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

Before
E.E. GEISER, R.G. KELLY, L.T. BOOKER
Appellate Military Judges

UNITED STATES OF AMERICA

v.

CHRISTOPHER C. GAMMON
AVIATION ELECTRONICS TECHNICIAN THIRD CLASS (E-4), U.S. NAVY

NMCCA 200800324
GENERAL COURT-MARTIAL

Sentence Adjudged: 24 January 2008.
Military Judge: CAPT Keith Allred, JAGC, USN.
Convening Authority: Commanding Officer, Naval Air Station, Lemoore, CA.
Staff Judge Advocate's Recommendation: LCDR Valerie Small, JAGC, USN.
For Appellant: LT W. Scott Stoebner, JAGC, USN.
For Appellee: LT Duke J. Kim, JAGC, USN; LT Timothy Delgado, JAGC, USN.

21 April 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BOOKER, Judge:

Officer and enlisted members sitting as a general court-martial convicted the appellant, contrary to his pleas, of one specification of indecent acts with a minor and multiple specifications of communicating indecent language to a minor, all in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The members announced a sentence of confinement for one year, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge from the Navy. The convening authority (CA) mitigated the dishonorable discharge to a bad-conduct discharge but otherwise approved the sentence as adjudged.

The appellant moved at trial, and renews his motions here as assignments of error, to dismiss the charges on the basis of speedy trial violations under Article 10, UCMJ, and RULE FOR COURTS-MARTIAL 707, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), and he likewise moved to suppress certain information derived from a consensual search of his laptop computer, maintaining that he withdrew his consent before the search.

Speedy Trial Violations

The appellant moved for dismissal under two distinct provisions, one statutory, one regulatory. Each basis has a separate analytical framework, and in any given case some facts may be more significant to the regulatory challenge and others more significant to the statutory challenge. In reviewing a military judge's rulings on either such motion, we are bound by his factual findings unless they are clearly erroneous. We review his rulings of law *de novo*. *United States v. Cooper*, 58 M.J. 54, 57-59 (C.A.A.F. 2003). The military judge's findings of fact are contained within Appellate Exhibit XI and they are amply supported by the record. We therefore adopt them as our own.

Rule for Courts-Martial 707

To gauge compliance with the regulatory right to speedy trial, we determine whether the United States brought the appellant to trial within 120 days of the beginning of the Government's accountability period, defined as preferral of charges or imposition of restraint. R.C.M. 707(a). The task involves more than merely counting the days between two points, as days can be excluded from Government accountability, thus allowing a trial to continue even if it apparently began more than 120 days from the beginning of the accountability period. It is important, moreover, to identify the correct starting point of accountability.

The appellant was assigned to an operational squadron embarked on USS JOHN C. STENNIS (CVN 74) when his alleged offenses came to light in February 2007. STENNIS was conducting a routine Western Pacific/Arabian Gulf deployment at the time, and the ship made several port visits outside the United States. At some point before preferral of charges, and because of the allegations, the appellant was determined to be a liberty risk, and accordingly his enjoyment of the port visits was curtailed. Numerous charges were preferred against the appellant on 22 August 2007, while the ship was still underway.

When the ship returned to the continental United States, the appellant was placed in pretrial confinement at Naval Air Station Miramar, California. His pretrial confinement ran continuously from 27 August 2007 until his sentence was adjudged on 24 January

2008.[1] On 24 September 2007, the special court-martial convening authority (SPCMCA) ordered a pretrial investigation. Some of the allegations involved a legalman stationed at the office that would normally provide defense counsel in the case; accordingly, the appellant was represented by counsel stationed in Everett, Washington. AE XI at ¶¶ 3-5. The investigating officer submitted his report and recommendation for referral for trial by general court-martial on 18 October 2007. The SPCMA forwarded the case to the general court-martial convening authority (GCMCA). The GCMCA dismissed seven specifications under three different charges, and referred the remaining charges and specifications for trial on 4 December 2007. The defense in the meantime had requested the appellant's release from pretrial confinement pending trial. AE I, Attachments A-F.

After the charges were referred for trial, the trial counsel prepared a docketing request on 5 December 2007 requesting a trial date of 4 February 2008. The defense counsel endorsed this request on 6 December and opposed the requested trial date, instead demanding a trial on the first available date.[2] AE I, Attachment H. This endorsement on the docketing request complemented the defense counsel's earlier written demand of 28 November 2007, directed to the SPCMCA (while a forum decision was still pending), for a speedy trial, and a corresponding request to the GCMCA on 3 December 2007. AE I, Attachment E.

