

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman Basic DARIUS K. STEWART
United States Air Force**

ACM 35011

26 September 2003

Sentence adjudged 19 December 2001 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Steven A. Hatfield (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 142 days.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Lieutenant Colonel Brandon A. Burnett, Major Jeffrey A. Vires, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, Major Adam Oler, and Major Lane A. Thurgood.

Before

VAN ORSDOL, STUCKY, and ORR, V.A.
Appellate Military Judges

OPINION OF THE COURT

STUCKY, Judge:

The appellant was convicted by a general court-martial consisting of a military judge sitting alone, in accordance with his pleas of guilty, of three specifications of assault, in violation of Article 128, UCMJ, 10 U.S.C. § 928. He was also convicted, notwithstanding his plea, of one specification of disrespect to a senior noncommissioned officer, in violation of Article 91, UCMJ, 10 U.S.C. § 891. Finally, he was charged with disobeying a lawful command of his superior officer, in violation of Article 90, 10 U.S.C. § 890, which was withdrawn after arraignment. The appellant was sentenced to a bad-

conduct discharge and confinement for 142 days. The convening authority approved the sentence as adjudged.

The appellant raises one assignment of error before this Court. He asserts that the military judge erred by denying his motion to dismiss all the charges and specifications with prejudice because of a violation of his right to a speedy trial under Article 10, UCMJ, 10 U.S.C. § 810. Article 10, UCMJ, states, *inter alia*, “When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to . . . try him or to dismiss the charges or release him.”

I. Background

The appellant was assigned to the 37th Training Squadron’s transition flight, Lackland Air Force Base (AFB), Texas in May 2001 pending a summary court-martial for one specification of disrespect (Charge I) and one specification of disobedience (Charge II). The appellant committed further misconduct by assaulting two airmen in the transition flight on 2 and 4 September 2001, respectively. Lackland AFB security forces apprehended the appellant and placed him in pretrial confinement at the Bexar County Correctional Facility on 5 September 2001 because there was no room in the base confinement facility. The amended charges were preferred on 25 September 2001, and a hearing in accordance with Article 32, UCMJ, 10 U.S.C. 832 was held on 3 October 2001. The investigating officer (I.O.) issued her report on 11 October 2001, 36 days after the accused was ordered into pretrial confinement.

At this point, matters became more complicated. The trial counsel reviewed the I.O.’s report and discovered that a sworn written statement of Airman First Class Nicholas Grenzler, the victim of one of the assaults, had been omitted. He contacted the I.O. *ex parte* sometime in mid-October, asking that the Article 32, UCMJ, investigation be reopened. After the trial counsel did not receive a response, he submitted a written request on 25 October 2001 to have the Article 32, UCMJ, investigation reopened. The defense counsel opposed that request. The I.O. denied the request on 31 October 2001. On 6 November 2001, the appellant submitted a speedy trial demand. The special court-martial convening authority forwarded the charges to the general court-martial convening authority with a recommendation that the case be referred to a general court-martial. Over the next two weeks the government answered questions concerning the charges and specifications, observed the Thanksgiving holiday, and waited for the convening authority to return from a two-day temporary duty trip. The convening authority referred the charges to a general court-martial on 30 November 2001. On 6 December, the trial counsel called the defense counsel to negotiate a trial date. The parties had a difficult time finding a mutually agreeable date due to witness availability, the trial counsel’s upcoming surgery, and the defense counsel’s schedule. The military judge took the competing interests under consideration and set the trial for 19 December 2001.

Excluding a 12-19 December delay, which was done at the behest of the defense, 98 days elapsed between the appellant's entry into pretrial confinement and the beginning of trial.

The speedy trial issue was fully litigated before the military judge at the court-martial. The military judge found, in addition to the events set out above, that the events of 11 September 2001 caused over 1000 medical personnel based at Lackland AFB, for whom the legal office was responsible, to be deployed. Moreover, access to and movement on Lackland AFB was severely limited for security reasons. He also found that the legal office had tried two summary courts-martial for misconduct that had occurred after the appellant went into pretrial confinement. While the military judge expressed some concern about the delay in forwarding the Article 32, UCMJ, investigation to the general court-martial convening authority, he found that the government had been "reasonably diligent" in bringing the case to trial. Finally, the military judge found that the accused had not been denied his speedy trial rights under Article 10, UCMJ, or the Sixth Amendment to the United States Constitution.

II. Waiver

The appellant pled guilty to the more serious assault charge and its specifications, and was convicted pursuant to those pleas. Therefore, the speedy trial issue is waived with respect to those offenses. Rule for Courts-Martial (R.C.M.) 707(e); *United States v. Cornelius*, 37 M.J. 622 (A.C.M.R. 1993); *United States v. Pruitt*, 41 M.J. 736 (N.M. Ct. Crim. App. 1994). However, the issue is not waived with respect to Charge I and its specification, the disrespect offense, as the appellant pled not guilty to them and was convicted notwithstanding his plea.

III. Law

We review the question of whether an appellant has received a speedy trial *de novo*. *United States v. Doty*, 51 M.J. 464, 465 (1999). The military judge's findings of fact on the issue are given "substantial deference and will be reversed only for clear error." *Id.* (citing *United States v. Edmond*, 41 M.J. 419 (1995), *vacated on other grounds*, 516 U.S. 802 (1995) (quoting *United States v. Taylor*, 487 U.S. 326, 327 (1988))). The test for determining whether the government has violated an appellant's Article 10, UCMJ, rights is whether it has acted with "reasonable diligence" in proceeding to trial. *United States v. Birge*, 52 M.J. 209, 211 (1999) (citing *United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993)). The Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972), enunciated a balancing test involving four factors to consider when determining if an appellant's right to a speedy trial has been violated under the 6th Amendment to the Constitution: "the length of the delay, the reason for it, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530. It is appropriate to "consider the *Barker v. Wingo* factors—in the context of Article 10's . . . reasonable diligence standard in determining whether a particular set of circumstances violates a

servicemember's speedy trial rights under Article 10." *Birge*, 52 M.J. at 212 (citations omitted).

III. Discussion

In this case, it is clear that the government did not simply delay matters through spite or inattention. The delay in forwarding the Article 32, UCMJ, investigation was accounted for by the government's concern that a statement which the I.O. had excluded could nonetheless be reviewed by the general court-martial convening authority. While this could perhaps have been done with more dispatch, much of the delay that did occur is the fundamental "fog of litigation" inherent in coordinating matters with geographically separated headquarters.* This Court finds that it does not rise to a lack of "reasonable diligence." In addition, we cannot ignore the very real pressure imposed on the Lackland AFB legal office by the 11 September 2001 attacks and the consequent deployment of some 1000 base personnel, for whose legal readiness that office was responsible, as well as the problems of base access and communication in the immediate aftermath of the attacks. Military operations are an important part of the circumstances relevant in the *Barker v. Wingo* balancing process. *United States v. Plants*, 57 M.J. 664, 667 n. 5 (A.F. Ct. Crim. App. 2002), *pet. denied*, 58 M.J. 181 (2003).

Finally, the military judge, in response to a defense motion for appropriate relief based upon the conditions of pretrial confinement, found no pretrial punishment, but did grant the appellant 20 additional days of credit under R.C.M. 305(k) because the conditions under which he was held at the Bexar County facility were harsher than comparable Air Force conditions. The sentence to 142 days confinement thus resulted in the appellant being released from confinement upon the adjournment of the court-martial. *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). This action undercuts any claim that the appellant was prejudiced by the length of time it took to bring him to trial.

Applying the balancing test enunciated in *Barker v. Wingo*, and taking into account the fact that the appellant in this case did assert his rights, we find that the government did pursue this case with "reasonable diligence," and that the appellant's right to a speedy trial under Article 10, UCMJ, was not violated.

* *Cf.* Carl von Clausewitz, *On War* (1827).

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), 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (2000). Accordingly, the approved findings and sentence are

AFFIRMED.

Judge ORR, V.A., participated in this decision prior to her retirement.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator