

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
W.L. RITTER, E.S. WHITE, R.E. VINCENT
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**LAWRENCE V. HOLLIDAY, JR.
AVIATION STRUCTURAL MECHANIC AIRMAN APPRENTICE (E-2)
U.S. NAVY**

**NMCCA 200700105
GENERAL COURT-MARTIAL**

Sentence Adjudged: 24 March 2006.

Military Judge: LtCol Michael Richardson, USMC.

Convening Authority: Commander, Navy Region Southeast,
Naval Air Station, Jacksonville, FL.

Staff Judge Advocate's Recommendation: CDR K.E. Kubas,
JAGC, USN.

For Appellant: LT W. Scott Stoebner, JAGC, USN.

For Appellee: Maj Brian Keller, USMC.

28 November 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WHITE, Judge:

A general court-martial composed of members, with enlisted representation, convicted the appellant, pursuant to his pleas, of two specifications of assault consummated by a battery, and wrongfully communicating a threat, in violation of Articles 128 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 928 and 934.¹ The appellant was sentenced to 15 months confinement,

¹ The appellant pled not guilty to, and after a contested trial on the merits was acquitted of, rape, forcible sodomy, conspiracy to commit rape and forcible sodomy, attempting to solicit another to commit rape, and two

forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant assigns three errors before this court. First, he contends the trial counsel committed plain error in his sentencing argument by asking the members to imagine themselves in the victims' situation and repeatedly referring to charges of which the appellant had been acquitted. Second, he contends he was denied his right under Article 10, UCMJ, to a speedy trial by the delay in docketing his case for trial due to the unavailability of a military judge to preside. Finally, he argues he has been denied his due process right to speedy post-trial review.

After considering the record, the appellant's brief and assignments of error, the Government's answer, and the appellant's reply, we conclude 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.

I. Factual Background

On 6 September 2005, the appellant was placed in pretrial confinement. On 18 December 2005, as part of his response to the trial counsel's docketing request, the appellant demanded a speedy trial. He was arraigned on 23 December 2005, at which time the military judge set a hearing on the expected Article 10, UCMJ, speedy trial motion for 11 January 2006. The judge noted there would not be a permanent military judge in the Jacksonville, Florida area until May or June of 2006. Record at 11-12.

On 27 December 2005, the appellant requested the Government provide him with expert assistance. Appellate Exhibit II at enclosure 54. On 30 December, he requested to conduct three depositions, *id.* at encl. 56, and sought additional discovery, *id.* at encl. 57. On 6 January 2006, the Acting Circuit Military Judge set trial on the merits to begin 20 March 2006, which he said was the first available date for trial. AE VIII. On 11 January 2006, the parties litigated the speedy trial motion. The military judge denied the motion, finding the Government had acted with reasonable diligence. AE XXII at 13. The trial judge further found the delay between arraignment and the scheduled trial date was not attributable to the Government for speedy trial purposes. *Id.* at 12-13. Nine additional defense motions were litigated on 14 March 2006. Record at 218-396. Finally, on 21 March, the appellant pled guilty to the charges of which he now stands convicted. *Id.* at 419. Trial on the merits then

specifications of wrongfully communicating a threat. Further, the appellant pled not guilty to, and the military judge dismissed, charges of conspiracy to obstruct justice and making a false official statement.

commenced on the remaining charges, to which the appellant had pled not guilty. As noted above, the appellant was ultimately acquitted of those charges. *Id.* at 1306.

During argument on sentence, the trial counsel said:

So, here's the complete picture. This probably answers some of your questions from before, if you had any. Perhaps during the trial you questioned, okay, so he threatened [CJ].² Maybe he did, maybe he didn't, I don't know. So, he threatened her, to pull her hair, to drag her out. But could a grown man actually pull a woman's hair? A grown man in the Navy would even pull a woman's hair? Could he be that cowardly, you probably wondered? He confessed yes. He confessed yes that he could be cowardly enough to pull a woman's hair because that's what he did. He pulled [AG]'s³ hair because she displeased him. He beat her on the head. Why? Because she was arguing with him.

This probably answers another question you might have had during the trial. Perhaps you wondered, "Well, this guy that everybody called scrawny, there's no way that he could have beat [CJ]. Well, was he even capable of dragging her by her hair, this guy that everyone says is so small?" Well, he was more than physically capable of beating two women at the same time . . . Yes, he's physically capable, emotionally capable, beating her, that man [Pointing], beating her on the head, because that's his MO."

Record at 1444-45.

Finally, the trial counsel said:

Nobody protected [CJ], nobody except a complete stranger, Petty Officer Monroe, sheltered [CJ] when he threatened to drag her out by her hair, when she didn't listen to him. Imagine that. Just picture being in a room full of women, being in a room full of your friends, that is, and being threatened by somebody else that you'll be dragged out by your hair -- imagine even being dragged out by your hair. Imagine being in a room full of people she thought were -- that were her friends, and having no one come to defend her. Imagine how worthless she felt. Imagine how -- how bad that must have made her feel inside.

² [CJ] was the victim of the alleged rape and forcible sodomy of which the appellant had been acquitted by the members, as well as the victim of the threat that the appellant was convicted of communicating.

³ [AG] was the victim of one of the assaults, consummated by a battery, of which the appellant was convicted.

Id. at 1447. The trial defense counsel did not object to any of these statements.

Sentence was adjudged on 24 March 2006. The record was authenticated on 18 September. The staff judge advocate's recommendation was completed on 15 November, and the appellant submitted a reply and clemency request on 20 November. The staff judge advocate prepared an addendum to the recommendation on 12 December, and the convening authority acted on 15 December. The case was docketed at this court on 6 February 2007, 319 days after sentence was adjudged.

II. Discussion

A. Speedy Trial

The appellant contends that the nearly three month delay between arraignment and trial was unreasonable, and, citing *United States v. Moreno*, 63 M.J. 129, 137 (C.A.A.F. 2006), argues that the unavailability of a military judge that was the cause of the delay is attributable to the Government because the staffing of the Navy-Marine Corps Trial Judiciary is the responsibility of the Judge Advocate General of the Navy. Appellant's Brief and Assignment of Error of 27 April 2007 at 19.

1. Principles of law

We review the military judge's decision to deny an Article 10, UCMJ, speedy trial motion *de novo*. *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007); *United States v. Cooper*, 58 M.J. 54, 59 (C.A.A.F. 2003).

When an accused is confined prior to trial, "immediate steps shall be taken to . . . try him or dismiss the charges and release him." Art. 10, UCMJ. To comply with this requirement, the Government must exercise reasonable diligence in bringing a confined accused to trial. *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993); *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965). To determine whether the Government exercised reasonable diligence, the court considers four factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for speedy trial; and (4) prejudice to the appellant. *United States v. Mizgala*, 61 M.J. 122, 129 (C.A.A.F. 2005)(citing *Barker v. Wingo*, 407 U.S. 514 (1972), and *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999)). See also *Cossio*, 64 M.J. at 256.

In weighing the reasons for delay, our superior court has observed that:

Some cases are obviously more convoluted than others and necessarily take longer to process. In addition, the logistical challenges of a world-wide system that is constantly expanding, contracting, or moving can at

times be daunting. Often operational necessities add a further layer of complexity unimagined by the civilian bar. Even ordinary judicial impediments, such as crowded dockets, unavailability of judges, and attorney caseloads, must be realistically balanced.

Kossman, 38 M.J. at 261-62.

Prejudice is assessed in light of the interests which the speedy trial right was designed to protect -- (1) preventing oppressive pretrial incarceration; (2) minimizing anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired. *Mizgala*, 61 M.J. at 129 (quoting *Barker*, 407 U.S. at 532).

2. Analysis

Our superior court has never decided whether judicially-caused delays in trying a confined accused can violate Article 10, UCMJ, and we need not decide that question in this case. Even assuming, *arguendo*, that Article 10, UCMJ, requires the judiciary, as well as the prosecution, to act with reasonable diligence to bring a confined accused to trial, we find the appellant's right to a speedy trial was not violated in this case.

The delay between arraignment and trial in this case was 88 days. The record establishes the reason for this delay was that 20 to 24 March 2006 was the first block of dates available for trial of this case, given the amount of time required for a trial on the merits and the Circuit's docket. AE XXII at 12-13. Comments on the record by the military judge at the hearing on the Article 10 motion indicated there was a temporary shortage of military judges in the circuit expected to last until May or June 2006. Record at 11-12. Presumably, this fact contributed to the availability of trial dates in this case.

The appellant made a speedy trial demand on 18 December 2006, but then subsequently requested expert assistance on 27 December 2006, and on 30 December requested additional discovery and an opportunity to depose certain expected Government witnesses. AE XXII at 12-13. These requests suggest the appellant was not, in fact, ready to go to trial immediately, and reduce the weight to be accorded to his demand. Further, we note the trial court acted expeditiously in scheduling and disposing of numerous pretrial motions in the period between arraignment and trial on the merits.

Most importantly, we find the appellant was not prejudiced by the delay. The court-martial adjudged, and the convening authority approved, a sentence of 15 months confinement, and the appellant was entitled to credit against that sentence for his pretrial confinement. *See United States v. Allen*, 17 M.J. 126, 128 (C.M.A. 1984). He did not, therefore, suffer oppressive

incarceration. Further, the appellant has demonstrated no special anxiety or concern resulting from the delay. Finally, it is indisputable the appellant suffered no harm to his ability to present a defense. He pled guilty to the offenses of which he stands convicted, and was acquitted of all the charges to which he pled not guilty.

