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

BEFORE

Charles Wm. DORMAN **C.J. VILLEMEZ** **J.D. HARTY**

UNITED STATES

v.

Javier A. MORENO, Jr.
Corporal (E-4), U.S. Marine Corps

NMCCA 200100715 Decided 13 May 2004

Sentence adjudged 30 September 1999. Military Judge: E.B. Stone. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Camp Smedley D. Butler, Okinawa, Japan.

Maj ANTHONY C. WILLIAMS, USMC, Appellate Defense Counsel
LT CHRISTOPHER BURRIS, JAGC, USNR, Appellate Government Counsel

HARTY, Judge:

A general court-martial, composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of rape, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The members sentenced the appellant to 6 years confinement, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered the sentence executed.

We have carefully reviewed the record of trial, the appellant's four summary assignments of error, and the Government's response. We conclude 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.

Speedy Trial

The appellant's first 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, and , U.S. CONST. amend. VI (6th Amendment), right to a speedy trial.[1] 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 appellant was placed in pretrial confinement on 1 May 1999; charges were preferred on 19 May 1999 and served on the appellant on 25 May 1999. Based on this evidence, we conclude that the 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 (1998 ed.) was held on 10 June 1999, the agreed upon date. The referral package was forwarded to the general court-martial convening authority on 23 June 1999 and the charge was referred on 1 July 1999.[2] The charge was served on the appellant on 8 July 1999. During the period 2-25 July 1999, the trial defense counsel was not available due to his long-standing leave arrangements.

The appellant was arraigned on 4 August 1999. At that hearing and before arraignment, the appellant reserved forum selection, pleas, and motions. Trial counsel stated he was ready

[1] The appellant's motion at trial alleged an Article 10, UCMJ, violation only.

[2] The base Commanding General's TAD was extended during this period and charges were eventually referred by the acting commander.

to go to trial immediately and trial defense counsel stated he would be ready but for discovery not yet provided by the Government. The parties then agreed on 7 September 1999 as the trial date. The trial defense counsel filed a Motion to Dismiss for Denial of Speedy Trial on 23 August 1999. Appellate Exhibit I. On 25 August 1999, the parties litigated the speedy trial motion. The military judge considered evidence and arguments, then issued a written ruling denying the motion. Appellate Exhibit XLIV. We accept the military judge's findings of fact as correct and supported by the record. We further find that the military judge did not err in denying the appellant's Art. 10, UCMJ, claim. This does not, however, address the appellant's claim under the 6th Amendment, brought for the first time on appeal.

On the appellant's arraignment date, 4 August 1999, the parties discussed trial dates with the military judge, and 7 September 1999 was the agreed upon date. After the trial date was set, the appellant moved to have the court-martial moved to the continental Unites States to allow compulsory process on a defense witness. That motion was addressed on the initial trial date, 7 September 1999, at which time the military judge ruled that the witness was relevant and material but that a deposition might be an adequate substitute. The next Article 39(a), UCMJ, session was scheduled for 13 September 1999; however, the Government requested a continuance on 9 September 1999, so it could produce a proposed substitute for the witness' live testimony. Appellate Exhibit IX. A video deposition of the witness was taken on 14 September 1999. The military judge reviewed the video deposition and transcript on 20 September 1999, and denied the appellant's motion to move the trial. On 21 September 1999, an Article 39(a), UCMJ, session was held to handle *voir dire* issues with the intent of beginning the trial at 1300 that day. Record at 260-61. The court-martial did not reconvene until 24 September 1999 due to a typhoon. *Id*. at 262.

Here, as in *Cooper*, the military judge did not address the *Barker v. Wingo*[3] factors or the post-arraignment delay. We apply those factors now based upon the evidence presented, the military judge's findings of fact, plus a review of the post-arraignment timeframe, and 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; (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 delay; and (6) the appellant suffered no prejudice to the preparation of his

[3] 407 U.S. 514, 526-29 (1972).

case as a result of the delay. In fact, trial defense counsel agreed to the dates for litigating the motion to dismiss and the initial date to try the case.

While the handling of this case was not a model of efficiency, we nevertheless conclude that the Government's movement towards trial was reasonably diligent, given the case's complexity and geographic hurdles. 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 hold that the appellant was not denied his 6th Amendment right to a speedy trial.

Suppression Motion

For his second summary assignment of error, the appellant alleges the military judge abused his discretion by denying the defense Military Rule of Evidence 305, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Motion to Suppress, filed on 23 August 1999. In this motion, the appellant alleges that his statement made to a Navy doctor during a medical examination was obtained in violationof the requirements of Mil. R. Evid. 305. Appellate Exhibit V. We disagree.

