

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

**Before
L.T. BOOKER, J.K. CARBERRY, E.C. PRICE
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DOUGLAS W. LABOUT, JR.
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 201000383
GENERAL COURT-MARTIAL**

Sentence Adjudged: 1 April 2010.

Military Judge: Maj Stephen F. Keane, USMC.

Convening Authority: Commanding General, 1st Marine
Division (Rein), Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: LtCol H.D. Russell,
USMCR.

For Appellant: CAPT Salvador Dominguez, JAGC, USN.

For Appellee: LCDR Sergio Sarkany, JAGC, USN.

11 January 2011

OPINION OF THE COURT

**IN ACCORDANCE WITH RUE 18.2, NMCCA RULES OF PRACTICES AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of one specification of attempt to distribute a controlled substance, one specification of unauthorized absence terminated by apprehension, three specifications of wrongful distribution of a controlled substance, in violation of Articles 80, 86, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 886, and 912a. The military judge sentenced the appellant to 30 months confinement, forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority approved the sentence.

The appellant asserts on appeal, as he did at trial, that he was denied a speedy trial as guaranteed by Article 10, UCMJ.¹

Background

The appellant was placed in pretrial confinement on 16 September 2009 and arraigned on 9 February 2010, 146 days later. Prior to his arraignment, the appellant did not request a speedy trial.

Article 10, UCMJ

When a servicemember is placed in pretrial confinement, "immediate steps shall be taken" to inform the accused of the charges and to either bring the accused to trial or dismiss the charges. Art. 10, UCMJ. The procedural framework for analyzing speedy trial violations under Article 10 examines the length of the delay, the reasons for the delay, whether the accused made a demand for a speedy trial, and prejudice to the accused. *United States v. Mizgala*, 61 M.J. 122, 129 (C.A.A.F. 2005). Although the procedural framework is derived from the Sixth Amendment test set forth by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972), Article 10 imposes a more stringent speedy trial standard than the Sixth Amendment. *Mizgala*, 61 M.J. at 127, 129 (noting that the military judge erred in limiting his consideration to the Sixth Amendment procedural framework).

We use the procedural framework to analyze Article 10 claims under the "immediate steps" standard of the statute and the applicable case law. *Id.* at 124. Article 10 does not require "constant motion, but reasonable diligence in bringing the charges to trial." *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007) (citations and internal quotation marks omitted). "Short periods of inactivity are not fatal to an otherwise active prosecution." *Mizgala*, 61 M.J. at 127 (citations omitted). In conducting our analysis, "we remain mindful that we are looking at the proceeding as a whole and not mere speed." *Id.* at 129. We conduct our review *de novo*, giving substantial deference to the military judge's findings of fact unless they are clearly erroneous. *Id.* at 127.

The evidence presented to the military judge convinces us that the delay in bringing the appellant to trial was caused, in part, by the high operational tempo of the Naval Criminal Investigative Service (NCIS) office and the need to gather additional evidence and thoroughly investigate the allegations against the appellant. Specifically, during the course of the investigation into the appellant's misconduct, the 4-man NCIS office was also conducting murder and suicide investigations;

¹ The speedy trial claims under the Sixth Amendment and RULE FOR COURTS-MARTIAL 707, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) were waived by the appellant's entry of his unconditional guilty pleas. See *United States v. Mizgala*, 61 M.J. 122, 124 (C.A.A.F. 2005); R.C.M. 707(e).

engaged in an on-going joint operation with local law enforcement; and, suffered the non-availability of an agent due to a family member's death. Additionally, testing of the pills obtained from the appellant took approximately 6 months.² Furthermore, it was not until January 2010 that NCIS located and interviewed two females who were present and witnessed three of the drug transactions.

Given the complexity of this case, the nature of the offenses, the fact that the investigation was on-going and the activity demonstrated by the Government, we agree with the military judge that the Government exercised reasonable diligence in bringing the appellant to trial. See Appellate Exhibit VIII, Military Judge's Findings of Fact and Conclusions of Law. Moreover, during the entire period of the appellant's pretrial confinement, there is no evidence that the delay was caused by the Government's neglect or an intent to delay the proceeding to hamstringing the defense.

We also agree that the appellant suffered no prejudice from the delay. The appellant contends he was prejudiced because the Marine informant who could testify as to the appellant's predisposition to sell drugs was discharged from the Marine Corps while the appellant was in pretrial confinement. Other than this broad assertion, which is contrary to the appellant's sworn colloquy with the military judge, there is no evidence that the discharge of this Marine prejudiced the appellant. The appellant's statements during his providence inquiry indicate clearly that the idea to sell drugs originated with him; that he was not induced to sell drugs; and, that he discussed the defense of entrapment with his defense counsel and agreed that it did not apply to him. Record at 66-68. In light of the lengthy colloquy between the military judge and the appellant, in which he confirms that the entrapment defense does not apply in his case, we are convinced that he suffered no prejudice. We note also that there is no evidence of undue anxiety caused by the appellant's pretrial confinement or evidence of any harsh or oppressive conditions of his confinement.

Finally, we note that the appellant never requested a speedy trial.

Applying the above-mentioned framework and factors to the case before us, we conclude that the Government exercised reasonable diligence in bringing the charges to trial and that

² The NCIS agent testified that it can take 6-8 months to get laboratory results. Laboratory results for the first two batches of suspected ecstasy were received in late January or early February 2010. The record indicates that NCIS bought suspected ecstasy from the appellant on 27 and 31 July 2009, 25 August 2009, and 4 September 2009, and sent the evidence to the San Diego Sheriff's Department laboratory. Suspected contraband seized from the appellant on 16 September 2009 was also sent to the San Diego Sheriff's Department laboratory for chemical analysis. See Appellate Exhibit II and Record at 17.

the appellant was not denied his right to a speedy trial under Article 10, UCMJ.

Conclusion

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

For the Court

R.H. TROIDL
Clerk of Court