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UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic JOSE A. COSSIO
United States Air Force

Misc. Dkt. 2006-02

10 May 2006

GCM convened at Hurlburt Field, Florida on 30 January 2006. Military Judge: William A. Kurlander.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Kimani R. Eason.

Appellate Counsel for Appellee: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain John S. Fredland.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

OPINION OF THE COURT

MOODY, Senior Judge:

On 22 November 2005, the Commander of the 16th Mission Support Squadron, Air Force Special Operations Command (AFSOC) at Hurlburt Field, Florida, preferred charges on the accused, Airman Basic (AB) Jose Cossio. These charges were one specification of attempted violation of a lawful general regulation, one specification of disrespect toward a commissioned officer, one specification of violation of a lawful order, wrongfully soliciting identification and password information by means of a false Hurlburt Field Webpage, and one specification of violating 18 U.S.C. § 912, by pretending to be an employee acting under the authority of a department of the United States in soliciting identification and password information, in violation of Articles 80, 89, 92, and 134, UCMJ, 10 U.S.C. §§ 880, 889, 892, 934. The charges were referred to

trial by general court-martial on 30 December 2005 and AB Cossio was arraigned on 30 January 2006.

Prior to entering pleas, AB Cossio, through counsel, moved for dismissal of the charges and specifications due to an alleged violation of his right to a speedy trial under Article 10, UCMJ, 10 U.S.C. § 810. The military judge granted the motion on 3 February 2006, dismissing the charges and specifications with prejudice. The government has appealed this dismissal under Article 62, UCMJ, 10 U.S.C. § 862. We have considered the government's brief in support of this appeal and AB Cossio's answer thereto. For the reasons set forth below, we set aside the military judge's decision and remand the case to the trial court for further proceedings.

Background

This case arose following the discovery that AB Cossio had established a website which looked remarkably similar to the one maintained by Hurlburt Field, Florida. This false website solicited members to provide their user name and password. At the time the website was established, AB Cossio was living in Illinois on appellate leave, having been previously convicted of wrongfully accessing the private financial records of Air Force personnel. He did this through a Defense Finance and Accounting System website, causing another member's pay to be routed to a charity selected by AB Cossio.

In granting AB Cossio's speedy trial motion, the military judge made extensive findings of fact. Because these findings comprise approximately 20 pages of transcript, we will identify and summarize what we consider to be the most significant for purposes of this appeal.

- On 27 September 2005, personnel assigned to the 16th Communications Squadron, Hurlburt Field, learned of a website that mimicked Hurlburt's official site.

- On 5 October 2005, the AFOSI and local law enforcement officials searched AB Cossio's residence in Illinois, seized five computer hard drives, among other things, and placed AB Cossio under apprehension.

- On 6 October 2005, AB Cossio was transported from Illinois to Hurlburt Field and placed in pretrial confinement.

- On 11 October 2005, the pretrial confinement hearing took place. (Although not contained in the judge's findings of fact, on 14 October 2005 the Pretrial Confinement Reviewing Officer continued AB Cossio in pretrial confinement).

- Around 15 October 2005, the AFOSI sent the hard drives to Defense Computer Forensics Laboratory (DCFL) for forensic analysis.

- On 26 October 2005, Captain W of the 16th Special Operations Wing legal office (16 SOW/JA) sent relevant statutes and documents to the AFSOC legal office (AFSOC/JA) for a "pre-preferral review."

- On 28 October 2005, AB Cossio, through counsel, made a demand for speedy trial.

- From 20 October to 15 November 2005, an analyst at DCFL conducted the "imaging" of the hard drives, copying them so that they could be analyzed.

- On 10 November 2005, AFSOC/JA completed its "pre-preferral review."

- From 15 November 2005 to 12 January 2006, the DCFL analyst conducted the actual forensic examination of the hard drives, although he attended a training course from 12 to 23 December 2005.

- On 22 November 2005, AB Cossio's commander preferred charges.

- Around 22 November 2005, the AFSOC/JA advised the trial counsel assigned to AB Cossio's case that another case, *United States v. Beres*, was to be his top priority.

- On 23 November 2005, the Commander of 16 SOW (16 SOW/CC) appointed a Major (Maj) A to be the investigating officer (IO) for the Article 32, UCMJ, 10 U.S.C. § 832, investigation in AB Cossio's case.

