UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant KEVIN T. MEYERS
United States Air Force

ACM 37432

09 December 2009

Sentence adjudged 10 March 2009 by GCM convened at McChord Air Force Base, Washington. Military Judge: Don M. Christensen.

Approved sentence: Bad-conduct discharge, confinement for 12 months, a fine of $46,367.00, to serve an additional 12 months confinement if the fine is not paid, and reduction to E-2.

Appellate Counsel for the Appellant: Major Jennifer J. Raab and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Major Kimani R. Eason, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACKSON, Senior Judge:

In accordance with the appellant's pleas, a military judge convicted him of one specification of larceny of money from the United States Air Force on divers occasions and one specification of signing false official records on divers occasions, in violation of Articles 121 and 107, UCMJ, 10 U.S.C. §§ 921, 907. A panel of officer members sitting as a general court-martial sentenced the appellant to a bad-conduct discharge, 12 months of confinement, a $46,367 fine and 12 months of additional confinement if the appellant

fails to pay the fine, and reduction to E-2. The convening authority approved the sentence.

On appeal, the appellant asks this Court to set aside the findings and sentence with prejudice. The appellant asserts his Sixth Amendment[1] right to a speedy trial was violated by the "stigmatization and duty restrictions he suffered during the approximately 21-month delay between his interrogation and ultimate court-martial."[2] Finding no prejudicial error, we affirm.

Background

On 1 December 2004, the appellant, a reservist, was involuntarily recalled to active duty. At the time of his recall, the appellant resided in either Tacoma, Washington or Olympia, Washington,[3] but he documented his residence as Forks, Washington on official records. The Forks, Washington residence entitled the appellant to per diem and dual Basic Allowance for Housing (BAH) whereas the Tacoma, Washington or Olympia, Washington residences provided no such entitlements. On 12 occasions over a 2-year period of time, the appellant filed travel vouchers falsely claiming the Forks, Washington residence. As a result of his actions, the United States Air Force overpaid the appellant approximately $46,000 in per diem and BAH entitlements.

While assisting the appellant with a travel voucher on or about 6 December 2006, Senior Master Sergeant (SMSgt) LD, an accounting and finance technician, began to question the legitimacy of a lodging receipt the appellant had submitted. SMSgt LD conducted an audit and discovered the appellant had falsely claimed residence in Fork, Washington and, as a result, had improperly collected per diem and BAH entitlements. On 4 March 2007, SMSgt LD informed agents with the Air Force Office of Special Investigations (AFOSI) of his audit.

On 27 April 2007, AFOSI agents summoned the appellant to their office for an interview. After a proper rights advisement, the appellant waived his rights and informed the agents that he had lived in Olympia, Washington prior to his recall but moved to Forks, Washington after his recall. After the agents asked the appellant for rental receipts for the Forks, Washington residence, the appellant requested an attorney and terminated the interview. On 10 November 2008, the charges and specifications were preferred against the appellant. On that same day, the appellant was informed of the charges and specifications and the Summary Court-Martial Convening Authority received the charges and specifications.

[1] U.S. CONST. amend. VI.
[2] This issue is filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[3] During his providency inquiry the appellant testified he lived in Tacoma, Washington but a financial audit indicated he resided in Olympia, Washington.

On 13 November 2008, an Article 32, UCMJ, 10 U.S.C. § 832, investigating officer conducted an investigation into the charges and specifications. On 19 November 2008, the Article 32, UCMJ investigating officer recommended trial by general court-martial. On 25 November 2008, the General Court-Martial Convening Authority (GCMCA) sought the approval of the Secretary of the Air Force (SECAF) to recall the appellant to active duty for court-martial.[4] On 16 February 2009, the SECAF granted approval to recall the appellant to active duty for court-martial.

On 17 February 2009, the GCMCA referred the charges and specifications to a general court-martial. On 2 March 2009, the GCMCA recalled the appellant to active duty, effective 5 March 2009, for the court-martial. On 6 March 2009, the appellant and the GCMCA entered into a pretrial agreement wherein the appellant agreed, inter alia, to plead guilty by exceptions and substitutions and to waive all waivable motions in return for the GCMCA's promise to withdraw the excepted language from the specification of Charge I and to present no evidence of the excepted language. On 9 March 2009, the appellant's court-martial convened. On that same day, the appellant unconditionally pled and was found guilty of the specifications and charges. In so doing, the appellant also informed the military judge that he was waiving all waivable motions.

Right to Speedy Trial

"There are five sources of the right to a speedy trial in the military: (1) Sixth Amendment speedy-trial guarantee; (2) Due Process Clause of the Fifth Amendment;[5] (3) Articles 10 and 33 of the [United States] Code . . . ;[6] (4) [Rule For Courts-Martial (R.C.M.)] 707 . . . ; and (5) [c]ase law." *United States v. Vogan*, 35 M.J. 32, 33 (C.M.A. 1992). In his assertion of error, the appellant only references the Sixth Amendment; thus, this Court will only examine the appellant's speedy trial rights under the Sixth Amendment. The Sixth Amendment provides, inter alia, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. CONST. amend. VI. This right applies upon "either a formal indictment or information" or "the actual restraints imposed by arrest and holding to answer a criminal charge." *Vogan*, 35 M.J. at 33 (citing *United States v. Marion*, 404 U.S. 307, 320 (1971); *Doggett v. United States*, 505 U.S. 647, 655 (1992)). In the military context, the Sixth Amendment speedy trial right applies after preferral or referral of charges or upon the imposition of pretrial restraint. *Id*.

