

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

**Before  
J.A. FISCHER, D.C. KING, T.H. CAMPBELL  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**LOGAN W. ROSTMEYER  
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201500095  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 17 October 2014.

**Military Judge:** Maj N.A. Martz, USMC.

**Convening Authority:** Commanding General, Command Element,  
II Marine Expeditionary Force, Camp Lejeune, NC.

**Staff Judge Advocate's Recommendation:** LtCol G.W. Riggs,  
USMC.

**For Appellant:** CDR Gregory Dimler, JAGC, USN.

**For Appellee:** LCDR Justin C. Henderson, JAGC, USN; Capt  
Matthew M. Harris, USMC.

**30 November 2015**

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**OPINION OF THE COURT**  
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**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 general court-martial convicted the appellant, pursuant to his pleas, of conspiracy, wrongful sale of military property, wrongful Oxycodone use, larceny, housebreaking, and solicitation in violation of Articles 81, 108, 112a, 121, 130, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 908, 912a, 921, 930, and

934. The military judge merged the conspiracy and solicitation offenses for sentencing, and then sentenced the appellant to four years of confinement, reduction to pay grade E-1, and a dishonorable discharge. In accordance with a pretrial agreement, the convening authority (CA) approved the adjudged confinement and reduction, approved only a bad-conduct discharge, and suspended all confinement in excess of 43 months.

The appellant raises three assignments of error (AOEs): (1) the military judge failed to recognize his entitlement to *Mason* credit for restriction tantamount to confinement; (2) the Government violated his speedy trial rights;<sup>1</sup> and (3) he received a disparately severe confinement sentence compared to other closely related cases. After carefully considering the record of trial and parties' submissions, we conclude the findings and sentence are correct in law and fact, and there is no error materially prejudicial to the appellant's substantial rights. Arts. 59(a) and 66(c), UCMJ.

### **Background**

At his off-base residence in early 2012, the appellant overheard his roommate, Sergeant (Sgt) Crockett, discussing plans with Master Sergeant (MSgt) Langford to break into a Camp Lejeune, North Carolina, military warehouse to steal and then sell property. The appellant joined their conspiracy. He served as lookout while the others entered the warehouse, took military property, and loaded it into a U-Haul trailer. The stolen items were taken off-base for a civilian buyer, J.Y. When MSgt Langford made another trip from his Alabama duty station to Camp Lejeune, the appellant also entered the warehouse and removed items himself—"for a larger cut."<sup>2</sup>

The appellant continued stealing from the warehouse by involving other Marines and civilians in the crimes. He sold the stolen items to various buyers. The appellant repeatedly sold directly to J.Y. between February 2012 and October 2013 knowing that J.Y.'s business involved further distributing the stolen property to interstate and overseas buyers. He estimated making \$100,000.00 through selling the stolen warehouse gear, but J.Y. claimed to have paid him double that amount or more. After midnight on 18 October 2013, the appellant and Lance

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<sup>1</sup> The appellant raises the second AOE, in part, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1992).

<sup>2</sup> Record at 114.

Corporal (LCpl) Swafford, with whom he had broken into the warehouse three or four times during the preceding month, were apprehended in the warehouse parking lot after they had loaded stolen items into a rented truck.

### **Pretrial Restraint**

The appellant was first confined from 20 October 2013 until 24 October 2013—when an Initial Review Officer ordered his release, based in part on defense arguments that he had a prescription drug problem for which treatment instead of pretrial confinement was appropriate.<sup>3</sup> Considering a medical doctor's 25 September 2013 assessment that the appellant was a "high risk substance abuse user,"<sup>4</sup> and indications the appellant was "buying black-market prescription drugs out in town [to fuel] a drug habit,"<sup>5</sup> the appellant's Battalion Commander implemented pretrial restriction upon the brig release.<sup>6</sup>

The appellant accepted his command's offers of inpatient treatment at substance abuse rehabilitation programs on two occasions before trial. Between 31 October 2013 and 13 December 2013, he was a patient at a Poplar Springs, Virginia facility. Pretrial restriction resumed when he returned to the command. He tested positive for illegal Oxycodone use on a 6 January 2014 urinalysis, and participated in another program at a Pueblo, Colorado facility between 26 January 2014 and 4 March 2014. While at both treatment centers, the appellant was not required to check-in with his unit. His Battalion Commander considered the appellant not on restriction during those times. When he returned from treatment in Colorado, the appellant was placed in pretrial confinement for a second time—lasting from 4 March 2014 until his trial on 16 October 2014.

