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

Before
R.Q. WARD, J.R. MCFARLANE, K.M. MCDONALD
Appellate Military Judges

UNITED STATES OF AMERICA

v.

STEVEN V. ROSARIO
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 201200502
SPECIAL COURT-MARTIAL

Sentence Adjudged: 10 August 2012.
Military Judge: CDR John Maksym, JAGC, USN.
Convening Authority: Commanding Officer, Headquarters Battalion, 3d Marine Division, Okinawa, Japan.
Staff Judge Advocate's Recommendation: Maj B.C. Corcoran, USMC.
For Appellant: CDR Michael Pallesen, JAGC, USN.
For Appellee: LT Ann Dingle, JAGC, USN.

17 October 2013

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.

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, consistent with his pleas, of one specification of attempted assault and three specifications of assault, in violation of Articles 80 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 928. The military judge sentenced the appellant to 355 days of confinement, reduction to pay grade E-1, forfeiture of $850.00 pay per month for 12 months, and a bad-conduct discharge. The convening authority

approved the sentence and, pursuant to a pretrial agreement, suspended execution of confinement in excess of 60 days.

The appellant asserts that the military judge erred in denying his Article 10, UCMJ, speedy trial motion. First, he contends that the military judge erred in ruling that his speedy trial motion was mooted once the Government released him from pretrial confinement; and second, that the military judge erred by failing to make findings of fact in connection with his ruling. Assuming *arguendo* that the military judge erred in finding the appellant's motion mooted, based on our *de novo* review of the record we find any error harmless as we conclude that the appellant suffered no violation of his rights under Article 10, UCMJ.

Background

The subject charges arose from an incident involving the appellant that occurred on 28 April 2012. His commanding officer placed the appellant on Class "C" Liberty Risk on 8 May 2012, a status which limited him to on-base liberty and required him to check out with his barracks duty noncommissioned officer (NCO) before leaving his barracks. Appellate Exhibit III at 16. It also restricted his attire to the utility uniform, the service "C" uniform, or PT gear. Finally, it prohibited the purchase, possession or consumption of alcohol. *Id*. at 16-17.

The appellant remained in this liberty risk status until 17 May 2012, when his commanding officer ordered him into pretrial confinement. *Id*. at 28. Among the reasons listed for pretrial confinement were the subject offenses, an earlier orders violation for visiting an off-limits establishment, a positive result from a urinalysis taken after the appellant was caught visiting the off-limits establishment, and multiple violations of his Class "C" liberty risk status. *Id*. at 28-29. His commanding officer also noted that the appellant previously received company nonjudicial punishment on 12 March 2012 for twice violating Article 92, UCMJ. *Id*. at 29. He also cited the appellant's violation of the liberty risk program as a factor underlying his belief that lesser forms of restraint would be inadequate. *Id*.

On 23 May 2012, the initial review officer (IRO) ordered the appellant released from pretrial confinement citing that lesser forms of restraint would be adequate to ensure the appellant's presence at trial. *Id*. at 34. The IRO also found that the appellant was not a risk for future serious misconduct.

That same day, the appellant's commanding officer placed him on pretrial restriction. This status placed physical limits on the appellant's liberty and imposed additional conditions, such as prohibiting civilian attire, consuming alcohol, having visitors in his barracks room, and required him to muster with the duty NCO at regular intervals. *Id*. at 36-39.

Less than two weeks later, on 12 June 2012, the appellant's commanding officer ordered him back into pretrial confinement. As justification, his commanding officer cited additional instances of misconduct where the appellant violated his pretrial restriction and was caught by military police with a suspected prohibited substance. *Id*. at 40-42.

Charges were preferred on 19 June 2012 and trial defense counsel was detailed on 20 June 2012. *Id*. at 44, 46. On 21 June 2012, the appellant demanded speedy trial. *Id*. at 56. He was first informed of the preferred charges on 12 July 2012 and the Government attempted to arraign him on 1 August 2012. However, after the military judge pointed out irregularities with the charge sheet, the Government re-referred charges on 1 August 2012. On 3 August 2012, trial defense submitted a motion to dismiss all charges for violation of Article 10, UCMJ. On 10 August 2012, the appellant was arraigned and litigated his Article 10, UCMJ, speedy trial motion.

At trial, the military judge denied the speedy trial motion, but *sua sponte* granted relief for a violation of Article 13, UCMJ, due to the appellant's status while on Class "C" liberty risk.[1] The appellant then entered guilty pleas pursuant to a pretrial agreement and was sentenced.[2] The record is unclear on the exact date when the appellant was released from pretrial confinement; however, both parties agree that he was released prior to 10 August 2012.

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[1] The Government presented the testimony of one witness on the defense motion to dismiss. Following her testimony, the military judge briefly heard argument from counsel on the motion before quickly diverting the argument into a discussion on the appellant's placement on liberty risk. Record at 24-31. After explaining that Article 10 relief was inapplicable due to the appellant's release, he announced that he would grant relief under Article 13, UCMJ, in the amount of 185 days of confinement credit. However, he articulated no findings of fact or conclusions of law in support of his ruling other than an expression that the appellant's command misused the liberty risk program as a form of pretrial restraint. *Id*. at 32-33.

[2] "[A] litigated speedy trial motion under Article 10 is not waived by a subsequent unconditional guilty plea." *Mizgala*, 61 M.J. at 127.

Discussion

On appeal, the Government initially adopts the military judge's conclusion that the appellant's release effectively mooted any relief under Article 10, UCMJ. The appellant disagrees, instead arguing that the entire time of the appellant's restraint prior to trial enjoys Article 10, UCMJ protection regardless of his subsequent release from confinement. Although we have doubts regarding the Government's position,[3] we need not decide that issue today. Even assuming *arguendo* that the military judge erred, we find that the appellant suffered no violation of his rights under Article 10, UCMJ.

Whether the appellant was denied his right to a speedy trial under Article 10, UCMJ, is a question of law that we review *de novo*. *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005). We give substantial deference to the military judge's findings of fact unless those findings are clearly erroneous. *Id.* (citing *United States v. Cooper*, 58 M.J. 54, 57-59 (C.A.A.F. 2003)).[4]

Article 10 motions are evaluated to determine if the Government has met its "affirmative obligation of reasonable diligence" in moving a case to trial. *Cooper*, 58 M.J. 60. The Government bears the burden of making this showing. *Mizgala*, 61 M.J. at 125. In evaluating an Article 10 motion, we balance "(1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant." *Id.* at 129 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972))).

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[3] It is true that Article 10 "becomes operative only after arrest or confinement[,]" *United States v. Schuber*, 70 M.J. 181, 187 (C.A.A.F. 2011), but it does not necessarily follow that release moots any Article 10 claim for confinement served. If it did, the Government could arguably avoid responsibility, no matter how egregious the violation, simply by releasing an accused on the eve of a motion hearing. *Cf. Schuber*, 70 M.J. at 187-88 (concluding that a period of pretrial restriction following release from pretrial confinement failed to qualify for Article 10 protection, the court then analyzed the earlier period of confinement for a violation Article 10, UCMJ).

[4] As previously noted, the appellant raises as a second error the failure of the military judge to articulate any factual findings on the record before denying his motion for Article 10, UCMJ, relief. We do not reach this assigned error as we conclude, based on our *de novo* review of the record, that the appellant suffered no violation of his rights under Article 10, UCMJ.

On the first factor, length of the delay, the parties disagree. Both at trial and on appeal, the appellant describes his entire period of restraint, to include liberty risk and pretrial restriction, a period of 93 days, as arrest or confinement triggering Article 10, UCMJ, protection. The Government disagrees and cites no findings of fact by the military judge or evidence in the record to establish such a claim. By its calculation, only the two periods of actual pretrial confinement totaling 66 days qualify under Article 10, UCMJ.

The appellant characterizes the military judge's decision to award Article 13, UMCJ, relief as evidence that his status on liberty risk and later pretrial restriction both qualify as "arrest" within the meaning of Article 10, UCMJ. We disagree. A contextual analysis of the record reveals first that the military judge's decision was motivated by a concern for a misuse of liberty risk as a subterfuge for pretrial restraint. Record at 29-33. While the military judge made several off-hand comments about the nature of the appellant's restraint (it is unclear whether he was referring to the liberty risk or later pretrial restriction), he made no findings indicating that these periods qualified as arrest or confinement under Article 10, UCMJ. *Id*. The only evidence contained in the record specific to the conditions of the appellant's restraint are a letter assigning him to the liberty risk program and a later letter placing him on pretrial restriction. AE III at 16-27, 36-39. Assuming that the appellant's restraint was imposed according to the terms of these letters, we conclude that the appellant did not suffer "arrest" within the meaning of Article 10 during either the period of liberty risk or later pretrial restriction.

Consequently, we find that only two periods of confinement qualify for consideration under Article 10, UCMJ.[5]

As noted by the Court of Appeals for the Armed Forces in *United States v. Cossio*, "[t]he first factor under the *Barker* analysis is the length of the delay which is to some extent a triggering mechanism, and unless there is a period of delay that appears, on its face, to be unreasonable under the circumstances, there is no necessity for further inquiry into the other factors that go into the balance." 64 M.J. 254, 257 (C.A.A.F. 2007) (citations and internal quotation marks omitted). This case presents an example of that rule in action. The appellant's first period of confinement, which lasted just 7

[5] The appellant was confined from 17-23 May (7 days) and from 12 June–9 August 2012 (59 days).

days, was so short as to not require any inquiry into the action of the Government during that time frame. As for the latter period of 59 days confinement, we find that also facially reasonable under the circumstances. The record reveals that during this period charges were preferred and referred, the appellant was served with the charges, a pretrial agreement was negotiated and approved, a stipulation of fact was negotiated and agreed upon, and a trial date was scheduled in an overseas location without a resident military judge. On these facts, we find that no further *Barker* inquiry is necessary. *Cossio*, 64 M.J. at 257.

Conclusion

Based on the foregoing, the findings and the sentence as approved by the convening authority are affirmed.

For the Court

R.H. TROIDL
Clerk of Court