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

**BEFORE**

**C.L. CARVER** **D.A. WAGNER** **Wm. F. L. RODGERS**

**UNITED STATES**

**v.**

**Kermit CAVES II**
**Boatswain's Mate Seaman (E-3), U.S. Navy**

NMCCA 200100171 Decided 19 October 2005

Sentence adjudged 9 March 2000. Military Judge: J.V. Garaffa. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Submarine Group TEN, Kings Bay, GA.

Maj C. ZELNIS, USMC, Appellate Defense Counsel
LT CRAIG POULSON, JAGC, USNR, Appellate Government Counsel
LT I.K. THORNHILL, JAGC, USNR, Appellate Government Counsel



RODGERS, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of wrongfully using marijuana, and contrary to his pleas of rape, attempted sodomy, and indecent assault, in violation of Articles 112a, 120, 80 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 912a, 920, 880 and 934. The military judge sentenced the appellant to a dishonorable discharge, confinement for 7 years, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority approved the adjudged sentence and, except for the dishonorable discharge, ordered it executed.

In his assignments of error, the appellant claims that: (1) he was denied his right to timely post-trial processing and appellate review; (2) he was denied his right to a speedy trial; (3) the military judge admitted improper evidence in aggravation during sentencing; and (4) the indecent assault and attempted sodomy charges represented an unreasonable multiplication of charges in light of the rape charge.

Having carefully reviewed the record of trial, the appellant's assignments of error, and the Government's response, we conclude that that 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.

**Post-Trial Delay**

In his first assignment of error, the appellant asserts that he was denied his right to a speedy post-trial review of his conviction. Appellant's Brief of 30 Jun 2004 at 2-6. A chronology of the review of the appellant's case follows. The military judge sentenced the appellant on 9 March 2000 and authenticated the record of trial on 9 June 2000. The trial defense counsel received the staff judge advocate's recommendation (SJAR) on 6 September 2000 and submitted a clemency request on behalf of the appellant on 16 October 2000. The convening authority took action on 9 November 2000. The three-volume, 595-page record of trial was docketed with this court on 23 January 2001. On 30 June 2004, after filing 36 motions for enlargement of time with this court, the appellant filed his brief containing four allegations of error. Of note, the appellant's twenty-eighth and thirtieth through thirty-third[1] motions for enlargement of time indicate the appellant, initially while incarcerated then continuing after his release, specifically consented to the requests for enlargement of time. Successive appellate defense counsel attributed the requested enlargements of time to their large caseloads. On 27 January 2005, the Government filed its answer.

We consider four factors in determining whether post-trial delay violates the appellant's due process rights: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to a timely appeal or the lack thereof, and (4) prejudice to the appellant. *United States v. Jones,* 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States,* 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Id*. Moreover, in cases of extreme delay, that delay itself may "'give rise to a strong presumption of evidentiary prejudice . . . .'" *Id*. (quoting *Toohey*, 60 M.J. at 102).

We find facially unreasonable the nearly five-year delay between the date of sentencing and the date the case was submitted to the court for decision, triggering a due process review. Proceeding to the second factor, given the length and

[1] Though the appellant's final motion for enlargement of time is styled as the "Thirty-Fifth," two filed motions for enlargement were designated as the "Thirtieth," thus, there were a total of 36 motions for enlargement.

complexity of the record, the eight-month length of time between the date of sentencing and the date the convening authority took action was reasonable. Three and one-half years of the delay thereafter, specifically, from 23 January 2001 until 30 June 2004, was attributable to the 36 enlargements of time that the appellant requested, and that length of time was not reasonable, nor were the defense explanations for this delay acceptable. *See Diaz v. Judge Advocate General of the* Navy, 59 M.J. 34, 38-40 (C.A.A.F. 2003).

Turning to the third factor, we find no prior assertion by the appellant of his right to timely post-trial processing of his appeal. To the contrary, his 36 motions for enlargement of time indicate the appellant desired ample time for his appellate defense counsel to thoroughly review his case and prepare a brief. Significantly, six of those enlargements indicated the appellant specifically consented to the requests, with the first five such consents being granted while he was still in confinement. Appellant's Twenty-Ninth, Thirtieth (2), and Thirty-First through Thirty-Third Motions for Enlargement. The appellant's repeated, specific consents to these delays, in our opinion, to a large extent negates an argument that his latest appellate defense counsel now advances, namely, that the appellant's failure to protest the delay should not be held against him because the "very source of much of the delay has been the inactivity of successive appellate defense counsel, the very individuals who had been detailed to champion Appellant's rights".[2] Appellant's Brief at 4.

Regarding the fourth factor, the appellant claims prejudice in that he served his entire sentence as adjudged at trial, less good time credit earned, before receiving any appellate review, thus eliminating any chance that his confinement could be shortened as a result of the review. Moreover, in the event of a rehearing, the appellant avers, the excessive time that has passed likely has resulted in the fading of witness memories. Finally, he contends that his incarceration has led to his financial inability to retain civilian counsel or expert assistance should further proceedings be necessary. Appellant's Brief at 5.

It is undeniably true that in instances where this court finds errors requiring relief, its options are restricted and an appellant is certainly prejudiced if confinement has already been served. Because, however, for reasons detailed below, we find no merit in the appellant's other assignments of error in this case, we consequently also find no prejudice resulting to the appellant from the fact that our review was not conducted before his release, as his sentence would not have been shortened by this court. Similarly, as there are no reasons to hold a rehearing or other new proceeding, those claims of possible prejudice can

[2] While we do not condone the appellate defense delay in this case, we do admire the candor of this observation.

never possibly arise. Quite simply, this court does not find any evidence of actual prejudice or other harm to the appellant resulting from the delay under the circumstances. Thus, we find there has been no due process violation due to the post-trial delay.

Finally, we are aware of our authority to grant relief under Article 66, UCMJ, but we decline to do so in this case. *See United States v. Oestmann,* 61 M.J. 103, 104 (C.A.A.F. 2005); *Jones*, 61 M.J. at 80; *Toohey*, 60 M.J. at 103-04; *Tardif*, 57 M.J. at 219. We caution that our decision is not to be construed as "no harm, no foul" reasoning. We do find "foul," namely, the inordinate defense delay in preparation of this case, and though here there was no "harm" to the appellant, we are certainly aware of our power to grant relief in appropriate circumstances even in the absence of harm. Here, however, the appellant's concurrence with his counsel's continued requests to delay, and the institutional inconsistency of first requesting delays then requesting relief based on the granting of those requests, tip the scales against our use of that discretionary power.

**Speedy Trial**

The appellant concedes that he was brought to trial within 120 days after first confined in accordance with RULE FOR COURTS-MARTIAL 707, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). Appellant's Brief at 9. Nonetheless, he asserts a violation of his rights under Article 10, UCMJ. *Id.* Article 10, UCMJ, requires that "immediate steps shall be taken . . . to try" an individual after arrest or confinement. This general wording, originally construed by military courts to infer a certain time period,[3] was replaced with a "reasonable diligence" standard that remains in effect today. *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993); *see United States v. Hatfield*, 44 M.J. 22, 24 (C.A.A.F. 1996). This standard can actually be stricter than the speedy trial clock established under R.C.M. 707. *United States v. Birge*, 52 M.J. 209, 211 (C.A.A.F. 1999)(citing *Kossman*, 38 M.J. at 262).

The Government failed to act with reasonable diligence before trial, the appellant contends, by responding to defense discovery requests for medical and psychological records of the victim in a delayed and dilatory fashion. Appellant's Brief at 6-13. Trial defense counsel filed a motion to dismiss for lack of speedy trial due to the delay in production of these documents. Appellate Exhibit XIII. That motion was litigated, with the military judge ultimately denying the motion. Record at 79; Appellate Exhibit XXI.

Differing standards of review apply to the two portions of the military judge's ruling. The findings of fact made by the

[3] First set at three months (*United States v. Burton*, 44 C.M.R. 166 (C.M.A. 1971)), later 90 days (*United States v. Driver*, 49 C.M.R. 376 (C.M.A. 1974).

military judge are entitled to "`substantial deference and will be reversed only for clear error.'" *United States v. Doty*, 51 M.J. 464 (C.A.A.F. 1999)(quoting *United States v. Taylor*, 487 U.S. 326, 337 (1988). By contrast, the military judge's legal conclusion is reviewed *de novo. United States v. Cooper,* 58 M.J. 54, 59 (C.A.A.F. 2003); *see United States v. Thompson*, 46 M.J. 472, 475 (1997).

As a matter of fact, the military judge found in relevant part that: the only documents in question were the mental health records of the victim; the length of time lost directly or indirectly for Article 10, UCMJ, speedy trial purposes was 63 days; Government counsel was inexperienced and did not always take instantaneous steps to comply with defense discovery requests; and defense counsel requested and received a continuance to study documents once obtained. Appellate Exhibit XXI.

Although not required to accept these findings, after due consideration we do not disagree with them. Therefore, we adopt them. We note further that, contrary to the appellant's assertion (Appellant's Brief at 11), the military judge did not find negligence on the part of the Government counsel. Record at 79; Appellate Exhibit XXI. As a result, much of the appellant's arguments concerning other documents requested through discovery and the alleged undue delay in obtaining them become irrelevant. Similarly, many of the appellant's allegations of negligence or misconduct on the part of the Government are rendered moot and we do not consider them.

We will, however, examine *de novo* the military judge's conclusion that Article 10, UCMJ, was not violated.

First, we agree that the military judge applied the correct test in evaluating whether the government failed to act with reasonable diligence, to wit: (1) the length of the delay; (2) reason(s) therefor; (3) appellant's assertion of his speedy trial right, and (4) resulting prejudice. *Barker v. Wingo,* 407 U.S. 514 (1972).

Addressing the first factor, we initially observe that there is no "magic number" to find an Article 10, UCMJ, speedy trial violation. *United States v. McLaughlin*, 50 M.J. 217, 218 (C.A.A.F. 1999). Here we do not find the total possible delay, nor, more importantly, any of the individual delays within that total, to be unreasonable as the appellant argues.

Next, as to the reasons for the delay, we again note that the military judge did not find any negligence, willful misconduct or "systemic effort to limit discovery" on the part of the Government. Appellate Exhibit XXI. Nor do we. We note that much of the requested information was held by civilian sources and obviously was highly sensitive; these facts alone offer sufficient explanation for the complained of delays. We note

further that military judges have long been afforded discretion as to evaluating the Government's motives and conduct whenever claims of improper delay such as those here are raised. *Kossman*, 38 M.J. at 261-62.

Clearly the appellant has asserted his right to a speedy trial, both at trial and on appeal.

Finally, we find no prejudice resulted from these delays for one salient reason: the appellant motioned for, and was granted, a continuance to review the documents eventually provided. Appellate Exhibit XXI.

As we can identify only one of the four factors set forth in *Barker v. Wingo* as present, we decline to find that any unreasonable delay equating to an Article 10, UCMJ, speedy trial violation existed. Accordingly, we decline to find the military judge erred and hence do not grant relief on this ground.

**Improper Evidence in Aggravation**

The appellant cites just one specific example of the "improper evidence" he argues was considered during aggravation: impact testimony[4] wherein the victim decried the appellant's "lack of guts" to take the stand in his own defense. Appellant's Brief at 14-16; Record at 575-77. This negative remark about the appellant's exercise of his constitutionally protected right to refrain from testifying is of course improper and normally prejudicial. But, significantly, the military judge cured this potential plain error by noting explicitly on the record that he did not consider this comment for findings or sentencing purposes. Record at 593. None of the appellant's other claims of improperly admitted evidence in aggravation are specific or credible enough to warrant discussion. Certainly the appellant, despite his bald assertions, does not establish that the admission of any remarks was plain error, precluding relief given the absence of any objection to any remarks at trial.

**Unreasonable Multiplication of Charges**

In his fourth assignment of error, the appellant asserts that Charge II, rape, and Additional Charges I, attempted sodomy, and III, indecent assault, constitute an unreasonable multiplication of charges. Appellant's Brief at 17-23. The substance of the appellant's claim is that the separately charged offenses "describe a single course of conduct, with no separation of time, location or intent." *Id.* at 20.

To determine whether there is an unreasonable multiplication of charges, we consider five factors: (1) whether the accused

[4] The appellant argues that the impact testimony of both the victim and her mother was improper, but makes no specific claim of impropriety with regard to the latter's testimony. Appellant's Brief at 14-16.

objected at trial; (2) whether the charges are aimed at distinctly separate criminal acts; (3) whether the charges misrepresent or exaggerate the appellant's criminality; (4) whether the charges unreasonably increase the appellant's punitive exposure; and (5) whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges and specifications. *United States v. Quiroz*, 52 M.J. 510 (N.M.Ct.Crim.App. 1999), *aff'd in part and modified in part*, 53 M.J. 600 (N.M.Ct.Crim.App. 2000)(en banc), *rev'd in part*, 55 M.J. 334 (C.A.A.F. 2001), *modified on remand*, 57 M.J. 583 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition). In deciding an issue of unreasonable multiplication of charges, trial courts should consider R.C.M. 307(c)(4), Discussion, which provides the following guidance: "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person."

The appellant did raise an unreasonable multiplication of charges motion at trial, initially before arraignment (Record at 106), then again at the close of the Government's case (Record at 467), so clearly the appellant has satisfied the first prong of *Quiroz*.

The military judge, when denying that motion, stated that by applying a strict elements test he concluded that the charges were aimed at separate criminal acts and that from a chronological perspective, the events were distinct. He specifically rejected the defense's "single course of conduct" argument. *Id.* We agree with the military judge's analysis.

The record indicates that the appellant first digitally penetrated the victim. Record at 215. The victim "told him no and to stop". *Id.* The appellant did not stop but instead removed his hand from within the victim's pants and moved it up to her shirt, whereupon he began fondling her breasts. Record at 216. The victim cried and repeated her request that the appellant stop. *Id.* Instead the appellant pulled the victim's pants down and placed his mouth on her vagina. Record at 217. The victim then kicked the appellant. *Id.* In response the appellant tried to put his penis into the victim's mouth. Record at 218. The victim kicked again, the appellant got "more angry" and then raped the victim. *Id.* From this sequence we conclude that though the acts and the charges are closely linked and sequential, they are aimed at distinctly separate criminal conduct and that each represented an escalation of criminality. As such, the charges are separate for purposes of *Quiroz's* second prong. Moreover, in light of the victim's repeated verbal and physical protestations between each act, and the renewed opportunities these protests afforded the appellant to stop his conduct at each stage, we similarly conclude that the separate charges do not misrepresent or exaggerate the appellant's criminality, thus satisfying the third prong of *Quiroz* as well.

As to the fourth prong, given that the maximum punishment for rape is life, it was impossible for the appellant to be exposed to greater total punishment by inclusion of the charges of attempted sodomy and indecent assault. Moreover, the actual confinement awarded by the military judge, seven years, much less than the maximum, refutes the notion that the appellant's punishment exposure was appreciably widened by the inclusion of the attempted sodomy and indecent assault charges for, under the circumstances, that length of confinement is certainly appropriate for the rape alone.

Finally, considering the fifth prong or test under *Quiroz*, we find no evidence or indication of overreaching or prosecutorial misconduct; instead, we agree with the Government's contention that because the issue of consent appeared likely to rise at trial, the charges for each act were necessary to allow for contingencies of proof; that is, it appeared entirely possible, at least at the time charges were preferred and referred, that the trier of fact would conclude some acts were consensual and others were not. Indeed, the additional charges were brought only after an Article 32, UCMJ, investigation was concluded and the investigating officer so recommended. *See* Investigating Officer's Report of 12 Oct 1999; Staff Judge Advocate's Advice of 27 Oct 1999.

**Conclusion**

Accordingly, we affirm the findings and sentence as approved by the convening authority. Art. 66(c), UCMJ.

Senior Judge CARVER and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court