For 51 days between his two pretrial confinement periods—*i.e.*, between release on 24 October 2013 and return on 4 March 2014—the appellant was physically with his unit and not at a treatment center. The written and executed terms of his pretrial restriction differed during those periods. The restriction assignment orders included the following requirements: muster outside of working hours and throughout the day on weekends; remain within the 2d Supply Battalion, mess

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<sup>3</sup> *Id.* at 76-77.

<sup>4</sup> *Id.* at 13.

<sup>5</sup> *Id.* at 21.

<sup>6</sup> *Id.* at 22; Appellate Exhibit IX at 9-10.

hall and barracks geographic limits; do not attend recreational movies or clubs; do not consume alcohol; do not drive personally owned vehicles; do not have visitors in the barracks; do not conduct individual physical training; only wear the uniform of the day from reveille until taps; and have an escort at dining facilities and religious services or whenever outside a sergeant or staff noncommissioned officer's supervision.<sup>7</sup> But in practice the appellant was occasionally permitted to attend medical appointments in civilian clothing and without escort,<sup>8</sup> to attend off-base Alcoholics Anonymous meeting in civilian clothes,<sup>9</sup> and unlike command members on punitive restriction, to have his own barracks room with a door he could lock as he wished.<sup>10</sup>

### **Trial Chronology Following Preferral of Charges**

Charges were preferred on 12 March 2014. On 19 March 2014 the defense requested a mental competency evaluation. The CA excluded 60 days for speedy trial clock purposes to complete the evaluation.<sup>11</sup> When the defense requested to reschedule the Article 32 hearing from 28 May 2014 to 14 July 2014, the CA, without objection, excluded another 48 days.<sup>12</sup> The Article 32 hearing occurred on 15 July 2014, and the Article 32 report was dated 1 August 2014. Charges were referred on 20 August 2014.

The appellant demanded a speedy trial for the first time at his 2 September 2014 arraignment, where he agreed to a trial schedule.<sup>13</sup> On 9 September 2014 the appellant filed Motions to Dismiss for speedy trial violations, and on 16 October 2014 he filed a Motion for Appropriate Relief for additional confinement credit due to unlawful pretrial punishment.<sup>14</sup> The military judge received evidence and arguments on the appellant's motions and issued consolidated, written findings of fact and conclusions of law. He denied the motions in part, but granted eight days of

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<sup>7</sup> AE IX at 9-10.

<sup>8</sup> Record at 18-19, 51.

<sup>9</sup> *Id.* at 51, 55.

<sup>10</sup> *Id.* at 31-32, 52.

<sup>11</sup> AE X at 33-34.

<sup>12</sup> *Id.* at 35-36.

<sup>13</sup> *Id.* at 5.

<sup>14</sup> AEs VIII, IX and XV.

confinement credit for R.C.M. 305 violations—not taking the appellant to at least eight medical appointments during pretrial confinement—constituting unduly harsh circumstances.<sup>15</sup> On 16 October 2014 the appellant unconditionally plead guilty to all charges and specifications.<sup>16</sup>

### **Companion Cases Identified in the CA's Action**

LCpl Swafford was convicted at a special court-martial, pursuant to his pleas, of single specifications of conspiracy, wrongful sale of military property, larceny, and housebreaking on 30 July 2014. He was sentenced to 225 days' confinement, a \$2,000.00 fine, reduction to pay grade E-1, and a bad-conduct discharge.

Sgt Crockett was convicted at a special court-martial, pursuant to his pleas, of three conspiracy specifications, and single specifications of wrongful sale of military property, larceny, and housebreaking on 25 September 2014. He was sentenced to four months' confinement, reduction to pay grade E-1, and a bad-conduct discharge.

MSgt Langford was convicted at a general court-martial, pursuant to his pleas, of three conspiracy specifications, and single specifications of wrongful sale of military property, larceny, and housebreaking on 26 August 2014. He was sentenced to 15 months' confinement, total forfeitures, reduction to pay grade E-1, and a bad-conduct discharge.

