

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

**Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**BRYAN A. VASQUEZ
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201000098
GENERAL COURT-MARTIAL**

Sentence Adjudged: 29 September 2009.

Military Judge: Col Daniel J. Daugherty, USMC.

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

Staff Judge Advocate's Recommendation: Col B.D. Barkey,
USMC.

For Appellant: LT Michael R. Torrisi, JAGC, USN.

For Appellee: LCDR Sergio F. Sarkany, JAGC, USN.

18 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.**

MAKSYM, Senior Judge:

A panel of members with enlisted representation sitting as a general court-martial convicted the appellant, contrary to his pleas, of a single specification of attempted possession of OxyContin, a Schedule I controlled substance, with the intent to distribute same, in violation of Article 80, Uniform Code of Military Justice, 10 U.S.C. § 880. The members sentenced the appellant to three years confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

The appellant alleges four errors in his case: (1) that his conviction is factually and legally insufficient because the Government did not introduce sufficient evidence to prove beyond a reasonable doubt that the appellant was not entrapped into the offense of attempted possession with the intent to distribute; (2) that the military judge erred by denying the appellant's motion to dismiss for a violation of Article 10, UCMJ; (3) that the sentence is inappropriately severe because Government conduct enticed the appellant into committing an offense qualitatively more severe than he originally intended, and he has now been sentenced by two sovereigns for the same crime; and, (4) that his trial defense counsel was ineffective for failing to submit clemency matters.

On 2 September 2010, we heard oral argument relative to assigned errors I, II, and III. After carefully considering the record of trial and the parties' pleadings, we are satisfied that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the appellant's substantial rights exists. Arts. 59(a) and 66(c), UCMJ.

Background

Working in conjunction with the Naval Criminal Investigative Service (NCIS), local police arrested the appellant on 17 March 2009 as he attempted to purchase over 270 pills of OxyContin from undercover law enforcement officials. NCIS was initially alerted to the appellant's intentions by LL, a roommate of the appellant's girlfriend. Thereafter, NCIS coordinated with LL to facilitate the drug purchase. LL sent the details of the proposed purchase to the appellant through text messages.

Following his arrest on 17 March 2009 after a successful undercover operation and an attendant three day stay at the local jail, the appellant was transferred to military custody and placed in pretrial confinement at the Camp Lejeune brig ostensibly awaiting trial. The appellant was not notified as to the existence of any pending charges until 6 May 2009 and his court-martial was finally concluded on 29 September 2009.

Legal and Factual Sufficiency

At trial, the appellant raised the defense of entrapment, alleging that while he may have been predisposed to buying and using small amounts of OxyContin, he was unlawfully enticed into the greater offense of attempted possession with the intent to distribute. Appellant's Brief of 9 Jun 2010 at 16. Once the defense of entrapment was raised, the Government carried the burden to prove beyond any reasonable doubt that it did not unlawfully entice the appellant to inflate his criminal ambition from a simple attempted possession into the greater offense of attempted possession with the intent to distribute. See RULE FOR COURTS-MARTIAL 916(b)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.); see also *United States v. Hall*, 56 M.J. 432, 436-37

(C.A.A.F. 2002). Now, the appellant argues that the Government's case in support of its proposition that entrapment did not exist in this case was legally and factually insufficient in sustaining its burden beyond a reasonable doubt.

Legal sufficiency requires the court to determine whether, considering the evidence in the light most favorable to the Government, a reasonable fact-finder could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319) (1979)). Factual sufficiency requires the court to determine whether, "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," we are convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting *Turner*, 25 M.J. at 325). Reasonable doubt does not mean that the evidence must be free of any conflict. See *United States v. Jackson*, 54 M.J. 527, 530 (N.M.Ct.Crim.App. 2000).

To prove that the appellant was not entrapped into the greater offense of attempted possession with the intent to distribute, the Government had to prove beyond a reasonable doubt: (1) that the Government did not induce the appellant into a criminal design to possess and distribute the 274 pills of OxyContin; and, (2) that the appellant had a predisposition to commit the offense. See *Hall*, 56 M.J. at 436-37; R.C.M. 916(b)(c).

The Government does not induce an individual by merely providing the opportunity or facilities to commit the crime. See *United States v. Howell*, 36 M.J. 354, 359-60 (C.M.A. 1993) (quoting *United States v. Stanton*, 973 F.2d 608, 610 (8th Cir. 1992)); R.C.M. 916(g). When a person accepts the opportunity to commit a crime without being offered extraordinary inducements, he demonstrates his predisposition to commit the type of crime involved. See *United States v. Lubitz*, 40 M.J. 165, 167 (C.M.A. 1994); see also *Howell*, 36 M.J. at 358.

