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

BEFORE

Charles Wm. DORMAN **R.C. HARRIS** **J.D. HARTY**

UNITED STATES

v.

Reuben TRUJILLO
Corporal (E-4), U.S. Marine Corps

NMCCA 200001732 Decided 16 May 2005

Sentence adjudged 1 July 1999. Military Judge: F. A. Delzompo. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 3d Marine Aircraft Wing, MarForPac, MCAS Miramar, San Diego, CA.

Maj ANTHONY C. WILLIAMS, USMC, Appellate Defense Counsel
LT LORI MCCURDY, JAGC, USNR, Appellate Government Counsel

HARTY, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of larceny of military property, in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. The members sentenced the appellant to 6 months of confinement, total forfeiture of pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered the sentence executed.

This court has carefully examined the record of trial, the appellant's 6 assignments of error, and the Government's response. We find 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), UCMJ.

Background

Prior to trial, the appellant challenged the court-martial member selection process, claiming unlawful command influence resulting from the systematic exclusion of personnel in pay grades E-6 and below. Gunnery Sergeant (GySgt) L, military justice chief for the 3d Marine Aircraft Wing (MAW) and Marine Corps Bases Western Area, testified that he received a standing panel[1] of service members from the Commanding General (CG) 3d MAW. From that list he checked to see who was available on a given date to serve as a court-martial member. For Marine Corps Bases Western Area, he solicited names from the G-1 shop, checked their availability, obtained each available person's Article 25, UCMJ, data sheet[2] and sent the names and data sheets to the CG.

GySgt L had received guidance to spread courts-martial service around by not submitting the same names over and over, and that service members who had already served on a court-martial and had current operational commitments would be excused by the CG. On 21 June 1999, 6 officers were removed from the convening order and replaced by 3 officers and 4 enlisted. GySgt L removed the 6 because each had served on prior courts-martial and had an operational commitment, had transferred out of the area, or was currently deployed. For the replacements, GySgt L randomly called names on the standing panel of potential members to see who was available. Once he found enough available members he sent their names and data sheets to the CG via the Law Center.

GySgt L did not know how the standing panels were created. He received the panel list from the 3d MAW staff judge advocate (SJA) who received it from the G-1. Neither the current standing panel, Appellate Exhibit (AE) LXXIII, nor the prior standing panel, AE LXXV, had any service members in pay grades below E-7. GySgt L did not know why there were no potential members below E-7.

Major (Maj) A, Deputy SJA (DSJA), 3d MAW, testified that the G-1 supplied the names of potential court-martial members to the Military Justice Office at the Law Center. He believed the 3d MAW stopped using standing panels in December 1998; however, he used the database from the G-1 when choosing names. He did not know why there were no service members below E-7 on that database. The G-1 sent out an e-mail in December 1998 stating that the CG would not excuse commanding officers, executive officers or sergeants major from service on courts-martial simply because they were busy, and that they should be included in any list of potential members.

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[1] The "standing panel" as referred to in this case is an alphabetical listing of names from which to choose potential members rather than a standing convening order used for multiple courts-martial.

[2] An Article 25 data sheet is the same as the Court-Martial Member Questionnaire. Appellate Exhibit LXXX.

According to the DSJA, the selection process begins with the standing convening order. Those members who were unavailable were subtracted and names were randomly selected from the G-1 database for replacements. The new names along with their Article 25, UCMJ, data sheets were sent to the CG. The CG never told the DSJA he did not want E-6 and below sitting as court-martial members.

The Government submitted a copy of the G-1's e-mail dated 16 April 1999, AE LXXVI, and an affidavit from the CG, 3d MAW, dated 8 April 1999, AE LXXVIII, used in an earlier but unrelated general court-martial for the same Article 25, UCMJ, issue. In the CG's affidavit, he stated that he was aware that he could choose any Marine or Sailor in his command, including those below pay grade E-7, to serve as court-martial members as long as they individually meet the high standard for such service. Attached to the affidavit is a list of 157 names from which the members were chosen in the earlier general court-martial.[3] There are no potential court-martial members on the list below pay grade E-7. *Id*.

The military judge found there was improper selection of certain members by GySgt L and dismissed those members. He further found there was no systematic exclusion based on pay grade, no improper motive, and no unlawful command influence.

Member Selection Process

For his first assignment of error, the appellant alleges the military judge erred by finding there was no unlawful command influence resulting from the systematic exclusion of all personnel below pay grade E-7. The Government asserts the military judge did not err because there was no systematic exclusion and that there was compliance with Article 25, UCMJ.

Article 25(d)(2), UCMJ, provides in part:

> When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.

This statute simply mandates the selection of members who are "best qualified." *See United States v. White*, 48 M.J. 251, 254 (C.A.A.F. 1998). The convening authority (CA) must personally select the court-martial members. *See United States v. Allen*, 18 C.M.R. 250, 263 (C.M.A. 1955). This, however, does not mean subordinates cannot be involved in this process. Our superior court has held:

[3] This list appears to be the same as AE LXXV submitted as the prior standing panel of potential court-martial members.

> [We] have recognized that the convening authority, while charged with the personal responsibility for the selection of court members, must have assistance in the preparation of a panel from which to choose those members. In order to carry out his function under Article 25, he must necessarily rely on his staff or subordinate commanders for the compilation of some eligible names. . . .

United States v. Kemp, 46 C.M.R. 152, 155 (C.M.A. 1973).

Subordinates routinely assist the CA by nominating potential court members. S*ee United States v. Benedict*, 55 M.J. 451, 455 (C.A.A.F. 2001). Subordinates, for example, may compile a pool of potential nominees by random selection from a master personnel file for submission to the CA (*see* K*emp*, 46 C.M.R. at 155), and they may submit nominees who meet Article 25, UCMJ, qualifications when those nominated satisfy the CA's personal desire for more personnel with command experience on a court-martial panel (*see White*, 48 M.J. at 253). Subordinates may not, however, nominate court-members solely on the basis of their rank and without consideration of the Article 25(d)(2), UCMJ, criteria, (*see United States v. Daigle*, 1 M.J. 139, 141 (C.M.A. 1975)), or exclude potentially qualified members below pay grade E-7 (*see United States v. Kirkland*, 53 M.J. 22, 25 (C.A.A.F. 2000))(*cf*. *United States v. Yager*, 7 M.J. 171, 173 (C.M.A. 1979)(permitting exclusion of soldiers in pay grades E-1 and E-2 as presumptively unqualified under Article 25(d), UCMJ). In *United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991), our superior court held that deliberate stacking of a pool of potential members was improper, *Id*. at 442, as was submitting nominees to the SJA who were supporters of a hard-discipline command policy. *Id*. at 440; *see also United States v. McClain*, 22 M.J. 124, 130-31 (C.M.A. 1986)(rejecting the systematic exclusion of junior officers and enlisted members in pay grade E-6 and below in order to avoid light sentences).

In *United States v. Dowty*, 60 M.J. 163 (C.A.A.F. 2004), our superior court identified three factors to apply in these cases. These three factors are neither "exhaustive, nor a checklist, but merely a starting point for evaluating a challenge alleging an impermissible members selection process. " *Id*. at 171. The court stated:

> First, we will not tolerate an improper motive to pack the member pool. Second, systemic exclusion of otherwise qualified potential members based on an impermissible variable such as rank is improper. Third, this Court will be deferential to good faith attempts to be inclusive and to require representativeness so that court-martial service is open to all segments of the military community.

Id.(internal citations omitted).

We review alleged violations of Article 25, UCMJ, violations *de novo*. *Kirkland*, 53 M.J. at 24. We are, however, bound by the military judge's findings of fact unless they are "clearly erroneous." *Benedict*, 55 M.J. at 454. The defense shoulders the burden of establishing the improper exclusion of qualified personnel from the selection process. *Kirkland*, 53 M.J. at 24 (citing *United States v. Roland*, 50 M.J. 66, 69 (C.A.A.F. 1999)). Once the defense establishes such exclusion, the Government must show by competent evidence that no impropriety occurred when selecting appellant's court-martial members. *Id*. Applying the *Dowty* factors here, we conclude that the appellant "has not met his burden of establishing the improper exclusion, with an improper motive, of qualified personnel from the selection process." *Dowty*, 60 M.J. at 171.

First, we find no evidence of improper motive. GySgt L testified he simply called names located on the standing panel provided to him by the 3d MAW SJA. When he had enough available service members to serve, he sent those names and their Article 25, UCMJ, data sheets to the CA for consideration. The 3d MAW DSJA testified they begin with the standing convening order then subtract names based on availability. Names are then chosen randomly from a standing list of names and submitted to the CA along with the Article 25, UCMJ, data sheets. That standing list of names is provided by the G-1. We do not see any improper motive in this process.

Second, the CA stated in his affidavit that he was aware that he could detail any member of his command, regardless of pay grade, to serve on a court-martial as long as they met the high standard for such service. In reality, however, a service member's name was not submitted for court-martial membership unless their name was on the standing panel. Once the standing panel was set, there was no system allowing the submission of names in pay grades below E-7. There cannot be any doubt that service members in the pay grade E-6 and below were denied membership on courts-martial convened by the CG, 3d MAW. Two consecutive standing panels without a single potential member below pay grade E-7 resulted in the systematic exclusion of those service members from participation. We find it was error to rely on standing panels that did not include service members below pay grade E-7. The military judge found there was no systematic exclusion of personnel below pay grade E-7. If he meant there was no intentional exclusion by pay grade, we agree. While we find the procedure used was flawed and was error, we do not find any evidence that the standing panels were created with the specific intent to exclude personnel based on their pay grade.

Third, we find that those involved in the submission of names to the CA acted in good faith when they relied on the standing panels. There is no evidence that anyone specifically

chose names from a standing panel to achieve a conviction or harsh sentence. There is no evidence that anyone involved in the creation of the standing panel had improper motives. While we understand the appellant believes improper motives can be inferred from the evidence, we do not find the factual basis to support such inference. We conclude that this issue is without merit.

Sentence Severity

For his second assignment of error, the appellant contends a sentence that includes confinement for 6 months, total forfeiture of pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge is inappropriately severe considering the offense and the appellant's character and service. Appellant's Brief of 17 Sep 2002 at 19.

Our mandate under Article 66(c), UCMJ, requires that we affirm only such part or amount of the sentence as we determine, on the basis of the entire record, "should be approved." We do not enter the realm of clemency, an area reserved for the convening authority. However, we are compelled to act when we find inappropriate severity within an adjudged and approved sentence. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *see* R.C.M. 1107(b); *see generally United States v. Spurlin*, 33 M.J. 443, 444 (C.M.A. 1991).

At the time of trial the appellant was in his first enlistment, yet was entitled to wear numerous decorations including the Navy-Marine Corps Achievement Medal, and had received Certificates of Commendation and 2 Meritorious Masts. The bottom line is the appellant did his job and did it well. The appellant tried to accept responsibility for his actions by pleading guilty to the only charge he was found guilty of, larceny of military property. Post-trial, the appellant submitted numerous letters of support from family, friends and servicemembers to the CA pursuant to R.C.M. 1105. The gravity of the appellant's crime, however, certainly warranted punishment. The appellant served in a position of trust, both as it relates to custody of the military property taken and as a noncommissioned officer. He violated that trust.

We are mindful of the approved sentences of similar cases in the field as we discharge our statutory mandate. Taking into account all the facts and circumstances and mindful of our responsibility to maintain general sentence uniformity among cases under our cognizance, *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999), we conclude the adjudged and approved sentence is appropriate.

Speedy Trial

In his sixth assignment of error, summarily raised pursuant to *United States v. Grostfon*, 12 M.J. 431 (C.M.A. 1982), the

appellant alleges he was denied his right to a speedy trial guaranteed by the Sixth Amendment[4] and RULE FOR COURTS-MARTIAL 707, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). We disagree.

We review a military judge's denial of a speedy trial motion *de novo, United States v. Cooper*, 58 M.J. 54, 57 (C.A.A.F. 2003), and afford the factual findings of the military judge substantial deference, *see United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999).

There is no doubt that the right to speedy trial is an important right. That right is a shield for an accused's protection, not a sword to be used against the Government. An accused cannot be responsible for or agree to delay and then turn around and demand dismissal for that same delay. Like most rights, speedy trial can be waived. *See United States v. King*, 30 M.J. 59, 66 (C.M.A. 1990); c*f. United States v. Cherok,* 22 M.J. 438, 440 (C.M.A. 1986); *United States v. Burris,* 21 M.J. 140, 144 (C.M.A. 1985).

The right to speedy trial is protected by four different legal authorities: (1) the Sixth Amendment; (2) the Fifth Amendment, due process protections (*see United States v. Lovasco*, 431 U.S. 783 (1977)); (3) Article 10, UCMJ; and (4) R.C.M. 707. *See United States v. Birge,* 52 M.J. 209, 210-11 (C.A.A.F. 1999). Here, the appellant contends only that his right to a speedy trial under the Sixth Amendment and R.C.M. 707 was violated.

The following chronology is pertinent:[5]

02 Sep 1998	Charges preferred.
24 Nov 1998	Charges referred.
08 Dec 1998	Appellant arraigned.
09 Feb 1999	Appellant moves for new Article 32, UCMJ, hearing.
19 Feb 1999	Military judge grants appellant's motion and orders new Article 32, UCMJ, hearing.
24 Feb 1999	Government requests excludable delay from 19 Mar 1999 until re-referral of charges pursuant to R.C.M. 707. AE LXIV at 10.
26 Feb 1999	The military judge who ordered the new Article 32, UCMJ, hearing grants the Government's request for excludable

[4] U.S. CONST. amend. VI.

[5] These dates are taken from the agreed chronology but do not include the entire chronology. See AE LXIV at 1-2.

		delay from 19 Feb 1999 until re-referral of charges. AE LXIV at 9.
08 Mar 1999		CA appoints investigating officer to conduct new Article 32, UCMJ, hearing.
19 Mar 1999		New Article 32, UCMJ, hearing held.
03 May 1999		Charges re-referred.
18 May 1999		Appellant arraigned on same charges.

Regarding the alleged constitutional error, in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), the Supreme Court suggested a balancing test and examination of four important factors in determining whether an individual's Sixth Amendment right to a speedy trial had been violated. The four factors are length of delay, reason for delay, assertion of the right, and prejudice. *Id*. The appellant has not claimed, and we find no indication, that he objected to the delay or demanded a speedy trial. There is also no claim by the appellant or evidence of record that he was in any way impaired by delay in being brought to trial. After applying the legal principles in *Barker v. Wingo*, we find that there has been no Sixth Amendment speedy trial violation in this case.

R.C.M. 707(a), in effect at the time of the appellant's trial, stated the general rule as follows: The accused shall be brought to trial within 120 days after preferral of charges or the imposition of restraint under R.C.M. 304, whichever is earlier. There was no pretrial restraint in this case, therefore, 2 September 1998, the date of preferral, started the R.C.M. 707 120-day clock. A servicemember is brought to trial on the date of his arraignment. R.C.M. 707(b)(1). Therefore, the appellant was brought to trial on 8 December 1998. On that date, the R.C.M. 707 clock stopped. The arraignment occurred on the 97th day after preferral of charges. The military judge found 14 days of excludable delay during this period, which the trial defense counsel conceded. Therefore, the appellant was brought to trial on the original charges well within the 120 days allowed.

No one seemed concerned about how long this case would take post-arraignment. The original detailed defense counsel withdrew due to his pending release from active duty, new counsel, including individual military counsel, were appointed. The parties agreed to a trial schedule on 30 December 1998 that put motions off until 9 February 1999. At that point the appellant moved for a new Article 32, UCMJ, hearing and the motion was granted on 19 February 1999.

The appellant's motion for appropriate relief seeking dismissal for denial of speedy trial rights was litigated on 17 June 1999. The accountability for time associated with the new Article 32, UCMJ, hearing was the crux of the motion. The Government argued that the period of 19 February 1999 through 3

May 1999 was excludable time because the prior military judge granted the request to exclude that time. The trial defense counsel argued that when the military judge granted the defense motion for a new Article 32, UCMJ, hearing, jurisdiction over excludable delay requests transferred to the CA, and therefore the military judge's subsequent grant of excludable delay had no legal effect. The Government conceded that his request for excludable delay should have been heard contemporaneously with the defense motion, and that the CA did not withdraw the charges because they were effectively withdrawn once the military judge ordered the new Article 32, UCMJ, hearing. Record at 228. That, however, does not correspond with the trial counsel's written request for excludable delay that states in pertinent part that: "The United States will move with all speed to have the existing charges *withdrawn and dismissed*, prefer new charges, conduct a new Article 32, and if necessary re-refer the new charges." AE LXIV at 10 (Emphasis added).

We hold that the military judge retained jurisdiction over this case until the charges were withdrawn or dismissed. The trial counsel could not make up his mind when the charges were withdrawn but he was certain they were not dismissed. We do not find anything in the record establishing a hard date of withdrawal. It is clear, however, that the CA appointed an investigating officer to the new Article 32, UCMJ, hearing on 8 March 1999, and provided him with a preferred charge sheet. Appointing letter of 8 Mar 1999. That charge sheet contained the original preferral and the original charges the appellant had already been arraigned on. The referral block was blank. We find the CA withdrew the original charges effective 8 March 1999. The military judge's grant of excludable delay occurred prior to that date. Although granted without trial defense counsel having an opportunity to contest the Government's request, the grant of excludable delay was legally effective.

We hold that the appellant's R.C.M. 707 120-day speedy trial clock stopped running at his first arraignment, 8 December 1998. The charges were withdrawn but never dismissed. Nothing happened post-arraignment to start the R.C.M. 707 clock up from where it left off. We are also mindful that the appellant was so unconcerned with speedy trial that he tried to enter an unconditional guilty plea to the sole charge he was ultimately found guilty of. But for the appellant's providence inquiry failure, he would have waived this issue. *See* R.C.M. 707(e). This summary assignment of error has no merit.

Conclusion

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), UCMJ. Accordingly, the findings and the sentence, as

approved by the convening authority, are affirmed.[6] The appellant's Motion to Request Oral Argument of 3 October 2002 is hereby denied.

Chief Judge DORMAN and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court

[6] We have reviewed the appellant's third summary assignment of error concerning disqualification of the SJA and DSJA from participating in the post-trial review stage of this matter. We find nothing that disqualifies either from performing their post-trial duties in this case. We have reviewed the appellant's fourth summary assignment of error alleging a defective staff judge advocate recommendation (SJAR) and find that issue was waived and that there is no plain error. We have reviewed the appellant's fifth summary assignment of error alleging a defective SJAR addendum and find that issue was waived and that there is no plain error.