### **Discussion**

#### **Mason Credit**

The appellant asserts he is entitled to day-for-day confinement credit from 25 October 2013 to 3 March 2014. The legal question of whether pretrial restriction is tantamount to confinement is reviewed *de novo*. *United States v. King*, 58 M.J. 110, 113 (C.A.A.F. 2003). "A military judge's findings of fact will not be overturned on appeal unless they are clearly erroneous." *United States v. Ivy*, 55 M.J. 251, 256 (C.A.A.F. 2001) (citing *Smith*, 53 M.J. at 168, *United States v. White*, 48 M.J. 251 (C.A.A.F. 1998), and *United States v. Dean*, 45 M.J. 461 (C.A.A.F. 1992)). An appellant is entitled to day-for-day credit for pretrial restriction that is tantamount to

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<sup>15</sup> AE XVII at 11-12.

<sup>16</sup> Record at 94-95 and 148; AEs XIII and XIV.

confinement. *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985) (summary disposition). Factors considered in determining whether restriction conditions are tantamount to confinement include: "the nature of restraint (physical or moral), the area or scope of restraint (confined to post, barracks, room, etc.), the types of duties, if any, performed during restraint (routine military duties, fatigue duties, etc.), and the degree of privacy enjoyed within the area of restraint." *King*, 58 M.J. at 113 (quoting *United States v. Smith*, 20 M.J. 528, 531-32 (A.C.M.R. 1985)). Certain conditions may "significantly affect" these factors, including: the requirement for an armed or unarmed escort; whether and to what degree visitation and telephone privileges were allowed; what religious, medical, recreational, educational, or other support facilities were available; the location of sleeping accommodations; and whether the appellant was allowed to retain and use his personal property (including his civilian clothing). *Id.* (quoting *Smith*, 20 M.J. at 531-32).

The military judge's findings of fact are supported by the record and not clearly erroneous. We adopt them as our own. Based upon our *de novo* review, we also agree with the military judge that the conditions of pretrial restriction were tailored to adequately address the specific aspects of this case. The command had credible indications of the appellant's lengthy opioid abuse and drug withdrawal symptoms, as well as suspicions that he stole many thousands of dollars' worth of military property and was awash in cash. His Battalion Commander and Sergeant Major both testified the restriction conditions were reasonably related to the legitimate command objectives of ensuring his safety and presence for trial, and preventing his commission of serious misconduct.<sup>17</sup> The command placed the appellant in a billet unrelated to the unit's maintenance and procurement of goods for other Camp Lejeune commands—reflecting a loss of trust and confidence in his abilities to perform his former job. It was reasonable for the command to implement restriction terms which ensured the appellant was identifiable, largely not left alone, or not left with only personnel junior to him. Yet he lived in his own room, and was occasionally allowed to attend medical and Alcoholics Anonymous meetings in civilian clothes and without escort. Such conditions were not tantamount to confinement.

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<sup>17</sup> Record at 22, 24, 41-42, 51.

Without suggesting conditions at the two treatment centers were tantamount to confinement, the appellant nonetheless argues entitlement to *Mason* credit for his treatment periods because he "was not really presented with a choice. He could either remain completely locked down or attend rehab."<sup>18</sup> The appellant cites *United States v. Regan*, 62 M.J. 299 (C.A.A.F. 2006), in support of his argument.<sup>19</sup> But the military judge found the appellant previously expressed interest in attending inpatient substance abuse treatment to the doctor who ultimately recommended both programs to the appellant's command. The appellant elected to attend the first program without any pressure from anyone in his command. Following the appellant's positive urinalysis, the doctor recommended the second program independent of the command and the appellant's charges. When his Sergeant Major discussed the option of attending the second program, he did not threaten confinement or continued restriction if the appellant elected not to attend. The appellate again chose to participate. He could have left the programs at any time, but elected to complete both. We agree with the military judge that time at the treatment facilities was not pretrial restraint, and award no administrative credit.

### **Speedy Trial**

The appellant contends that, even deducting the excludable delay periods, his right to a speedy trial was violated. The Constitution of the United States, the UCMJ, and Rules for Courts-Martial each guarantee the right to a speedy trial. The legal question of whether an appellant was denied these rights is reviewed *de novo*. *United States v. Cooper*, 58 M.J. 54, 57 (C.A.A.F. 2003).

"[A]n unconditional 'plea of guilty which results in a finding of guilty waives any speedy trial issue as to that offense,'" under R.C.M. 707. *United States v. Tippit*, 65 M.J. 69, 75 (C.A.A.F. 2007) (quoting R.C.M. 707(e)). Only a conditional guilty plea entered with consent by both the Government and military judge preserves a RULE FOR COURTS-MARTIAL

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<sup>18</sup> Appellant's Brief of 17 Aug 2015 at 17-18.

<sup>19</sup> But as both the appellant and Government note, (Appellant's Brief at 12, Government Brief of 16 Oct 2015 at 18-19), *Regan* does not hold that any inpatient treatment provided without a choice is tantamount to confinement; it simply holds that inpatient treatment conditions short of "physical restraint characteristic of confinement" do not trigger RULE FOR COURTS-MARTIAL 305, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) protections. 62 M.J. at 302 (internal quotation marks omitted).

707, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) issue. *United States v. Bradley*, 68 M.J. 279, 281-82 (C.A.A.F. 2010); see also R.C.M. 910(a)(2). Thus the appellant's unconditional guilty pleas and convictions waive any R.C.M. 707 appeal here.<sup>20</sup>

But unconditional guilty pleas do not waive Article 10, UCMJ, issues litigated at trial. See *United States v. Mizgala*, 61 M.J. 122, 126-27 (C.A.A.F. 2005). Article 10 provides, "When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him." With its "immediate steps" requirement, "it has long been assumed that Article 10 . . . imposes a more stringent speedy-trial standard than that of the Sixth Amendment." *United States v. Kossman*, 38 M.J. 258, 259 (C.A.A.F. 1993) (citing *United States v. Burton*, 44 C.M.R. 166, 171 (C.M.A. 1971)). The Government's requirement is not "constant motion, but reasonable diligence in bringing the charges to trial." *Mizgala*, 61 M.J. at 127 (quoting *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965)).

We examine factors identified by the Supreme Court for analyzing Sixth Amendment claims—" (1) the length of delay; (2) the reasons for the delay; (3) whether the appellant made a demand for speedy trial; and (4) prejudice to the appellant"—in determining whether reasonable diligence was exercised. *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007) (quoting *Mizgala*, 61 M.J. at 129) (additional citation omitted). The Supreme Court explained, "We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Barker v. Wingo*, 407 U.S. 514, 533 (1972).

1. Length of Delay. The Article 10 clock began with the appellant's 4 March 2014 confinement and ended at trial on 16 October 2014 after 226 days of continuous pretrial confinement, including 44 days after arraignment.<sup>21</sup> We conclude this length

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<sup>20</sup> Even if the issue had not been waived, the appellant's voluntary participation in the inpatient treatment programs constituted significant periods for purposes of R.C.M. 707(b)(3). The 120-day clock would have stopped on 31 October 2013 and 26 January 2014, and started over upon return to the command on 13 December 2013 and on 4 March 2014.

<sup>21</sup> Had we agreed with the appellant about restriction tantamount to confinement, the relevant calculations would have included 361 days between the initial confinement on 20 October 2013 and trial on 16 October 2014.

of delay is sufficient to trigger the full *Barker* inquiry. See *Cossio*, 64 M.J. at 257; see also *United States v. Schuber*, 70 M.J. 181, 188 (C.A.A.F. 2011); *United States v. Thompson*, 68 M.J. 308, 312 (C.A.A.F. 2010); and *Mizgala*, 61 M.J. at 128-29.

2. Reasons for the Delay. The Government notes it was necessary to investigate a complex conspiracy involving Marines and civilians in multiple states and to attempt to locate and recover the stolen property after the appellant's arrest, but never indicates what investigative steps remained to be taken after 4 March 2014. Yet of the 182 total days which elapsed before arraignment on 2 September 2014, only 74 were outside the two excluded periods. Most of the delay—108 days resulted from defense requests to conduct a mental competency examination and to postpone the Article 32 hearing. On the balance, the reasons for the delay in this case weigh in the Government's favor.

3. Speedy Trial Request. The appellant made a demand for speedy trial only at arraignment. As he was tried with due haste and on the date he agreed upon thereafter, this factor also weighs in the Government's favor.

4. Prejudice. The appellant's prejudice argument is largely related to the restriction tantamount to confinement argument we have rejected. Specifically, he argues prejudice resulted from charges being preferred over 140 days after he was first confined on 20 October 2013, and from his inability to prepare his defense or meet with counsel during that period. But there are no indications the appellant was unable to work with detailed trial defense counsel after reentering confinement and receiving preferred charges in March 2014. The military judge found no prejudice. We agree that the record clearly fails to establish the appellant suffered any *Barker* prejudice.