In this case, the appellant was not induced into attempting to purchase 274 pills of OxyContin; his acceptance of the opportunity and attempt to complete the purchase of the drug demonstrated his predisposition to commit that offense. The Government presented evidence of the appellant's text messages to the Government's cooperating witness (LL), as well as the appellant's videotaped confession to the NCIS. In particular, the appellant texted LL the following message:

3 March 2009 at 4:07 p.m.
"As many ud be willn 2 let go. Id appreciate any tho. But ya as many as possible." Prosecution Exhibit 6 at 14.

Then after NCIS told LL that they had access to 500 pills,

the appellant texted LL the following messages:

6 March 2009 at 6:21 p.m.

"Cool. Id def buy at least 100. Prob more but wateve he can do." Prosecution Exhibit 6 at 9.

8 March 2009 at 2:11p.m.

"Hav u talkd 2 him or found out if hes gunna want 2 sell those 4 sure?" Prosecution Exhibit 6 at 5.

8 March 2009 at 2:16p.m.

"Im guna try buy a lot n get sum other pep n so that's y im asking al these questions sorry." Prosecution Exhibit 6 at 4.

After his arrest on 17 March 2009, the appellant confessed that the "only reason I [planned on getting 300 pills] is because [LL] said they were five dollars." Prosecution Exhibit 2 at 17:58:00. The sum of this evidence demonstrates an individual who was given the opportunity to commit an offense and eagerly took it.

The Government did not introduce the text messages sent by LL or call LL as a witness in this case. But the appellant's text messages combined with the testimony of law enforcement officials and the appellant's videotaped confession are sufficient to prove beyond a reasonable doubt that the appellant was not induced and that he had a predisposition to commit the offense. We find the evidence in this case to be legally and factually sufficient to support the conviction.

Article 10

"Article 10 creates a more exacting speedy trial demand than does the Sixth Amendment." *United States v. Thompson*, 68 M.J. 308, 312 (C.A.A.F. 2010) (quoting *United States v. Mizgala*, 61 M.J. 122, 124 (C.A.A.F. 2005)). When a service member 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.

An analysis of Article 10 issues considers four factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether the accused made a demand for a speedy trial; and (4) prejudice to the accused. *Thompson*, 68 M.J. at 312-13. This court bears in mind that Article 10 speedy trial standards are more stringent than those under the Sixth Amendment. *Id.* at 312.

While recognizing Article 10 imposes an "immediate steps" standard, it is understood that 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 (citation 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 appellant spent 197 days in pretrial confinement, which is amply sufficient to trigger an Article 10 inquiry. See *Thompson*, 68 M.J. at 312. When the military judge ruled on the Article 10 motion, he attributed 96 days of delay to the Government. The military judge excluded the initial three days the appellant spent in custody of local law enforcement. But even that initial custody resulted from a joint operation between NCIS, the initiating agency, and local law enforcement, the joint enterprise resulting in this general court-martial. Accordingly, we resolve that the speedy trial clock was triggered when the appellant was arrested on 17 March 2009. Thus, 99 days of delay are attributed to the Government. See *United States v. Reed*, 2 M.J. 64 (C.M.A. 1976); *United States v. Keaton*, 40 C.M.R. 212 (C.M.A. 1969).

In articulating the rationale for delay, the Government counsel explained first that it was coordinating with civilian authorities to determine who had jurisdiction, and second that issues arose in turnover between trial counsel. Record at 20, 22. The United States also noted that the complete NCIS investigation was not received until 17 April 2009. *Id.* at 23. While we find that the Government's processing of this case was markedly short of optimal, we consider the 99-day delay in conjunction with the proceeding as a whole, and recognize that some Government activity certainly took place during that time, notably the Article 32 investigation.¹ See *Thompson*, 68 M.J. at 313; *Mizgala*, 61 M.J. at 122.

Furthermore, we take note that the appellant did not opt to make demand for his right to speedy trial. Also striking was the appellant's actual absence of concern relative to alacrity in the setting of a trial date. Indeed, trial defense counsel advanced a recommended trial date two months into the future which was adopted, minus objection from the Government. In best light, the appellant arguably asserted his right to speedy trial by way of his Motion to Dismiss for a violation of Article 10, UCMJ -- 108 days after pretrial confinement commenced. Contextually, this motion was submitted after the appellant requested and was

¹ Logistical issues in processing cases are a reality that the appellate courts have recognized in military criminal practice, but counsel have been reminded that these can be resolved with "adequate attention and supervision, consistent with the Government's Article 10 responsibilities." *United States v. Thompson*, 68 M.J. 308, 313 (C.A.A.F. 2010). This serves as yet another reminder.

granted a most distant trial date of choice. We reaffirm that a failure to demand speedy trial weighs most heavily against finding a violation of Article 10. *United States v. Miller*, 66 M.J. 571, 574-75 (N.M.Ct.Crim.App. 2008).

