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.

Carlos E. VAZQUEZ
Yeoman Third Class (E-4), U.S. Navy

NMCCA 200201621 Decided 10 March 2005

Sentence adjudged 5 January 2002. 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 ROBERT SALYER, JAGC, USNR, Appellate Defense Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel

DORMAN, Chief Judge:

The appellant was tried by a general court-martial before a military judge sitting alone. Consistent with his pleas, the appellant was convicted of conspiring to distribute both marijuana and methylenedioxymethamphetamine (ecstasy), the possession of these two substances with the intent to distribute them, three specifications of the distribution of ecstasy, and two specifications of distribution of both marijuana and ecstasy. The appellant's crimes violated Articles 81 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 912a. The adjudged and approved sentence includes a dishonorable discharge and confinement for 42 months. Consistent with the terms of the appellant's pretrial agreement, confinement in excess of 28 months was suspended for a period of 12 months for the date the sentence was imposed.

The appellant has raised a single assignment of error. He asserts that he was subjected to pretrial punishment because he was placed into pretrial confinement after he did not become a cooperating witness for the Naval Criminal Investigative Service (NCIS). We have reviewed the record of trial, the appellant's assignment 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.

Pretrial Punishment

In his sole assignment of error the appellant asserts that he was subjected to pretrial punishment because he was placed into pretrial confinement for an improper reason. Article 13, UCMJ, prohibits the intentional imposition of pretrial punishment, and also the imposition of restrictions on liberty which exceed that needed to ensure an accused's presence for trial. *United States v. McCarthy*, 47 M.J. 162, 166 (C.A.A.F. 1997). In resolving the issue of whether the appellant has suffered a violation of Article 13, UCMJ, we must first determine whether the appellant has met the minimal requirements for raising the issue. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). To raise the issue, the burden is on the appellant to present evidence to support his claim of pretrial punishment. Once an appellant successfully does that, the burden then shifts to the Government to present evidence to rebut the allegation "beyond the point of . . . inconclusiveness." *United States v. Scalarone*, 52 M.J. 539, 543-44 (N.M.Ct.Crim.App. 1999)(quoting *United States v. Cordova*, 42 C.M.R 466 (A.C.M.R. 1970)), *aff'd*, 54 M.J. 114 (C.A.A.F 2000). We review the question of pretrial punishment *de novo*, but in so doing, "[w]e will not overturn a military judge's findings of fact, including a finding of no intent to punish, unless they are clearly erroneous." *Mosby*, 56 M.J. at 310 (citing *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000)).

At trial the appellant raised this issue through a motion seeking his release from pretrial confinement. Appellate Exhibit III. The appellant testified in support of his motion. As a result of that testimony, the appellant asserts, and we agree, that the following facts are not in dispute. The appellant was interrogated on 15 May 2001 by NCIS Special Agent (SA) Burkhardt concerning the appellant's involvement in drug distribution in and around Bremerton and Everett, WA. At that meeting, the appellant informed SA Burkhardt that he would be willing to assist NCIS in their ongoing drug investigations. A follow-on meeting was scheduled for 1000 hours on 18 May 2001 at SA Burkhardt's office. Before that meeting was to take place, SA Burkhardt received a phone call from an individual who said he was the appellant's attorney, telling SA Burkhardt that he would like to attend the 18 May meeting. Appellant Brief of 25 Aug 2004 at 6. The appellant was placed in pretrial confinement on 23 May 2001. It is questionable whether the appellant's testimony in support of his motion was sufficient to shift the burden of proof to the Government. For purposes of this appeal, however, we will assume the burden shifted.

In response to the motion the Government submitted an answer. Appellate Exhibit IV. The Government also submitted the Confinement Order, Appellate Exhibit VI, which indicates that the appellant was confined to ensure his presence for trial and

because of the seriousness of the offenses. In his letter to the initial review officer (IRO), the acting commanding officer of the USS ABRAHAM LINCOLN stated that the appellant was placed into "pretrial confinement to prevent further serious criminal misconduct . . . and because, given the increasing severity of the charges against him, he is deemed to be a flight risk." Appellate Exhibit VII at 1. It is also clear that he considered the appellant's failure to meet with NCIS when required to do so in making the decision to continue the appellant's confinement. *Id*. at 2. On 29 May 2001, CDR R.C. Bragg, the IRO, conducted the initial review of the appellant's pretrial confinement. Following that review, the IRO concluded that further pretrial confinement was warranted because it was foreseeable that the appellant would engage in serious misconduct and because a lesser form of restraint would be inadequate. Appellate Exhibit X.