Balancing the *Barker* factors in this Article 10 context, we conclude the Government proceeded with reasonable diligence under the circumstances, and that the appellant was not denied his right to a speedy trial under Article 10.

### **Sentence Appropriateness**

The appellant contends his sentence is inappropriately severe considering his co-conspirators' and Corporal (Cpl) Widak's adjudged confinement, and that we should affirm no more than 24 months. We review sentence appropriateness *de novo*.

*United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). When arguing for relief based on sentence disparity in the exercise of our unique, highly discretionary authority to determine sentence appropriateness under Article 66, UCMJ, the appellant must demonstrate "that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.'" If the appellant meets that burden . . . then the Government must show that there is a rational basis for the disparity." *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999). "Closely related" cases involve "offenses that are similar in both nature and seriousness or which arise from a common scheme or design." *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994); see also *Lacy*, 50 M.J. at 288. However, co-conspirators are not entitled to equal sentences. *United States v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001); see also *United States v. Wach*, 55 M.J. 266, 268 (C.A.A.F. 2001).

In assessing whether sentences are highly disparate, we are "not limited to a narrow comparison of the relative numerical values of the sentences at issue," but may also consider "the disparity in relation to the potential maximum punishment." *Lacy*, 50 M.J. at 287. A vast difference in maximum punishments can result from the disposition forums. A CA's discretion on "the selection of the appropriate forum for disposition is part of prosecutorial discretion," and "[d]ecisions on how to process a case are not considered *de novo* at the reviewing court level." *Kelly*, 40 M.J. at 570. If cases are closely related yet result in widely disparate disposition, we must instead decide whether the disparity in disposition also results from good and cogent reasons. *Id.*

Clearly the charged co-conspirators' cases are closely related. As the record is silent on Cpl Widak's charges, the appellant has not demonstrated that case is too.<sup>22</sup> But even if Cpl Widak's is also closely related, and even if these cases have highly disparate sentences, we find a rational basis for any sentence disparity and good and cogent reasons for different disposition forums.

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<sup>22</sup> Not a charged co-conspirator nor listed as a companion case in the appellant's CA's action, Cpl Widak is discussed in the stipulation of facts about the conspiracy to sell military property. The appellant's brief provides the only additional facts about Cpl Widak's misconduct and court-martial: that he "also broke into the warehouse and stole military gear; involved in conspiracy to sell the gear to a civilian for personal profit; unlike his coconspirators, Widak also stole military weapons and sold them for profit;" and that he was sentenced to three years of confinement, reduction to E-1, and a dishonorable discharge. Appellant's Brief at 30.

The trial facts reveal various levels of culpability. MSgt Langford was senior to the appellant, but the appellant became much more involved in the overall criminal enterprise. Not only did he become J.Y.'s main supplier, the appellant continued to steal more gear and involve more people, even without the continued assistance of his two original co-conspirators. Although he did not direct everyone's actions, the appellant became a driving force and the principle financial beneficiary out of all the military personnel involved in the government losses from the warehouse. The appellant also confessed to having at least some connections with Cpl Widak's armory thefts.<sup>23</sup> And he alone continued criminal activity following apprehension—illegal drug use. The case facts are sufficiently different to explain and justify the different forums and sentences. They also demonstrate the appropriateness of the appellant's sentence.

### **Conclusion**

The approved findings and sentence are affirmed.

For the Court

R.H. TROIDL  
Clerk of Court



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<sup>23</sup> "X/ROSTMEYER advised he had bought stuff like KBARS and magazines from a Marine named Sam Widak who was an Armorer....Additionally, X/ROSTMEYER thought WIDAK may have also hit the warehouse in the past without him." PE 2 at 4. Possibly, but not necessarily, referring to Cpl Widak, this sentencing evidence also includes, "X/ROSTMEYER advised...he had also bought a lot of gear that he knew was stolen. X/ROSTMEYER advised, if you buy any military gear it has pretty much been stolen. X/ROSTMEYER gave an example of one time he had bought 'bulk stuff' from people for \$2,000 - \$3,000 then sold it for \$8,000, but as for the actual stuff that they had taken 'I couldn't really tell you.'" PE 2 at 2.