Considering the factors identified in *Mizgala* and *Birge*, we conclude the appellant was brought to trial with reasonable diligence, and that his right to a speedy trial was not violated.

B. Improper sentencing argument

1. Principles of law

Failure to object to improper argument before the military judge begins to instruct the members on sentencing constitutes waiver of the objection. RULE FOR COURTS-MARTIAL 1001(g), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). We review allegations of improper argument raised for the first time on appeal for plain error. *United States v. Edwards*, 35 M.J. 351, 355 (C.M.A. 1992); *United States v. Oatney*, 41 M.J. 619, 631 (N.M.Ct.Crim.App. 1994)(en banc), *aff'd*, 45 M.J. 185 (C.A.A.F. 1996).

Our superior court has held, "[t]he plain error doctrine is invoked to rectify those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.' The doctrine is only 'to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *United States v. Causey*, 37 M.J. 308, 311 (C.M.A. 1993)(quoting *United States v. Fisher*, 21 M.J. 327, 328-29 (C.M.A. 1986)(quoting *United States v. Frady*, 456 U.S. 152, 163 n. 14 (1982))). *Accord United States v. Young*, 470 U.S. 1, 17 n.14 (1985).

The trial defense counsel has the responsibility to object to improper argument so that the trial judge may take appropriate action. Failure to object supports the inference that any error was deemed "to be of little consequence." *Oatney*, 41 M.J. at 631 (quoting *United States v. Grandy*, 11 M.J. 270, 275 (C.M.A. 1981)).

An accused may only be sentenced for those offenses of which he is convicted, but the sentencing authority may consider evidence of other offenses or acts of misconduct that was properly introduced on the merits if such evidence also constitutes proper aggravation. R.C.M. 1001 (f)(2)(A), (b)(4); *United States v. Jones*, NMCCA No. 9400881, unpublished op. at 7, 9 (N.M.Ct.Crim.App. 30 May 1995); *United States v. Plott*, 38 M.J. 735, 740-41 (A.F.C.M.R. 1993).

Members are not to be asked to fashion their sentence upon blind outrage and visceral anguish, but upon cool, calm

consideration of the evidence and commonly accepted principles of sentencing. So-called Golden Rule arguments that ask the members to place themselves in the place of the victim or a near relative are improper. The trial counsel may, however, ask the members to imagine the victim's fear, pain, terror and anguish, since that is simply asking the members to consider victim impact evidence. *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000).

2. Analysis

After reviewing the record and considering the argument of trial counsel in the context of the entire trial, we are convinced that the trial counsel's argument does not constitute plain error.

While the trial counsel's argument did briefly invite the members to put themselves in [CJ]'s position, the comment can also easily have been taken as an invitation to consider the impact of the appellant's conduct on [CJ]. In any event, it did not, in our view, have the effect of appealing to, or inflaming, the members' passions. Further, the trial counsel's references to the appellant's ability to beat [CJ] are better understood as comments on the seriousness of his threats, rather than as an invitation to punish him for offenses of which we was acquitted, i.e. the alleged physical assault on [CJ], which was temporally and physically separate from the threat of which he was convicted. These less sinister interpretations of the meaning and effect of the trial counsel's argument are bolstered by the lack of contemporaneous objection by the trial defense counsel. As a result, we conclude that the trial counsel's sentencing argument did not constitute plain error.

C. Post-trial delay

The appellant also argues he has been denied speedy post-trial review. If we determine any error was harmless beyond a reasonable doubt, we need not reach the question of whether an appellant has actually suffered a denial of due process as a result of post-trial delay. *United States v. Allison*, 63 M.J. 365, 371 (C.A.A.F. 2006). The appellant has not identified, nor do we find, any harm from the delay in this case. The appellant has not suffered oppressive incarceration pending the outcome of his appeal. He has not shown, or even alleged, he has suffered any particularized anxiety or concern related to the delay, distinct from the anxiety and concern normal for persons awaiting appellate decisions. We have found no error that requires a rehearing at which the appellant could be prejudiced by the delay. *See United States v. Toohey*, 63 M.J. 353, 361 (C.A.A.F. 2006)(quoting *Moreno*, 63 M.J. at 138). Consequently, we find the delay in this case is harmless beyond a reasonable doubt.

III. Conclusion

For the foregoing reasons, we affirm the findings and sentence, as approved by the convening authority.

Chief Judge RITTER and Judge VINCENT concur.

For the Court

R.H. TROIDL
Clerk of Court