UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JEREMY J. PEACH
United States Air Force

ACM 36459

31 May 2007

Sentence adjudged 25 July 2005 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Bruce T. Smith (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 13 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major Anniece Barber.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Matthew S. Ward.

Before

BROWN, MATHEWS, and PETROW
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

PETROW, Judge:

The appellant was convicted, in accordance with his pleas, of being absent without leave and wrongful use of marijuana and cocaine, in violation of Articles 86 and 112a, UCMJ, 10 U.S.C. §§ 886, 912a. The military judge, sitting as a general court-martial, sentenced the appellant to a bad-conduct discharge, confinement for 24 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority later reduced the term of confinement to 13 months pursuant to the terms of a pretrial agreement. On appeal, the appellant asserts two errors pursuant to *United States v.*

Grostefon, 12 M.J. 431 (C.M.A. 1982): (1) That the military judge erred in denying the appellant's motion to dismiss all charges and specifications for denial of his right to speedy trial under Article 10, UCMJ, 10 U.S.C. § 810 and the Sixth Amendment to the United States Constitution; and (2) That the military judge erred by failing to grant the appellant confinement credit for conditions he experienced prior to his court-martial, which he claims were tantamount to confinement. Finding no merit in either contention, we affirm.

Background

The information provided by the appellant during the military judge's inquiry conducted pursuant to *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969), and contained in a stipulation of fact admitted into evidence at trial revealed that, after volunteering for duty in South Korea, the appellant received orders to Osan Air Base, Korea, with a report date of no later than 10 February 2005. In January 2005, the appellant informed his section chief that he was refusing his assignment to Korea. On 31 January 2005, the appellant attended a meeting with his commander and various other unit supervisors. They explained to the appellant the consequences of his refusal and advised him on ways to reduce the hardships of the Korean tour. The appellant agreed to expedite his out-processing and completed it on 4 February 2005. The appellant failed to report for duty at Shaw Air Force Base (AFB), South Carolina, after 4 February 2005 and did not appear for his 8 February 2005 flight to Korea. On 18 February 2005, the appellant's unit at Shaw AFB was informed by his gaining unit that the appellant failed to arrive in Korea. On 22 February 2005, the appellant was apprehended at his off-base residence located near Shaw AFB. He was subsequently interviewed and consented to a urinalysis. The results tested positive for both marijuana and cocaine.

At trial, the appellant moved for dismissal of the charges based on the government's failure to provide a speedy trial as required by Article 10, UCMJ. The appellant asserted that he was placed in pretrial confinement on 22 February 2005, and that he was released from confinement shortly thereafter, but was restricted to base under conditions tantamount to confinement in violation of Article 13, UCMJ, 10 U.S.C. § 813. The charges were referred to trial on 13 June 2005, a period of 112 days from the initial date of pretrial confinement. As an alternative to outright dismissal of charges, the appellant requested day-for-day administrative credit toward his sentence to confinement.

During trial, Master Sergeant (MSgt) H, the appellant's first sergeant, was called by the prosecution and testified to the following facts. Prior to February 2005 the appellant's duties were as a crew chief. The appellant was in pretrial confinement from 22 February 2005 to 24 February 2005. After his release, MSgt H orally ordered the appellant to restrict himself to the confines of the base (a written order restricting the appellant to base, signed by the unit commander on 14 April 2005, was admitted into evidence at trial). The only other restriction was a no-contact order regarding MD, the

wife of an airman assigned to an unaccompanied tour in Korea, with whom the appellant was having a relationship. The appellant was reassigned by his commander to another job in the unit, where his duties consisted of taking inventory and straightening out supplies. Since he would be required to turn in his line badge during out-processing, the appellant would not have unescorted access to the flight line for his former crew chief duties. After several weeks, the appellant was reassigned to the Production Section which was responsible for hangar maintenance. His duty hours were from 0700 until 1500 to 1600 hours and he was required to check in before being released for the day. The appellant was not required to check in with anyone else after being released or on the weekends. On four or five occasions, MSgt H called the appellant after 1600 hours to arrange a meeting at the latter's dorm room regarding issues that would arise.

Captain (Capt) C, Chief of Military Justice at Shaw AFB, South Carolina, testified that the appellant had been placed in pretrial confinement on 22 February 2005 by his commander, Lieutenant Colonel (Lt Col) K, and was released within 48 hours. Lt Col K wanted to put him on some lesser form of restriction. On 7 March 2005, Capt C received the results of the appellant's urinalysis. On 17 March 2005, Capt C requested a litigation package from the Air Force Drug Testing Laboratory, Brooks City-Base, Texas, which had tested the appellant's urine. The litigation package was received on 22 March 2005. On 1 April 2005, he received the Air Force Office of Special Investigations (AFOSI) Report of Investigation. Shortly afterwards, he was advised by Capt B, the appellant's assigned trial defense counsel, that she was going to seek release from the case due to a pending re-assignment. Capt C checked with her on a weekly basis as to the status of her release. There was no progress until the end of April 2005 when Capt B advised Capt C that Capt A would be replacing her as the appellant's trial defense counsel. Capt C emailed Capt A on 3 May 2005, but did not receive a reply. On 16 May 2005, they made contact and scheduled the Article 32, UCMJ, 10 U.S.C. § 832, hearing for 23 May 2005. Capt C never received a request for speedy trial from the trial defense counsel.