- On 29 November 2005, the 16 SOW/CC appointed a different IO, Maj K, in view of his knowledge of computers.

- On 1 December 2005, Maj K set the date of the Article 32, UCMJ, investigation for 6 December 2005.

- On 5 December 2005, AB Cossio, through counsel, requested a delay until the afternoon of 13 December 2005.

- On 14 December 2005, Maj K conducted the Article 32, UCMJ, investigation.

- On 22 December 2005, Maj K submitted his written report of the investigation to the 16 SOW/JA.

- On 3 January 2006, representatives of the government, along with the defense counsel, attended a docketing conference with the Chief Circuit Military Judge (CCMJ) of the Eastern Judicial Circuit. At this conference, the government asked for a 30 January 2006 trial date, due in part to Hurlburt Field having three intervening courts scheduled for dates earlier in January.

- On 6 January 2006, the CCMJ directed that AB Cossio's trial begin on 30 January.

- In 2005, Hurlburt Field tried the highest number of general courts-martials in the Air Force.

- On 25 January 2006, the AFOSI completed its report of investigation in AB Cossio's case.

- On 30 January 2006, trial began and AB Cossio was arraigned.

Discussion

The United States may appeal "an order or ruling of the military judge which terminates the proceedings with respect to a charge or specification." Article 62(a)(1)(A), UCMJ. The military judge granted the defense's motion to dismiss the charges and specification with prejudice, finding a violation of AB Cossio's Article 10, UCMJ, rights. The military judge's ruling meets the jurisdictional requirements of Article 62, UCMJ.

This Court reviews a military judge's rulings on speedy trial de novo and his findings of fact under a clearly erroneous standard. *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003). We have examined these findings of fact and, with certain qualifications discussed below, conclude that they are not clearly erroneous.

Our misgivings concern some of the military judge's observations contained in his findings of fact. For example, in commenting on the forensic examination conducted at DCFL, the military judge concluded that the laboratory did not work with what the judge viewed as the proper speed. He stated, "DCFL should have attached a higher priority to their examination of the materials in [AB Cossio's case]. Had this been done, it is likely that the forensic examination would have been finished much sooner." Later, on another matter, the military judge commented, "[The] initial pre-preferral review took

[Headquarters] AFSOC/JA 14 days to turn around. In the Court's view, this took way too long."

Again, in commenting on the substitution of Maj K for Maj A as IO, the military judge stated, "nobody told the defense until 1 December that an investigating officer had been appointed. The Court has trouble understanding why it took nine days to notify the defense of the appointment of [Maj K]." Although Maj K was actually appointed on 29 November 2005, only 3 days prior to notification, the judge apparently believed that these actions should have taken place much sooner. The military judge also found that AB Cossio's case would not involve "an overwhelming amount of case preparation" and implied that a forensic examination of the five hard drives in question may not have even been necessary to prove up the charges.

In examining these statements, and any other similar ones that may be contained in the findings of fact, we note that military judge's concern is the length of time that was involved in preparing the case for trial. Insofar as the statements refer to elapsed days, they can be compared with the testimony and other evidence for accuracy. However, to the extent that they contain criticism of the government's processing of the case, they are problematic. That is, while in a sense it may be true that, compared to a standard of ideal justice, the AFSOC/JA took "way too long" to do its initial review of the case, it is also true that this statement cannot be verified or disproved by anything in the record, although we note the large number of cases that AFSOC was overseeing at the time.

This is also true of the military judge's apparent belief that the case would not involve extensive preparation and that a forensic examination may not even have been needed. These statements are also speculative, made, no doubt, with the advantage of hindsight. Therefore, we take these conclusory statements to be opinions of the military judge to which we give due consideration but which we do not consider to be matters of objective fact which can be tested for clear error and which must necessarily affect our holding.

Turning to the legal priciples at issue here, Article 10, UCMJ, provides that "When any person subject to [the UCMJ] 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." The standard for measuring compliance with Article 10 "is not constant motion, but reasonable diligence in bringing the charges to trial. Brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive." *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993) (quoting *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965)).

Our superior court has determined that, in evaluating an alleged violation of Article 10, we must apply the criteria set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "Length of delay, the reason for the delay, the defendant's assertion of his right

[to a speedy trial], and prejudice to the defendant." *See also United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999).

In applying these criteria to AB Cossio's case, we note that the length of time elapsing between incarceration of AB Cossio and his arraignment—117 calendar days—is not in dispute. The military judge calculated the days attributable to the government as 109 days, making allowances for delays at the behest of the defense. However, for purposes of Article 10, we view the difference between the two to be insignificant. There is no dispute that AB Cossio made a demand for speedy trial. Therefore, we will focus our discussion on the other two criteria, bearing in mind our superior court's holding that Article 10 provides a more "stringent" speedy trial protection than the Sixth Amendment. *Id*.

Reason for the Delay

The military judge concluded that various blocks of time consumed in the processing of the case were excessive and without adequate reason. He mentioned, for example, the 14 days it apparently took the AFSOC/JA to examine the case prior to preferral, the 7 days to appoint Maj K as IO, the fact that Maj K did not set the Article 32, UCMJ, hearing immediately, and that, in the military judge's view, the government should have requested a trial date prior to 30 January 2006, utilizing other military installation courtrooms or conference rooms if necessary.

However, after examining the record as a whole, and drawing upon our own common sense and knowledge of the ways of the world, we conclude that the reason for the timing of the preferral, Article 32, UCMJ, hearing, referral, and arraignment in this case is that there was extensive investigation which had to be undertaken before it could be competently tried. While no doubt most of the data gleaned from examining the five hard drives in question was not relevant to the case, it is only to be expected that the government would want to pursue all possible sources of information before undertaking a prosecution. Despite the military judge's view that the case is not difficult, we see nothing unusual, let alone negligent, in the government exploring all possible leads that come to its attention. To put it succinctly, when an accused is arraigned five days after the completion of the AFOSI report of investigation, our first impression is not that the government has been dilatory.

We acknowledge that there were some apparent missteps in the government's handling of the case. For example, the government did not provide all the requested discovery to the defense as expeditiously as it could have. However, the various periods of time identified by the military judge as unreasonable delays never rose to the level of an absolute cessation of case preparation, as occurred in *United States v. Hatfield*, 44 M.J. 22 (C.A.A.F. 1996). In that case, the government apparently stopped processing the trial altogether, thereby causing an Article 10 violation. In any event, an accused is entitled to

a fair trial, not necessarily a perfect one. *See generally United States v. Hasting*, 461 U.S. 499, 508 (1983).

The military judge recognized the government's interest in thoroughly exploring all aspects of a case prior to trial when, in the last of his factual findings, he stated:

> Although the defense in this case repeatedly asked for an early trial date, if this case had been fully litigated and the DCFL report had not yet been completed, it is likely that the defense theme would be "the government's rush to judgment." Given that the burden of proof is upon the government, and the fact that government counsel's job is to seek justice and not simply a conviction, the government in every case has a right to methodically and carefully prepare its case, with due consideration for the requirements of Article 10.

Prejudice

Assuming, arguendo, that nevertheless the government has been dilatory in its processing of the case, we must still inquire as to whether AB Cossio has been prejudiced. The military judge's analysis of this criterion is as follows:

> Although there was pretrial confinement in this case, there has been no evidence that [AB Cossio's] "anxiety and concern" has exceeded the norm. There's been no showing that he wasn't paid, after an early finance glitch that was remedied. There's been no showing that the conditions of his pretrial confinement have been unduly harsh. There's been no showing that his defense has been impaired by the passage of time. Lastly, upon conviction, he would be entitled to receive administrative credit upon any sentence to confinement for the days he spent in pretrial confinement. Therefore, there is no prejudice in this case beyond that inherent in sitting in pretrial confinement for 109 days.

Admittedly, confinement is prejudicial. However, balancing the mere fact of pretrial confinement against the government's interest in a thorough investigation of the case, and especially taking into account the military judge's own determination that AB Cossio's ability to put on a defense had not been harmed, we conclude that there has been no prejudice to the substantial rights of AB Cossio. *See United States v. Mizgala*, 61 M.J. 122, 129 (C.A.A.F. 2005).

Decision

Examining the record of trial in light of the *Barker* criteria, and applying the Article 62, UCMJ, standard of review, we hold that AB Cossio has not been denied his

right to a speedy trial as secured by Article 10, UCMJ. The decision of the military judge dismissing the charges and specifications is set aside. Accordingly, the appeal of the United States is

GRANTED.

Judge FINCHER participated in this opinion prior to his reassignment.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator