UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	)	**Misc. Dkt. No. 2010-14**
Appellant	)	
	)	
v.	)	
	)	**ORDER**
Airman First Class (E-3)	)	
RORY J. SCHUBER,	)	
USAF,	)	
Appellee	)	**Special Panel**

ROAN, Judge:

On 22 July 2010, counsel for the United States filed an Appeal Under Article 62, UCMJ, 10 U.S.C. § 862, in accordance with this Court's Rules of Practice and Procedure.

The appellee was charged with one specification of divers use of methamphetamine and one specification of divers use of marijuana, both in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The charges were referred to trial by general court-martial on 26 April 2010. Prior to entering pleas, the appellee, through counsel, moved for dismissal of the charge and specifications alleging a violation of his right to a speedy trial pursuant to Article 10, UCMJ, 10 U.S.C. § 810. The military judge granted the motion on 28 June 2010, dismissing the charge and specifications with prejudice. The government made a timely appeal of this dismissal under Article 62, UCMJ. We have considered the government's brief in support of this appeal and the appellee's answer thereto.

Standard of Review

Because this case arises by way of a government appeal under Article 62, UCMJ, we are limited to reviewing the military judge's decision only with respect to matters of law. Article 62, UCMJ; Rule for Courts-Martial (R.C.M.) 908(c)(2). Unless the military judge's findings of fact are clearly erroneous, we are bound by his determinations and may not find facts or substitute our own interpretation of the facts. *See United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005). This court reviews de novo the question of whether the appellee was denied his right to a speedy trial under Article 10, UCMJ. *United States v. Cooper*, 58 M.J. 54, 58-59 (C.A.A.F. 2003).

Background

The pertinent chronology of this case is as follows:

Date (2010)	**Event(s)**	**Julian Date**
10 Feb	Appellee was placed into pretrial confinement following his fourth positive urinalysis	41
10 Mar	One charge with two specifications alleging divers use of methamphetamine and marijuana in violation of Article 112a, UCMJ, were preferred against the appellee	69
17 Mar	Appellee made first speedy trial request (contained within defense discovery request)	76
18 Mar	Article 32, UCMJ, 10 U.S.C. § 832, investigating officer (IO) appointed	77
29 Mar	Appellee made second speedy trial request (as part of discovery request)	88
30 Mar	Article 32, UCMJ, hearing held; the evidence consisted only of documents	89
7 Apr	IO forwarded report to 60th Air Mobility Wing legal office (60 AMW/JA) with recommendation that the case be referred to a special court-martial	97
15 Apr	Special court-martial convening authority signed disposition of charges and forwarded case file to general court-martial convening authority	105
21 Apr	Appellee made third speedy trial request (as part of discovery request)	111
22 Apr	Defense requested appellee be released from pretrial confinement to attend his grandfather's funeral; appellee was released and given a 3-day pass to attend services	112
26 Apr	Appellee returned to Travis Air Force Base (AFB) and was placed on restriction which stayed in place until trial commenced on 28 June 2010; charges referred to general court-martial	116
28 Apr	Referral paperwork sent to central docketing office	118
2 May	Appellee made fourth speedy trial request (as part of discovery request)	122
3 May	Docketing conference held. Trial docketed for 28 June 2010 – first date Air Force Drug Testing Laboratory (AFDTL) expert was available. Defense counsel indicated her first available date for trial was 7 June.	123
4 May	Military judge detailed to case	124
27 May	Prosecution requested arraignment due to approaching 120-day R.C.M. 707 limit	147

2 Jun	Appellee arraigned (112 days after confinement and subsequent restriction)	153
11 Jun	Appellee made fifth speedy trial request (as part of discovery request)	162
24 Jun	Appellee made sixth speedy trial request (as part of discovery request)	175
28 Jun	Trial commenced (138 days after confinement/restriction, 56 days after docketing conference)	179

The military judge made the following pertinent findings of fact:

> The 28 June 2010 trial date was requested by the prosecution because they chose to only use expert witnesses from the Brooks Air Force Drug Testing Laboratory (AFDTL) when their cases involved a urinalysis sample tested at the AFDTL and expert testimony was required.
>
> The expert witness from the AFDTL assigned to this case is Dr. [David] Turner. During the time of the docketing conference, Dr. Turner's schedule was such that he would not be available for trial until 28 June 2010. However, he testifies only 18-22 times a year due to many of the cases he is scheduled to testify in resolve . . . before trial and no longer require his appearance. As such, Dr. Turner's work weeks result in him being available for trial, including several weeks in June 2010.
>
> . . . .
>
> The AFDTL has several experts that are able to testify in courts-martial. 60 AMW/JA personnel did not contact AFDTL after the trial was scheduled to see whether or not AFDTL could provide an expert prior to the 28 June 2010 trial date.
>
> [T]he 60 AMW/JA used an expert in a urinalysis case in the last couple of months that was not from the Brooks [AFDTL] laboratory . . . .

In granting the appellee's Article 10, UCMJ, motion to dismiss, the military judge made the following conclusion of law:

> I find the *Barker v. Wingo* factors, as a whole, weigh heavily in favor of the accused's speedy trial right being violated pursuant to Article 10, UCMJ. In looking at the proceeding as a whole, the government did not expeditiously move this case along. To the contrary, it took 75 days to refer the most basic of crimes and they then arbitrarily elected to use a single expert's lack of availability as an excuse for not taking this case to

> trial . . . . I do not find that the government has met this [Article 10, UCMJ,] burden and I do not find the government moved this case forward with reasonable diligence.

Other findings of fact and conclusions of law made by the military judge are discussed below.

Discussion

We are presented with the following issue: Did the military judge err in granting appellee's motion to dismiss under Article 10, UCMJ?

Appellant argues the military judge erred by concluding the government failed to act with reasonable diligence in prosecuting this case. Specifically, appellant contends the military judge failed to acknowledge the government's rational explanation for delay; placed undue emphasis on the appellee's "pro forma" requests for speedy trial; and unduly diminished the importance of the lack of any prejudice to the appellee associated with the delay.

After a thorough review of the case law, the record of trial, the military judge's findings of fact and conclusions of law and the briefs from both the appellant and appellee, we conclude that, as a matter of law, the government acted with reasonable diligence and the appellee was not denied his Article 10, UCMJ, right to a speedy trial.

Speedy Trial Analysis

Article 10, UCMJ, provides that upon "arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him." In reviewing claims of a denial of a speedy trial under Article 10, UCMJ, constant motion is not demanded; rather, the government must use "reasonable diligence in bringing the charges to trial." *Mizgala*, 61 M.J. at 127 (quoting *United States v. Tibbs*, 35 C.M.R. 322, 325 (1965)). Brief inactivity in an otherwise active prosecution is not unreasonable or oppressive. *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993).

Although Article 10, UCMJ, creates a more stringent speedy trial standard than the Sixth Amendment, our superior court has instructed, "the factors from *Barker v. Wingo*[, 407 U.S. 514 (1972),] are an apt structure for examining the facts and circumstances surrounding an alleged Article 10 violation." *Mizgala*, 61 M.J. at 127 (citing *United States v. Cooper*, 58 M.J. 54, 61 (C.A.A.F. 2003); *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999)). Those factors are: "(1) the length of the delay; (2) the reasons for the delay; (3) whether the appell[ee] made a demand for a speedy trial; and (4) prejudice to the appell[ee]." *Mizgala*, 61 M.J. at 129 (citing *Barker*, 407 U.S. at 530).

Length of Delay

There is no disagreement that the appellee was in pretrial confinement for 71 days, released for three days to attend memorial services following the death of his grandfather, and then restricted to the limits of Travis AFB for an additional 67 days until the beginning of the court-martial. For purposes of this case, we will follow this Court's prior decision in *United States v. Munkus*, 15 M.J. 1013 (A.F.C.M.R. 1983), and hold where the appellee has been in nearly continuous confinement and restraint for 138 days and made a timely demand for a speedy trial, the length of delay is sufficient to trigger the full *Barker* inquiry.

Reasons for the Delay

In his conclusions of law, the military judge found the reason for the pretrial delay was "due completely to the government's mismanagement of the case." He further opined:

> There is quite honestly no excuse for the government's inability to be ready for trial well before 28 June 2010 . . . . the government was simply unconcerned with the multiple speedy trial requests of the [appellee] . . .
>
> . . . .
>
> [A]nd they [the government] then arbitrarily elected to use a single expert's lack of availability *as an excuse* for not taking this case to trial for another 63 days."

(Emphasis added.) As our superior court noted in *Cossio*, the military judge "must be careful to restrict findings of fact to things, events, deeds or circumstances that 'actually exist' as distinguished from 'legal effect, consequence, or interpretation.'" *United States v. Cossio*, 64 M.J. 254, 257 (C.A.A.F. 2007).

At its core, the military judge's ruling was premised on the government's failure to "expeditiously move this case along." Were this issue to be decided strictly on the basis of speed and lack of unexplained or perhaps even unwarranted delay in some areas, the appellant may well have not have met its burden of processing the case with reasonable diligence. However, in an Article 10, UCMJ, analysis, the key is orderly expedition not speed. *Mizgala*, 61 M.J. at 129. Our disagreement with the military judge lies in his failure to give credence to or even discuss the government's proffered explanation in requesting the 28 June 2010 trial date: "The recent decision in [*United States v.*] *Blazier*[, 68 M.J. 439 (C.A.A.F. 2010),] has led base legal offices to believe that it is best practice to move forward with a Brooks [AFDTL] expert to avoid unnecessary complications at trial so that we can dispose of cases in a timely manner." Rather, the

military judge summarily dismisses the argument, concluding the government's "decision to wait for a single AFDTL expert's schedule to free-up when so many other qualified experts are likely available to testify before that expert, *is an arbitrary decision on the part of the prosecution*" (emphasis added).

It is well settled the government does not engage in unreasonable delay when it seeks to "marshal and weigh all evidence, including forensic evidence, before proceeding to trial." *Cossio*, 64 M.J. at 257; *United States v. Plants*, 57 M.J. 664, 668 (A.F. Ct. Crim. App. 2002) ("The requirement that 'immediate steps shall be taken' does not mean the government must bring court-martial charges against a member being held in pretrial confinement before collecting the evidence to conduct a successful prosecution."). Put differently, *Cossio* stands for the proposition that the government has the right, if not the obligation, to thoroughly investigate and prepare a case before proceeding to trial. Such preparation must include obtaining evidence needed to address case dispositive legal issues likely to be raised by the defense. We cannot ignore that the law with regard to the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), and its application to experts and urinalysis cases is currently unsettled.[1] Regardless of whether trial defense counsel would have actually made a confrontation clause motion at trial or ultimately been successful had they done so, it was not unreasonable for the prosecution to secure the evidence (in this case, forensic testimony) to prepare for this likely possibility.[2] The prosecution had to choose how best to proceed given the options: wait for an AFDTL expert in order to address a *Melendez-Diaz* motion by the appellee and thereby risk dismissal for violation of Article 10, UCMJ, or obtain the first available non-AFDTL expert and risk the appellee's claim that his constitutional right to confrontation was violated. In our opinion, under the facts of this case, waiting for the first available AFDTL expert[3] was not unwarranted, and was certainly not arbitrary, capricious, or unsupported by the facts and circumstances of this case.[4]

The government's prosecution of this case was not exemplary. The government could have moved with more urgency between various phases of confinement, preferral, the Article 32, UCMJ, investigation and referral to reduce the number of elapsed days. Certainly the government could have been more emphatic with the AFDTL scheduling officials to determine whether an adequate substitute expert might become available prior to the 28 June 2010 trial date. However, when evaluating the process in its entirety, we are convinced the government did in fact move with reasonable diligence and was not

[1] We note that our superior court has granted review in several cases dealing with this very issue; *United States v. Blazier*, ___ M.J. ___, No. 09-0441/AF (Daily Journal 27 Sep 2010) (hearing held)(remanded by C.A.A.F. to AFCCA on 01 Dec 10); *United States v. Nutt*, ___ M.J. ___, No. 10-0668/AF (Daily Journal 13 Sep 2010) (order granting petition for review); *United States v. Sweeney*, ___ M.J. ___, No. 10-0461/NA (Daily Journal 10 Sep 2010) (order granting petition for review); *United States v. Robinson*, 69 M.J. 168 (C.A.A.F. 2010) (order granting petition for review).

[2] In fact, trial defense counsel apparently submitted a motion to "Confront Drug Testing Personnel" to the military judge.

[3] The prosecution had secured the first available Air Force Drug Testing Laboratory (AFDTL) expert by the time of the 3 May 2010 docketing conference setting the trial date at 28 June 2010.

[4] Using the military judge's rationale, the prosecution would be obligated to accept the first available expert in any case in which the accused is in pretrial confinement and has requested a speedy trial, regardless of whether such an expert would actually benefit the prosecution of the case. We do not find support in Article 10, UCMJ, precedent for such an outcome.

engaging in an attempt to unnecessarily delay the appellee's trial date. We cannot disregard the practical realities of what was occurring in the 60 AMW legal office before, during and after the appellee's confinement and restriction.[5] The office was short-manned and faced a heavy caseload.[6] We are satisfied the prosecution attempted in good faith to balance the competing needs of good order and discipline with the appellee's speedy trial concerns.[7] We find no evidence to support the military judge's conclusion that the "60 AMW/JA does not give any apparent priority to cases in which an accused asserts his right to a speedy trial."

Request for Speedy Trial

The military judge determined the government was "on notice of the defense's desire to move the case expeditiously." While we agree with the military judge's finding that the government was aware of the defense counsel's request for a speedy trial, we do not give it the same emphasis he apparently did. The speedy trial request is but one of the four factors that must be balanced when evaluating speedy trial demands. *Barker*, 407 U.S. at 533 (explaining the four factors are related and must be considered together with such other circumstances as may be relevant). In this case, the trial defense counsel's desire to actually move the trial forward as expeditiously as portrayed is debatable. Defense counsel submitted all six speedy trial petitions as part of much larger requests for discovery. While such a method is permitted, it does call into question whether the requests were more pro forma than intentional.[8] This concern is borne out by the fact defense counsel chose not to inform the military judge that the appellant had been in near continuous confinement/restriction for 112 days at the time of arraignment.[9] While she made passing mention of her intent to file a speedy trial motion, it is certainly curious why trial defense counsel did not file the motion at the arraignment, or at the very least inform the military judge of the situation given her apparent insistence for a speedy trial.

Moreover, it is unclear whether trial defense counsel was even prepared to proceed to trial prior to the 7 June 2010 date indicated on the 4 May 2010 "Confirmation of Initial Trial Date" memorandum. At arraignment, trial defense counsel notified the military judge she anticipated that additional defense counsel was going to be detailed to the case. Additionally, trial defense counsel told the military judge she was withdrawing a potential motion to compel production of evidence because trial counsel had recently

[5] As pointed out by Judge Cox in *Kossman*, "[T]he logistical challenges of a world-wide system that is constantly expanding, contracting, or moving can at times be daunting. . . . Even ordinary judicial impediments, such as crowded dockets, unavailability of judges, and attorney caseloads, must be realistically balanced." *United States v. Kossman*, 38 M.J. 258, 261-62, (C.M.A. 1993).

[6] Between 10 February and 24 June 2010, the Travis Air Force Base legal office conducted three general courts-martial, seven special courts-martial, two summary courts-martial, two "fully-litigated" administrative discharge boards, and a full-day motion hearing with only five certified judge advocates.

[7] Seven airmen were in pretrial confinement during this period, two of whom had made speedy trial requests and were prosecuted before the appellee.

[8] We note the speedy trial requests were essentially the same in each discovery document and in her fifth and sixth discovery requests, trial defense counsel continued to demand a speedy trial even though the 28 June 2010 trial date had already been set.

[9] In his findings of fact, the military judge states he was not notified the accused had requested a speedy trial until 21 June 2010.

provided discovery with respect to the drug testing laboratory. This raises a reasonable question as to how defense counsel would have been prepared for trial at an earlier date where she did not have full discovery and the second defense counsel was not even on the case. However, despite our reservations as to the sincerity of the defense counsel's speedy trial demands, we agree with the military judge that the requests were in fact made known to the government and this prong of the *Barker* analysis has been met.

Prejudice

The Supreme Court has identified the following interests of the appellee as relevant to the analysis of prejudice in the speedy trial context:

> (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Barker, 407 U.S. at 532 (footnote omitted), *quoted in Mizgala*, 61 M.J. at 129.

In his decision, the military judge specifically found there had been no loss of evidence or implication that witnesses would not be available for trial or that defense experts would be unable to review the evidence and assist the defense as a result of the pretrial delay. He found the appellee suffered no prejudice. We agree.

Conclusion

Considering the fundamental command of Article 10, UCMJ, for reasonable diligence and balancing the *Barker* factors, we conclude that under the circumstances of this case, the government proceeded to trial with reasonable diligence and the appellee was not denied his right to a speedy trial. We hold the military judge erred as a matter of law in granting appellee's motion and set aside the military judge's decision and remand the case to the trial court for further proceedings.

On consideration of the United States Appeal Under Article 62, UCMJ, it is by the Court on this 2nd day of December, 2010,

ORDERED:

That the United States Appeal Under Article 62, UCMJ, is hereby **GRANTED**.

Judges ORR and WEISS concur.

FOR THE COURT

OFFICIAL

STEVEN LUCAS
Clerk of the Court