Our superior court has held that "[a] military judge's ruling admitting or excluding evidence is reviewed for abuse of discretion." *United States v. Moolick,* 53 M.J. 174, 176 (C.A.A.F. 2000); *see United States v. Dewrell*, 55 M.J. 131, 137 (C.A.A.F. 2001); *see also United States v. Valentin-Nieves*, 57 M.J. 691, 694 (N.M.Ct.Crim.App. 2002). As such, this court "will reverse for an abuse of discretion [only] if the military judge's findings of fact are clearly erroneous or if [the] decision is influenced by an erroneous view of the law." *United States v. Vassar,* 52 M.J. 9, 12 (C.A.A.F. 1999)(quoting *United States v. Reister,* 44 M.J. 409, 413 (C.A.A.F. 1996)(internal citations omitted)). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *United States v. McElhaney,* 54 M.J. 120, 130 (C.A.A.F. 2000)(quoting *United States v. Miller,* 46 M.J. 63, 65 (C.A.A.F. 1997)). To establish an abuse of discretion, the appellant must come "forward with [a] conclusive argument." *United States v. Houser,* 36 M.J. 392, 397 (C.M.A. 1993)(quoting *United States v. Mukes,* 18 M.J. 358, 359 (C.M.A. 1984)). Even if this court finds that a military judge abused his discretion, relief is only granted upon a showing of prejudice. *See United States v. Garcia,* 44 M.J. 27, 30 (C.A.A.F. 1996).

Here, the appellant was in the process of being seen by a nurse-midwife for the purpose of collecting hair, fiber, blood, urine, and physical inspection for signs of a struggle. During the physical inspection, the appellant was informed that the nurse-midwife was looking for signs of a struggle. During that

inspection, the appellant held his arms out and stated words to the effect of “See, no signs of a struggle, no marks.” Record at 128-29. The appellant had previously invoked his right to remain silent and to have an attorney present during any questioning, and was in the custody of NCIS agents at the time of his statement.

After a lengthy evidentiary hearing, the military judge submitted his written findings of fact and conclusions of law finding that the appellant’s statement was not the result of any question designed to or reasonably likely to elicit an incriminating statement from him. Furthermore, the military judge determined the appellant’s statement was voluntary and spontaneous. Appellate Exhibit XLV. Upon reviewing this record, we hold that the military judge's essential findings of fact and conclusions of law are supported by the evidence at trial and are not clearly erroneous. We hold the military judge did not err in denying the appellant's motion to suppress.

Motion to Change Trial Location

For his third summary assignment of error, the appellant alleges the military judge abused his discretion by not moving the court-martial from Okinawa to the continental United States. The appellant does not cite any legal authority for his position.

The appellant requested the production of a former Marine who had been on active duty in Okinawa, was an eyewitness to the alleged incident, and who was now a civilian living in Virginia. The witness was to testify for the defense on the merits. The witness had made it clear he would not return to Okinawa to testify but would be willing to travel within the continental United States to testify. The military judge found the witness’ testimony to be relevant and material. The Government argued a video deposition would be an adequate substitute for live testimony, however, the appellant insisted on moving the court-martial to the continental United States where he could obtain compulsory process on the witness.

The Government filed a Request for Deposition on 30 August 1999, Appellate Exhibit XII, and the Convening Authority issued a Deposition Order on 8 September 1999. Appellate Exhibit XVI. The deposition was taken at Quantico, Virginia, on 14 September 1999. Appellate Exhibit XV. The military judge deferred ruling on the appellant’s motion to move the trial until he had the chance to evaluate the proposed substitute evidence. Upon review of the video deposition and transcript, and without issuing findings of fact or conclusions of law, the military judge found the video deposition to be an adequate substitute for the witness’s live testimony, and on 20 September 1999 denied the defense motion to move the trial.

In *United States v. Tangpuz*, 5 M.J. 426 (C.M.A. 1978), our superior court established a non-exhaustive list of relevant factors to determine when an accused is entitled to the personal attendance of a witness. Those factors include: (1) the issues involved in the case and the importance of the requested witness to those issues; (2) whether the witness was desired on the merits or on sentencing; (3) whether the witness's testimony would be "merely cumulative;" and (4) the availability of alternatives to the personal appearance of the witness such as deposition, interrogatories, or previous testimony. *Id*. at 429.

