failure to ask for release from confinement, while not conclusive, is strong evidence that the accused is not entitled to relief. *United States v. Fricke*, 53 M.J. 149, 154 (C.A.A.F. 2000) (citing *United States v. Huffman*, 40 M.J. 225, 227 (C.M.A. 1994)). Based on the totality of facts found by the military judge, we conclude the appellant's continued confinement was proper, and would have continued even if he had asked for release.

The appellant further asserts that the conditions he faced in the Bay County jail were so onerous as to constitute pretrial punishment. Among the appellant's complaints are that he was unable to adequately exercise; that he had no access to rehabilitation programs; that he experienced difficulty contacting his attorneys and other Air Force personnel; that he was offered illegal drugs by other inmates in the jail; that the jail's

telephone service for the inmates was too expensive; and that the food was of poor quality and offered in limited quantities.

Article 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.

This Court's determination of whether the appellant suffered from unlawful pretrial punishment involves constitutional and statutory considerations. *Bell v. Wolfish*, 441 U.S. 520, 535-36 (1979); *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005). We will defer to the findings of fact by the military judge unless they are clearly erroneous; however, our application of those facts to the constitutional and statutory considerations, as well as any determination of whether this appellant is entitled to credit for unlawful pretrial punishment, involves independent de novo review by this Court. *King*, 61 M.J. at 227 (citing *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000)). The appellant bears the burden of establishing his entitlement to additional sentence credit because of a violation of Article 13, UCMJ. *King,* 61 M.J. at 227; *see also* R.C.M. 905(c)(2).

The military judge made detailed findings of fact on the conditions the appellant faced in the Bay County jail. We have reviewed those findings, and they are amply supported by the testimonial and documentary evidence and therefore are not clearly erroneous. Based on our review of the facts, we conclude the appellant's pretrial confinement was lawful under the circumstances. He was properly placed in the Bay County jail instead of the Tyndall AFB confinement facility to avoid housing him with two other airmen who were witnesses against him. We find that the conditions of the appellant's confinement were neither punishment nor unnecessarily harsh or rigorous, and hold there was no violation of Article 13, UCMJ, in this case.

Denial of Speedy Trial

The appellant alleges that the government did not proceed with reasonable diligence in bringing the case to trial. Specifically, the appellant contends that his right to a speedy trial was violated because there were several periods of inactivity on the part of the government, during which it had sufficient evidence to bring the appellant to trial.

This issue was raised at trial. We have examined the record and conclude that the military judge's findings of fact are not clearly erroneous. *See United States v. Springer*,

58 M.J. 164, 167 (C.A.A.F. 2003); *United States v. Burris*, 21 M.J. 140, 144 (C.M.A. 1985). We adopt them as our own for purposes of ruling on the assignment of error. We conclude that the government proceeded with reasonable diligence in bringing this case to trial and hold that the appellant has not been denied his right to a speedy trial, whether under Article 10, UCMJ, or the Sixth Amendment to the United States Constitution. *See Barker v. Wingo*, 407 U.S. 514 (1972); *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999); *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993).

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.

Senior Judge MATHEWS participated prior to his retirement.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator