UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic ALTON B. CHRISTIANA JR.
United States Air Force

ACM 36229

25 January 2007

Sentence adjudged 9 December 2004 by GCM convened at McGuire Air Force Base, New Jersey. Military Judge: Ronald A. Gregory.

Approved sentence: Bad-conduct discharge and confinement for 18 months.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major Christopher S. Morgan

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Daniel J. Breen.

Before

ORR, FRANCIS, and SOYBEL
Appellate Military Judges

FRANCIS, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of one specification of absence without leave terminated by apprehension and one specification of wrongful distribution of marijuana, in violation of Articles 86 and 112a, UCMJ, 10 U.S.C. §§ 886, 912a. The appellant was sentenced to a bad-conduct discharge and confinement for 18 months. The convening authority approved the sentence as adjudged. The appellant was credited with 134 days for pretrial confinement and an additional 268 days for illegal pretrial confinement.

The appellant raises two allegations of error: (1) the government violated his Article 10, UCMJ, 10 U.S.C. § 810, right to a speedy trial; and (2) the evidence is legally and factually insufficient to support his conviction for distribution of marijuana.[1] Finding no error, we affirm.

Background

In May 2004, the appellant was convicted by special court-martial of being absent without leave (AWOL) from his unit at McGuire Air Force Base, New Jersey, in violation of Article 86, UCMJ.[2] The adjudged and approved sentence included confinement for 3 months. The appellant was released from confinement on 20 July 2004 and directed to report for duty on 22 July 2004. He did not do so. After attempts to locate the appellant proved unsuccessful, his unit first reported him as AWOL and then placed him in desertion status. The case was turned over to the local Air Force Office of Special Investigations (AFOSI) detachment for investigation. AFOSI in turn alerted civilian law enforcement authorities near the appellant's home of record in Accord, New York. On 29 July 2004, New York State Police arrested the appellant at his parent's home. He was returned to Air Force control early the next day and placed in pretrial confinement, where he remained until completion of his court-martial.

At trial, the appellant moved to dismiss the charged offenses, asserting a violation of his right to a speedy trial under both the Sixth Amendment of the United States Constitution and Article 10, UCMJ. The judge denied the motion and the appellant pled not guilty to all charged offenses. His conviction for the offenses now at issue followed.

Speedy Trial

In his first assignment of error, the appellant again asserts his right to a speedy trial has been violated, but now confines his focus to Article 10, UCMJ. [3]

Whether an appellant has received a speedy trial is a question we review de novo. *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003); *United States v.*

[1] This assignment of error is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[2] Prior to his first AWOL conviction, the appellant twice received nonjudicial punishment pursuant to Article 15, UCMJ, 10 U.S.C. § 815, for other AWOL offenses. He served 20 days of pretrial confinement in connection with his first court-martial.
[3] The appellant does not assert a speedy trial violation under the Due Process Clause on the basis of undue investigative delay such as that addressed in *United States v. Lovasco*, 431 U.S. 783, 789 (1977). We agree such an assertion is not supported by the facts of this case. We also agree that the facts and circumstances do not support a Sixth Amendment challenge. Rule for Courts-Martial (R.C.M.) 707 is not at issue. The military judge found, and the parties agreed, that only 112 days were accountable for R.C.M. 707 speedy trial purposes.

Doty, 51 M.J. 464, 465 (C.A.A.F. 1999). We give substantial deference to findings of fact made by the military judge and will not overturn such findings unless they are clearly erroneous. *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005); *Cooper*, 58 M.J. at 58.

A military member's right to a speedy trial under Article 10, UCMJ, arises from the requirement imposed by that article to take "immediate steps" to try a person placed in pretrial confinement. *United States v. Birge*, 52 M.J. 209, 211 (C.A.A.F. 1999). The standard of review for claims of a denial of speedy trial under Article 10, UCMJ, is whether the government was "reasonably diligent" in bringing the case to trial. Constant motion is not required. *Mizgala*, 61 M.J. at 127. "Short periods of inactivity are not fatal to an otherwise active prosecution." *Id.* Although Article 10, UCMJ, is more stringent than the protections afforded by the Sixth Amendment right to a speedy trial, the factors enunciated by the Supreme Court in *Barker v. Wingo*[4] for determining Sixth Amendment speedy trial claims provide a sound initial basis from which to determine whether a violation of Article 10, UCMJ, occurred. *See also Cooper*, 58 M.J. at 61.

Applying a *Barker* analysis, with due consideration for the more stringent requirements of Article 10, UCMJ, we must at a minimum balance the impact of four factors: (1) the length of delay in bringing the appellant to trial, (2) the reason(s) for the delay, (3) whether the appellant asserted his right to a speedy trial prior to trial, and (4) the extent of any prejudice to the appellant. *Barker*, 407 U.S. at 530; *Birge*, 52 M.J. at 212. We do not apply these factors in a vacuum, but must also look at the entire proceeding as a whole, for the essential requirement of Article 10, UCMJ, is orderly expedition of the case, not mere speed. *Mizgala*, 61 M.J. at 129. Having applied these factors, and further considering the entire record, we find no violation of Article 10, UCMJ.

In ruling on the appellant's motion to dismiss for lack of a speedy trial, the military judge made extensive findings of fact. The evidence of record supports those findings and we adopt them as our own.

Article 10, UCMJ, protections were triggered on 29 July 2004 when the appellant was arrested for desertion and placed in pretrial confinement, where he remained until sentence was announced on 9 December 2004, a total of 133 days.[5] Applying the first two *Baker* prongs, we find this to be a substantial period of time to remain in pretrial confinement, particularly under the circumstances endured by this appellant, as further discussed under the prejudice prong, infra. Nonetheless, in light of the nature of the offenses of which the appellant was suspected and the

[4] *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

[5] Although the appellant was given 134 days credit for pretrial confinement, the correct credit, using the method set out in *United States v. Oliver*, 56 M.J. 779, 781 (A.F. Ct. Crim. App. 2002), is 133 days.

circumstances surrounding the appellant's pretrial confinement, the delay was reasonable.

At the time of the appellant's arrest on 29 July 2004, the AFOSI had not completed its investigation into the circumstances surrounding his absence. The appellant correctly notes that AWOL is a relatively simple offense and generally does not require a significant period of investigation. However, the appellant, at the time of his confinement, was suspected of the greater offense of desertion, and that is the charge on which he was arraigned.[6] Desertion is a more complicated offense, requiring proof of intent to remain away permanently. Proving the requisite intent is often difficult, forcing investigators, in the absence of an admission by the suspect, to marshal circumstantial evidence. Such was the case here. Special Agent (SA) Coates testified that after the appellant's apprehension, he continued to seek additional information from the New York State Police and other witnesses to prove the desertion offense. New York authorities were slow to respond and SA Coates, after consultation with his supervisor, ultimately closed out his report without waiting for the New York report, which was not received until 29 September 2004. Although the New York report ultimately added nothing new, SA Coates did not know that when he sought the information.

Prior to his absence in July 2004, the appellant had come under investigation by AFOSI for suspected drug offenses. After the appellant's arrest, SA Coates also continued to investigate those offenses. His investigative activity in that regard included attempting to locate and interview additional witnesses and obtaining a search authorization for the appellant's urine to test for drugs. Most of the additional witnesses could not be located, and SA Coates' last attempt to do so ended on 19 August 2004. The drug investigation was further stymied when the drug-testing laboratory notified SA Coates on 17 August 2004 that it had accidentally destroyed the appellant's sample prior to testing. SA Coates finally got a break on 20 August 2004, when a follow-up interview of Senior Airman (SrA) N, the subject of a separate drug investigation, identified multiple distributions of marijuana by the appellant. Although a prior statement given by SrA N to AFOSI on 23 March 2004 raised some evidence of potential drug distribution offenses by the appellant, SrA N's 20 August 2004 statement provided significantly greater information. SA Coates thereafter sent out additional investigative leads based on SrA N's statement and coordinated with local law enforcement authorities, but turned up no additional evidence before closing his report.

[6] The charges on which the appellant was arraigned included a charge of desertion terminated by apprehension, in violation of Article 85, UCMJ, 10 U.S.C. § 885. The court-martial found him not guilty of that offense, but guilty of the lesser included offense of AWOL terminated by apprehension.

The AFOSI investigation took 42 days and closed out 7 September 2004. Given the nature of the appellant's suspected offenses, it was not unreasonable for AFOSI to take 42 days to complete the investigative activities described. Indeed, as evidenced by the decision to close out the AFOSI report without waiting for the final New York report, it is clear AFOSI was aware of the need to proceed expeditiously and worked to do so. We attach little significance to the fact that the AFOSI investigative efforts for the most part proved unsuccessful. There is no requirement that every investigative lead turn up incriminating evidence. It is enough that the investigative measures taken were reasonable based on the circumstances of the case and that the investigative leads were pursued in a timely manner.

The completed AFOSI investigation report was provided to the servicing legal office on 13 September 2004. Case management from that time until charges were preferred was not a model of speed. Prosecution of the case did, however, continue to move forward. The staff judge advocate (SJA), deputy staff judge advocate, and the military justice chief all reviewed the AFOSI report the same week it came in. The SJA assigned a relatively new judge advocate to serve as trial counsel. The trial counsel immediately began to review the evidence and talk with the investigators to determine what charges the evidence would support. He was also responsible for drafting the necessary charges and preparing a proof analysis for review by the chief of justice and the SJA. To ensure the case continued to move forward, the chief of justice met with the trial counsel approximately two weeks later, at the end of September 2004, to discuss progress. Thereafter, the chief of military justice and the SJA continued to monitor the trial counsel's progress through their weekly meetings to discuss all pending courts-martial cases, including the appellant's. The trial counsel completed his review on 19 October 2004 and submitted draft charges and a proof analysis to the SJA on 21 October 2004. Simultaneous with the trial counsel's review of the evidence, the chief of military justice engaged in discussions with the appellant's defense counsel to determine what documents he had and worked to provide any missing documentation that was not passed on to him by prior counsel.[7]

Charges were preferred on 26 October 2004. After preferral, the case progressed rapidly. The Article 32 investigation,[8] referral of charges, and trial all were completed expeditiously. The only significant delay was from 3 November to 18 November for the Article 32, at the request of the appellant's trial defense counsel. An additional five-day delay was attributable to both the defense need to

[7] The appellant cycled through four separate trial defense counsel between the date of his pretrial confinement and his court-martial. He released his third counsel on 26 October 2004, the day charges were preferred against him.
[8] Article 32, UCMJ, 10 U.S.C. § 832.

prepare for the case after referral and to the availability of the military judge for trial.

Considering the total circumstances, including the relative slowness with which the case moved from the time the legal office received the AFOSI report to preferral, we find government prosecution of the case, taken as a whole, moved forward expeditiously. Although the base legal office might have acted faster if a more experienced counsel had been assigned, processing of the case continued to move forward at an acceptable pace. It was prudent for the assigned government counsel to review the case thoroughly to make sure the evidence supported the charges ultimately preferred against the appellant.

Turning to prong three of *Barker*, we find it significant that the appellant made no demand for a speedy trial before the motions presented in connection with his court-martial, despite being represented at various points in the court-martial process by four different, successive trial defense counsel. Indeed, the appellant's trial defense counsel actually asked for and received a significant delay in the Article 32 investigation, from 3 to 18 November 2004. Although there is no requirement to demand a speedy trial as a precondition of raising such issue before the courts, the Supreme Court has emphasized that the "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker*, 407 U.S. at 532; *Birge*, 52 M.J. at 212.

The fourth prong for consideration is the extent to which the delay prejudiced the appellant. Such prejudice must be assessed in terms of the need "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired". *Barker*, 407 U.S. at 532. Of these, the last concern is the most serious, for it directly impacts the ability of an accused to fairly defend the charges against him. *Id.*

The first two factors weigh heavily in favor of the appellant. Not only was the appellant in pretrial confinement, but the military judge also found that the nature of that confinement violated Article 13, UCMJ, 10 U.S.C. § 813, and awarded an additional 268 days credit toward the appellant's sentence to confinement. Because there was no confinement facility on base, the appellant's pretrial confinement was in a local civilian county jail. The military judge found, as do we, the conditions of that pretrial confinement deplorable. Among other things, the appellant was commingled with convicted prisoners, deprived of his military uniform and forced to wear normal prison attire, and prevented from shaving.[9] He was also at times required to share a two-bed cell with two other

[9] The appellant initially appeared at trial unshaven and in prison attire.

people, forcing them to take turns sleeping on a concrete floor with nothing but a mat. The physical condition of the facility was poor. Cells were dirty, and the water so bad that when run through a white cloth over night, it turned the cloth brown. The appellant was also at one point placed in solitary confinement for 12 hours when prison officials became concerned he might be suicidal. The appellant testified that cell was particularly dirty, with blood on the walls and feces on the floor. The appellant's access to his trial defense counsel was also at times limited. There is no doubt these conditions increased the appellant's own anxiety, as evidenced by complaints he made at the time to prison officials, his command chain, and his Congressman.

Considering the third prejudice factor enunciated by *Barker*, we find no indication that the delay in bringing the appellant to trial compromised defense preparation in regard to trial strategy or presentation of evidence and witnesses, either in findings or in sentencing. Indeed, when expressly questioned by the trial judge as to whether the defense, in light of the appellant's pretrial confinement conditions, had sufficient client access to prepare for trial, trial defense counsel stated: "We're prepared to proceed with trial." Trial defense counsel also expressly indicated in his argument on the speedy trial motion that the defense was fully prepared for trial. Furthermore, there is no indication any defense witness, or any potential defense witnesses, suffered from memory loss. The only witness who appeared to suffer memory loss about the appellant's offenses at trial was SrA N, who was called by the prosecution to prove the drug offenses. SrA N could not remember the exact dates the appellant allegedly used or distributed marijuana. That memory lapse appears to actually have benefited the appellant, as he was found not guilty of the specification alleging wrongful use of marijuana.

Balancing all of the above, and mindful that the protections of Article 10, UCMJ, are more stringent than the Sixth Amendment protections at issue in *Barker*, we find no violation of Article 10. When the appellant was arrested and placed in pretrial confinement, the investigation of his alleged offenses was not yet complete. Additional significant investigation leads remained and were pursued expeditiously by AFOSI. Although processing of the case by the base legal office between the time it received the completed report of investigation and the date charges were preferred was slow, it is clear the case still continued to move forward. Once charges were preferred, the case progressed rapidly to trial. During this entire period, the appellant never raised a speedy trial issue. Indeed, between preferral and trial, the defense actually requested and received a significant delay in the Article 32 investigation, required after the appellant released his third assigned trial defense counsel and the newly appointed counsel needed time to prepare. Against this backdrop, we find the appellant did suffer some prejudice as a result of the oppressive conditions of his pretrial confinement and the anxiety he experienced because of those conditions. However, there is no

evidence the appellant was prejudiced in his ability to defend the charges against him. In the absence of prejudice to the appellant's ability to defend the charges against him, and considering all the surrounding circumstances – including the prejudice arising from the oppressive nature of the pretrial confinement, for which he was awarded an additional 268 days sentence credit – we find no violation of the appellant's Article 10 rights. Considering the case as a whole, the government exercised due diligence in bringing the case to trial. That is all that is required.

Legal and Factual Sufficiency

We turn now to the appellant's claim that the evidence was legally and factually insufficient to support his conviction for distribution of marijuana.

We review the appellant's claim of legal and factual insufficiency de novo, examining all the evidence properly admitted at trial. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. Both standards are met here.

The appellant attacks the credibility of the government witnesses, asserting that because the appellant was deployed during a large portion of the time the offenses were alleged to have occurred, the evidence does not support his conviction. The appellant also asserts his conviction for distribution of marijuana is inconsistent with a finding by the same court-martial panel that he was not guilty of wrongful use of marijuana.

Having reviewed the evidence of record properly admitted at trial, we find that such evidence, considered in the light most favorable to the government, was sufficient for a reasonable factfinder to find all of the essential elements beyond a reasonable doubt. The appellant was indisputably deployed to Iraq during a portion of the time the government witness testified the marijuana distributions occurred. However, the appellant was not deployed during the entire time the offenses were alleged to have occurred. Although the government witness was uncertain of the exact dates of each individual transaction, he convincingly testified the appellant sold him marijuana on at least 15 different occasions. Based on that testimony, as bolstered by the other evidence of record, a reasonable

factfinder could find beyond a reasonable doubt the appellant wrongfully distributed marijuana on divers occasions within the total time period alleged. We also find no inconsistency between the finding of guilty on this offense and the finding of not guilty to the offense of wrongful use of marijuana. The two offenses require proof of different elements. Moreover, the time periods of the two offenses, both as alleged and as supported by the evidence, though similar, were not identical. A reasonable factfinder could have found the appellant guilty of one offense and not guilty of the other.

We are also convinced beyond a reasonable doubt that the appellant is in fact guilty of distributing marijuana on divers occasions during the times alleged. Mindful that we did not personally observe the witnesses, we find the testimony of the government witnesses both credible and convincing.

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

Senior Judge ORR participated in this decision prior to his reassignment.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator