

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

BEFORE

J.W. ROLPH

R.E. VINCENT

E.B. STONE

UNITED STATES

v.

**David K. SORENSON
Electrician's Mate First Class (E-6), U.S. Navy**

NMCCA 200001969

Decided 9 August 2007

Sentence adjudged 11 January 2006. Military Judge: J.T. Wooldridge. Staff Judge Advocate's Recommendation: CDR D.M. Tompkins, JAGC, USN. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Training Center, Great Lakes, IL.

CDR Mary Grace MCALEVY, JAGC, USN, Appellate Defense Counsel
CAPT DANIEL R. LUTZ, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

STONE, Judge:

This case is before our court for the second time as a result of our decision to affirm the findings of guilty, but to set aside the original sentence and return the record to the Judge Advocate General of the Navy for remand to the convening authority with a rehearing on the sentence authorized. *United States v. Sorenson*, No. 200001969, 2005 CCA LEXIS 164, unpublished op. (N.M.Ct.Crim.App. 27 May 2005). At the sentencing rehearing held on 9 and 11 January 2006, the appellant was sentenced to a dishonorable discharge. The convening authority approved a bad-conduct discharge.

At his original trial on 11-12 July 2000, the military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of three specifications of indecent liberties with a child by taking photographs of a nude female child in provocative poses, in violation of Articles 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to a bad-conduct discharge. The convening

authority (CA) approved the sentence as adjudged and, except for the bad-conduct discharge, ordered it executed.

We have carefully considered the record of trial, the appellant's two assignments of error,¹ 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.

Right to Speedy Trial at Sentence-Only Rehearing

In his first assignment of error, the appellant contends that his right to a speedy trial under RULE FOR COURTS-MARTIAL 707 MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.),² was denied when he was not brought to the sentence-only rehearing by 29 October 2005, the 120th day on the speedy trial clock. *See United States v. Becker*, 53 M.J. 229 (C.A.A.F. 2000). The appellant further contends that the military judge erred as a matter of law when he denied his motion for appropriate relief based on a violation of a right to a speedy trial.

We review a military judge's denial of a speedy trial motion *de novo*.³ However, we afford the factual findings of the military judge substantial deference. *See United States v. Cooper*, 58 M.J. 54, 57 (C.A.A.F. 2003); *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999).

The Government concedes that under R.C.M. 707(b)(3)(D) the 120-day clock for a rehearing started on the 1st of July 2006, when the CA received this court's opinion, the record of trial,

¹ I. APPELLANT'S R.C.M. 707 RIGHT TO SPEEDY TRIAL AT HIS SENTENCE-ONLY REHEARING WAS VIOLATED. THE MJ ERRED AS A MATTER OF LAW WHEN HE DENIED THE DEFENSE MOTION FOR VIOLATION OF APPELLANT'S RIGHT TO SPEEDY TRIAL.

II. A PUNITIVE DISCHARGE IS INAPPROPRIATELY SEVERE IN LIGHT OF THE CIRCUMSTANCES OF THE CASE.

² R.C.M. 707(b)(3)(D) states the following:

Rehearings. If a rehearing is ordered or authorized by an appellate court, a new 120-day time period under this rule shall begin on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing. An accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904 or, if arraignment is not required (such as in the case of a sentence-only rehearing), at the time of the first session under R.C.M. 803.

³ The military judge erred in determining that the standard of review of the military judge's determination on a motion under R.C.M. 707 is an "abuse of discretion." Appellate Exhibit LVII at 8. We review a military judge's denial of a speedy trial motion *de novo*, *United States v. Blankett*, 62 M.J. 625, 628 (N.M.Ct.Crim. App. 2006)(citing *United States v. Cooper*, 58 M.J. 54, 57 (C.A.A.F. 2003)), and afford the factual findings of the military judge substantial deference, *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999).

and the Judge Advocate General's directive to conduct a rehearing, and that the clock stopped on 9 January 2006 at the first session under Article 39(a), UCMJ, 72 days past the 120-day clock. Therefore, the only issue before this Court is whether the appellant is entitled to sentence relief as a remedy. *Id.*

In *Barker v. Wingo*, 407 U.S. 514, (1972), the Supreme Court set out the test for determining a violation of the Sixth Amendment right to a speedy trial. The *Barker* analysis includes four factors for consideration: (1) length of delay; (2) reasons for the delay; (3) the appellant's demand for speedy trial; and (4) prejudice to the appellant. *Id.* at 530.

In *United States v. Becker*, 53 M.J. 229 (C.A.A.F. 2000), our superior court adopted the four *Barker* factors when addressing the right to a speedy trial in a sentence-only rehearing. The 2004 Amendments to RULES FOR COURTS-MARTIAL 707(b)(3)(D) and 707(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) incorporated the *Becker* decision. R.C.M. 707(d) states the following:

(1) *Remedy*. A failure to comply with this rule will result in dismissal of the affected charge, or, in a sentence-only rehearing, sentence relief as appropriate. . . .

* * * *

(2) *Sentence Relief*. In determining whether or how sentence relief is appropriate, the military judge shall consider, among others, each of the following factors: the length of the delay, the reasons for the delay, the accused's demand for speedy trial, and any prejudice to the accused for the delay. Any sentence relief granted will be applied against the sentence approved by the convening authority.

In analyzing the instant case under the factors in R.C.M. 707(d)(2), we conclude that the appellant is not entitled to relief.

