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

BEFORE

C.L. CARVER **R.W. REDCLIFF** **J.D. HARTY**

UNITED STATES

v.

John B. KOCH, Jr.
Aviation Ordnanceman Airman (E-3), U.S. Navy

NMCCA 200200408 Decided 13 May 2005

Sentence adjudged 9 August 2001. Military Judge: E.W. Loughran. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commandant, Naval District Washington, Washington DC.

CDR ROBERT A. SANDERS, JAGC, USN, Appellate Defense Counsel
LT DONALD PALMER, JAGC, USNR, Appellate Government Counsel
LT C.J. HAJEC, JAGC, USNR, Appellate Government Counsel
LT. J.A. LIEN, JAGC, USNR, Appellate Government Counsel

HARTY, Judge:

In accordance with his pleas, the appellant was convicted by a military judge, sitting alone as a special court-martial, of 11 specifications of larceny, and forgery in violation of Article 121 and 123, Uniform Code of Military Justice, 10 U.S.C. §§ 921 and 923. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 5 months, forfeiture of $680.00 pay per month for 5 months, and reduction to pay grade E-1. The convening authority approved the adjudged sentence and, pursuant to the terms of a pretrial agreement, suspended confinement in excess of time served for 12 months from the date of his action.

This court has carefully examined the record of trial and all post-trial matters and allied papers. 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

The appellant stole 17 blank checks from his roommate, forged his roommate's signature to at least 14 of those checks and made the checks payable to himself. The appellant deposited the checks into his own account then removed the funds at automatic teller machines, collecting $9,000.00 in cash in the process. The appellant's scheme was discovered on 7 June 2001. The investigation immediately turned to the appellant who gave a written confession the next day, 8 June 2001. Appellate Exhibit V, enclosure (1). The appellant was placed in pretrial confinement the same day.

Further investigation was required. The staff judge advocate (SJA) made contact with a special agent of the Defense Criminal Investigative Service (DCIS) who had recently worked a civilian felony case against the appellant. The DCIS agent agreed to work the new case by obtaining the original checks for prosecution. The SJA instructed the Naval District Washington (NDW) Master at Arms (MAA) office to provide all reports to DCIS.

The MAA office received copies of the forged checks from Naval Federal Credit Union (NFCU) but never received the original checks. The MAA office gave a copy of the checks to DCIS but not to the SJA office, because everything was to go to DCIS. DCIS thought the SJA needed the original checks to draft charges and did not give a copy of the checks to the SJA. On 23 June 2001, the NDW MAA office received information that a second party may be involved in this scheme and additional investigation was conducted.

Due to the DCIS agent being out of the area for 2 weeks, the SJA being out of the office for a few days and missing more time due to a short illness, there was little communication between the SJA and DCIS between 11 June and 9 July 2001. On 23 July the SJA decided to draft charges based on what little information she had. Her staff tracked down a copy of the MAA report and found it contained a copy of the forged checks. Charges were preferred on 27 July and referred to trial by special court-martial on 30 July 2001.

The appellant received his Initial Review Officer (IRO) hearing on 13 June 2001.[1] The trial defense attorney who was subsequently detailed to his case represented the appellant at the IRO hearing. On 15 July 2001 the appellant submitted a written request through brig channels to call "the JAG Office in Navy Yard to find out [what] is going on with my case." AE VIII Under "Remarks" a brig confinement officer wrote the appellant wanted to find out if an attorney had been appointed to him, and that he informed the appellant that an attorney would not be appointed until the appellant was "presented with a charge

[1] The IRO Record of Review is dated 12 June 2001 but the record itself states the review hearing was conducted on "010613." AE VII.

sheet." *Id*. Trial defense counsel was formally detailed on 3 August 2001. The appellant was arraigned on 6 August 2001 and entered into a pretrial agreement on the same day that his speedy trial motion was presented and denied on 9 August 2001. Minutes after his motion was denied, the appellant, pursuant to his written plea agreement, entered unconditional guilty pleas, was convicted and sentenced on the same date. Prior to trial, there were no demands for speedy trial and the appellant received appropriate credit for his pretrial confinement. The appellant was in pretrial confinement for a total of only 62 days at the time of trial.

Speedy Trial

The appellant raises three issues all stemming from the military judge's handling of the speedy trial motion. It is unnecessary to address issues 2 and 3,[2] because we find the appellant was not denied his Article 10, UCMJ, speedy trial right.

The Government asserts that the appellant's unconditional guilty pleas served to waive the issue or, if not waived, a *de novo* review shows the appellant was not denied his speedy trial rights. While we agree with the Government, further comment is required.

Unconditional pleas of guilt waive review of speedy trial issues. RULES FOR COURTS-MARTIAL, 707(e), 801(g), 905(e), 910(a)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.); *see also United States v. Birge,* 52 M.J. 209, 212 (C.A.A.F. 1999)(suggesting that an appellant may waive an Article 10, UCMJ, speedy trial issue through a valid guilty plea); *United States v. Kossman,* 38 M.J. 258, 262 (C.M.A. 1993)(holding that "[l]ike most rights, speedy trial can be waived.")(quoting *United States v. King,* 30 M.J. 59, 66 (C.M.A. 1990)); *United States v. Britton*, 26 M.J. 24, 26-27 (C.M.A. 1988); *United States v. Pruitt,* 41 M.J. 736, 738-39 (N.M.Ct.Crim.App. 1994). We hold that appellant's unconditional guilty pleas waived the speedy trial issue.

Even if the appellant had not waived the speedy trial issue by entering unconditional guilty pleas, we find no violation of the appellant's right to a speedy trial under Article 10, UCMJ. The Government correctly notes that, on appeal, we must

[2] II. The military judge erroneously found reasonable diligence was exercised by the Government and erroneously relieved the Government of its burden to prove such reasonable diligence by shifting that burden to the defense when he defined the NLSO as a prosecution/government entity. Appellant's Brief of 19 March 2004 at 8.

III. The military judge was not impartial and materially prejudiced appellant's substantial right to a fair and impartial trial. *Id*. at 12.

determine *de novo* whether the Government "has used reasonable diligence in discharging its duty under Article 10 to take immediate steps to try an accused. . . ." *United States v. Cooper*, 58 M.J. 54, 59 (C.A.A.F. 2003). In doing so, we must consider the factors enumerated in *Barker v. Wingo*, 407 U.S. 514 (1972). *Id*. at 56; *see Birge*, 52 M.J. at 212 (holding the appropriate analysis of Article 10, UCMJ, issues involves consideration of the *Barker v. Wingo* factors).

We apply those factors based upon the stipulated facts at trial, Appellate Exhibit II, the evidence presented at trial, and the military judge's essential findings of fact, plus the additional post-arraignment time to bring the appellant to trial and find: (1) the appellant made no demand for a speedy trial or to be released from pretrial confinement prior to arraignment; (2) the appellant filed a post-arraignment motion to dismiss due to a violation of Article 10, UCMJ; (3) the appellant entered a pretrial agreement the same day his speedy trial motion was litigated and his trial was held; (4) the appellant received appropriate credit for his pretrial confinement on his sentence; (5) there is no evidence of willful or malicious conduct on the part of the Government to create the delay; and (6) the appellant suffered no prejudice to the preparation of his case as a result of the delay.

Having carefully examined the evidence, we are fully satisfied that the Government acted with "reasonable diligence" throughout this prosecution. *See Kossman,* 38 M.J. at 262; *United States v. Tibbs,* 35 C.M.R. 322, 325 (C.M.A. 1965). Accordingly, even if we were to assume, *arguendo*, that the speedy trial issue was not waived by the appellant's unconditional guilty pleas, we would not find an Article 10, UCMJ, violation in this case. The assigned error is without merit.

Conclusion

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

Senior Judge CARVER and Judge REDCLIFF concur.

For the Court

R.H. TROIDL
Clerk of the Court