UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class NICO C. SANTOS
United States Air Force

ACM 38172

09 October 2013

Sentence adjudged 4 June 2012 by GCM convened at Peterson Air Force Base, Colorado. Military Judge: Scott E. Harding (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 13 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Christopher D. James.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Captain Richard J. Schrider; and Gerald R. Bruce, Esquire.

Before

HELGET, WEBER, and PELOQUIN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

WEBER, Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of causing a breach of the peace, assault with a dangerous weapon, and two specifications of actions that prejudiced good order and discipline in the armed forces, in violation of Articles 116, 128, and 134, UCMJ, 10 U.S.C. §§ 916, 928, 934. The adjudged sentence was a bad-conduct discharge, confinement for 13 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority disapproved the adjudged forfeitures, but otherwise approved the sentence as

adjudged.[1] The appellant alleges that the military judge erred in failing to dismiss the charges and specifications for the Government's alleged violation of Article 10, UCMJ, 10 U.S.C. § 810, by failing to exercise reasonable diligence in bringing the appellant to trial. We disagree, and affirm.

Background

In October 2011, the appellant pled guilty to attempted sexual exploitation of a child in Gilpin County, Colorado, arising from earlier Internet communications with an undercover police officer. He was released on bond while awaiting sentencing and was prohibited from possessing firearms as one of the conditions of his release.

On 21 November 2011, the appellant showed up at a duty location for the 50th Security Forces Squadron at Schriever Air Force Base while he was on leave. There, he spoke with some Airmen, none of whom noticed anything of particular concern. He then spoke with a coworker, Senior Airman (SrA) AD, and thanked him for not treating him differently in light of his off-base legal issues. As they spoke, SrA AD became increasingly concerned that the appellant may be suicidal and may have a weapon. As SrA AD approached the appellant, the appellant pulled out a .380 semiautomatic pistol from the front pocket of his sweatshirt and placed it on his lap. As SrA AD attempted to persuade the appellant that he could get help, the appellant pointed his weapon at SrA AD and instructed him to leave the room.

SrA AD left the room and initiated a building evacuation. Over the next 10 hours or so, the appellant barricaded himself inside the building and repeatedly threatened to kill himself as base security forces and local and federal law enforcement personnel surrounded the building. At one point as he was speaking over the telephone with SrA AD, he stated that he wanted to kill the squadron's acting first sergeant, who was posted in the building to respond to the appellant's actions. The appellant later revised his threat to state that he only wanted to shoot the acting first sergeant and hurt him, but the acting first sergeant was nonetheless removed from the building because of the appellant's threat. Eventually the appellant peacefully surrendered, leaving his loaded weapon and a series of suicide notes in the building.

The appellant's commander immediately ordered the appellant into pretrial confinement, where he remained for the next 45 days. During this time, Gilpin County officials contacted base officials to work out who would maintain custody of the appellant since he had a criminal proceeding pending in Gilpin County and had violated the terms of his release. After some negotiation and after a county judge issued a writ of habeas corpus to produce the appellant, the general court-martial convening authority

[1] The convening authority waived mandatory forfeitures pursuant to Article 58b, UCMJ, 10 U.S.C. § 858b, for the benefit of the appellant's spouse and dependent child.

agreed to deliver the appellant to county authorities. The appellant was transferred to the county's custody on 4 January 2012. Soon thereafter the State sentenced him to confinement for 12 months.

On 29 February 2012, while the appellant was still confined by the State, the Government preferred charges against the appellant in the instant case. A sanity board completed on 23 March 2012, and an Article 32, UCMJ, 10 U.S.C. § 832, investigation took place at the appellant's correctional facility on 29 March 2012. The convening authority referred the case to trial on 24 April 2012. On 30 May 2012, the appellant completed his sentence to confinement by the State. Upon his release he was immediately reordered into military pretrial confinement where he remained for an additional six days until trial on 4 June 2012.