The Government also presented the testimony of SA Burkhardt. He testified that NCIS had initially planned on arresting the appellant on 6 April 2001, at which time the staff judge advocate (SJA) of the LINCLON informed him that the appellant would be placed in pretrial confinement. NCIS, however, did not contact the appellant on that date. SA Burkhardt later informed the SJA that he would be interviewing the appellant on 15 May 2001. Again, the SJA told SA Burkhardt that the appellant should be returned to the LINCOLN so that he could be sent into pretrial confinement. SA Burkhardt, however, convinced the SJA to allow the appellant to continue his normal duties if he cooperated with NCIS and other investigative agencies concerning drug trafficking.

The appellant met with SA Burkhardt on 15 May 2001, and expressed his willingness to cooperate. Based upon his willingness, the appellant was allowed to return to his normal duties, but was instructed to return to see SA Burkhardt on the 18th. The appellant asserts that he did not go to the meeting because it was called off by NCIS. SA Burkhardt denies that he cancelled the meeting. He also testified after the appellant failed to show up for the meeting, he contacted the appellant by phone and told him to have his lawyer get back to him on the following Monday. When SA Burkhardt did not hear from the appellant or his attorney on Monday or Tuesday of the following week, he contacted the SJA, who then initiated the appellant's pretrial confinement.

Thus, the appellant argues that he was ordered into confinement because of his lack of cooperation with NCIS. He also asserts that there is no credible evidence that the appellant failed to cooperate with NCIS. He makes his "credibility" argument based upon his assertion that SA Burkhardt lied "under oath." Appellant's Brief at 6. At the time the military judge was evaluating the evidence concerning this

motion, however, there was no indication that SA Burkhardt **may** have lied under oath.[1]

Following the evidentiary hearing on the appellant's motion, the military judge issued his ruling denying the appellant relief for his allegation of pretrial punishment, as well as denying the appellant's request to be released from pretrial confinement. Appellate Exhibit XVII. We have reviewed the "Essential Findings" issued by the military judge. We find no clear error in those essential findings and adopt them as our own. We also specifically note and endorse the military judge's finding that the appellant's testimony "that S.A. Burkhardt called, either in person or in a voice mail message, to cancel [the 18 May] meeting was self-contradictory, confused and unpersuasive." Rulings on Motions to Dismiss and for Appropriate Relief of 16 Oct 2001 at 2, ¶ 6.

We have no doubt that had the appellant been placed in pretrial confinement on either the 6th of April or the 15th of May 2001, as the SJA had originally intended, we would not be reviewing any issue concerning the legality of the appellant's pretrial confinement. Based upon the crimes that he pled guilty to, the appellant faced the potential of over 100 years of confinement. Additionally, the appellant was actively engaged in distributing marijuana and significant quantities of ecstasy beginning in July of 2000 and continuing until the 21st of April 2001. The fact that he was afforded the opportunity to avoid pretrial confinement by cooperating with NCIS, and then confined when he failed to meet with NCIS, does not render his otherwise lawful pretrial confinement unlawful punishment. Applying a *de novo* standard of review, we conclude that the: (1) the military judge did not err in denying the appellant's requested relief, and (2) that the appellant was not subjected to pretrial punishment.

[1] We, too, are concerned about the conduct of NCIS agents in this case. Later in the trial, it was developed that they may have given false testimony under oath at the appellant's Article 32, UCMJ, investigation. In particular, they testified that they did not know a Sailor (Martinez) who was then working for them as a cooperating witness. See comments of the military judge at page 253-61. We recommend to the Judge Advocate General of the Navy that he forward this record of trial to the Director, NCIS.

Conclusion

Consistent with our holdings above, 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