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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **R.C. HARRIS**

UNITED STATES

v.

Juse C. BARROS
Mess Management Specialist Third Class (E-4), U.S. Navy

NMCCA 200201603 Decided 22 April 2005

Sentence adjudged 20 December 2001. Military Judge: D.M. White. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Northwest, Silverdale, WA.

LT JASON S. GROVER, JAGC, USN, Appellate Defense Counsel
LT DONALD L. PALMER, JAGC, USNR, Appellate Government Counsel

DORMAN, Chief Judge:

The appellant was tried by a general court-martial. Consistent with his pleas, he was convicted of the use of methamphetamine, the use of marijuana, the distribution of methamphetamine, and the distribution of marijuana, all on divers occasions, and all in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. A panel of officer and enlisted members sentenced the appellant to 9 months confinement, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the adjudged sentence and, except for the bad-conduct discharge, ordered the sentence executed.

The appellant has raised three assignments of error. He asserts that he was denied a speedy trial under Article 10, UCMJ, that he was denied a speedy review of his case, and that the trial counsel committed plain error when presenting his sentencing argument. We have reviewed the record of trial, the appellant's brief and assignments of error, and the Government's response. Following that review, we conclude that the findings and sentence are correct in law and fact, and that no errors were

committed that materially prejudiced the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Speedy Trial Under Article 10, UCMJ

In this first assignment of error, the appellant alleges that the military judge erred when he denied the defense motion to dismiss for denial of the appellant's Article 10, UCMJ, right to a speedy trial. A military judge's denial of a motion to dismiss based upon a denial of speedy trial is reviewed de novo. *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003).

In applying a de novo standard of review, we do so conscious of the requirements of Article 10, UCMJ, that the Government is required to exercise reasonable diligence in bringing an accused to trial, but that constant motion is not required. *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993). We are also conscious of the four factors contained in *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999); specifically: the length of the delay; the reasons for the delay; the assertion of the right to a speedy trial; and the existence of prejudice. *See Cooper*, 58 M.J. at 61. In addition, *Birge* suggests that we should also consider whether the appellant demanded a speedy trial or release from confinement, whether the appellant raised the issue at trial, whether the appellant entered pleas of guilty, and if so, was it pursuant to a pretrial agreement, whether credit was awarded for pretrial confinement on the sentence, whether the Government was guilty of bad faith in creating the delay, and whether the appellant suffered any prejudice in the preparation of his case as a result of the delay. *Birge*, 52 M.J. at 212. Applying the above-mentioned standard of review and factors to the case before us, we conclude that the appellant was not denied his right to a speedy trial under Article 10, UCMJ. We also conclude that the appellant's guilty pleas waived review of this issue. *United States v. Bruci*, 52 M.J. 750, 754 (N.M.Ct.Crim.App. 2000).

Waiver.

The appellant argues that we should overturn our decision in *Bruci*, because the Court of Appeals for the Armed Forces "differentiate[s] between the different types of speedy trial guarantees." Appellant's Brief of 30 Jul 2004 at 6. The appellant cites the *Birge* decision in support of his argument. We decline the invitation to overrule *Bruci*, as did our superior court.

When this court decided *Bruci* we specifically considered the decision our superior court had rendered in *Birge*. In fact, *Birge* is cited in our *Bruci* decision. We believed *Bruci* was properly decided when we issued the opinion, and we continue to so believe. We once again adopt the waiver analysis found in *Bruci* at 52 M.J. at 754. While the appellant is absolutely correct that in its *Birge* decision our superior court reserved

the question of whether Article 10, UCMJ, is waived by an unconditional guilty plea, we believe *Birge* suggests the answer. First, *Birge* notes that Article 10, UCMJ, is like the Speedy Trial Act, 18 U.S.C. § 3162(a)(2), in that they both provide for a statutory right to a speedy trial. *Birge*, 52 M.J. at 211. The court also noted its prior decisions that supported waiver of Article 10, UCMJ, issues, citing *United States v. Sloan*, 48 C.M.R. 211 (C.M.A. 1974). *Id.* The court continued, comparing waiver of speedy trial issues by civilian courts.

> Civilian law does not support a requirement for an affirmative and fully developed waiver. For example, under the Speedy Trial Act, 18 USC § 3162(a)(2), "failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendre shall constitute a waiver of the right to dismissal under this section." See, e.g., *United States v. Kime*, 99 F.3d 870, 881 (8th Cir. 1996), *cert. denied*, 519 U.S. 1141 [](1997); *United States v. Andrews*, 790 F.2d 803, 809-10 (10th Cir. 1986), *cert. denied*, 481 U.S. 1018 [](1987).