Article 10, UCMJ

The appellant asserts that he was denied his right to a speedy trial under Article 10, UCMJ, because the Government failed to exercise reasonable diligence in timely bringing him to trial, and that the military judge erred in failing to dismiss the charges and specifications because of this denial.[2] "This [C]ourt reviews de novo the question of whether [the appellant] was denied his right to a speedy trial under Article 10, UCMJ, as a matter of law and we are similarly bound by the facts as found by the military judge unless those facts are clearly erroneous." *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007).

"[T]he constitutional right to a speedy trial is a fundamental right. It is protected both by the Sixth Amendment[3] and Article 10[,UCMJ]." *United States v. Cooper*, 58 M.J. 54, 60 (C.A.A.F. 2003) (footnote added) (citing *Barker v. Wingo*, 407 U.S. 514, 515 (1972)). Article 10, UCMJ, "'imposes . . . a more stringent speedy-trial standard than . . . the Sixth Amendment.'" *Id.* (quoting *United States v. Kossman*, 38 M.J. 258, 259 (C.M.A. 1993)). "The standard of diligence under which we review claims of a denial of speedy trial under Article 10[,UCMJ,] 'is not constant motion, but reasonable diligence in bringing the charges to trial.' Short periods of inactivity are not fatal to an otherwise active prosecution." *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005) (citing *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965); *Kossman*, 38 M.J. at 262; *United States v. Johnson*, 1 M.J. 101 (C.M.A. 1975)). "[O]ur framework to determine whether the Government proceeded with reasonable diligence includes balancing the following four factors: (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." *Id.* at 129 (citing *Barker*, 407 U.S. at 530). In applying these four factors, we are to "engage in a difficult and sensitive balancing process" with none

[2] The appellant's claim solely invokes Article 10, not the Fifth or Sixth Amendment or Rule for Courts-Martial 707.
[3] U.S. CONST. amend VI.

of the four factors serving "as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." *Barker*, 407 U.S. at 533. However, the first factor (length of the delay) "is to some extent a triggering mechanism, and unless there is a period of delay that appears, on its face, to be unreasonable under the circumstances, there is no necessity for inquiry into the other factors that go into the balance." *Cossio*, 64 M.J. at 257 (internal quotation marks omitted) (quoting *United States v. Smith*, 94 F.3d 204, 208-09 (6th Cir. 1996)).

We find that the appellant's Article 10, UCMJ, right to a speedy trial was not violated. As an initial matter, we agree with the military judge that the entire 197 days that elapsed between the time the appellant was first placed into pretrial confinement and the time of trial is not the relevant measure for determining if an Article 10, UCMJ, violation occurred. Rather, the length of the delay to be considered in this case amounts to 51 days – 45 days in pretrial confinement before the transfer to civilian authorities, plus six more days in pretrial confinement after the appellant completed his civilian confinement. The appellant's release from pretrial confinement after 45 days removed the harm Article 10, UCMJ, was intended to address – namely, being subject to pretrial confinement while not yet having received a trial. *See United States v. Schuber*, 70 M.J. 181 (C.A.A.F. 2011) (concluding that where an appellant was placed into military pretrial confinement and then released subject to restriction to base, his time spent under restriction did not amount to an arrest under Article 10 and did not "count" for purposes of calculating the length of the delay). The appellant's confinement pursuant to his civilian legal troubles was not done at the military's behest and the military only released the appellant pursuant to a written request and a writ of habeas corpus, and after significant negotiations between military and civilian officials. The appellant was not in the military's custody during this time, he was not in pretrial confinement, and he was in the custody of a separate sovereign for separate (albeit somewhat related) legal matters. We find that the time the appellant spent in civilian confinement is not to be considered in examining the length of the delay.

Turning back to application of the *Barker* factors, the military judge concluded that even excluding the time spent in civilian confinement, the 51-day delay between initial imposition of military pretrial confinement and trial was sufficient to trigger the full four-part *Barker* inquiry. We do not disturb that finding. As to the length of the delay, during the 51-day period in question the Government concluded the investigation into the appellant's misconduct, conducted the pretrial confinement review hearing, negotiated the appellant's transfer to civilian authorities, prepared a proof analysis, and finished preparation for trial. In addition, the Government proactively completed preferral, an Article 32, UCMJ, investigation, a sanity board, and referral while the appellant was confined for his civilian proceedings. We concur with the military judge that the Government's processing of this case during the 51-day period at issue was done with reasonable diligence. Moreover, even if the entire 197-day period between initial imposition of military pretrial confinement and trial was to be considered, the

Government still exercised reasonable diligence to bring the appellant to trial, given that it could not control the length of time the State confined the appellant.[4] The first *Barker* factor weighs in the Government's favor.

Applying the other three *Barker* factors, we agree with the military judge that the appellant was not entitled to relief for an Article 10 violation. The Government provided adequate reasons justifying the delays in this case, and the appellant did not make a demand for a speedy trial. The appellant points to a suicide attempt he made on 4 January 2012 while in pretrial confinement as evidence of "anxiety and concern," an interest that the Supreme Court has stated is protected by the speedy trial right. *Barker*, 407 U.S. at 532. While we agree that this suicide attempt does evince some level of anxiety and concern, it is unclear whether the appellant's anxiety and concern resulted from his pending court-martial, his pending civilian legal proceedings, his mental health issues documented in the sanity board, or the general life issues that led him to commit the charged events on 22 November 2011. In any event, to the extent that his suicide attempt while in pretrial confinement can be considered evidence of prejudice, when weighed in conjunction with the other *Barker* factors, it is insufficient to establish an Article 10 violation. Under the heading of prejudice, we note as well that the appellant failed to demonstrate that his ability to defend himself at the court-martial was impaired.

Evaluating the totality of the circumstances in this case, and balancing the *Barker* factors with recognition that Article 10 imposes a more stringent standard than the Sixth Amendment, we conclude that the appellant's Article 10, UCMJ, right to a speedy trial was not violated.

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[4] We recognize that military officials could have elected not to release the appellant to civilian authorities, which presumably would have allowed the Government to proceed to trial sooner than it did. However, the base's Chief of Military Justice testified that military officials were motivated to ensure compliance with the "anti-shuttling provisions" of the Interstate Agreement on Detainers Act (IADA). The IADA is a compact between 48 states, the Federal Government, and the District of Columbia that generally seeks to create uniform procedures for lodging and executing a detainer (a legal order that requires a state in which an individual is currently imprisoned to hold that individual when he has finished serving his sentence so that he may be tried by a different state for a different crime). 18 U.S.C. app. 2, § 2; *Alabama v. Bozeman*, 533 U.S. 146, 148 (2001). Under the IADA, a prisoner may initiate final disposition of any untried indictment, information, or complaint against him/her, and the prosecuting authority of a state in which an untried indictment, information, or complaint is pending may obtain temporary custody of a prisoner against whom it has lodged a detainer by filing a written request for custody with the incarcerating state. 18 U.S.C. app. 2, § 2, art. III-IV. The IADA's anti-shuttling provisions are triggered when the receiving state lodges an official detainer against the defendant. In that situation, if trial is not had on any indictment, information, or complaint before the defendant is returned to his original place of imprisonment, such charges must be dismissed with prejudice. 18 U.S.C. app. 2, § 2, art. IV(e). Under the IADA, the Federal Government is treated as a state, and the anti-shuttling provision applies to transfers between state and federal custody. 18 U.S.C. app. 2, § 2, art. 2; *United States v. Thompson*, 562 F.2d 232, 234 n.2 (3d Cir. 1977). Therefore, had the appellant been tried by court-martial before disposition of the proceedings with the State of Colorado, and had the State lodged a detainer against the appellant during his military confinement, either the appellant or the State could have effectuated his release to resolve that detainer before his return to military confinement. Under these circumstances, we see no reason to question the decision of the general court-martial convening authority to release the appellant to civilian officials to allow him to complete his civilian confinement before his court-martial, preventing any concern about IADA issues.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court