UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class SHANE A. EMERICK
United States Air Force

ACM 37817

16 November 2012

Sentence adjudged 2 November 2010 by GCM convened at Schriever Air Force Base, Colorado. Military Judge: David S. Castro and Scott E. Harding (sitting alone).[1]

Approved sentence: Bad-conduct discharge, confinement for 11 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Grover H. Baxley; Major Tiwana L. Wright; and Captain Ja Rai A. Williams.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Captain Tyson D. Kindness; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ROAN, Senior Judge:

Consistent with his pleas, the appellant was found guilty of communicating a threat, in violation of Article 134, UCMJ, 10 U.S.C. § 934, and seven violations of Article 112a, UCMJ, 10 U.S.C. § 912a, involving wrongful use of marijuana; wrongful

[1] Judge Castro was the original military judge assigned to the case. He was replaced by Judge Harding after arraignment, who presided over the subsequent trial.

use of cocaine; and wrongful use, divers possessions, introduction with intent to distribute, and distribution of heroin. A military judge, sitting as a general court-martial, sentenced the appellant to a bad-conduct discharge, confinement for 15 months, forfeiture of $500.00 pay per month for 15 months, and reduction to E-1; however, he also awarded the appellant 618 days of confinement credit to be applied against his adjudged sentence. In compliance with the terms of a pretrial agreement,[2] the convening authority ultimately approved "only so much of the sentence as provides for a bad-conduct discharge, confinement for 11 months, and reduction to the grade of E-1."

The appellant raises three issues on appeal: (1) Whether the military judge erred when he failed to dismiss the case for a speedy trial violation under Article 10, UCMJ, 10 U.S.C. § 810; (2) Whether the Specification of Charge II fails to state an offense because it fails to allege the terminal element under Article 134, UCMJ; and (3) Whether the bad-conduct discharge should be set aside to provide meaningful relief for violations of Articles 12 and 13, UCMJ, 10 U.S.C. §§ 812, 813.

For the reasons discussed below, we affirm.

Speedy Trial

The appellant was placed in pretrial confinement on 7 April 2010, arraigned 119 days later on 3 August 2010, and court-martialed on 1-2 November 2010 (210 days after being placed in pretrial confinement). Defense counsel made a timely motion to dismiss for denial of a speedy trial, citing violations of the Sixth Amendment[3] and Article 10, UCMJ. The military judge denied the motion. The appellant revisits this issue on appeal, arguing that the 210-day delay between the imposition of pretrial confinement and the date of his court-martial violated his right to a speedy trial.

We review de novo the legal question of whether the accused was denied his right to a speedy trial, giving substantial deference to the military judge's findings of fact. *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005). The Sixth Amendment establishes the right to a speedy trial "in all criminal prosecutions." Article 10, UCMJ, provides that upon "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." In reviewing claims of a denial of a speedy trial under Article 10, UCMJ, constant motion is not demanded; rather, the Government must use "reasonable diligence in bringing the charges to trial." *Mizgala*, 61 M.J. at 127 (quoting *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965)). Brief inactivity in an otherwise active prosecution is not unreasonable or oppressive. *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993).

[2] In a pretrial agreement, the convening authority agreed not to approve any period of confinement in excess of 11 months.
[3] U.S. CONST. amend VI.

Although Article 10, UCMJ, creates a more stringent speedy trial standard than the Sixth Amendment, our superior court has instructed, "the factors from *Barker v. Wingo*, [407 U.S. 514 (1972),] are an apt structure for examining the facts and circumstances surrounding an alleged Article 10 violation." *Mizgala*, 61 M.J. at 127 (citing *United States v. Cooper*, 58 M.J. 54, 61 (C.A.A.F. 2003); *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999)). Those factors are: "(1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant." *Mizgala*, 61 M.J. at 129 (citing *Barker*, 407 U.S. at 530).

In his findings of fact, the military judge detailed the reasons for the 210-day delay between pretrial confinement and trial. We do not find them clearly erroneous and adopt them as our own. The military judge found that the discovery of evidence of additional and serious criminal activity, to include investigation into whether the appellant was criminally liable for the death of another Airman, "contributed to extended processing" in the case. We concur.[4] Additionally, on 2 August 2010, trial defense counsel requested the military judge order a sanity board in accordance with Rule for Courts-Martial (R.C.M.) 706. The military judge informally granted the request, but reserved issuing a final decision until he could provide "a tailored order laying out the particulars of [the] order." On 17 August 2010, the military judge ordered the sanity board, which completed its evaluation on 13 October 2010. A trial date was then scheduled for 2 November of that year.

We concur with the military judge's conclusion that, under the specific circumstances of this case, the record does not establish indifference or substantial inactivity indicating the Government acted without reasonable diligence. *See United States v. Thompson*, 68 M.J. 308, 312 (C.A.A.F. 2010). Rather, the complex nature of the homicide investigation, significant amounts of evidence requiring scientific analysis, and an unusually detailed sanity board hearing ordered by the military judge were substantial factors that resulted in reasonable delays in getting the appellant's case to trial.

While the appellant invoked his right to a speedy trial, we find it particularly relevant to our prejudice analysis that the military judge found "there is no indication that defense's preparation for trial, defense evidence for trial strategy, or [the ability] to secure witnesses on both the merits and sentencing were compromised by the processing time in this case." Based on the record of trial, we agree with his finding. After an independent review, we find that the Government acted with reasonable diligence in light of the incidents leading up to trial and conclude that the appellant was not denied his right to a speedy trial under either the Sixth Amendment or Article 10, UCMJ.

[4] An agent of the Air Force Office of Special Investigations (AFOSI) testified that command policy sets an expected completion date for a "routine" death investigation at 240 days. Because the appellant was in pretrial confinement at the time the investigation began, AFOSI requested the United States Army Criminal Investigations Laboratory to expedite its analysis in an effort to shorten the processing time.

Article 134, UCMJ, Specification

The appellant was charged with communicating a threat to kill Airman First Class (A1C) JW, in violation of Article 134, UCMJ. The Government did not allege either Clause 1 or Clause 2 of Article 134, UCMJ, in the specification. The appellant now argues that his plea to Charge II and its Specification are invalid because the Government failed to state an offense.

Whether a charge and specification state an offense is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted). Our superior court recently held that failure to allege the terminal element of an Article 134, UCMJ, offense is error but, in the context of a guilty plea, the error is not prejudicial where the military judge correctly advises the appellant of all the elements and the providence inquiry shows that the appellant understood to what offense and under what legal theory he was pleading guilty. *United States v. Ballan*, 71 M.J. 28, 35 (C.A.A.F. 2012), *cert. denied*, __ S. Ct. __ (U.S. 25 June 2012) (No. 11-1394).

Here, the appellant entered into a pretrial agreement and pled guilty to the charge and specification. The military judge described and defined both Clauses 1 and 2 of the terminal element during the providence inquiry and asked the appellant whether he believed his conduct was either prejudicial to good order and discipline or service discrediting. The appellant acknowledged understanding the elements, and explained to the military judge, "Airmen cannot go around threatening other [A]irmen, and when we do, it takes away from the good order and discipline in the United States armed forces." The appellant also attested to its impact when he stated that he noticed the victim, an Airman in his same unit, was "hesitant to talk to [the appellant] after that point. Clearly he was scared." Having fully reviewed the entire record of trial, we are convinced the appellant clearly understood how his conduct violated at least one of the terminal elements of Article 134, UCMJ, and therefore suffered no prejudice to a substantial right by their exclusion from the charged offense.

Meaningful Relief for Confinement Credit

Prior to sentencing, the military judge credited the appellant with 618 days of confinement credit, broken down as follows: 210 days for the time spent in pretrial confinement (*Allen*[5] credit); 26 days for the time he was confined with foreign nationals, in violation of Article 12, UCMJ; and 382 days for the Government's failure to comply with Article 13, UCMJ,[6] after the appellant was transferred to the confinement facility at

[5] *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984) (holding that, in light of the Department of Defense instruction requiring procedures employed by military services for computation of sentence be in conformity with those published by the Department of Justice, the accused was entitled to sentence credit for pretrial confinement).