(1) Length of delay. The Government took 193 days, 72 days over the speedy trial clock. In *Becker*, our superior court held that despite the Government taking 337 days to commence a sentence-only rehearing, the appellant in that case was not entitled to sentence relief. Though we do not view the delay in *Becker* as a talisman, it is useful in this case for assessing length of delay.

(2) Reasons for the delay. The Government claims the delay was caused by the Government's unfamiliarity with the novel procedures involved in accomplishing a sentence-only rehearing after more than 5 1/2 years since the original trial date, and not due to bad faith or neglect on their part. Given the unusual nature of preparing for a sentence-only rehearing after 5 1/2 years, the Government faced the following issues: locating and bringing the appellant back to active duty; locating tapes and

files from the original case; preparing accounting data for sentencing witnesses and subpoenaing them; obtaining the appellant's service record book; consulting with the appropriate authorities at Navy Personnel Command about pay and retirement issues involved in re-sentencing the appellant; and flying the trial defense counsel to New Mexico to ensure he met with his client. AE LVII (Military Judge's Findings of Fact) at 13; Government's Answer of 17 Nov 2007 at 6; AE XLIX (Stipulation of fact); Record at 31-32, 65; Government's Answer at 4-5; Record at 71. Additionally, the Government claims that the CA lacked the funding in fiscal year 2005 to pay for the sentence-only rehearing. AE XLIX.

On 2 August 2005, the officer in charge of the Trial Service Office, on behalf of the CA, requested an extension of time from the Navy-Marine Corps Appellate Review Activity (NAMARA), citing the difficulties in bringing the appellant to active duty and the lack of funding available. AE XLIII-Attachment (1); AE XLIX. NAMARA granted the Government an extension from 3 August 2005 until 14 November 2005, when NAMARA informed the CA that funding had become available for fiscal year 2006 and that the rehearing should go forward. Appellate Exhibit XLIX; Appellate Exhibit XLI, Attachment (2). However, since the charge was already referred, the proper authority to request an extension for delay under R.C.M. 707(c)(1) was the military judge, not NAMARA. In other words, NAMARA mistakenly assumed that it was the proper authority for granting extensions in this case. In good faith, the Government followed NAMARA's written instructions on requesting an extension from NAMARA instead of the military judge. AE LVII; Record at 18-20. AE XLIX; AE XLI-Attachment 2. The military judge erred in finding that NAMARA was authorized to grant such a delay and that the period of time from 3 August until 14 November should be considered excludable day under R.C.M. 707. AE LVII at 7 and 9. We note that if the military judge, instead of NAMARA, had granted the extension, then the 91 day delay would have been properly excludable and the rehearing would have taken place well within the 120 day clock. AE LVII at 6. Considering all of the above, we specifically find that the Government acted with reasonable diligence in their effort to bring this rehearing to fruition. AE LVII at 10. We also further find, as set forth extensively below, that even if the 91 day period was not considered excludable delay, the appellant has suffered no prejudice under the totality of the circumstances. AE LVII at 15.

(3) Demand for speedy trial. Appellant did not assert his speedy trial right until 7 November 2005, nine days after the 120-day clock had expired. AE LVII at 7.

(4) Prejudice from the delay. The military judge determined that the appellant suffered "no specific prejudice during the time the case was docketed for re-hearing on sentence." AE LVII at 7. The military judge found that the appellant had not been under

any restraint or confinement and that, during the entire time following the original proceeding until the rehearing on sentencing, the appellant was duly employed in his civilian job. *Id.* at 7. The appellant, however, contends that he suffered prejudice because he was offered and declined a promotion to a supervisory position at Home Depot based upon his uncertainty about the duration of the retrial as to sentence. Record of Rehearing at 43-47. The appellant further contends that he has suffered "particularized anxiety" due to this delay in the nature of financial difficulties due to lower wages resulting from the loss of the promotion offer. The appellant claims that he suffered "numerous physical ailments" resulting from his case being unresolved for more than 5 years. Appellant's Brief at 18. In particular, the appellant states that due to his "reduced wages" he has not been able to afford health insurance. *Id.* at 22. We, however, agree with the military judge and find that the appellant in this case is similarly situated to the appellant in *Becker* in that he was "not incarcerated or in any other way physically restrained; he remained in his civilian life and at his civilian job virtually throughout the period of delay; and there was no evidence that his ability to present a defense and to receive a fair proceeding and sentence had been impaired." *Becker*, 53 M.J. at 231. Additionally, we find that the appellant's claims of prejudice, if believed, are, on their face, problems of his own making arising from a decision to accept lower wages and decline a promotion. We therefore decline to grant relief.

Sentence Severity

In his second assignment of error, the appellant alleges that the seriousness of his offenses do not sufficiently outweigh his military accomplishments of over 30 years of military service with more than 17 years of active duty service, including combat duty in Vietnam. The appellant claims that there is no evidence of any impact of his offenses on the victim. The appellant further argues that he has already received some punishment as a result of the charges lingering over his head for years. We disagree and decline to grant relief after considering the entire record, including the nature of appellant's crimes of sexually exploiting an 18-month-old infant. We further conclude that the adjudged sentence is appropriate for this particular offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982).

Conclusion

The approved findings and sentence are affirmed.

Chief Judge ROLPH and Judge VINCENT concur.

For the Court

R.H. TROIDL
Clerk of Court