

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

BEFORE

C.L. CARVER

D.A. WAGNER

J.F. FELTHAM

UNITED STATES

v.

**Kay R. FISHER
Private First Class (E-2), U.S. Marine Corps**

NMCCA 200500079

Decided 17 October 2005

Sentence adjudged 26 February 2004. Military Judge: P.J. Ware. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Force Service Support Group, MarForPac, Camp Pendleton, CA.

LT KYLE KNEESE, JAGC, USNR, Appellate Defense Counsel
LT ANTHONY S. YIM, JAGC, USNR, Appellate Defense Counsel
LT JESSICA HUDSON, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FELTHAM, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to her pleas, of failure to obey a lawful general order by possessing drug paraphernalia aboard Marine Corps Base, Camp Pendleton, California; wrongful use of methamphetamines; and wrongful introduction of methamphetamine onto an installation used by the armed forces, in violation of Articles 92 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 912a. The appellant was sentenced to a dishonorable discharge, confinement for five years, forfeiture of all pay and allowances, and reduction to pay grade E-1. Pursuant to a pretrial agreement, the convening authority approved the sentence as adjudged, but suspended all confinement over 36 months.

The appellant claims the Government denied her a speedy trial and that, despite her guilty pleas, she did not waive this issue on appeal. The appellant also claims that if this court determines her trial defense counsel waived the speedy trial issue, then she was denied a fair trial because of the

ineffective assistance of her counsel for failing to make a formal speedy trial motion to dismiss the charges with prejudice.

We have carefully considered the record of trial, the appellant's two assignments of error, and the Government's response. We conclude that the findings and sentence are correct in law and in fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Speedy Trial

In her first assignment of error, the appellant argues that the Government denied her a speedy trial in violation of the Fifth and Sixth Amendments to the United States Constitution, RULE FOR COURTS-MARTIAL 707, MANUAL FOR COURTS-MARTIAL (2002 ed.), and Article 10, UCMJ. We decline to grant relief.

The appellant did not allege a violation of her right to a speedy trial before, or during, her trial. After arraignment, she informed the military judge that she had no motions, and subsequently entered unconditional pleas of guilty to the charges and specifications described above. The specifications to which she pled not guilty were withdrawn. The speedy trial issue was first raised before this court, some 13 months after trial.

R.C.M. 707(a) provides that an accused shall be brought to trial within 120 days after the earlier of prefferal of charges or the imposition of restraint under R.C.M. 304(a)(2)-(4). The appellant was placed in pretrial confinement on 15 August 2003, and the charges were preferred on 28 August. On 16 October 2003, the appellant's trial defense counsel requested a continuance in the appellant's pretrial investigation under Article 32, UCMJ, from 22 October 2003 to 5 November 2003. The counsel stated in the request that he had not received the Naval Criminal Investigative Service (NCIS) investigation in the case until 15 October 2003. He also stated that there were "other critical items of discovery" then being obtained, and that granting the continuance would enable him and the appellant's retained civilian counsel to "properly prepare" for the pretrial investigation. The request was approved by the appellant's commanding officer.

On 3 November 2003, the trial defense counsel requested a second continuance in the Article 32 pretrial investigation from 5 November to 20 November 2003. He again cited the recent receipt of the NCIS investigation, the need to obtain critical items of discovery, and the need for additional time for himself and the appellant's civilian counsel to properly prepare for the pretrial investigation. He also stated that the defense team was finalizing the submission of a pretrial agreement offer, and agreed "the time involved in this continuance shall be excludable delay." The appellant's commanding officer approved her second continuance request.

On 21 November 2003, the trial defense counsel requested a third continuance in the Article 32 pretrial investigation from 21 November 2003 until 19 December 2003. He claimed the continuance was needed to resolve issues related to the withdrawal of the appellant's retained civilian counsel, and "the settlement of possible misconduct of that counsel, as well as the acquisition of additional military counsel in the form of an Individual Military Counsel request." He further asserted that rescheduling to 19 December 2003 would allow himself and the contemplated individual military counsel to resolve issues concerning the appellant's former civilian counsel and "properly prepare for the Article 32." The appellant's commanding officer approved her third continuance request.

