

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

**Before  
C.L. REISMEIER, J.K. CARBERRY, M.D. MODZELEWSKI  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**MICHAEL S. HARIDAT  
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201100275  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 25 January 2011.

**Military Judge:** LtCol G.W. Riggs, USMC.

**Convening Authority:** Commanding General, 2d Marine  
Division, Camp Lejeune, NC.

**Staff Judge Advocate's Recommendation:** Maj C.S. Ruwe, USMC.

**For Appellant:** LT Daniel C. LaPenta, JAGC, USN.

**For Appellee:** Maj William C. Kirby, USMC.

**10 January 2012**

-----  
**OPINION OF THE COURT**  
-----

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS  
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2..**

CARBERRY, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of three specifications of aggravated assault in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928. The military judge sentenced the appellant to confinement for a period of 12 years, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

## Background

On 2 January 2010, the appellant and his friends got into a fistfight with another group of men inside a nightclub in Jacksonville, North Carolina. The altercation resumed as both groups were leaving the club. The appellant then went to his car, retrieved an unloaded pistol from the glove compartment, loaded the weapon, and then shot three persons. The Jacksonville Police Department arrested and detained the appellant on 3 January 2010. On 12 January 2010, the appellant was released from civilian custody, returned to his unit, and placed in pretrial confinement (PTC).

The district attorney for Onslow County, North Carolina ceded jurisdiction to the United States Marine Corps on 8 February 2010. Charges were preferred on 12 February 2010 and served on the appellant on 22 February 2010. On 16 February and again on 24 February 2010, the appellant served speedy trial requests upon the Government. On 26 March 2010, charges were referred to a general court-martial and on 9 April 2010, the appellant was arraigned. In accordance with the trial schedule that was negotiated and agreed to by the appellant's counsel, the military judge set motions for 23 June, 11 August, and 23 September 2010, and the trial for 18 October 2010. Record at 7. The appellant did not object to the proposed schedule or request an earlier trial date.

On 8 June 2010, after 147 days in PTC, the appellant filed a motion to dismiss, arguing that the Government violated his right to a speedy trial. The military judge denied the motion. The appellant asserts on appeal that the military judge's analysis under *Barker v. Wingo*, 407 U.S. 514 (1972) was flawed as it was based on clearly erroneous findings of fact. The appellant claims the military judge omitted critical dates and episodes of Government neglect from his factual findings, resulting in a flawed analysis.

We disagree and, after considering the pleadings of the parties as well as the entire record of trial, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

## Discussion

Whether an appellant's Article 10, UCMJ, right to speedy trial was violated is a question of law reviewed *de novo*. *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005). In conducting our review, we rely on the findings of fact made by the military judge unless they are clearly erroneous or unsupported by the record. *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007). The possibility that a factual finding could be wrong is insufficient to find it clearly erroneous. *Id.* Where the record contains some support for a factual finding it is not clearly erroneous. *Id.* A factual finding is only clearly erroneous where there exists a "definite and firm conviction that a mistake has been committed." *United States v. Martin*, 56 M.J. 97, 106 (C.A.A.F. 2001) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

Here, the appellant alleges the military judge's factual findings as a whole were clearly erroneous. The appellant asserts that the military judge failed to address several crucial issues in his factual findings and those omissions render the findings clearly erroneous. The appellant initially claimed two specific periods of time were omitted entirely from the military judge's factual findings, a 10-day delay in service of preferred charges on the accused and a 31-day delay in ordering a defense-requested evaluation pursuant to RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Additionally, the appellant alleged the military judge failed to address defense discovery requests as well as a request for investigative assistance. We disagree with the appellant's interpretation of the military judge's findings of fact and note specific findings addressing each of the four purported omissions.

The first purported omission was the 10-day period of time between preferral on 12 February 2010 and service of charges on the appellant on 22 February 2010. This period of time was well-covered within the factual findings, specifically, findings of fact K, AA, and BB. Appellate Exhibit XI at 2, 3. These factual findings are not clearly erroneous, as each is supported by uncontroverted testimony in the record. Record at 56-59, 78-79. The appellant takes issue with finding of fact K as "general and conclusory." <sup>1</sup> Appellant's Reply Brief of 15 Nov

---

<sup>1</sup> Finding of fact K reads as follows:

Enclosure (1) to AE VIII details the almost daily activities of both the government counsel and [Naval Criminal Investigative Service] agents undertaken from 3 Jan to 17 Jun 10 and thereafter.

2011 at 2. The conclusion we draw from this finding of fact is that the military judge determined that the actions listed in the document occurred. In finding of fact K, the military judge adopted and incorporated by reference, as a finding of fact, a detailed day-by-day breakdown of the Government's actions to move the case forward towards trial.<sup>2</sup>

The second purported omission was the 31-day period of time between the defense request for an R.C.M. 706 evaluation and the convening authority ordering the evaluation. We find the relevant period of time, beginning on 6 April 2010, covered within findings of fact. Finding of fact LL specifically addresses the receipt of the defense request for a 706 evaluation on 6 April 2010. AE XI at 3. Finding of fact KK addresses steps taken by the Government during the month of April to move the case forward. AE XI at 3. Findings of fact K and NN specifically incorporate by reference a document that contains a detailed breakdown of events, several of which occurred during the relevant period. AE XI at 2, 4. We find no basis to challenge these findings as clearly erroneous as each is well-supported by the record. Record at 56-59, 63, 65, 77-79.

Lastly, the appellant argues the military judge failed to address the defense discovery requests and the request for investigative assistance in his findings of fact. We find both issues adequately covered in the military judge's findings. Findings of fact K, EE, NN, and PP all incorporate by reference Enclosure (1) of AE VIII, which contains several specific entries regarding discovery requests and expert assistance requests. AE XI at 2-4. Further, findings N and BB expressly reference the Government conducting evidence review, an essential component of responding to a discovery request. AE XI at 2, 3. Further, those factual findings are well-supported by the record. Record at 68, 70, 71, 78, 79.

The findings of fact made by the military judge are supported by the record and not clearly erroneous. Accordingly, the findings of fact are accepted for purposes of our *de novo*

---

<sup>2</sup> We note that finding of fact EE incorporates by reference the same document as that in finding of fact K, Enclosure (1) to AE VIII. AE XI at 3. Finding of fact EE contains a scrivener's error in referencing the document as AE VII rather than AE VIII. The surrounding explanation within finding of fact EE, whose testimony the document was a part of and the content of the document, demonstrate that referring to it as AE VII rather than AE VIII was merely a scrivener's error.

review of whether the appellant's Article 10 right to a speedy trial was violated.

### Article 10, UCMJ

When a servicemember is placed in PTC, "immediate steps shall be taken" to inform the appellant of the charges and to either bring the appellant 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 appellant made a demand for a speedy trial, and prejudice to the appellant. *Mizgala*, 61 M.J. at 129. Although the procedural framework is derived from the Sixth Amendment test set forth by the Supreme Court in *Barker v. Wingo*, 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 noted 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.

Having noted that the appellant was arraigned on day 88, we pause to discuss the import of the arraignment on our analysis. As the Court of Appeals for the Armed Forces has stated, after arraignment, a change in the speedy-trial landscape occurs. *United States v. Cooper*, 58 M.J. 54, 60-61 (C.A.A.F. 2003). This is because after arraignment, "the power of the military judge to process the case increases, and the power of the [Government] to affect the case decreases." *Id.* at 60 (quoting *United States v. Doty*, 51 M.J. 464, 465-66 (C.A.A.F. 1999)). As a result, once an appellant is arraigned, significant responsibility for ensuring that the appellant's court-martial proceeds with reasonable dispatch rests with the military judge. The military judge has the power and responsibility to force the

Government to proceed with its case if justice so requires. Bearing this in mind, we nonetheless conduct our review to determine whether the Government met its affirmative obligation to proceed with reasonable diligence.

#### Length of Delay.

At the outset, given the facts of this case, we conclude that the 147-day delay from the start of the appellant's PTC until the filing of his motions to dismiss is not presumptively prejudicial. See *Barker v. Wingo*, 407 U.S. at 530 (explaining that without a presumptively prejudicial delay there is no need for further analysis of remaining factors). In this instance, the appellant was confined by military authorities on 12 January 2010. The Marine Corps obtained primary jurisdiction from local authorities on 8 February 2010. Charges were preferred on 12 February 2010. On 16 February and again on 24 February 2010, the appellant submitted speedy trial requests to the Government. On 6 April 2010, the appellant submitted a request for an R.C.M. 706 evaluation.<sup>3</sup> The request was approved on 7 May 2010. On 9 April 2010 (Day 88), the appellant was arraigned and agreed to a schedule of trial milestones culminating with the trial set for 18 October 2010. At arraignment, the appellant did not renew his demand for speedy trial, did not request an earlier trial date and voiced no objection to the proposed trial schedule. In light of these facts laying out the procedural events of the case, we do not find the delay presumptively prejudicial.

#### Reasons for Delay

Even assuming 147 days in PTC was presumptively prejudicial, the facts of this case demonstrate legitimate reasons for the delay. Here, the civilian authorities initially exercised their jurisdiction over the incident as it occurred off-post within Onslow County, North Carolina. AE XI at 1. The civilian authorities did not relinquish jurisdiction to the Marine Corps until 8 February 2010. AE XI at 1. The incident was originally investigated by civilian authorities, involved over 60 pieces of physical evidence, multiple victims, interviews of 15 - 20 witnesses, a defense requested R.C.M. 706 examination, forensic testing such as gunshot residue, ballistic and DNA testing, collection of videotaped interviews and recorded 911 calls from different city and county police

---

<sup>3</sup> In the request, the appellant agreed that all delay, not exceeding 30 days, from the date of the request until the completion of the examination was attributable to the appellant and excludable for R.C.M. 707 and Article 10 purposes.

departments, and the prosecution of two cooperating witnesses. AE XI at 2-4 and 7-8.

Given the serious nature of the offenses, i.e., originally charged as three specifications of attempted murder involving three different victims,<sup>4</sup> the involvement of multiple law enforcement agencies, the fact that the investigation was on-going, and the other activities demonstrated by the Government, we agree with the military judge that the Government exercised reasonable diligence in bringing the appellant to trial. See AE XI at 7-8. Moreover, during the entire period of the appellant's PTC, there is no evidence that the delay was caused by neglect on the part of the Government or an intent to delay the proceeding to hinder the defense. AE XI at 4.

### Prejudice

The appellant contends he suffered prejudice as a result of being placed in PTC and delay on the part of the Government in bringing the case to trial because: (1) he did not receive adequate mental health care while in PTC; (2) his assignment to special quarters was oppressive; and (3) his pretrial preparations were hindered because the opportunity was lost, at an early stage, to find witnesses and use photo-identification information to interview witnesses. We find the appellant suffered no prejudice due to PTC or purported delay in the case being brought to trial.

The record makes clear that the appellant suffered from and was prescribed medications for post-traumatic stress disorder and traumatic brain injury. Although the appellant's course of treatment was slightly modified while in PTC, specifically, he was afforded the opportunity to attend group PTSD counseling sessions in the brig as opposed to individual counseling sessions, the treatment was essentially the same as he was receiving preconfinement. The group sessions offered in the brig were conducted by a licensed forensic social worker and participation was voluntary. Record at 93, 95. The appellant chose to attend approximately half of the sessions available. AE XI at 5; Record at 97. The appellant continued to receive his medications and see a psychiatrist every 3-5 weeks, as he would have if he had not been in confinement. See AE XI at 5; Record at 92, 96. In light of the testimony of Dr. Hotchkiss, the Brig's staff psychiatrist, the findings of fact, and the

---

<sup>4</sup> Pursuant to the terms of the PTA, the convening authority withdrew and dismissed the attempted murder specification.

record, we conclude that the appellant received adequate mental health care while in PTC.

Additionally, there is no evidence of undue anxiety caused by the appellant's PTC or evidence of any harsh or oppressive conditions of his confinement. See AE XI at 5. Other than his assignment to special quarters, which he requested, there is no evidence in the record that the conditions of his PTC were oppressive.

The appellant's final allegation of prejudice was that his ability to challenge identification issues was lost due to delay. Appellant's Reply Brief at 6. The appellant makes two specific claims in support: first that delay in approval of his request for investigative assistance caused him prejudice; and, second, that he suffered prejudice from not being notified until 17 May 2010 that a particular witness could not be located by the Naval Criminal Investigative Service case agent. Appellant's Brief of 25 Jul 2011 at 21-22. Due to the inherent difficulty of demonstrating that one's defense has been impaired by the passage of time, actual "proof of particularized prejudice is not essential to every speedy trial claim." *Doggett v. United States*, 505 U.S. 647, 655 (1992) (emphasis added). However the Government needs some time to gather its evidence and prepare its case, therefore some pretrial delay is inherent in every case. See *Doggett v. United States*, 505 U.S. 647, 656 (1992) (noting "pretrial delay is often both inevitable and wholly justifiable."). Here, we note the delay suffered was not excessive, was supported by entirely reasonable justifications, and there is no evidence that the Government acted in bad faith or even with any measurable negligence. Accordingly, finding no evidence to support the appellant's claims, we decline to engage in speculation regarding witnesses that might have been available or whose memories might have dimmed. See AE XI at 5.

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

Chief Judge REISMEIER and Judge MODZELEWSKI concur.

For the Court

R.H. TROIDL  
Clerk of Court