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.

Robert J. JORDAN
Lance Corporal (E-3), U. S. Marine Corps

NMCCA 200500320 Decided 21 December 2006

Sentence adjudged 16 June 2004. Military Judge: P.H. McConnell. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, 2d Force Service Support Group, U.S. Marine Forces, Atlantic, Camp Lejeune, NC.

CAPT ROLANDA R. SANCHEZ, USMC, Appellate Defense Counsel
LT JUSTIN E. DUNLAP, JAGC, USNR, Appellate Government Counsel

STONE, Judge:

The appellant was tried by general court-martial consisting of a military judge sitting alone. Pursuant to his pleas, the appellant was convicted of one specification of violating a lawful general order, two specifications of assault consummated by a battery upon a child under 16 years of age, and one specification of adultery, in violation of Articles 92, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 928 and 934. The military judge sentenced the appellant to confinement for 42 months, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, however he suspended all confinement in excess of 33 months pursuant to a pretrial agreement.

The appellant assigns as error that his right to a speedy trial has been violated, that he did not receive effective assistance of counsel at trial, and that the military judge erred regarding the examination of the appellant when he appeared as a witness during sentencing. After careful review of the record, the appellant's assignments of error, and the Government

response, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c).

Speedy Trial

The appellant asserts on appeal, as he did at trial, that he was denied a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution, Article 10, UCMJ, and RULE FOR COURTS-MARTIAL 707, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). The speedy trial claims under the Sixth Amendment and R.C.M. 707 were waived by the appellant's entry of unconditional guilty pleas. *See United States v. Mizgala*, 61 M.J. 122, 124 (C.A.A.F. 2005); R.C.M. 707(e).

We apply a *de novo* standard of review concerning the question of whether an accused received a speedy trial under Article 10, UCMJ. *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. 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. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965); *see 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. *Tibbs*, 35 C.M.R. at 325. Further, we are mindful that the four factors in determining whether a Sixth Amendment speedy trial violation 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)(citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). 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*, 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* factors. Applying all of the above-mentioned standards of review and factors to the case before us, we agree with the military judge and conclude that the appellant was not denied his right to a speedy trial under Article 10, UCMJ.

Assistance of Counsel

The appellant urges us to find that he did not receive effective assistance of counsel for several reasons. Trial defense counsel enjoys a strong presumption of competence. *United States v. Cronic*, 466 U.S. 648, 658 (1984); *United States v. Russell*, 48 M.J. 139, 140 (C.A.A.F. 1998). To overcome the presumption of competence, an appellant must satisfy the two-part test handed down in *Strickland v. Washington*, 466 U.S. 668 (1984), and demonstrate: (1) a serious deficiency in counsel's performance that deprived the appellant of his Sixth Amendment guarantee to representation; and (2) that the deficient performance prejudiced the defense to such an extent as to deprive the appellant of a fair court-martial whose result is reliable. *United States v. Adams,* 59 M.J. 367, 370 (C.A.A.F. 2004). Generally, an appellant who claims ineffective assistance during trial or sentencing is viewed as having to "surmount a very high hurdle." *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998)(quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)). Applying these principles to the facts of this case, we find the appellant's claims to be without merit. We nevertheless offer comment on two of the appellant's contentions.

The appellant claims that the trial defense counsel provided ineffective assistance when he allowed the appellant to enter into a stipulation of fact which included aggravating facts that the military judge considered in sentencing, but were not necessary to support the pleas of guilty entered by the appellant. The appellant stated that he read and understood the contents of the stipulation of fact and that the facts contained therein were true. Record at 179. The appellant further agreed that the stipulated facts could be used both to support his guilty pleas and in determining an appropriate sentence. *Id*. at 80. The appellant agreed, as part of his pretrial agreement, to allow the Government to admit the stipulation of fact, along with eight other exhibits, as evidence on sentencing. The military judge discussed this part of the pretrial agreement with the appellant. *Id*. at 223. The stipulation of fact was part of a pretrial agreement voluntarily entered into by the appellant and discussed with the military judge. The appellant received the full benefit of his bargain when the convening authority reduced the adjudged sentence by suspending nine months of the confinement. The appellant has failed to show how his counsel's performance in negotiating this favorable pretrial agreement was in any way deficient.

The appellant also contends that his trial defense counsel wrongfully advised him to give sworn testimony during the sentencing portion of the trial. This allegation is wholly without merit as there is no evidence in the record that this was the case. While it is true that the appellant gave sworn testimony during the sentencing portion of the trial, there is no evidence in the record, other than the argument of appellate

counsel in the brief before this court, that this tactic was the result of the legal advice of the trial defense counsel.

Cross-Examination of the Appellant

The remaining assignment of error, that the military judge abused his discretion by allowing cross-examination of the appellant to exceed the scope of direct examination, submitted pursuant to *United States* v. *Grostefon*, 12 M.J. 431 (C.M.A. 1982), is without merit.

Conclusion

Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Senior Judge WAGNER and Judge VINCENT concur.

For the Court

R.H. TROIDL
Clerk of Court