This court, in *United States v. Jones*, 20 M.J. 919, 926 (N.M.C.M.R. 1985), found that case law supported expansion of the *Tangpuz* considerations to include: (a) unavailability of the witness, such as that occasioned by nonamenability to the court's process, *United States v. Bennett*, 12 M.J. 463 (C.M.A. 1982)[4]; (b) whether or not the requested witness is in the armed forces and/or subject to military orders, *United States v. Ciarlatta*, 23 C.M.R. 70 (C.M.A. 1974); *United States v. Davis*, 41 C.M.R. 217 (C.M.A. 1970); (c) the effect that a military witness's absence will have on his or her unit and whether that absence will adversely affect the accomplishment of an important military mission or cause manifest injury to the service, *United States v. Manos*, 37 C.M.R. 274 (C.M.A. 1967); *United States v. Davis*, 41 C.M.R. 217 (C.M.A. 1970). *See United States v. Crockett* 21 M.J. 423 (C.M.A. 1986), *cert. denied*, 479 U.S. 835 (1986)(holding video depositions specifically allowed).

Our review of this record convinces us that: (1) the requested witness was relevant and necessary; (2) the defense desired his testimony on the merits; (3) his testimony would not be cumulative; (4) the witness was not amenable to the court's process; (5) the witness was not in the armed forces; and, (6) a video deposition was available and an adequate substitute for the witnesses' live testimony. Under these circumstances, we find that the military judge's ruling was supported by the evidence at trial, was not clearly erroneous, and that he did not abuse his discretion in ruling on the motion. This issue has no merit.

Member Challenge

For his final summary assignment of error, the appellant alleges the military judge abused his discretion by denying the defense challenge against Lieutenant Colonel (LtCol) F. The trial defense counsel challenged eight members for cause. The military judge granted seven of those challenges, leaving LtCol F available for a peremptory challenge. The trial defense counsel exercised his peremptory challenge against Colonel O rather than

[4] In *United States v. Bennett*, 12 M.J. 463 (C.M.A. 1982), our superior court discussed in detail an accused's right to secure witness attendance. Factually similar to our case, *Bennett* involved a trial held in the Philippines and an accused who wanted to subpoena an American citizen residing within the United States. The court held that military courts cannot enforce a subpoena beyond United States territorial limits, *Id*. at 472.

LtCol F, and therefore preserved the issue for later review. *See United States v. Jobson*, 31 M.J. 117, 120 (C.M.A. 1990).

The trial defense counsel challenged LtCol F on the grounds the member could not be impartial, based on the fact he had read articles about the case and his wife was a counselor who had counseled rape victims in the past. Record at 343. During individual *voir dire*, LtCol F stated that he had the following connections to this case: (1) he knew the chaplain listed on the Government witness list; (2) he was the deputy comptroller at the time of the incident and the appellant was working in the disbursing office; (3) because he was the deputy comptroller, he was briefed by the appellant's Officer in Charge and was aware what was in the logbook; (4) he spoke with duty officers so he could brief his boss as to what happened; (5) he read an article about the incident stating the case involved drinking in the enlisted club, there may have been drugs involved, there was sexual contact, two Marines were placed in pretrial confinement, the other Marine had been deposed or may be a witness in this trial, the deposition was part of the delay starting this trial; and, (6) his wife is a counselor who has counseled rape victims in the past. Record at 295-99. LtCol F stated that his pretrial knowledge of a witness, limited personal fact gathering, reading an article, and his wife's counseling experiences did not cause him to be biased toward the Government or the appellant. *Id*.

R.C.M. 912(f)(1), the controlling provision at the time of this case, enumerates specific grounds and one "catch-all" ground upon which a challenge for cause could be brought. The "catch-all" ground, R.C.M. 912(f)(1)(N), provides that a challenge for cause may be granted if it is "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." A military judge shall be liberal in granting challenges for cause. *Jobson*, 31 M.J. at 121; *United States v. Smart*, 21 M.J. 15, 21 (C.M.A. 1985). The record in this case, however, supports the military judge's denial of the challenge for cause against LtCol F.

Exposure to pretrial information does not automatically disqualify a prospective member. The standard for determining whether LtCol F should have been disqualified is contained in R.C.M. 912(f)(1)(N). As our superior court has held, fairness requires that an accused have "a panel of impartial, 'indifferent' [fact-finders] who need not be totally ignorant of the facts and issues involved." *Jobson*, 31 M.J. at 121 (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)). "Judges are often confronted with . . . members who have acquired some extra-judicial knowledge concerning a case. It is resolution of these difficult and delicate matters that we entrust to the good judgment of good men and women sitting on the trial bench." *Id*. at 121-22.

Applying the above standards to the facts of this case, we conclude that the military judge did not abuse his discretion in

denying the challenge of LtCol F for cause. This issue has no merit.

Conclusion

Accordingly, we affirm the findings and sentence, as approved by the convening authority.

Chief Judge DORMAN and Judge VILLEMEZ concur.

For the Court

R.H. TROIDL
Clerk of Court