On 10 December 2003, the trial defense counsel submitted a fourth continuance request, asking that the Article 32 pretrial investigation be continued from the then-scheduled date of 17 December 2003 "until 12 January 03 [sic]." (It is apparent to this court that the date 12 January 03 was a typographical error, and that counsel intended to request a continuance until 12 January 2004.) The trial defense counsel claimed a fourth continuance was necessary because he was then attempting to "recover documents from the recently fired civilian counsel." In addition, he asserted that "the defense [was] seeking an opportunity to first present a pretrial agreement offer to the GCM convening authority, but given the General's schedule, it is not likely to get in before the holidays." The appellant agreed that "the time involved in this continuance shall be excludable delay," and her commanding officer approved her fourth continuance request.

On 21 January 2004, the appellant and the convening authority signed a pretrial agreement. The appellant was arraigned on 26 February 2004, and her trial was completed the same day.

The appellant was brought to trial 196 days after the imposition of pretrial confinement. Her four continuance requests resulted in 92 days of excludable delay. Therefore, she was brought to trial on day 104 for purposes of R.C.M. 707(a). These calculations are unnecessary, however, because of the appellant's unconditional pleas of guilty. R.C.M. 707(e) states that "a plea of guilty which results in a finding of guilty waives any speedy trial issue as to that offense." Our superior court recently noted that courts have applied the same principle to the constitutional guarantee to a speedy trial under the Sixth Amendment. *United States v. Mizgala*, 61 M.J. 122, 124 (C.A.A.F. 2005). Accordingly, for purposes of R.C.M. 707 and the Sixth Amendment, we find that the appellant's unconditional pleas of guilty waived any speedy trial issue as to the offenses of which she was found guilty.

We further find that appellant's unconditional guilty pleas, combined with her failure to make a motion to dismiss or any other motion for relief on the grounds of lack of a speedy trial, waived review of the speedy trial issue by this court for Article 10, UCMJ, purposes. *United States v. Sloan*, 48 C.M.R. 211, 214 (C.M.A. 1974). See *Mizgala*, 61 M.J. at 125-27; *United States v. Birge* 52 M.J. 209, 211-12 (C.A.A.F. 1999).

Ineffective Assistance of Trial Defense Counsel

Because we find that the appellant waived appellate review of the speedy trial issue, we must address her second assignment of error, in which she contends she was denied a fair trial by the ineffective assistance of her trial defense counsel due to his failure to make a formal speedy trial motion to dismiss with prejudice.

The U.S. Supreme Court has established a two-prong test for ineffective assistance of counsel: deficient representation and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see *United States v. Quick*, 59 M.J. 383 (C.A.A.F. 2004); *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). "The competence of counsel is presumed. To make out a claim of ineffective assistance of counsel, the accused must rebut this presumption by pointing out specific errors made by his defense counsel which were unreasonable under prevailing professional norms." *Scott*, 24 M.J. at 188.

"The test for prejudice when a conviction is challenged on the basis of actual ineffectiveness of counsel 'is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *Id.* at 189 (citing *Strickland*, 466 U.S. at 695). "This requires a court to consider the totality of the evidence before the factfinder." *Id.*

With respect to the first prong of the Supreme Court's *Strickland* test, we find that the trial defense counsel's representation of the appellant was competent and well-within prevailing professional norms.

The appellant initially retained a civilian lawyer to represent her. Under such an arrangement, the civilian attorney is normally considered the lead counsel, and the military lawyer serves as associate counsel. Nevertheless, appellant's trial defense counsel submitted four continuance requests on her behalf in order to delay the Government's inexorable progress toward an investigation under Article 32, UCMJ. He cited cogent reasons for each request, including the need for additional time to review the NCIS report, the need to conduct discovery, the need for time to prepare for the Article 32 investigation, and the need for time to prepare a pretrial agreement offer. In the third continuance request, the trial defense counsel alluded to problems stemming from the civilian counsel's withdrawal from the

case and possible misconduct on the part of that counsel. He further indicated that he was attempting to obtain an individual military counsel on behalf of the appellant. In the fourth continuance request, he stated that he was attempting to recover documents from appellant's former civilian counsel, and was also trying to present a pretrial agreement offer to the convening authority.