In analyzing prejudice, the court looks at the interests that the right to speedy trial was designed to protect, a threefold prospect: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the appellant; and (3) to limit the possibility that the defense will be impaired. *Miller*, 66 M.J. at 575 (citing *Barker v. Wingo*, 407 U.S. 514, 532 (1972)) (footnote omitted). While this court is most concerned that the appellant had his pay curtailed wrongfully once pretrial confinement commenced on 20 March 2009 through 21 July 2009, this grave and negligent error was corrected. More importantly, the appellant does not claim that being temporarily mulcted actually affected any of the rights that Article 10 was designed to protect; specifically the appellant articulates no prejudice to his defense. The appellant also asserts prejudice through the unique and particularized anxiety of a servicemember facing prosecution by two different sovereigns. But there is no evidence that the appellant's anxiety exceeded that of any other individual who is subject to prosecution within two jurisdictions. Finally, we note that the appellant appropriately received substantial credit upon his sentence for the days he spent in pretrial confinement. We conclude that under the very specific facts of this case, this appellant suffered no prejudice. See *Cossio*, 64 M.J. at 257-58.

To be clear, the pretrial processing of this case by the United States was hardly textbook, and we expect more exacting diligence in cases where Sailors and Marines are deprived of their liberty pending trial. However, considering the fundamental command of Article 10, UCMJ, for reasonable diligence and balancing the *Barker* factors, we find that the appellant was not denied his right to speedy trial under Article 10, UCMJ.

Sentence Severity

A court-martial is free to impose any lawful sentence that it considers fair and just. *United States v. Turner*, 34 C.M.R. 215, 217 (C.M.A. 1964). Article 66(c), UCMJ, requires this court to independently determine the sentence appropriateness of each case we affirm. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005). In doing so, this court considers the nature and seriousness of the offenses as well as the character of the offender. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). We keep in mind that sentence appropriateness is distinguishable from clemency, which is the prerogative of the CA. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988).

In this case, the appellant faced a maximum punishment of 15 years confinement, forfeiture of all pay and allowances, reduction to the lowest enlisted pay grade, and a dishonorable

discharge. Yet his sentence to confinement represents but a fraction of that authorized. We have carefully considered and examined the record of trial -- including the testimony of the appellant's mother and his unsworn statement given through his civilian counsel -- and measured that against the severity of his attempt to acquire a sizable amount of narcotics for future sale. We conclude that the adjudged sentence is, at the very least, appropriate and arguably lenient for this particular offender and his offenses. *Baier*, 60 M.J. at 382.

Ineffective Assistance of Counsel

Service members have the right to effective assistance of counsel at their courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005). We presume on appeal that trial defense counsel provided effective assistance throughout the trial; this presumption is rebutted only by "a showing of specific errors made by defense counsel that were unreasonable under prevailing professional norms." *Davis*, 60 M.J. at 473 (citing *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001)); see also *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004). We also recognize that the tactical and strategic choices made by defense counsel need not be perfect; instead, they must be judged by a standard ordinarily expected of fallible lawyers. See *United States v. Anderson*, 55 M.J. 198, 202 (C.A.A.F. 2001) (quoting *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993)); *United States v. Curtis*, 44 M.J. 106, 119 (C.A.A.F. 1996). "[S]econd-guessing, sweeping generalizations, and hindsight will not suffice." *Davis*, 60 M.J. at 473 (citations omitted).

Ineffective assistance of counsel involves a mixed question of law and fact, which requires a *de novo* review. *Id.* (citing *Anderson*, 55 M.J. at 201). In review, a three-prong test is used to determine if the presumption of competence has been overcome:

- (1) Are the allegations true; if so, "is there a reasonable explanation for counsel's actions?";
- (2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers?"; and
- (3) If defense counsel was ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result?

United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991) (citations and internal quotation marks omitted).

Clemency was not submitted to the CA in this case. However, we find that the appellant's trial defense counsel has articulated a reasonable explanation for his actions. Counsel explains that throughout the trial, the appellant was concerned about the prospect of similar charges pending in the State of North Carolina for the same misconduct he was facing at his court-martial. Declaration of Trial Defense Counsel dated 17 Aug 2010. Facing a minimum of 120 months of confinement -- consecutive to any sentence he received at court-martial -- the appellant's attorneys leveraged his court-martial sentence with prosecutors in North Carolina to reduce the appellant's confinement time in the state. *Id.* The prosecutors agreed to a plea on a lesser charge and the appellant received 18 months of confinement in North Carolina. *Id.* As his counsel explains, had the appellant received clemency, the civilian prosecutors may not have been as willing to negotiate. *Id.* After the State sentenced the appellant, the Naval Clemency and Parole Board granted further relief and reduced the appellant's period of military confinement by 18 months. *Id.* We find that the appellant's trial defense counsel's actions were well-within the performance ordinarily expected of fallible lawyers. The appellant has not demonstrated substandard representation or that the result of the proceeding would have been different had other choices been made. This court concludes that the appellant has not met his burden of showing that his trial defense counsel was ineffective.

Conclusion

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

Judge PERLAK and Judge PAYTON-O'BRIEN concur.

For the Court

R.H. TROIDL
Clerk of Court