UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic KENNETH J. NEWHOUSE
United States Air Force

ACM S30325

18 April 2005

Sentence adjudged 6 December 2002 by SPCM convened at Cannon Air Force Base, New Mexico. Military Judge: Gregory E. Pavlik (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 5 months.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Andrea M. Gormel, and Captain Diane M. Paskey.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Michelle M. Lindo.

Before

STONE, GENT, and SMITH
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

SMITH, Judge:

Consistent with his pleas, the appellant was found guilty of two specifications of failing to obey a lawful order and one specification of dereliction of duty, in violation of Article 92, UCMJ, 10 U.S.C. § 892; one specification of assault upon a person performing law enforcement duties, in violation of Article 128, UCMJ, 10 U.S.C. § 928; one specification of being drunk and disorderly and one specification of communicating a threat, in violation of Article 134, UCMJ, 10 U.S.C. § 934; and one specification of failing to go to his place of duty on divers occasions, in violation of Article 86, UCMJ, 10 U.S.C. § 886. He was sentenced by a military judge sitting as a special court-martial to a

bad-conduct discharge and confinement for 5 months. The convening authority approved the sentence as adjudged.

The appellant contends the government violated his right to a speedy trial under Article 10, UCMJ, 10 U.S.C. § 810. We find that he waived our consideration of his Article 10, UCMJ, claim.

Background

At the time of the charged offenses, the appellant was a 19-year-old apprentice jet engine mechanic. On 4 August 2002, he was apprehended at the main gate to Cannon Air Force Base (AFB), New Mexico, for driving under the influence of alcohol (DUI) and trying to smuggle a civilian on base. Once apprehended, the appellant assaulted a security forces member and threatened another. The appellant received nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, based, in part, on two offenses from that episode: underage drinking and DUI. The punishment included restriction to Cannon AFB.

The appellant was then sent to Texas for inpatient medical and psychiatric evaluation. When he returned to Cannon AFB, the appellant's squadron commander issued him an order requiring that he check in twice a day. The appellant disobeyed that order and the order restricting him to the base. As a result, the squadron commander ordered the appellant into pretrial confinement on 23 August 2002. Charges were preferred against him on 12 November 2002, and those charges were referred to trial by special court-martial on 15 November 2002. The referred charges combined the orders violations with offenses from the 4 August 2002 incident that were not included in the nonjudicial punishment action. The court-martial convened on 5 December 2002 and concluded the next day. At issue is the 104-day period from 23 August 2002 to 5 December 2002.[1]

Waiver

This court has held that "[t]he right to a speedy trial pursuant to Article 10 is a nonjurisdictional ground for dismissal and can be waived" with an unconditional plea of guilty. *United States v. Benavides*, 57 M.J. 550, 554 (A.F. Ct. Crim. App. 2002), *pet. denied*, 57 M.J. 477 (C.A.A.F. 2002). At trial, the appellant raised a motion to dismiss for a violation of his speedy trial rights under Article 10, UCMJ. After the military judge denied the motion, the appellant entered an unconditional plea of guilty to all charges and

[1] For speedy trial purposes, 24 August 2002 is the first accountable day. *See* Rule for Courts-Martial (R.C.M.) 707(b)(1). We consider the appellant to have been "tried" on 5 December 2002. *See United States v. Cooper*, 58 M.J. 54, 60 (C.A.A.F. 2003).

specifications. His pleas prompted the following exchange between the military judge and the appellant:

> MJ: First question, again, is raised with regard to the motion to dismiss and what affect that has on the Article 10 motion. Again, while there has been some debate at various points in time in the speedy trial area as to whether or not that's waived, the thing I will advise your client is you have to presume it's waived. It's always possible that the courts may find otherwise, but you have to assume that that's not the case. What I'm talking about, Airman Newhouse, is based upon your plea, there are certain motions that are preserved no matter what. For instance, if the court does not have jurisdiction over you for some reason, then it doesn't have to be raised at trial. A motion for jurisdiction can be raised on appeal at a later point and the court on appeal might find that there's no jurisdiction and even if you plead guilty to everything, they could set aside the findings. But most motions are waived by a guilty plea. I'm sure your lawyers have discussed this with you, but essentially, with regard to your motion to dismiss for the Article 10 violation, in making your determination to plead guilty, you need to understand that most likely, if this gets reviewed on appeal, the appellate lawyers will not be able to raise that motion. Do you understand that?
>
> ACC: Yes, sir.
>
> MJ: And is it still your desire that you want to plead guilty?
>
> ACC: Yes, sir.

In this case, the appellant pled guilty and acknowledged the effect of his unconditional plea on the speedy trial issue. Although there is no requirement that an appellant affirmatively waive an Article 10, UCMJ, claim for a waiver to be effective, the appellant's explicit acknowledgment unquestionably establishes he knowingly and intelligently understood the effect of his guilty pleas. *See Benavides*, 57 M.J. at 552; *United States v. Birge*, 52 M.J. 209, 211 (C.A.A.F. 1999). We conclude the appellant waived our consideration of his Article 10, UCMJ, claim with his unconditional guilty plea and affirmative waiver.

Due Process

Our finding that the appellant's waiver disposes of his Article 10, UCMJ, claim does not mean that alleged speedy trial violations become unreviewable whenever an accused enters an unconditional guilty plea. We agree with our Navy and Marine Corps brethren that "[i]n those rare cases where we might find a speedy trial violation so severe

as to constitute a due process violation, we have the power under Article 66(c), UCMJ, [10 U.S.C. § 866(c)] to do justice despite a previous waiver of the issue at trial." *United States v. Bruci*, 52 M.J. 750, 754 (N.M. Ct. Crim. App. 2000). This is not such a case.

We have carefully reviewed the case to ensure there was no due process violation. Although the military judge appeared to blur the distinctions between R.C.M. 707 and Article 10, UCMJ, and incorrectly calculated aggregate dates,[2] we nevertheless are convinced the military judge correctly denied the motion. *See Cooper*, 58 M.J. at 59. We have considered the government's handling of this case in the context of the appellant's right to a speedy trial under the Sixth Amendment, Article 10, UCMJ, and R.C.M. 707. We also have considered the case law interpreting those separate speedy trial rights, to include *Barker v. Wingo*, 407 U.S. 514 (1972); *Cooper*, 58 M.J. at 60; *United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993); *United States v. Tibbs*, 35 C.M.R. 322 (C.M.A. 1965); and *United States v. Plants*, 57 M.J. 664 (A.F. Ct. Crim. App. 2002), *pet. denied*, 58 M.J. 181 (C.A.A.F. 2003). Whatever flaws there may have been with the military judge's legal and factual analysis, we find them to be de minimis and therefore harmless. We conclude the government acted with "reasonable diligence." *See Kossman*, 38 M.J. at 262.

Convening Authority Action

The military judge granted a defense motion for additional pretrial confinement credit. He found violations of R.C.M. 305(h) and (i) with regard to the government's lack of compliance with the pretrial confinement review requirements. In accordance with R.C.M. 305(k), the military judge granted a remedy of an additional "two for one" credit for two days of the pretrial confinement period. R.C.M. 1107(f)(4)(F) provides that the convening authority shall direct such credit in his or her action. The convening authority's action does not reflect the credit in this case and must be re-accomplished.

[2] The military judge appears to have counted the day the appellant entered pretrial confinement as "day 1" for accountability purposes. More importantly, he appears to have used 15 November 2002, the date the deputy staff judge advocate *requested* a 6 December 2002 trial date from the Central Circuit Judiciary as the last day for accounting purposes, rather than using the date when the government said it could proceed, 25 November 2002.

Conclusion

The action of the convening authority is set aside. The record of trial is returned to The Judge Advocate General for remand to the convening authority for administrative correction of the action and the promulgating order to reflect the credit ordered by the military judge. Thereafter, Article 66, UCMJ, 10 U.S.C. § 866, will apply.

OFFICIAL

ANGELA M. BRICE
Clerk of Court