Moreover, "the Sixth Amendment speedy-trial protection does not apply to pre-accusation delays when there has been no restraint." *United States v. Reed*, 41 M.J. 449, 451 (C.A.A.F. 1995) (citing *Marion*, 404 U.S. 307; *Vogan*, 35 M.J. 32). The "primary

[4] The appellant had by this time been released from active duty but remained on continuous status with the United States Air Force Reserves at McChord Air Force Base, Washington.
[5] U.S. CONST. amend. V.
[6] 10 U.S.C. §§ 810, 833.

guarantee" or "primary protection" against pre-accusation delay, absent pretrial restraint, is the statute of limitations. *Id.* (quoting *Marion*, 404 U.S. at 322; *Perez v. Sullivan*, 793 F.2d 249, 259 (10th Cir. 1986)). Put simply, delays occurring before preferral are irrelevant for Sixth Amendment speedy trial purposes. *United States v. Lovasco*, 431 U.S. 783, 788 (1977).

The appellant was not subjected to pretrial restraint; thus, his Sixth Amendment speedy trial right began on 10 November 2008—the day the charges and specifications were preferred. The appellant's court-martial convened on 9 March 2009, 119 days after preferral.

For the following reasons, the appellant is not entitled to relief. First, the appellant waived any speedy trial issue as to the specifications and charges. He did so not only by waiving all waivable motions in accordance with his pretrial agreement, but also by his unconditional guilty plea and the findings of guilt that resulted from his unconditional guilty plea. *United States v. Tippit*, 65 M.J. 69, 75 (C.A.A.F. 2007) (noting an unconditional guilty plea which results in a finding of guilty waives any Sixth Amendment speedy trial issue as to that offense).

Second, assuming, arguendo, the appellant did not waive his Sixth Amendment speedy trial rights, he is still not entitled to relief under the Sixth Amendment speedy trial analysis. At the onset, we note that we review speedy trial issues de novo. *United States v. Cooper*, 58 M.J. 54, 59 (C.A.A.F. 2003). Additionally, in examining whether an appellant's Sixth Amendment speedy trial right has been violated, we follow our superior court's guidance in using the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right; and (4) prejudice to the appellant.[7] *Tippit*, 65 M.J. at 73.

These factors are balanced on an ad hoc basis and the "quantum of delay is 'a triggering mechanism' for identifying a 'presumptively prejudicial' delay." *Grom*, 21 M.J. 53, 56 (C.M.A. 1985). Once this due process analysis is triggered by a facially unreasonable delay, we analyze each factor and make a determination as to whether that factor favors the government or the appellant. *See Rheuark v. Shaw*, 628 F.2d 297, 303 (5th Cir. 1980). We then balance our analysis of the factors to determine whether there has been a due process violation. *Barker*, 407 U.S. at 533. Having enunciated the Sixth Amendment speedy trial test, we now apply the test to the case sub judice.

[7] In determining prejudice, this Court looks to three interests for prompt appeals: "(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired." *Rheuark v. Shaw*, 628 F.2d 297, 303 n.8 (5th Cir. 1980) (citing *Barker v. Wingo*, 407 U.S. 514, 532 (1972)).

"Delays of as little as five or six months have caused the federal courts to inquire into the remaining *Barker* factors." *Grom*, 21 M.J. at 56. A 244-day delay was sufficient to cause our superior court to inquire into the remaining *Barker* factors. *Id.* While there is no magic number of days that must elapse before a delay morphs into a presumptively prejudicial delay, we find a 119-day delay is insufficient to trigger an inquiry into the remaining *Barker* factors.

Lastly, assuming, arguendo, a presumptively prejudicial delay and no reasonable governmental basis for the delay, the appellant is still not entitled to relief. With respect to the third *Barker* factor, we note the appellant did not assert his right to a speedy trial prior to his case arriving at this Court and this belies the appellant's assertion that he was denied his Sixth Amendment right to a speedy trial. *See Barker*, 407 U.S. at 532 (finding a defendant's failure to assert his right to a speedy trial makes it difficult for a defendant to prove that he was denied a speedy trial). In short, the third *Barker* factor favors the government.

Concerning the issue of prejudice, we make the following observations: (1) there has been no oppressive incarceration pending appeal because the appellant's claim on appeal is without merit so he is in no worse position due to the delay; (2) the appellant has failed to meet his burden of showing particularized anxiety or concern; and (3) there is little possibility that the appellant's ability to present a defense at a rehearing will be impaired because the appellant has not been successful on a substantive issue on this appeal and is therefore not entitled to a rehearing. The appellant has not suffered prejudice because of the delay and, thus, the final *Barker* factor favors the government.

We now qualitatively balance the factors to determine whether the appellant was denied due process. Assuming there was sufficient delay to create a rebuttable presumption of an unreasonable delay, the delay was not lengthy or extraordinary. Moreover, the fact that the appellant waited until this appeal to assert his speedy trial rights undermines his stated desire for a speedy trial. Lastly, the appellant experienced no prejudice from the delay. In the final analysis, the appellant waived any violation of his Sixth Amendment right to a speedy trial; the delay was insufficient to trigger an inquiry into the remaining *Barker* factors; and, by applying the test enunciated in *Barker*, we find the appellant was not denied his Sixth Amendment right to a speedy trial.

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); *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