Id. Finally, the court examined treatment of speedy trial issues by the Supreme Court, concluding the "the same considerations militate against requiring an affirmative waiver on the record with respect to an Article 10 violation." *Id*. at 212. We, therefore, once again hold that an unconditional guilty plea waives appellate review of an alleged violation of Article 10, UCMJ. Accordingly, the appellant's unconditional guilty pleas to the only specifications upon which he stands convicted waived review of his alleged denial of his statutory right to a speedy trial under Article 10, UCMJ.

Speedy Trial.

Although, we have concluded that waiver applies in the case before us, for the sake of judicial economy we have also reviewed the issue de novo and conclude that the appellant was not denied his Article 10 right to a speedy trial. Accordingly our decision is not based solely upon waiver, but also upon our conclusion that he was not denied a speedy trial.

During the litigation of this motion, the Government presented the testimony of Chief Legalman (SW) Offen, the Discipline Officer of the appellant's unit. He also works in the office of the staff judge advocate for the appellant's command. He testified concerning the complexity of the investigation that led to the charges and specifications being referred against the appellant. The investigation identified approximately 16 suspects who were involved with drugs. He further detailed the appellant's pretrial confinement hearing, as well as steps that were taken by the staff judge advocate with respect to witnesses who did not want to appear at the appellant's initial Article 32, UCMJ, hearing.

The Government also called Lieutenant O'Brien, the Article 32, UCMJ, Investigation Officer in this case. He conducted both the initial and the re-opened Article 32, UCMJ, investigation. He detailed the time-line for conducting the investigation and completion of his investigative report. In making his ruling the military judge found that the investigating officer had abused his discretion in issuing his amended report in November 2001, and the military judge awarded the appellant 3 for 1 credit for this delay.

Additionally, the military judge considered the chronologies contained in Appellate Exhibits VIII and IX, and since he had personal knowledge of the case history he made minor modifications to those chronologies. Both Appellate Exhibits VIII and IX were submitted by the appellant. Following presentation of the evidence and arguments of counsel, the military judge issued his written decision in which he denied the appellant's motion to dismiss for denial of speedy trial. Appellate Exhibit XI. Finding no clear error in the findings of fact we accord them substantial deference and adopt them as our own. *Cooper*, 58 M.J. at 58.

The appellant was placed in pretrial confinement on 24 April 2001 and his pretrial confinement hearing was conducted on 30 April 2001. Charges were preferred on 15 May 2001, and the appellant was informed of the charges against him on 25 May 2001. Once an accused is placed in pretrial confinement, immediate measures must be taken to notify him of the charges against him and either bring him to trial or dismiss the charges. Art. 10, UCMJ. Based on this evidence, we conclude that this notice portion of Article 10, UCMJ, was satisfied.

The pretrial investigation mandated by Article 32, UCMJ, and RULE FOR COURTS-MARTIAL 405, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) was opened on 25 May 2001, and continued until 5 June 2001, pending resolution of the appellant's request for individual military counsel. On 1 June 2001, the convening authority excluded delay between 25 May and 5 June 2001. The Article 32, UCMJ, investigation was conducted 5-8 June 2001, and the Investigative Officer's report was issued on 25 June 2001. On 18 July 2001 the charges were referred to trial by general court-martial, and on 22 July 2001 the Government requested a trial date of 20 August 2001. That request was granted on 31 July 2001. On 10 August 2001 the appellant requested that the case be continued indefinitely. At a docket meeting on 13 August 2001, the military judge informed the parties that the case would be taken to arraignment on 20 August 2001. The charges were served upon the appellant on 14 August 2001, and the appellant's civilian counsel entered his appearance on 17 August 2001. On 20 August 2001 the appellant was arraigned. This arraignment, however, did not stop the speedy trial clock for Article 10, UCMJ purposes. *Cooper*, 58 M.J. at 59. At arraignment the appellant's court-martial was set for 2-12 October 2001, to accommodate the defense counsel's schedules. The Government, however, did not

want to wait that long. On 2 October 2001 the appellant's motion to reopen the Article 32, UCMJ, investigation was granted. The appellant then requested a one-day delay in opening the investigation. That investigation was conducted on 11 and 12 October 2001, but the investigating officer did not produce his amended report until 16 November 2001. We fully concur with the military judge that the record does not support a "rational basis or acceptable justification" for the investigating officer taking this long to produce his amended report. Nevertheless, the appellant did not request a speedy trial, nor is there any evidence that he was prejudiced by this delay.

It is not clear if the military judge specifically applied the *Barker v. Wingo*[1] factors to the post-arraignment delay, although he clearly applied them to the delay prior to the date of arraignment. While we conclude that the military judge did not err in denying the appellant's Article 10, UCMJ, claim, we are required to review this issue *de novo*. In so doing we have applied *Barker v. Wingo* factors and the *Birge* considerations to the entire period of delay and conclude that the appellant was not denied a speedy trial under Article 10, UCMJ.