[6] Article 13, UCMJ, 10 U.S.C. § 813, prohibits any pre-trial confinement from being "any more rigorous than that circumstances required to insure [the accused's] presence."

F.E. Warren Air Force Base, Wyoming. Because the appellant's adjudged sentence to confinement was insufficient to offset the amount of credit he was awarded, he requests this Court set aside his bad-conduct discharge in order to receive meaningful relief.[7]

Credit for illegal pretrial punishment is a question of law that we review de novo. *United States v. Zarbatany*, 70 M.J. 169, 174 (C.A.A.F. 2011). The appellant has the burden of establishing entitlement to relief for violations of Article 13, UCMJ. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). Neither party challenges the total confinement credit calculated by the military judge. Upon an independent review, we find no error in the *Allen* credit calculation. Thus, we calculate the amount of relief received based on the appellant's entitlement to 618 days of confinement credit.

The 11 months of approved confinement equates to 333 days. *See* Department of Defense 1325.7-M, *DoD Sentence Computation Manual* (27 July 2004). After applying 123 days of *Allen* credit; 26 days of Article 12, UCMJ, credit; and 184 days of Article 13, UCMJ, credit, the appellant had 285 days of outstanding confinement credit to apply against the remainder of his adjudged sentence.

Our superior court instructs that "after the convening authority has applied confinement credit to the adjudged confinement, the convening authority may then apply any excess confinement credit" pursuant to the conversions provided by R.C.M. 305. *Zarbatany*, 70 M.J. at 175. Among other things, R.C.M. 305(k) allows outstanding confinement credit to be applied to "forfeiture of pay" and specifically states "[f]or purposes of this subsection, 1 day of confinement shall be equal to 1 day of total forfeiture or a like amount of fine."

In this case, the convening authority approved "only so much of the sentence as provides for a bad-conduct discharge, confinement for 11 months, and reduction to the grade of E-1." However, the Action went on to state: "The accused will be credited with 408 days for illegal pretrial confinement against the sentence to confinement. Because the adjudged confinement is insufficient to offset all the credit to which the accused is entitled, the credit shall be applied against the sentence to forfeiture of pay." In light of the convening authority's clarification regarding his intent when he did not approve the adjudged forfeiture of pay, we find that the relief from $7,500 in forfeited pay[8] is appropriately applied to the outstanding confinement credit, rather than viewed as an act of clemency.

Consistent with our findings, the appellant correctly argues that the total of $7,500 in avoided forfeitures should be divided by the rate of one day of "total forfeiture," in order to determine its equivalent in confinement days. *See* R.C.M. 305(k). We calculate that an additional 156 days of confinement credit is to be applied against the approved

[7] *See* the appendix for a breakout of the dates and times involved in deciding this issue.
[8] Forfeitures of $500 pay per month for 15 months = $7,500.

forfeitures.[9] This still leaves an outstanding confinement credit balance of 129 days, for which the appellant seeks relief.

Under R.C.M. 305(k), "if the confinement adjudged is insufficient to offset all the credit to which the accused is entitled, the credit shall be applied against hard labor without confinement, restriction, fine, and forfeiture of pay, in that order . . . . The credit shall not be applied against any other form of punishment." However, R.C.M. 305 is not the exclusive remedy for violations of Article 13, UCMJ. *Zarbatany*, 70 M.J. at 175. Thus, having exhausted all relief in the form of avoided confinement or pay forfeitures pursuant to R.C.M. 305(k), this Court must still determine whether there is additional proportionate relief available to offset the 129 days of outstanding confinement credit.

Depending on the circumstances, Article 13, UCMJ, violations may be remedied by disapproval of a bad-conduct discharge or dismissal of the charges. *Id.*; *see also United States v. Nelson*, 39 C.M.R. 177, 181 (C.M.A. 1969); *United States v. Fulton*, 55 M.J. 88, 89 (C.A.A.F. 2001). Determining whether meaningful relief has been or should be granted depends "on factors such as the nature of the Article 13, UCMJ, violations, the harm suffered by the appellant, and whether the relief sought is disproportionate to the harm suffered or in light of the offenses for which the appellant was convicted." *Zarbatany*, 70 M.J. at 176-77.

Turning first to the nature of the violations, the military judge found the following: (1) between 0800-1700, the appellant was required to remain in his cell, during which time he could only walk, stand, or sit on a stainless steel seat that was bolted to the wall, with no backrest; (2) when using the seat, the appellant was not allowed to lean against the wall, rest his face on his hands, or hang his head down; (3) the appellant was not allowed to sleep during the day, or even lie on his bed between 0800-1700; (4) between 0800-1200, he was only allowed to read the confinement facility's rulebook; and (5) only after lunch was he allowed to read other material, provided that it was of a religious nature. The military judge found, and we agree, that the violations were unreasonable and more rigorous than required, especially in light of the fact that, during a good portion of the time at the F.E. Warren confinement facility, the appellant was the only member confined under the guards' supervision. Nonetheless, we also find it relevant that the military judge found no evidence of intent to punish in this case and we are less inclined to grant relief in the nature of a windfall to the appellant for this arbitrary and overzealous conduct unless the appellant can provide evidence of substantial harm.

Upon a review of the trial record and appellate filings, we find no evidence that such physical imposition resulted in any long-term or continuing harm of a physical or psychological nature that warrants extraordinary relief. With no evidence that the conditions were necessary to ensure presence at trial or maintain good order and

[9] The base pay for an E-1 in 2010 was $1,447.20 per month, regardless of years in service, which equates to $48.24 per day based on an average 30-day month. $7,500/$48.24 = 155.48 or 156 days.

discipline, we agree that they were unreasonable and served no legitimate purpose. However, such conditions do not presumptively cause the level of harm that would warrant complete dismissal of a punitive discharge.

Lastly, we assess whether the relief requested is "disproportionate in the context of the case." *Zarbatany*, 70 M.J. at 177. When contemplating whether additional relief is warranted, we consider the "seriousness of the offenses," pursuant to *Zarbatany*, and note that the evidence at trial showed extensive and ongoing drug use, introduction onto the base, and distribution. The appellant admitted to using heroin so many times, in the roughly two months between 1 November 2009 and 6 January 2010, that he could not be sure of the amount. He knew "it was a high number" and he "personally lost count," but he bragged to a fellow Airman with words to the effect that he had "moved up from cocaine to black tar heroin" and he had been "shooting up every night" between Christmas 2009 and early January 2010. It would be a windfall to give the appellant the added relief of disapproving the punitive discharge – which is otherwise entirely appropriate for the egregious conduct upon which he was convicted. Any harm that the appellant may have experienced as a result of some of the inappropriate limitations imposed during his months of pretrial confinement is speculative. Therefore, we decline to provide further relief.

Appellate Delay

Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time this case was docketed with the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the *Barker* factors again, this time, as they relate to the timeliness of his appellate review. *See United States v. Moreno*, 63 M.J. 129, 135–36 (C.A.A.F. 2006). However, when we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

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 the sentence are

AFFIRMED.

Chief Judge Orr participated in this decision prior to his retirement.

OFFICIAL

STEVEN LUCAS
Clerk of the Court

APPENDIX

Appellant placed in Pretrial Confinement	-	7 April 2010
Sentenced announced	-	2 Nov 2010
Total days served in PTC (Allen credit)	-	210 days
Article 12 credit award by MJ (2-for-1)	-	26 days
Article 13 credit awarded by MJ (2-for-1)	-	382 days
Total illegal PTC credit awarded	-	408 days
Total PTC credit (Allen + Art 12 + Art 13)	-	618 days
Total confinement approved	-	11 months = 333 days (IAW DoD Manual)
Confinement minus Allen credit	-	333 – 210 = 123 days remaining confinement

Remaining PTC credit minus remaining confinement

408 – 123 = 285 days remaining PTC credit

Forfeiture Calculations Under RCM 305(k)

Monthly base pay for E-1 with 2 years (CY 2010)	-	$1447/month
Daily base pay ($1447/30days)	-	$48/day
Total FF approved ($500/mo x 12 months)	-	$7500
Total FF/Daily base pay ($7500/$48.20)	-	155.48 rounded to 156 days credit

Remaining credit = 285 days
Credit for ff = 156 days

Total unused credit = 129 days