The trial defense counsel was ultimately successful in negotiating a pretrial agreement that protected the appellant from all confinement in excess of 36 months. Despite the difficulties described in his four continuance requests, and his stated desire to obtain an individual military counsel for his client, he appears to have been his client's sole advocate during the pretrial agreement negotiations, as he is the only person who signed the agreement as a defense counsel.

After obtaining a favorable pretrial agreement for his client, the appellant's trial defense counsel zealously represented her at her trial, including sentencing, and during the post-trial process. He offered into evidence defense exhibits pertaining to the appellant's victimization during a sexual assault, documents describing teaching she did while stationed in Japan, a number of written character statements from friends and family members, and a collection of 85 original works of art created by the appellant. He also arranged for a stipulation of expected testimony of the appellant's psychiatrist. In addition, the trial defense counsel called the appellant's mother as a sentencing witness, and conducted an effective direct examination of her. In view of the appellant's compelling unsworn statement to the military judge, we deem it likely that the trial defense counsel had significant input in its composition. Finally, we note that the trial defense counsel did not abandon his client after trial. On 6 August 2004, he submitted a three-page clemency request, supported by 10 enclosures, to the convening authority.

Turning to the second prong of the Supreme Court's two-prong test, we find that the appellant has shown no prejudice resulting from her trial defense counsel's failure to raise a speedy trial motion. As our discussion of her first assignment of error makes clear, the appellant had little chance of successfully litigating an R.C.M. 707 speedy trial motion. After accounting for the period of excludable delay, she was brought to trial within 104 days of the imposition of pretrial confinement.

We also find that the appellant stood little chance of obtaining relief for an Article 10, UCMJ, violation. In assessing an alleged violation of Article 10, the test is whether the Government acted with "reasonable diligence" in proceeding to trial. *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993).

In the instant case, the appellant was apprehended on 15 August 2003 entering Camp Pendleton, California, with nearly 30

grams of methamphetamine in her possession. She was placed in pretrial confinement the same day, and the suspected drugs were sent to NCIS for analysis on 22 September 2003. Prosecution Exhibit 2. The NCIS Report of Analysis was issued on 29 September 2003, and an Article 32, UCMJ, pretrial investigation was scheduled for 22 October 2003. But for the appellant's first continuance request, the investigation would presumably have begun on that date.

In response to the appellant's first continuance request, the Government rescheduled the Article 32 investigation from 22 October to 5 November 2003. It then rescheduled the investigation to 20 November in response to her second continuance request, to 19 December in response to her third continuance request, and to 12 January 2004 in response to her fourth continuance request. The pretrial agreement was signed on 21 January 2004, and the appellant proceeded to trial on 26 February 2004.

We note that: (1) the appellant made no demand for a speedy trial or to be released from pretrial confinement; (2) the appellant made no motion to dismiss the charges, or any other motion for relief, on the basis of lack of a speedy trial; (3) the appellant entered a pretrial agreement after being granted four continuances of the Article 32 investigation, and ultimately waived her right to the investigation as partial consideration for the pretrial agreement; (4) the appellant received 195 days sentence credit for her pretrial confinement; (5) there is no evidence in the record that the Government willfully or maliciously delayed the progress of this case to trial; and (6) the preparation of the appellant's case was not hindered or prejudiced by the delay. In fact, the additional time occasioned by the granting of her four continuance requests may have assisted her in the preparation of her case and in the successful negotiation of a favorable pretrial agreement.

We hold that the facts before us are not sufficient to raise an Article 10 violation. Having also held that there was no R.C.M 707 speedy trial violation in this case, we hold that appellant's trial defense counsel was not ineffective in his representation of her by not making a speedy trial motion on her behalf. Appellant's second assignment of error is without merit.

Conclusion

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

Senior Judge CARVER and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court