The military judge issued findings of fact, based on the above testimony. Among these were:

> [MSgt H's] order, which was subsequently reduced to writing on or about the 14th of April 2005, contained no physical restraints; no escort requirements; no sign-in requirements; no limitations on access to visitors other than the aforementioned civilian dependent spouse; no limits on the use of personal telephones, again, other than the prohibition on his communication with the aforementioned civilian dependant spouse; no imposition of conditions on his non-duty hours or whereabouts other than limiting him to the confines of Shaw [AFB], South Carolina; no limits on the use of recreation facilities or entertainment; no restriction on the wear of civilian attire when not on duty; no restriction on access to personal

property; and that the accused had free and unrestricted access to legal counsel.

Based on his findings and his review of the steps taken by the government to bring the appellant to trial, the military judge reached two conclusions: First, apart from the 48 hours the appellant spent in pretrial confinement, his pretrial restriction was not tantamount to confinement; and second, the government proceeded with reasonable due diligence in the charging and prosecution of the appellant. Accordingly, he denied the appellant's motion in all respects, allowing administrative credit only for the 48 hours of pretrial confinement.

Discussion

Speedy trial issues are reviewed de novo. *United States v. Cooper*, 58 M.J. 54, 59 (C.A.A.F. 2003). In determining whether a violation of the speedy trial clause of the Sixth Amendment to the United States Constitution occurred, four factors should be considered: (1) the length of pretrial delay; (2) reasons for the pretrial delay; (3) whether the appellant demanded a speedy trial; (4) and prejudice suffered by the appellant as a result of the delay. *United States v. Nichols*, 42 M.J. 715, 719 (A.F. Ct. Crim. App. 1995) (citing *Barker v. Wingo*, 407 U.S. 514, 531-32 (1972)). Especially strong weight should be given to whether the appellant previously demanded speedy trial. *Nichols*, 42 M.J. at 719. In discussing the standard applicable to Article 10, UCMJ, our superior court has held that the pre-*Burton*[*] standard of "reasonable diligence" is applicable. *United States v. Birge*, 52 M.J. 209, 211 (C.A.A.F. 1999); *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993).

Based on Capt C's testimony, we find that the government did exercise due diligence in bringing the appellant's case to trial. Accordingly, we concur with the military judge's determination that no violation of the appellant's right to a speedy trial pursuant to Article 10, UCMJ, or the Sixth Amendment occurred.

The Court applies a de novo standard of review to determine whether an appellant is entitled to pretrial confinement credit. *United States v. Smith*, 56 M.J. 290, 292 (C.A.A.F. 2002). In *United States v. Rendon*, 58 M.J. 221, 224 (2003), our superior court observed, "We find no evidence that the President intended the procedural protections or the credit provided in Rule for Courts-Martial (R.C.M.) 305 to apply to anything other than the physical restraint attendant to pretrial confinement." The Court further found that R.C.M. 305 is applicable to restriction tantamount to confinement only when the conditions or circumstances attendant to that restriction meet the definitional requirements for confinement. *Id*. The conditions or terms of the restriction must

[*] *United States v. Burton*, 44 C.M.R. 166 (C.M.A. 1971).

constitute physical restraint depriving an accused of his or her freedom and anything less is outside the scope of R.C.M. 305. *Id.*

As in the instant case, the appellant in *Rendon* was geographically limited to the boundaries of the military compound; however, he could go the gym each workday morning, to the Exchange at lunch on Tuesdays, and to the mess hall for meals. No escort was required when he went to those facilities. He had access to the lobby and smoking area of the barracks, and he was assigned neither extra duties nor hard labor. Under those circumstances, the Court concluded the appellant had not been physically restrained. *Id.* at 225-27.

The record does not support the appellant's contention that the restrictions placed upon him following his release from pretrial confinement were equivalent in nature and scope to physical restraint. Accordingly, we concur with the military judge's conclusion that the appellant was not entitled to credit towards his confinement under the provisions of R.C.M. 305.

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 sentence are

AFFIRMED.

Senior Judge MATHEWS participated in this decision prior to his retirement.

OFFICIAL

MARTHA COBLE-BEACH, TSgt, USAF
Court Administrator