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

BEFORE

C.A. PRICE **M.J. SUSZAN** **R.C. HARRIS**

UNITED STATES

v.

Garrett L. LEWIS
Aviation Ordnanceman Airman Recruit (E-1), U.S. Navy

NMCCA 200001587 Decided 24 March 2004

Sentence adjudged 6 January 2000. Military Judge: J.V. Garaffa. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Air Reserve Force, New Orleans, LA.

LT THOMAS P. BELSKY, JAGC, USNR, Appellate Defense Counsel
Maj PATRICIO A. TAFOYA, USMC, Appellate Government Counsel

PRICE, Senior Judge:

A general court-martial, composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of one specification each of wrongful use of marijuana and cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The members sentenced the appellant to 10 months confinement, forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered the sentence executed.

After carefully considering the record of trial, the appellant's assignments of error, and the Government's response, we conclude that the findings 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. However, we conclude that the sentence is inappropriately severe.

Sentence Appropriateness

In his first assignment of error, the appellant asserts that his sentence is inappropriately severe and requests that we affirm a sentence of two months confinement and associated forfeitures. While we concur that the sentence is inappropriately severe, we will afford less relief than requested.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 10 C.M.A. 102, 106-07, 27 C.M.R. 176, 180-81 (1959)).

In his testimony on the merits, the appellant admitted that, on one occasion, he smoked a marijuana cigarette laced with cocaine. The only evidence offered by the Government was a positive urinalysis and accompanying expert testimony. That evidence did not establish how much marijuana or cocaine the appellant ingested, or how many times he used those controlled substances. Thus, we are left with a conviction for one-time use of marijuana and cocaine.

We note that the appellant had been to Captain’s Mast just a few weeks before he committed the current offenses. Indeed, he committed the offenses soon after completing a term of correctional custody awarded at the Mast hearing. We also note that the appellant served in a rating involving the handling of aviation ordnance. The Government offered no other aggravating information.

In extenuation and mitigation, the appellant offered favorable testimony from two first class petty officers regarding his military character and potential for rehabilitation, as well as two enlisted evaluations. The appellant also made a sworn statement in which he accepted responsibility for his offenses and admitted that he had let down his family and chain of command.

While the offenses he committed are serious, particularly considering his rating and disciplinary record, we conclude that, based on our review of the entire record, a sentence

including 10 months confinement is inappropriately severe. Accordingly, we will provide relief in our decretal paragraph.

Speedy Trial

The appellant's second assignment of error alleges that the military judge erred in failing to grant a defense motion to dismiss for denial of the appellant's Article 10, UCMJ, right to speedy trial. We review a military judge's denial of such a motion *de novo. United States v. Cooper,* 58 M.J. 54, 57 (C.A.A.F. 2003). Applying this standard of review, we agree with the military judge that the appellant was not denied his right to a speedy trial.

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. Although the Government is required to exercise reasonable diligence in bringing an accused to trial, proof of constant motion is unnecessary. *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993). On appellate review, we afford the factual findings of the military judge substantial deference, *see United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999), and are required to consider: (1) the length of the delay; (2) the reasons for the delay; (3) the assertion of the right to speedy trial; and (4) the existence of prejudice. We should also consider such factors as: (1) did the appellant enter pleas of guilty, and if so, was it pursuant to a pretrial agreement; (2) was credit awarded for pretrial confinement on the sentence; (3) was the Government guilty of bad faith in creating the delay; and (4) did the appellant suffer any prejudice to the preparation of his case as a result of the delay. *See United States v. Birge,* 52 M.J. 209, 212 (C.A.A.F. 1999).

In the case at bar, the parties stipulated that the appellant was placed in pretrial confinement on 29 September 1999, charges were preferred the next day, and he was afforded a RULE FOR COURTS-MARTIAL 305(c)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), hearing on 5 October 1999. Based on this evidence, we conclude that the notice portion of Article 10 was satisfied. Although the pretrial investigation mandated by Article 32, UCMJ, and R.C.M. 405 was initially scheduled for 25 October 1999, the hearing was delayed until 4 November 1999 in response to a defense request for a continuance. The report of this investigation was forwarded to the general court-martial convening authority on 1 December 1999 and charges were referred

the next day. After a scheduling conflict, the appellant was arraigned on 17 December 1999.

After the appellant was arraigned, the military judge discussed a trial date with counsel. The trial defense counsel stated that he was "ready for trial today, sir," and submitted a written demand for speedy trial. Record at 7; Appellate Exhibit I. The trial counsel was taken aback by the defense demand, believing that the defense intended to proceed with the arraignment only, then set a mutually agreeable trial date after the holidays. Accordingly, no members or witnesses had been summoned to appear on 17 December.

We note that, despite the defense demand, motions and pleas were reserved. Moreover, the appellant failed to formally state his choice of forum on the record. Rather, he reserved that election. In that posture, we are not confident that the defense was truly ready for trial that day.

At the next Article 39a, UCMJ, session on 3 January 2000, the parties litigated the speedy trial motion. The military judge considered stipulated evidence and arguments, then issued a written ruling denying the motion. Appellate Exhibit XII. In his ruling, the military judge stated that, "during the arraignment, both counsel candidly admitted that they were not ready to go to trial the following week and trial was set for the next available date, 3 January 2000." Appellate Exhibit XII at 2. As indicated previously, this finding of fact was incorrect regarding the defense position. With that exception, we accept the military judge's findings of fact as correct and supported by the record.

Putting aside for the moment the fact that this case involved a reserve command, which resulted in minor delays caused by limited drilling schedules, we nevertheless conclude that the Government's movement of this matter towards trial was reasonably diligent. Moreover, we cannot find any evidence to support a claim that the appellant was prejudiced in any way by the timetable on which this case proceeded. Therefore, we agree with the military judge that the appellant's Article 10, UCMJ, rights were observed, and uphold the denial of the speedy trial motion.

Conclusion

We affirm the findings and only so much of the sentence extending to confinement for six months, forfeiture of all pay and allowances, and a bad-conduct discharge.

Judge SUSZAN and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court