UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic THOMAS H. WILLIS III
United States Air Force

ACM 34235

24 January 2002

Sentence adjudged 24 March 1999 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: W. Thomas Cumbie.

Approved sentence: Bad-conduct discharge, confinement for 15 months, and forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Colonel James R. Wise, Lieutenant Colonel Timothy W. Murphy, Major Stephen P. Kelly, and Captain Patrick J. Dolan.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Martin J. Hindel.

Before

BURD, BRESLIN, and HEAD
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

The appellant was convicted, in accordance with his pleas, of 12 specifications of larceny, and 5 specifications of stealing matter from the mail, in violation of Articles 121 and 134, UCMJ, 10 U.S.C. §§ 921, 934. The sentence adjudged and approved was a bad-conduct discharge, confinement for 15 months, and forfeiture of all pay and allowances.

The appellant contends he was denied a speedy trial, where the government withdrew existing charges, and re-preferred essentially the same charges later. He also alleges the military judge committed plain error by failing to dismiss Specification 1,

Charge II, because a similar offense had been previously charged by the State of Arizona. We find no error, and affirm.

Speedy Trial

In March 1999, shortly before the appellant's first court-martial on other theft charges, the Pima County, Arizona, police arrested him for another theft offense. A search of his car incident to arrest revealed that he was in possession of 12 credit and debit cards belonging to others. He was held in pretrial confinement by Pima County authorities for 80 days. During that time the appellant was tried and convicted by court-martial on the pending charges. On 24 March 1999, the appellant was sentenced to a bad-conduct discharge, confinement for 15 months, forfeiture of all pay and allowances, and reduction to AB. The military confinement was deferred until completion of his detention by Pima County authorities.

The appellant negotiated a plea bargain with Pima County officials. He pled guilty to one count of theft, and was given three years' probation. On 2 June 1999, he began serving his adjudged confinement at Davis-Monthan Air Force Base (AFB).

On 18 August 1999, while the appellant was in post-trial confinement, the government preferred court-martial charges arising from the offenses discovered shortly before his first court-martial. Additional charges were preferred on 15 October 1999. After considerable discussion, trial was scheduled for 9 December 1999. However, on 23 November 1999, the convening authority dismissed the pending charges to allow time to investigate possible forgery charges, with a view toward trying all the outstanding charges at a single trial. The subsequent handwriting analysis was inconclusive. On 15 March 2000, the appellant's commander preferred court-martial charges substantially similar those previously dismissed. The government brought the appellant to trial on the second set of charges 68 days after preferral (26 of those days were properly excluded for speedy trial purposes).

At trial, the appellant moved to dismiss the charges for violation of his right to speedy trial under Rule for Courts-Martial (R.C.M.) 707 and the Sixth Amendment. The appellant, citing *United States v. Robinson*, 47 M.J. 506, 510 (N.M. Ct. Crim. App. 1997), alleged the dismissal of charges was a subterfuge to toll the running of the 120-day speedy trial clock. The appellant also maintained the delay violated his Sixth Amendment right to a speedy trial, because he was held in a local confinement facility rather than being transferred to a larger facility with more rehabilitative programs.

The military judge heard testimony, considered evidence, and entered findings of fact and law. He found that the appellant was brought to trial on the re-preferred charges well within the 120-day time limit in R.C.M. 707. The military judge found that the decision to dismiss the charges was not done solely to stop the speedy trial clock—rather

it was done to allow time for further investigation. He determined the government was fully prepared to go to trial on the original charges within the 120-day limit. The military judge also found that there had been no pretrial restraint for Sixth Amendment purposes. After the appellant's first court-martial, he was held by civilian authorities on separate charges, and later placed into post-trial confinement serving his military sentence. The military judge found the pretrial delay was not excessive under the circumstances, and that there was no prejudice to the appellant's ability to prepare for trial.

The appellant renews his complaint on appeal, alleging again a violation of his right to a speedy trial under R.C.M. 707 and the Sixth Amendment. We find no error.

Under military law, the right to speedy trial arises from three distinct sources: the Sixth Amendment to the United States' Constitution, Article 10, UCMJ, 10 U.S.C. § 810, and R.C.M. 707. *United States v. Becker*, 53 M.J. 229, 231 (2000); *United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993). Whether an appellant received a speedy trial is an issue of law, which we review de novo. *United States v. Doty*, 51 M.J. 464, 465 (1999). However, we give substantial deference to the military judge's findings of fact, and will reverse them only for clear error. *United States v. Taylor*, 487 U.S. 326, 337 (1988); *United States v. Edmond*, 41 M.J. 419, 420 (1995).

The military judge's findings of fact are well-crafted and amply supported by the evidence. We adopt them as our own. We find no violation of the appellant's right to a speedy trial under R.C.M. 707, Article 10, UCMJ, or the Sixth Amendment.

Failure to Dismiss Specification I, Charge II

The appellant now asserts that the military judge erred in failing, sua sponte, to dismiss Specification 1 of Charge II. We find no error.

As noted above, authorities from Pima County, Arizona, arrested the appellant following the complaint from the local merchant and the search of his vehicle. Pima County authorities charged the appellant with theft of a credit card belonging to Senior Airman (SrA) Howell, and theft of automobile tires and rims, obtained through the wrongful use of SrA Howell's credit card. Under the pretrial agreement noted above, the appellant pled guilty to the theft of the tires and rims, and the first count was dismissed.

At trial, the defense counsel moved to dismiss Specification 2 of Charge I, which alleged the appellant stole money from First USA bank by wrongfully using SrA Howell's credit card. The prosecution responded that the property allegedly stolen in that specification did not include the tires and rims which were the subject to the Pima County charges—rather, they were for separate cash withdrawals from automatic teller machines (ATMs). Trial defense counsel argued that, because the charged theft of money and the theft of the tires and rims were committed through the misuse of SrA Howell's credit

card, the offenses were "similar." He maintained that this similarity ran afoul of the language of Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, which prohibited court-martialing "any member of the Air Force for substantially the same act or omission for which a state or foreign court tried the member regardless of outcome." The military judge denied the motion, finding that the theft of the tires and rims was a separate offense from the theft of money from ATMs.

Under the auspices of *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant, on his own, raises a slightly different claim of error on appeal. Focusing on a different set of charges, the appellant argues that the military judge should have dismissed Specification 1 of Charge II, charging theft of SrA Howell's credit card from the mail, because it was similar to Pima County's charge that the appellant stole SrA Howell's credit card.

We find no merit in this argument. The policy announced in AFI 51-201 applies to offenses for which an accused has been "tried by a state or foreign court." The appellant was not tried by Pima County for stealing SrA Howell's credit card—that charge was dismissed pursuant to the plea negotiation. There is no evidence the appellant was ever arraigned on that count, or that a jury been impaneled or sworn. *United States v. Hutchinson*, 49 M.J. 6, 7 (1998).

The 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; *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, SSgt, USAF
Chief Court Administrator