Based upon the evidence presented, the military judge's findings of fact, plus a review of the post-arraignment delay we find: (1) the appellant made no demand for a speedy trial or to be released from pretrial confinement prior to or after arraignment; (2) the appellant filed a post-arraignment motion to dismiss due to a violation of Article 10, UCMJ; (3) the appellant did not enter into a pretrial agreement, but he did plead guilty; (4) the appellant received 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. In fact, trial defense counsel agreed to the dates for litigating the motion to dismiss and specifically asked to continue the case from the date the case was originally scheduled to be tried. Furthermore, this case was under the control of the same military judge from the date of referral until the date of sentencing. In ruling on the motion, the military judge specifically noted he had excluded 27 days after referral and before arraignment "because setting the case earlier in August was impracticable due to a full court schedule and defense assertions that they were not ready to docket the case." AE XI at 2. Accordingly, for all the above reasons, we conclude that the appellant was afforded his right to a speedy trial under Article 10, UCMJ.

[1] 407 U.S. 514, 526-29 (1972).

Post-Trial Delay

In his second assignment of error the appellant seeks relief, citing *Toohey v. United States*, 60 M.J. 100 (C.A.A.F. 2004) and *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002), for the delay in the post-trial processing of his case. Appellant's Brief of 30 Jul 2004 at 7-8. Specifically, the appellant claims that he was denied his right to a timely appeal in that it took over 900 days between the date of his trial and the date that his brief was filed with this court. *Id*. at 8. He alleges no specific prejudice based upon this delay. As relief, he requests that we "reassess the sentence and set aside the bad-conduct discharge." *Id*. at 9.

We are cognizant of this court's power under Article 66(c), UCMJ, to grant sentencing relief for post-trial delay even in the absence of actual prejudice. *See Tardif*, 57 M.J. at 224. However, having carefully reviewed the record in light of our authority and responsibility under both Articles 59(a) and 66(c), UCMJ, we find no prejudice or harm to the appellant, nor do we see any other basis to afford him relief for any post-trial processing delays that occurred in his case. We, therefore, decline to grant relief on this ground.

Argument of Trial Counsel

In his final assignment of error, the appellant alleges that he was prejudiced by the argument of the trial counsel during the sentencing phase of his trial. He specifically objects to comments made by the trial counsel concerning the appellant's decision to live with a known drug dealer. The appellant acknowledges that the standard of review for this issue is plain error, because he did not object to the argument at trial. Appellant's Brief at 9 (citing *United States v. Rodriguez*, 60 M.J. 87 (C.A.A.F. 2004)).

During his argument, the trial counsel made the following comments:

> What kind of message was the accused sending when he lived in, not one, but two houses over the course of months with a known civilian drug dealer, Jason. What message was he sending in going to these parties with other Sailors, but also with lots of civilians and civilians who hung around these residences what he lived at, using and selling controlled substances? In their eyes that is the Navy. . . . What message was the accused sending to his shipmates on the USS MICHIGAN (BLUE) when he went home and on repeated occasions used drugs, methamphetamine and marijuana, with civilians and lived with Jason, this known drug dealer? What kind of message does that send to the MICHIGAN (BLUE) Sailors?

> . . . So ask yourself what type of message the accused was sending when he did drugs on the weekends, did drugs at night, lived with this Jason, this known drug dealer, and then got up in the morning and put on his uniform and reported for duty like, "Oh, everything is fine."
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> . . . A third class petty officer using and distributing marijuana and methamphetamine to shipmates, to civilians, living in two houses with a known drug dealer, if he is left to be a petty officer, that is a message that gets sent out to the Navy that it is okay, you know, that that is petty officer leadership.
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> . . . .
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> . . . Fireman Recruit Hall told you that when he went to the accused's residence he purchased drugs from Jason six times, and you can debate for yourselves whether it is possible for the accused to not know that that was going on.

Record at 697-98, 700, 703. The trial counsel specifically asked that the members sentence the appellant to a dishonorable discharge, confinement for 21 months, and a reduction to pay grade E-1. The appellant was already beyond his EAOS and was in a no pay status.

We have reviewed the comments of the trial counsel in light of the appellant's argument that these comments violated his right to association. Appellant's Brief at 10 (citing *Dawson v. Delaware*, 503 U.S. 159, 163 (1992)). We find no such violation in this case. Here the trial counsel was making an argument based upon the evidence of record and logical inferences that flowed from it. While trial counsel struck hard blows, they were fair and, in our view, relevant. *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F 2000). Furthermore, noting the appellant's offenses, and the fact that the members did not return the sentence requested by the trial counsel, we conclude that the appellant was not prejudiced by the trial counsel's argument. Accordingly, we decline to grant relief.

Conclusion

We affirm the findings and the sentence as approved by the convening authority.

Senior Judge PRICE and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court