UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DAVID R. GLAZE
United States Air Force

ACM S31588

14 September 2009

Sentence adjudged 21 November 2008 by SPCM convened at Sheppard Air Force Base, Texas. Military Judge: William M. Burd (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of $898.00 pay per month for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Michael A. Burnat and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Major Jeremy S. Weber, Captain Jaime L. Mendelson, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

OPINION OF THE COURT

HELGET, Judge:

In accordance with his pleas, the appellant was found guilty of one specification of absence from his place of duty without authority, one specification of disrespect to a superior noncommissioned officer, one specification of willful dereliction of duty, and one specification of wrongful use of cocaine, in violation of Articles 86, 91, 92 and 112a, UCMJ, 10 U.S.C. §§ 886, 891, 892, 912a. The approved sentence consists of a bad-

conduct discharge, confinement for six months, forfeiture of $898 pay per month for six months, and reduction to E-1.[1]

The appellant asserts three assignments of error before this Court: (1) the military judge erred by denying the appellant's motion for appropriate relief seeking *Suzuki*[2] credit for enduring illegal pretrial punishment and *Mason*[3] credit for enduring conditions tantamount to confinement while housed in Sheppard Air Force Base's (AFB) Transition Flight; (2) the military judge erred by denying the appellant's motion to dismiss the charges and specifications with prejudice where the government violated the appellant's Article 10, UCMJ, 10 U.S.C. § 810, right to a speedy trial by restraining the appellant approximately 170 days in Sheppard AFB's Transition Flight before bringing him to trial;[4] and (3) the appellant's sentence, which includes a bad-conduct discharge and confinement for six months, is inappropriately severe.

Background

On the evening of 17 May 2008, the appellant drove two other airmen to a convenience store across the street from Sheppard AFB, Texas. An older man, Mr. KT, approached the appellant and, after a brief conversation, they agreed they should go out to a club together sometime. The appellant drove the other airmen back to Sheppard AFB and returned alone to the convenience store to meet Mr. KT, who offered to drive the appellant to a club. While Mr. KT was driving, he retrieved a pipe containing crack cocaine and offered some to the appellant, who decided to ingest it. The appellant proceeded to smoke directly from the pipe while they were driving. Later that night, the appellant and Mr. KT drove to a Budget Inn in Wichita Falls. Throughout the night, and until noon on 18 May 2008, the appellant ingested cocaine between 5 and 15 times.

On 29 May 2008, the appellant received a Letter of Reprimand (LOR) for failure to attend a mandatory formation. On 3 June 2008, he received another LOR for sleeping on duty and security violations. On 4 June 2008, the appellant's commander placed him in Sheppard AFB's Transition Flight because of his ongoing disciplinary problems. Transition Flight is used to segregate airmen who have disciplinary problems, or who are awaiting court-martial or discharge, "to prevent a negative influence on the morale and discipline of other [a]irmen." Air Education and Training Command Instruction 36-2116, *Administration of Military Standards and Discipline Training*, ¶ 23.1 (16 Jun 2004). The appellant remained in Transition Flight until he was placed into pretrial confinement on 17 November 2008.

[1] The appellant was credited with four days of pretrial confinement.
[2] *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983).
[3] *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985).
[4] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

While assigned to Transition Flight, the appellant committed various offenses, including the offenses that formed the basis of Charges I, II, and III. On 27 July 2008, the appellant climbed out of the Transition Flight building after curfew and remained away for approximately two hours. On the morning of 26 August 2008, he was disrespectful towards Technical Sergeant (TSgt) RS. The appellant had volunteered to work the base litter patrol. While exiting the Transition Flight building, he walked past one of the Military Training Leaders (MTL), TSgt RS, who reprimanded the appellant because he was eating candy. The appellant responded along the lines of, "This is bullshit. I am not the only one that was doing it." The appellant then walked away from TSgt RS without permission. At approximately 2300 on 30 August 2008, the appellant assisted two other airmen in violating "Call to Quarters," a time when all members of Transition Flight are required to remain in the Transition Flight building. The appellant assisted in tying bed sheets together so the other airmen could climb out of the restroom window on the second floor of the building. When the other airmen returned at approximately 0400 the following morning, the appellant assisted them by opening a side door of the building while the MTL was asleep.

Illegal Pretrial Punishment

At trial, the appellant brought a motion for appropriate relief requesting three-to-one *Suzuki* credit for illegal pretrial confinement pursuant to Article 13, UCMJ, 10 U.S.C. § 813, and Rule for Courts-Martial (R.C.M.) 304. The appellant also sought *Mason* credit for the time he spent in Transition Flight under conditions tantamount to confinement.

The appellant asserts that the overly rigorous conditions he experienced as a member of Transition Flight did not serve a legitimate, non-punitive purpose and effectively punished him before his day in court. Alternatively, he asserts that the conditions he endured amounted to restriction tantamount to confinement. The alleged conditions consist of not being allowed base liberty without an escort for almost one month, having the bedroom doors removed from their hinges for over a month, being denied access to religious services, and being subjected to group punishment that essentially locked the appellant down in the Transition Flight building for at least 22 days and denied him access to personal items.

The military judge specifically found that despite the appellant's assertion, he was never denied access to religious services. Concerning the remaining conditions alleged by the appellant, the record shows that the restrictions were imposed following a series of disciplinary problems, many of which involved the appellant. The disciplinary problems included sleeping on duty, possession of contraband, absence without leave, and fights. On 19 September 2008, in response to these incidents, new guidelines were implemented at Transition Flight. Members were allowed base liberty, but only with an escort; no personal items were allowed, except members were allowed to use their cell phones for

fifteen minutes per day and only in the presence of a MTL; and the bedroom doors were removed, but the members were allowed to hang towels in the door frames for privacy purposes. All of these measures were aimed at regaining good order and discipline and most remained in effect until 16 October 2008. On 17 October 2008, new policies were implemented at Transition Flight to include a phase program similar to the one utilized by the training squadrons at Sheppard AFB. When the program was implemented, all airmen in Transition Flight began in Condition 1. The appellant was phased up to Condition 2 after a week and was then allowed base liberty and use of personal items. The members could be phased up to Condition 3 for good behavior or phased down to Condition 1 for poor behavior. On 7 November 2008, the appellant was scheduled to be phased up to Condition 3, but due to instances of negative behavior, he was not phased to Condition 3 until 14 November 2008. On 17 November 2008, he was placed in pretrial confinement.

After making findings of fact, the military judge denied the motion finding there had been no intent to punish the appellant by either his assignment to Transition Flight or any of the conditions he had been subjected to while assigned to Transition Flight. The military judge further found that Sheppard AFB's Transition Flight was operated in accordance with established regulations within Air Education and Training Command, and were necessary for the maintenance of good order and discipline. Additionally, the military judge found that the conditions imposed upon the appellant either constituted conditions on liberty under R.C.M. 304(a)(1) or administrative restraint under R.C.M. 304(h), but they did not amount to restriction tantamount to confinement.

Whether the appellant is entitled to confinement credit for illegal pretrial punishment is a mixed question of fact and law. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). A military judge's findings of fact, including a finding of no intent to punish, will not be overturned unless they are clearly erroneous. *Id*. "We will review *de novo* the ultimate question whether an appellant is entitled to credit for a violation of Article 13[, UCMJ]." *Id.* The appellant has the burden of showing his entitlement to relief under Article 13, UCMJ. *Id.*

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." "Thus, Article 13, UCMJ, prohibits: (1) intentional imposition of punishment on an accused before his or her guilt is established at trial; and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial." *United States v. Crawford,* 62 M.J. 411, 414 (C.A.A.F. 2006). "[F]or a military member to be 'held for trial,' he must, at a minimum, be pending trial and have his freedom of movement

'substantially burdened.'" *United States v. Starr*, 51 M.J. 528, 533 (A.F. Ct. Crim. App. 1999), *aff'd*, 53 M.J. 380 (C.A.A.F. 2000).

"We review de novo the ultimate legal question of whether certain pretrial restrictions are tantamount to confinement." *United States v. King*, 58 M.J. 110, 113 (C.A.A.F. 2003) (citing *United States v. Guerrero*, 28 M.J. 223 (C.M.A. 1989)). "If the level of restraint falls so close to the 'confinement' end of the spectrum as to be tantamount [to confinement], an appellant is entitled to . . . administrative credit against his sentence." *United States v. Smith*, 20 M.J. 528, 531 (A.C.M.R. 1985).

In conducting our review of the conditions of restriction, we look to the totality of the conditions imposed. *Id*. at 530. In *King*, our superior court outlined the factors to consider in determining whether restrictions are tantamount to confinement, to include:

> the nature of the restraint (physical or moral), the area or scope of the restraint (confined to post, barracks, room, etc.), the types of duties, if any, performed during the restraint (routine military duties, fatigue duties, etc.), and the degree of privacy enjoyed within the area of restraint. Other important conditions which may significantly affect one or more of these factors are: whether the accused was required to sign in periodically with some supervising authority; whether a charge of quarters or other authority periodically checked to ensure the accused's presence; whether the accused was required to be under armed or unarmed escort; whether and to what degree [the] accused was allowed visitation and telephone privileges; what religious, medical, recreational, educational, or other support facilities were available for the accused's use; the location of the accused's sleeping accommodations; and whether the accused was allowed to retain and use his personal property (including his civilian clothing).

King, 58 M.J. at 113 (alteration in original) (quoting *Smith*, 20 M.J. at 531-32).

After reviewing the record before us, and considering the nature and scope of the appellant's pretrial restriction and the conditions imposed upon him, the military judge's findings of fact are not clearly erroneous. Additionally, even accepting the fact that the appellant was denied some privileges at times, his pretrial restriction was not tantamount to confinement. Considering his presence on an installation devoted almost exclusively to training new airmen, we find the conditions imposed on the appellant and others in the Transition Flight were necessary in that environment to maintain good order and discipline on the installation and amongst airmen awaiting separation from the Air Force. While strict, the restrictions were not equivalent to confinement and were not punishment under Article 13, UCMJ.

Speedy Trial

The appellant's second assignment of error is that the military judge erred when he denied his motion to dismiss the charges and specifications based on a violation of Article 10, UCMJ.[5] As stated above, the military judge found the conditions of Transition Flight constituted either administrative restraint or conditions on liberty rather than arrest or restriction in lieu of arrest. The appellant asserts that the harsh conditions he endured, consisting of an escort requirement, limited access to his personal property, and group punishment, were more severe than administrative restraint or conditions on liberty. The appellant also claims that the military judge erred when he found the government acted with reasonable diligence when it took 170 days to bring him to trial. Applying the factors under *Barker v. Wingo*, 407 U.S. 514 (1972),[6] the appellant claims that the delay was unreasonable and unjustified. Since the appellant made a demand for a speedy trial on 26 September 2008 through his attorney, he claims the third *Barker* factor weighs in his favor. Finally, the appellant claims he was prejudiced by the delay in that he experienced increased anxiety by enduring the continued harsh conditions of Transition Flight.

Whether an appellant was denied his right to a speedy trial in violation of Article 10, UCMJ, is a legal issue we review de novo. *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007). In making that determination, this Court gives substantial deference to the findings of fact made by the military judge and will not overturn them unless they are clearly erroneous. *Id*.

The triggering event for Article 10, UCMJ, is when a service member is placed under pretrial arrest or in confinement. From that point on, the government is compelled to take "immediate steps" either "to try him or to dismiss the charges and release him." Article 10, UCMJ. "The test for compliance with the requirements of Article 10[, UCMJ,] is whether the government has acted with 'reasonable diligence.'" *United States v. Proctor*, 58 M.J. 792, 798 (A.F. Ct. Crim. App. 2003). Our superior court has often said it does "not demand 'constant motion [from the government], but reasonable diligence in bringing the charges to trial.'" *Cossio*, 64 M.J. at 256 (quoting *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005) (quoting *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965))). Each of these prior cases maintains that while Article 10, UCMJ, provides greater rights than does the speedy trial clause of the Sixth Amendment,[7] the four-part test set out in *Barker* is a proper analytical tool for deciding Article 10, UCMJ, issues.

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[5] We note that in the appellant's brief, he also argues that the government violated his Rule for Courts-Martial (R.C.M.) 707(a) right to a speedy trial. However, under R.C.M. 707(e) the appellant waived any speedy trial issue by unconditionally pleading guilty to the charged offenses. *United States v. Tippit*, 65 M.J. 69, 75 (C.A.A.F. 2007).

[6] The four factors under *Barker v. Wingo*, 407 U.S. 514 (1972), are: (1) length of delay; (2) reasons for the delay, (3) whether the appellant made a demand for a speedy trial, and (4) prejudice to the appellant.

[7] U.S. CONST. amend. VI.

In this case, the appellant was never arrested nor was he restricted in lieu of arrest. As we held above, the appellant's placement in Transition Flight did not constitute restriction tantamount to confinement. We concur with the military judge that the conditions the appellant experienced as a member of Transition Flight can be classified as either conditions on liberty under R.C.M. 304(a)(1) or a form of administrative restraint under R.C.M. 304(h) imposed for operational purposes independent of military justice. Accordingly, the speedy trial clock was not triggered until 17 November 2008, when the appellant was placed in pretrial confinement. Since the appellant's court-martial started only three days later on 20 November 2008, he was not denied his right to a speedy trial in violation of Article 10, UCMJ.

Even if the triggering event for Article 10, UCMJ, was 4 June 2008, the date the appellant was placed into Transition Flight, in reviewing the record of trial, the briefs, the military judge's findings and conclusions, and applying the applicable law including the *Barker* factors, we likewise find the appellant was not denied a speedy trial under Article 10, UCMJ. The government acted with reasonable diligence in bringing the appellant to trial within the 170 days.

Inappropriately Severe Sentence

The appellant asserts that the portion of his sentence, which includes a bad-conduct discharge and confinement for six months, is inappropriately severe. We disagree.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006) (citing *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999); *Healy*, 26 M.J. at 395-96.

The maximum punishment in this case was the jurisdictional limit for a special court-martial, which includes a maximum of 12 months confinement and a bad-conduct discharge. The appellant's approved sentence was a bad-conduct discharge, confinement for six months, forfeitures of $898 pay per month for six months, and reduction to E-1. Having given individualized consideration to this particular appellant, the nature of the offenses, the appellant's record of service, and all other matters in the record of trial, we

hold that the approved sentence, which includes a bad-conduct discharge and confinement for six months, is not inappropriately severe.

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 approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court