On 11 December 2007, the trial counsel, defense counsel, and docketing judge held a conference over the telephone under R.C.M. 802. Trial counsel was located in Lemoore, California; defense counsel was located in Everett, Washington; and the military judge was located in San Diego. The purpose of this call was to resolve the disagreement over trial dates. The military judge who ruled on the docketing request set an initial appearance of 08 January 2008 and excluded all time between the date of the request, 5 December 2007, and the "date of trial" (unspecified in the order)[3] from accountability for speedy trial purposes. AE III at 68.

Arraignment occurred on 21 December 2007, the earliest date after referral that all the parties could gather, and thus the Government's accountability under R.C.M. 707 terminated. The

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[1] The military judge determined that certain aspects of the appellant's liberty risk and pretrial confinement constituted illegal pretrial punishment under Article 13, UCMJ. He granted 60 days' judicial credit to be applied against the adjudged sentence. AE XXIII. That determination is not challenged before us.

[2] There are attachments to the pleadings, moreover, evidencing defense efforts to get into court on the merits as early as 2 January 2008. AE III at 65.

[3] While it would have been proper to arraign the appellant (thus making this the first day of trial; *see* R.C.M. 707 at the Article 39(a) session scheduled for 08 January 2008, for example, it would not have been required. *See, e.g.*, R.C.M. 803, Discussion.

appellant's trial continued on 8 January with a motions session, and trial on the merits ran from 22 through 24 January 2008.

We have determined that the proper inception date for Government accountability is the date that the charges were preferred. While it is true that the appellant's liberty was curtailed during the majority of his squadron's Western Pacific deployment, restrictions on liberty are not ordinarily considered restraint for speedy trial purposes, *see* R.C.M. 707(b)(1), and we decline to find that the conditions are restraint in this case. The appellant was able to go ashore and was generally able to experience other cultures. Enclosure (1) to AE XV. Granted, he and his liberty buddies were required to return from liberty earlier than other Sailors, and he was not permitted to consume alcohol, but he was allowed ashore in Hawaii without conditions. Record at 108. The military judge's summary of the passage of days contained within Appellate Exhibit XI is therefore correct, and it appears from that summary that the appellant was arraigned more than 120 calendar days after the beginning of Government accountability.

The military judge properly excluded, however, the period between 11 and 20 December 2007, inclusive, from the Government's accountability under R.C.M. 707, as the Defense Counsel was unavailable for trial during those days. *See, e.g.*, AE I, Attachment J; Appellate Exhibit XI at ¶ 29. In addition, given the dispersal of the trial participants, we concur in the military judge's determination that holding an arraignment would have resulted in unjustifiable expense.[4] We therefore resolve this assignment of error adversely to the appellant.

Article 10, UCMJ

When an appellant is placed in pretrial confinement, the Government must take immediate steps to get him to trial. Reviewing courts do not expect "constant motion," but instead look for steady progress toward trial. The Government's accountability in the appellant's case began on 27 August 2007, and here we are concerned with the quality of the time passed, not the quantity. *See, e.g., United States v. Kossman*, 38 M.J. 258, 261 (C.M.A. 1993). We review the question of whether the appellant received a statutory speedy trial *de novo*. *E.g., United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007).

In an Article 10 case, it is appropriate to examine the factors enunciated in *Barker v. Wingo*, 407 U.S. 514 (1972), to determine whether the member's statutory right to a speedy trial has been violated. *See United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005). We therefore look to the length of the

[4] We understand the importance of arraignment from the perspective of both parties, *see United States v. Doty*, 51 M.J. 464, 465-66 (C.A.A.F. 1999), but in this case the exclusion of the time between docketing and arraignment was proper.

delay; the reasons for the delay; whether the defense has demanded speedy trial; and any prejudice to the defense. *Id*. at 129. Our assessment of these factors favors the United States.

The delay between the appellant's placement in pretrial confinement (27 August 2007) and his first appearance before a military judge (his 21 December arraignment) was lengthy, nearly four months, and this factor favors the appellant. Geographic dispersal of the parties partly contributed to this delay, as did a problem initially of identifying conflict-free (an apparent conflict as noted above, not an actual conflict) counsel. We disagree with the military judge's characterization of the period consumed by a search for conflict-free counsel as "not within the control of the Government," *see Diaz v. Judge Advocate General*, 59 M.J. 34, 38-39 (C.A.A.F. 2003), but that minor period of time did not constitute the "spiteful neglect" necessary to rule in favor of the appellant.[5] *See Kossman*, 38 M.J. at 262. We therefore assess this factor in favor of the United States.

As noted in the Rule 707 discussion above, the defense made persistent speedy-trial requests in late November and early December. The United States actually accommodated those requests with an arraignment on 21 December, and we therefore assess this factor in favor of the United States.

Finally, the appellant has demonstrated no prejudice from any alleged denial of a speedy trial. He instead alleges only a vague prejudice of "dead time for his career and life," Appellant's Brief of 13 Aug 2008 at 11, as a basis for setting aside the findings and dismissing the charges and specifications with prejudice. We find that the appellant suffered no prejudice from pretrial delay.

As we noted above, the military judge's findings of fact in AE XI are amply supported by the record of trial. The military judge, faced with logistic challenges of parties spread up and down the West Coast, of natural disasters (wildfires, noted in the record, that displaced many service members and disrupted normal operations for several days), and of competing demands on counsel's and judges' time, realistically balanced the parties' interests in reaching his determination that the Government complied with both the letter and the spirit of Article 10. His legal conclusions are correct, and in our review *de novo* we likewise conclude that the appellant was not denied a speedy trial in violation of his statutory right.

[5] This delay was during a critical phase of the proceedings, that is, immediately after the appellant's confinement and the instigation of charges, and were there any hint of prejudice, our resolution on this factor well could have been different.

Motion to Suppress Evidence

The appellant's final assignment of error is that information derived from his laptop computer should have been suppressed because he withdrew his consent to search the computer before the information was discovered. We review the military judge's ruling on this motion for an abuse of discretion, examining his findings of fact for clear error and his conclusions of law *de novo*. *E.g., United States v. Gallagher*, 66 M.J. 250, 253 (C.A.A.F. 2008). The military judge's findings of fact in AE XXVIII are supported by the record and we adopt them as our own. We will also point to additional facts in the record during our discussion of this assignment of error. The military judge found that the Government had met its burden of demonstrating by clear and convincing evidence that the appellant voluntarily consented to the search of his laptop computer. The military judge did not abuse his discretion, and we thus resolve this assignment adversely to the appellant.

The appellant had engaged in on-line discussions with a teenager, KT, who lived in Lemoore, California, and who subsequently, moved to Arkansas in 2007. The appellant never met the girl. The Government introduced evidence in the form of the girl's testimony to demonstrate the appellant's intent with regard to the alleged victim of his indecent act, AT. Record at 581-82.

When the allegations against the appellant first came to light, he was underway on STENNIS. *See, e.g.*, AE XVIII at 10, 12. As part of the investigation, the Naval Criminal Investigative Service (NCIS) sought and obtained the appellant's permission to search his laptop computer. Record at 206, 396; AE XXV at 8. The permissive authorization noted an investigation period of 6 months. AE XXV at 8.

It was necessary to send the device off the ship to be analyzed. Record at 206-07. While the device was off the ship, the appellant approached the NCIS afloat agent and asked for the computer back, essentially because he was bored. *Id.* at 211, 403. He had also been advised by some of his shipmates to require the NCIS to obtain a warrant, *Id.* at 402, but all his conversations with the agent were simply to the effect that he wanted the computer back, not that he was revoking consent. *E.g.*, Record at 399.

We agree with the appellant that consent to search may be revoked at any time. MILITARY RULE OF EVIDENCE 314(e)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). We also agree with the military judge's observation that written consent must be clearly revoked. *United States v. Stoecker*, 17 M.J. 158, 162 (C.M.A. 1984). Because we agree with the military judge, and we find independently, that the appellant did not clearly or by reasonable implication revoke his consent to search the laptop computer, we affirm the military judge's ruling.

It is important to remember, moreover, that the true worth of the information from the appellant's laptop was that it led to the discovery of the witness KT. KT's testimony, as noted above, was introduced and argued on the matter of the appellant's intent with respect to activity with AT (who, despite the common last initial, is not related in any way to KT). There was ample other evidence in the form of the appellant's inculpatory statement to the NCIS, Prosecution Exhibit 2a, the testimony from AT, and the appellant's own testimony at trial, from which the members could infer the appellant's intent in causing her to touch his penis, so any error with respect to the laptop computer is harmless.

Conclusion

The findings and the sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. We affirm the findings and the modified and approved sentence. Arts. 59(a) and 66(c), UCMJ.

Senior Judge GEISER and Judge KELLY concur

For the Court

R.H. TROIDL
Clerk of Court