UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman VONTREVIAN J. WILLIAMS
United States Air Force

ACM S31851

23 April 2012

Sentence adjudged 3 August 2010 by SPCM convened at Robins Air Force Base, Georgia. Military Judge: William C. Muldoon, Jr. (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 45 days, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; and Captain Nathan A. White.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Naomi N. Porterfield; Captain Jamie L. Mendelson; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

PER CURIAM:

A general court-martial composed of military judge alone convicted the appellant in accordance with his pleas of two specifications of absence without leave, one specification of wrongful use of marijuana, and one specification of sleeping on post, in violation of Articles 86, 112a, and 113, UCMJ, 10 U.S.C. §§ 886, 912a, 913.[1] The appellant was sentenced to a bad-conduct discharge, confinement for 45 days and reduction to E1. The convening authority approved the sentence as adjudged. On appeal,

[1] The military judged acquitted the accused of one specification of failure to go and one specification of unlawful possession of marijuana, in violation of Articles 86 and 112a, UCMJ, 10 U.S.C. §§ 886, 912a.

the appellant asserts he was denied his right to a speedy trial pursuant to Article 10, UCMJ, 10 U.S.C. § 810.

Background

At trial, the appellant moved to dismiss the charges based on a denial of his Article 10, UCMJ, speedy trial rights. In ruling on this motion, the military judge made extensive findings of fact and conclusions of law. We find that the findings of fact are amply supported by the evidence; therefore, we adopt them as our own. The appellant fell asleep while on post on 29 January 2010 and was absent without leave (AWOL) from 16 thru 18 February 2010. On 18 April 2010, the appellant was arrested by Georgia law enforcement authorities for possession of a concealed weapon and possession of ecstasy and marijuana. He remained incarcerated until 23 April 2010 when he posted a bond and was released. The appellant provided a urinalysis sample on 7 May 2010 which later tested positive for marijuana. On 4 May 2010, the appellant's commander initiated Article 15, UCMJ, 10 U.S.C. § 815, proceedings for the January and February incidents, but the appellant went AWOL on 10 May 2010 before the proceedings could be completed. On 14 May 2010, military authorities requested that the civilian authorities waive jurisdiction so the military could prosecute the appellant for the 18 April 2010 events; the waiver was received on 19 May 2010. On 17 May 2010, the appellant turned himself in to the Georgia authorities and was immediately placed in military pretrial confinement. On 1 June 2010, the Government received from the Georgia State Police evidence related to the April incidents. The evidence was shipped to the United States Army Criminal Investigations Laboratory (USACIL) for testing the next day. On 11 June 2010, USACIL reported that the seized evidence consisted of marijuana and a non-controlled drug.[2] Charges were preferred on 30 June 2010 and referred on 1 July 2010. On 8 July 2010, the case was docketed for trial on 3 August 2010, the first date a urinalysis expert was available to testify for the Government. Trial convened on 3 August 2010, 78 days after the appellant was placed in pretrial confinement.[3]

Speedy Trial

Alleged violations of Article 10, UCMJ, are evaluated using the four factors identified in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) length of delay; (2) reasons for delay; (3) demand for speedy trial; and (4) prejudice. We review de novo whether the appellant was denied the right to a speedy trial as a matter of law and are "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), *quoted in United States v. Schuber*, 70 M.J. 181, 188 (C.A.A.F. 2011).

[2] The military judge incorrectly determined that the Government received the report of the United States Army Criminal Investigations Laboratory on 17 June 2010. Based on the record of trial, the Government received the report on 11 June 2010.

[3] Throughout his incarceration, the appellant made multiple requests for a speedy trial.

After applying the *Barker* factors, the military judge found the Government had acted with reasonable diligence in bringing the appellant to trial and denied the appellant's speedy trial motion. The military judge further determined that the appellant was aware of the charges he was facing, the incarceration was not oppressive, and there was no indication that the appellant had suffered any prejudice as a result of being incarcerated.

When an accused is held in pretrial confinement, the Government is required to take "immediate steps" to either "try him or to dismiss the charges and release him." Article 10, UCMJ. In reviewing claims of a denial of a speedy trial under Article 10, UCMJ, our superior court has interpreted "immediate steps" to mean "'not . . . constant motion, but reasonable diligence in bringing the charges to trial.'" *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005) (quoting *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965) (internal quotation marks omitted). While the Government must demonstrate reasonable diligence in proceeding toward trial during the appellant's pretrial confinement, "[b]rief inactivity is not fatal to an otherwise active, diligent prosecution." *Id.* (citing *Tibbs*, 35 C.M.R. at 325).

Reviewing the issue de novo, we find that the appellant was not denied his right to a speedy trial under Article 10, UCMJ. Applying the first of the four *Barker* factors, we do not find the length of delay to be facially unreasonable. The uncontested facts show that only 78 days elapsed between the imposition of restraint and trial. Most of the delay was attributable to the transfer of evidence from the state authorities, testing of the evidence by USACIL, and waiting for the first available forensic expert who could testify at trial. It is well settled that 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 (citing Rule for Courts-Martial 601(e)(2), Discussion); *United States v. Plants*, 57 M.J. 664, 668-69 (A.F. Ct. Crim. App. 2002) ("'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"). In fact, USACIL's report revealed that some of the suspected contraband were not illicit drugs, a result that obviously benefited the accused. Having reviewed the entire record, we are convinced the Government moved with reasonable dispatch to obtain and evaluate the evidence and bring the appellant to trial in a diligent manner. Having found the length of delay reasonable, we need not inquire into the remaining *Barker* factors. *Schuber*, 70 M.J. at 189.

Appellate Delay

Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time this case was docketed with the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable.

Because the delay is facially unreasonable, we examine the four factors set forth in *Barker*, 407 U.S. at 530: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006) (citations omitted). When we assume error but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

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.

OFFICIAL

STEVEN LUCAS
Clerk of the Court