IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

D.A. WAGNER **R.E. VINCENT** **E.B. STONE**

UNITED STATES

v.

Josh R. HARCROW
Lance Corporal (E-3), U. S. Marine Corps

NMCCA 200401923 Decided 30 October 2006

Sentence adjudged 16 July 2002. Military Judge: L.K. Burnett. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Education Command, Marine Corps Combat Development Command, Marine Corps Base, Quantico, VA.

Capt JEFFREY STEPHENS, USMC, Appellate Defense Counsel
LT JESSICA HUDSON, JAGC, USNR, Appellate Government Counsel

VINCENT, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of unauthorized absence, failure to obey a lawful general order, escape from custody, wrongful use of methamphetamine on divers occasions, and wrongful use of cocaine, in violation of Articles 86, 92, 95, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 892, 895, and 912a. Contrary to his pleas, the military judge convicted the appellant of failure to obey a lawful general order, wrongful manufacture of methamphetamine, wrongful possession of cocaine, wrongful possession of heroin, and wrongful use of cocaine, also in violation of Arts. 92 and 112a, UCMJ. The appellant was sentenced to confinement for six years, reduction to pay grade E-1, and a bad-conduct discharge.

The convening authority approved the sentence, but, in accordance with the pretrial agreement, suspended all confinement in excess of four years for a period of 12 months from the date of trial, 16 July 2002. The convening authority noted in his action of 15 December 2004 that since the suspension period

expired on 16 July 2003, it had therefore been remitted. Furthermore, the convening authority suspended the unexecuted period of confinement from 15 December 2004 to the date that the appellant would have been released pursuant to the pretrial agreement, for a period of 12 months from the date of his action.

The appellant raises six assignments of error. In his initial assignment of error, he contends that the evidence at trial was not legally and factually sufficient to prove his guilt to all of the charges and specifications to which he pled not guilty. The appellant's second assignment of error alleges that the military judge erred by admitting forensic drug lab reports into evidence. His third assignment of error asserts two separate unreasonable multiplication of charges contentions.

The appellant's fourth assignment of error alleges that the military judge erred by failing to find two specifications multiplicious for findings. In his fifth assignment of error, the appellant contends that his guilty plea to wrongful possession of drug paraphernalia was improvident. His sixth, and final, assignment of error, alleges that the military judge erred by denying his motion to dismiss all charges due to a violation of his Sixth Amendment and Article 10, UCMJ, rights to a speedy trial.

We have carefully reviewed the record of trial, the appellant's six assignments of error, and the Government's response. Addressing the appellant's first assignment of error, we will dismiss Charge III and its specification since we have determined that the evidence adduced at trial was not legally sufficient to support a conviction. Regarding the appellant's fourth assignment of error, the Government concedes, and we agree, that Specification 1 of Additional Charge II and Specification 3 of Additional Charge II are multiplicious for findings and, accordingly, we will dismiss Specification 1 of Additional Charge II. Concerning the appellant's fifth assignment of error, we will modify the finding concerning Additional Charge I and its specification, since we have concluded that the appellant's guilty plea to the portion of the specification under Additional Charge I pertaining to possession of a three bar measuring scale as drug paraphernalia was improvident. We have determined that the appellant's second, third, and sixth assignments of error are without merit.

Following our corrective action, we conclude that the remaining findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Facts

The appellant first used methamphetamine in June 2000. In February 2001, the appellant began to manufacture methamphetamine at his private residence. On 7 August 2001, Naval Criminal

Investigative Service (NCIS) agents and members of the Stafford County, Virginia, Sherriff's Office, arrived at the appellant's private residence in order to execute a warrant for his arrest. The arrest warrant was based on the fact that the appellant was suspected of manufacturing methamphetamine at his residence. While conducting a search of the appellant's residence, law enforcement personnel identified material often used to manufacture methamphetamine.

On 4 February 2002, the appellant was ordered into pretrial confinement. He escaped from custody while being escorted to the brig and commenced a period of unauthorized absence. On 2 March 2002, members of the Stafford County, Virginia, Sherriff's Office arrived at the appellant's residence to execute a *capias* warrant for the appellant's failure to appear before a civilian court on unrelated charges. While executing the *capias* warrant, law enforcement personnel seized drug paraphernalia, some of which contained residue of heroin and cocaine.

Legal and Factual Sufficiency

In his first assignment of error, the appellant's contends that the evidence at trial was not legally and factually sufficient to prove his guilt to all of the charges and specifications to which he pled not guilty.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

The test for factual sufficiency is whether after weighing the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ. Proof beyond a reasonable doubt, however, does not mean the evidence must be free from conflict. *Reed*, 51 M.J. at 562. Furthermore, this court, in its factfinding role, "may believe one part of a witness' testimony and disbelieve another." *United States v. Lepresti*, 52 M.J. 644, 648 (N.M.Ct.Crim.App. 1999)(quoting *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979)).

At the outset, we note that our decision to dismiss Specification 1 of Additional Charge II renders the appellant's factual and legal sufficiency argument concerning this offense moot.

The sole specification under Charge III involves the violation of Secretary of the Navy Instruction (SECNAVINST)

5300.28C, ¶ 4b. of 24 March 1999, a lawful general order, on divers occasions, from on or about 1 May 2001 to on or about 6 August 2001, by unlawfully possessing drug paraphernalia, to wit: a methamphetamine drug lab. As stated earlier, we find that the evidence adduced at trial was not legally sufficient to support a conviction.

To obtain a conviction for a violation of a lawful general order under Article 92, UCMJ, the Government must prove that (1) there was in effect a certain lawful general order, (2) the accused had a duty to obey it, and (3) the accused violated or failed to obey it. We find that the Government failed to present any evidence at trial to prove the first two elements. In order to satisfy the first element, the Government could have requested that the military judge take judicial notice of the instruction or could have offered the instruction into evidence. However, the Government failed to do so. Additionally, the Government did not produce any evidence to prove that the appellant had a duty to obey the instruction.

We recognize that, during his providence inquiry concerning the specification of Additional Charge I (violating SECNAVINST 5300.28C by unlawfully possessing a three bar measuring scale and a hypodermic needle as drug paraphernalia), the appellant acknowledged that this instruction had been in effect since 24 March 1999 and further acknowledged that he had a duty to obey the instruction. However, we further note that the military judge did not inform the appellant that his statements concerning his guilty plea to violating SECNAVINST 5830.28C under Additional Charge I could be used as evidence against him on any of the charges to which he pled not guilty. Rather, the appellant was informed that the use of his providence inquiry statements was limited to (1) future prosecution for perjury or false statement and, (2) if the Government requested, the sentencing portion of the appellant's court-martial. Record at 42.

It is a longstanding rule that the Government is precluded from relying on statements made during the providence inquiry to prove the essential elements of an unrelated offense to which the appellant pled not guilty. *United States v. Wahnon*, 1 M.J. 144, 145 (C.M.A. 1975); *United States v. Caszatt*, 29 C.M.R. 521 (C.M.A. 1960); *see also United States v. Cahn*, 31 M.J. 729, 730-31 (A.F.C.M.R. 1990)(finding "no support for the proposition that an accused's right to remain silent on a contested offense may be abridged by allowing consideration of statements required to be made in support of a guilty plea").[1] Accordingly, we will set aside Additional Charge I and its sole specification.

[1] The Government is permitted to use a guilty plea to a lesser-included offense to establish elements common to both the greater and lesser crimes of a single specification. *United States v. Rivera*, 23 M.J. 89, 95 (C.M.A. 1986); *Wahnon*, 1 M.J. at 145. In the instant case, Additional Charge I and Charge III are two separate Article 92 charges alleging separate and distinct violations of the same general lawful order.

Concerning Specification 2 of Charge V (wrongful manufacture of methamphetamine, on divers occasions, between on or about 1 February 2001 and 6 August 2001), we find that the evidence adduced at trial was both legally and factually sufficient to establish that the appellant wrongfully manufactured methamphetamine.

Two of the appellant's accomplices, Private Perry and Private Robinson testified against the appellant. Private Perry testified that he manufactured methamphetamine with the appellant at the appellant's residence on two or three occasions between February and August 2001. He described the solvents, chemicals and ingredients that he and the appellant obtained and used in manufacturing methamphetamine on each occasion. Specifically, he listed iodine, muriatic acid, hydrogen peroxide, suphedrine, antihistamine tablets, automobile gas treatment fuel, Red Devil Lye, isotone, balloons, coffee filters, pie plates, and the striker pads from approximately 5,000 matches. Private Perry also meticulously described the processes that he and the appellant utilized to manufacture methamphetamine. He provided exacting details about the appellant's residence when describing how he and the appellant used the appellant's kitchen to manufacture the methamphetamine and stored necessary supplies in the appellant's bathroom. Record at 118-32. He testified the manufacturing process took approximately six to eight hours to complete. He also stated that he and the appellant used glass Pyrex pie plates during the manufacturing process. Record at 177-78.

Private Robinson testified that he had previously been to the appellant's residence and observed liquid methamphetamine cooking in a Pyrex pan on the appellant's stove. Record at 182. He also testified that he had previously provided Coleman fuel to the appellant in the MCB Quantico barracks parking lot. Private Robinson admitted that he informed an NCIS agent that the appellant stated that he had dumped chemicals used to manufacture methamphetamine down the toilet. Record at 187. He further testified that the appellant admitted that he and Private Perry manufactured methamphetamine. Record at 193.

The appellant testified on his own behalf and denied ever possessing a methamphetamine drug lab or manufacturing methamphetamine. He claimed that Privates Perry and Robinson were lying about his involvement in manufacturing methamphetamine. Two witnesses for the defense, a Lance Corporal and a Sergeant in the Marine Corps, both testified that they had supervised Privates Perry and Robinson and formed an opinion that they are untruthful and could not be trusted. Both witnesses also testified that Privates Perry and Robinson had a reputation for being untruthful.

The appellant contends that the evidence concerning this offense consisted solely of the testimony of Privates Perry and Robinson and was, therefore, insufficient to prove that he

wrongfully manufactured methamphetamine. The appellant argues they had a motive to fabricate testimony since, pursuant to a pretrial agreement, they were testifying under grants of immunity, and had reputations for untruthfulness. The appellant further argues that the record of trial does not contain any corroborating physical evidence of drug residue or drug paraphernalia.

As we consider the legal and factual sufficiency of the evidence presented to convict the appellant, we presume the military judge knew and applied the law, including the law pertaining to accomplice testimony. We also find that the Government provided corroborating evidence. Special Agent (SA) [H], from the Naval Criminal Investigative Service, testified that he participated in executing an arrest warrant for the appellant at his private residence on the morning of 7 August 2001. He testified that the appellant admitted that he obtained fuel, which is commonly used to manufacture methamphetamine, on 5 August 2001, and then dumped the fuel on 6 August 2001. He also testified that the appellant admitted possessing matches, antihistamine, and lye that were located in the appellant's residence.[2] Record at 89-91. These items corroborate Private Perry's testimony describing the items he and the appellant used to manufacture methamphetamine.

Furthermore, SA [J], a clandestine drug lab coordinator for the Drug Enforcement Administration, testified as an expert witness regarding clandestine drug labs. He described the four principally used clandestine methods for manufacturing methamphetamine, noting that the red phosphorous method was the most common method used in Virginia. He listed the required chemicals and solvents necessary for the red phosphorous method, explaining that the required organic solvents, either ephedrine or pseudo ephedrine, can be obtained from Sudafed, red phosphorous can be obtained from striker plates on matches, and sodium hydroxide can be obtained from Red Devil Lye. He further explained that hydrochloride gas is manufactured by mixing muriatic or sulfuric acid, which can be obtained from a car battery, and rock salt. He also noted that iodine was a required ingredient and explained that coffee filters and pie plates were commonly used in the filtering processes. SA [J] outlined the chemical processes that take place using the necessary solvents and chemicals. Record at 94-101.

We find that the evidence adduced at trial was both legally and factually sufficient to establish that the appellant wrongfully possessed heroin and wrongfully used cocaine on 2 March 2002. Accordingly, after careful review of the record of trial, and recognizing that we did not personally observe the witnesses, as did the trial court, we are convinced beyond a

[2] SA [H] testified that law enforcement authorities seized a shotgun and stove fan screen from the appellant's residence, but apparently did not seize these items when executing the arrest warrant.

reasonable doubt that the appellant is guilty of Specification 2 of Charge V, Specifications 2 and 3 of Additional Charge II, and the excepted language of the specification of Additional Charge I. We are also convinced that considering the evidence in the light most favorable to the Government, any rationale trier of fact could have found the elements of these crimes beyond a reasonable doubt.

Admission of Forensic Lab Reports

In his second assignment of error, the appellant claims that the military judge erred in admitting two Certificate of Analysis reports from the Commonwealth of Virginia, Department of Criminal Justice Service, Division of Forensic Science. These reports contained the results of laboratory testing of items seized by Virginia law enforcement authorities from the appellant's residence on 6 August 2001. Specifically, the laboratory results indicated the presence of heroin and cocaine residue on metal spoons and plastic bags. Prosecution Exhibits 1 and 2. These exhibits were introduced into evidence, without any objection by the appellant, during the testimony of a Patrol Deputy from the Stafford County, Virginia Police Sherriff's Office. Record at 161-62.

The appellant contends that the military judge should have ensured the scientific reliability of the forensic lab reports prior to admitting Prosecution Exhibits 1 and 2, citing *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Alternatively, the appellant claims that the forensic lab reports were testimonial hearsay prohibited under the Sixth Amendment of the Constitution, citing *Crawford v. Washington*, 541 U.S. 36 (2004).

The appellant's failure to object to the admission of evidence at trial forfeits the issue on appeal, absent plain error. *United States v. Magyari*, 63 M.J. 123, 125 (C.A.A.F. 2006)(citing *United States v. Gilley*, 53 M.J. 113, 122 (C.A.A.F. 2001)). To prevail under a plain error analysis, the appellant must show that there was an error, that the error was plain or obvious, and that the error materially prejudiced one of his substantial rights. *United States v. Tyndale*, 56 M.J. 209, 217 (C.A.A.F. 2001).

Our superior court has recently held that Navy Drug Screening Laboratory documents reporting the results of urinalysis testing are not testimonial hearsay and are, as business records, admissible under a firmly rooted hearsay exception. *Magyari*, 63 M.J. at 127-28. Since *Crawford,* other jurisdictions have held that chemical analysis laboratory results are non-testimonial hearsay. *See Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005)(holding that reports certifying the results of laboratory drug tests are business records and, accordingly, are not testimonial); *People v. Johnson*, 18 Cal.Rptr. 3d 230 (Cal. Ct. App. 2004)(in *dicta*, court stated that chemical analysis report was non-testimonial).

We find that the Commonwealth of Virginia forensic laboratory reports were non-testimonial and were admissible under the business records hearsay exception. *See* MILITARY RULE OF EVIDENCE 803(6), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). Since the military judge was considering evidence of a test that does not involve a novel scientific procedure, a *Daubert*-type analysis was not required. Therefore, the appellant's reliance on *Daubert* and *Crawford* are misplaced. Accordingly, the admission of Prosecution Exhibits 1 and 2 into evidence was not plain error and the issue is waived.

Unreasonable Multiplication of Charges

The appellant's third assignment of error alleges two separate unreasonable multiplication of charges contentions. First, he contends that Specification 1 of Charge IV (escape from custody) and Charge II (unauthorized absence) constitute an unreasonable multiplication of charges. Second, he contends that Charge III (violation of SECNAVINST 5300.28C, ¶ 4b, by possessing a methamphetamine drug lab) and Specification 2 of Charge V (wrongful manufacture of methamphetamine) also constitute an unreasonable multiplication of charges.

At the outset, we note that our decision to dismiss the sole specification of Charge III renders the appellant's second unreasonable multiplication of charges argument moot.

To determine whether there has been an unreasonable multiplication of charges, we consider five factors set forth in *United States v. Quiroz*, 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition).

Regarding the escape from custody and unauthorized absence offenses, we note that the appellant did not object at trial. Second, we conclude that escape from custody and a one-month period of unauthorized absence are separate and distinct criminal acts since they have distinct elements and address separate military societal issues. The unauthorized absence offense addressed the appellant's conscious decision to absent himself from his command without authority for one month. The escape from custody offense addressed the appellant's decision to free himself from the custody of an individual authorized to apprehend him. Additionally, there is a time duration component to an unauthorized absence offense, albeit a matter in aggravation, which does not exist in an escape from custody offense.

We also conclude that the two offenses do not misrepresent or exaggerate the appellant's criminality. He chose to commit distinct offenses on 4 February 2002. The unauthorized absence and escape from custody offenses constitute separate forms of conduct prohibited by Congress among members of the Armed Forces. On 4 February 2002, the appellant commenced a period of

unauthorized absence, which made him unavailable to perform his military duties for one month. When he commenced this period of unauthorized absence, the appellant escaped from the custody of a sergeant in the Marine Corps, who was authorized by the appellant's commanding officer to apprehend the appellant and take him to the brig. By escaping custody, the appellant defied the authority of his commanding officer and the sergeant, who had legally apprehended the appellant. With respect to the last two *Quiroz* factors, we find that the method of charging the appellant with these two offenses did not unfairly expose him to greater punishment, nor is there any evidence of prosecutorial overreaching.

Improvident Plea

In his fifth assignment of error, the appellant contends that his guilty plea to wrongful possession of drug paraphernalia was improvident. Under Additional Charge I, the appellant was charged with violating SECNAVINST 5300.28C, a lawful general order, by unlawfully possessing drug paraphernalia, to wit: a three bar measuring scale, metal spoons, and a hypodermic needle. The appellant pled guilty to Additional Charge I except for the words, "metal spoons".[3] Contrary to the appellant's pleas, the military judge found him guilty of the excepted language of Additional Charge I. Record at 254.

We have no difficulty concluding that the appellant's guilty plea to the portion of Additional Charge I pertaining to possession of a hypodermic needle was provident. However, we agree that the appellant's guilty plea to the portion of Additional Charge I pertaining to possession of a three bar measuring scale was improvident because the military judge did not elicit sufficient facts to establish that the three bar measuring scale qualified as drug paraphernalia.

The standard of review to determine whether a plea is provident is whether the record of trial reveals a substantial basis in law and fact for questioning the plea. *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005)(citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

An appellate court is to review a military judge's decision to accept a guilty plea "for an abuse of discretion." *United States v. Eberle,* 44 M.J. 374, 375 (C.A.A.F. 1996). In order to find the plea improvident, this court must conclude that there has been an error prejudicial to the substantial rights of the appellant. Art. 59(a), UCMJ. Such a conclusion "must overcome

[3] We note that in his Brief and Assignments of Error, the appellant contends that the military judge did not inquire whether the Government intended to go forward with the excepted language of Additional Charge I and its specification. Appellant's Brief of 23 Jun 2005 at 21. However, the record of trial indicates that the Government informed the military judge that it intended to go forward on the excepted language. Record at 83.

the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty." *United States v. Dawson*, 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999); *see also* R.C.M. 910(j).

Regarding the possession of the hypodermic needle, the Secretary of the Navy has specifically defined a hypodermic needle used, intended to be used, or designed to be used in injecting a controlled substance, as drug paraphernalia. *See* SECNAVINST 5300.28C, enclosure (3), ¶ 1(i)(1). During the providence inquiry, the appellant admitted that, on 2 March 2002, two of his drug-abusing friends were visiting his residence when members of the Stafford County, Virginia, Sherriff's Office entered the residence. The appellant admitted that (1) his two friends were drug abusers, (2) he had previously seen them possess hypodermic needles in order to inject drugs into their body, and (3) he should have known that they possessed hypodermic needles when they were visiting him. The appellant testified that his friends left the hypodermic needle when they fled his residence upon the arrival of the police. He further testified that the police found the hypodermic needle in his residence on 2 March 2002.[4]

Measuring scales, on the other hand, are not specifically delineated as a type of drug paraphernalia under SECNAVINST 5300.28C. A three bar measuring scale is not an inherently illegal object and the appellant did not admit that he used or intended to use the three bar measuring scale in connection with drug related activities. In fact, the appellant informed the military judge that his wife owned the scale and that it was normally used to measure the weight of gold chains and jewelry. Record at 244.

We find that the appellant's providence inquiry is devoid of any evidence that the appellant possessed the three bar measuring scale with the specific intent to use it in connection with drug-related activity. *See* SECNAVINST 5300.28C, enclosure (3), ¶ 1(i)(3). Therefore, the facts developed during the providence inquiry failed to establish that the three bar measuring scale was drug paraphernalia. Accordingly, we conclude that the military judge abused her discretion in accepting this portion of the appellant's guilty plea. We will take corrective action in our decretal paragraph.

Speedy Trial

In his sixth assignment of error, the appellant asserts that he was denied a speedy trial as provided by the Sixth Amendment

---

[4] The appellant's testimony that his two friends frequently abused drugs and had previously possessed drug paraphernalia in his presence, including hypodermic needles, convinces us that, at a minimum, he had joint constructive possession of the hypodermic needle found at his residence. *See United States v. Santiago-Davila*, 26 M.J. 380, 389 (C.M.A. 1988).

to the United States Constitution and Article 10, UCMJ. We disagree.

We apply a *de novo* standard of review concerning the question of whether an accused received a speedy trial. *United States v. Cooper*, 58 M.J. 54, 57-58 (C.A.A.F. 2003). Where a military judge has made findings of fact when ruling on a motion to dismiss for denial of a speedy trial, we review those findings for clear error.[5] Where no clear error is found, those findings can be accorded substantial deference and adopted by this court. *Id*. at 58. We have reviewed the military judge's extensive findings of fact and, finding no clear error, adopt them as our own.

The standard of diligence under which we review claims of a denial of speedy trial under Article 10 "is not constant motion, but reasonable diligence in bringing the charges to trial." *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993). Short periods of inactivity are not fatal to an otherwise active prosecution. *Id*.

Further, we are mindful that the four factors in determining whether a Sixth Amendment speedy trial violation[6] has occurred are an apt structure for examining the facts and circumstances surrounding an alleged Article 10 violation. *Cooper*, 58 M.J. at 61; *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999). These four factors are: (1) length of the delay; (2) reasons for the delay; (3) assertion of the right to a speedy trial; and (4) prejudice. *Id*. at 212 (citing *Barker v. Wingo*, 407 U.S. at 530).

In reviewing the question of whether the appellant was denied his right to a speedy trial, we have examined the entire period of time in this case, from the date of confinement to the date of sentencing. In applying a *de novo* standard of review, we do so conscious of the Article 10, UCMJ requirements as well as the four *Barker v. Wingo* factors. Applying all of the above-mentioned standards of review and factors to the case before us, we conclude that the appellant was not denied his right to a speedy trial under either Article 10, UCMJ or the Sixth Amendment.

Conclusion

Accordingly, the findings of guilty to the specification of Charge III and Specification 1 of Additional Charge II are set aside. The specification of Charge III and Charge III, and Specification 1 of Additional Charge II are dismissed.

---

[5] We note that in his Brief and Assignments of Error, the appellant contends that the military judge did not enter essential findings of fact concerning his speedy trial motion. Appellant's Brief of 23 Jun 2005 at 24. However, the record of trial indicates that the military judge entered essential findings of fact. Appellate Exhibit X.

[6] See *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

Additionally, we except the language, “three bar measuring scale” from the specification of Additional Charge I. The excepted language is set aside and dismissed. The finding for Additional Charge I, as excepted, and the remaining findings are affirmed. Because of our action on the findings, we must reassess the sentence in accordance with the principals set forth in *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006); *United States v. Cook*, 48 M.J. 434, 438, (C.A.A.F. 1998), and *United States v. Sales*, 22 M.J. 305, 307-09 (C.M.A. 1986).

We find that the sentence continues to be appropriate for the offenses and the offender and no greater than that which would have been adjudged if the prejudicial errors had not been committed.

Accordingly, the sentence is affirmed as approved by the convening authority.

Senior Judge WAGNER and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court