

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

D.A. WAGNER

E.B. STONE

M.C. WELLS

UNITED STATES

v.

**Saul J. ADDISON
Mess Management Specialist Seaman Apprentice (E-2), U.S. Navy**

NMCCA 200600263

Decided 23 May 2007

Sentence adjudged 12 May 2003. Military Judge: P.L. Fagan. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS JOHN C. STENNIS (CVN 74).

LtCol R.R. POSEY, USMC, Appellate Defense Counsel
LT AIMEE SOUDERS, JAGC, USN, Appellate Defense Counsel
LT DEREK BUTLER, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Senior Judge:

Before us once again is the same old story of the record of trial turned gear adrift. The appellant appeared on 12 May 2003 before a military judge sitting as a special court-martial, where he was convicted, pursuant to his pleas, of two specifications of unauthorized absence, use of methylenedioxymethamphetamine (ecstasy) and methamphetamine, larceny, indecent assault, and breaking restriction.¹ He was sentenced to confinement for nine months, forfeiture of \$767.00 pay per month for nine months, reduction to pay grade E-1, and a bad-conduct discharge. The 86-page record of trial was authenticated just 26 days later, but the staff judge advocate did not complete his recommendation until 16 October 2003, over four months later. On 2 December 2003, the convening authority approved the sentence as adjudged. Thereafter, and without explanation for the delay, the record of trial was not received at this court for appellate review until 14 July 2006, 955 days following the convening authority's action.

¹ The offenses violated Articles 86, 112a, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 912a, 921, and 934.

The delinquent record of trial was then the subject of not one, but two appellate motions for enlargement of time to file a brief and assignment of error. Both filings were themselves filed out-of-time. The Government, suddenly concerned with the tardiness of the post-trial processing in this case, opposed both enlargement requests. On 8 December 2006, just shy of five months since the wayward record of trial was docketed for appellate review, we ordered the record brought into panel without appellate filings. Thereafter, in the space of 12 days, the record of trial was thoroughly reviewed and, on 20 December 2006, the issue of post-trial delay was specified to the appellant's appellate defense counsel for briefing. The appellant's brief and assignment of error was filed on 22 January 2007, accompanied by a motion for relief from post-trial processing error. The Government answer was filed on 20 February 2007.

In addition to addressing the court-specified issue of post-trial delay, the appellant alleges in his motion for relief from post-trial processing error that the record of trial does not reflect his waiver of the right to be served personally with the staff judge advocate's recommendation, nor does it reflect service of the staff judge advocate's recommendation upon trial defense counsel. Neither allegation is correct, as the appellate rights statement, Appellate Exhibit III, contains the appellant's request that the record of trial and staff judge advocate's recommendation be served on his trial defense counsel vice himself, and the convening authority's action reflects that the recommendation was, in fact, served on the trial defense counsel in a timely fashion.²

We turn, then, to review the issue at hand. In reviewing claims of post-trial delay we apply the Supreme Court's analysis of pretrial delays as set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). *Toohey v. United States (Toohey I)*, 60 M.J. 100, 102 (C.A.A.F. 2004). We consider four factors in determining whether there had been a due process violation resulting from pretrial delay:

- (1) the length of the delay;
- (2) the reasons for the delay;
- (3) the defendant's assertion of his right; and
- (4) prejudice to the defendant.

² This meritless motion was denied by our order of 26 January 2007, noting the waste of time occasioned by appellate counsel's failure to thoroughly read the record of trial.

Barker, 407 U.S. at 530. The first factor, the length of the delay, is a triggering mechanism. The Supreme Court has stated that, until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. *Id.* The Court of Appeals for the Armed Forces, however, has stated that the *Barker* inquiry is triggered whenever the delay is facially unreasonable. *Toohey I*, 60 M.J. at 103. We are bound to apply the threshold standard established by our superior court, although we have urged reconsideration of that standard. See *United States v. Adams*, No. 200600767, 2006 CCA LEXIS 332, unpublished op. (N.M.Ct.Crim.App. 19 Dec 2006). The delay in this case, specifically the 955 days between the convening authority's action and docketing of the case with this court, is unreasonable on its face and triggers a due process analysis.

The delay in processing this 86-page record of trial is so unreasonable that it also gives rise to a presumption of prejudice, at least sufficient to trigger a due process analysis under *Barker*. The first factor weighs in favor of the appellant. We then must balance the delay against the remaining factors in order to determine if a due process violation has occurred. *Barker*, 407 U.S. at 530-31. Turning to the second factor, the Government advances no reasons for the delay. Our superior court has categorized delay in transmission of the record of trial as the "least defensible" of all delay. *United States v. Moreno*, 63 M.J. 129, 137 (C.A.A.F. 2006)(quoting *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990)). The second factor weighs heavily in favor of the appellant.

The appellant did not assert his right to a speedy review until the filing of his initial brief and assignments of error with this court. In addressing this third factor, the Supreme Court set forth the following standard:

The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

Barker, 407 U.S. at 531-32. Our superior court, however, has declined to hold the appellant responsible for failing to complain about dilatory processing of the record of trial. *Moreno*, 63 M.J. at 138 ("The obligation to ensure a timely review and action by the convening authority rests upon the Government and *Moreno* is not required to complain in order to receive timely convening authority action. Similarly, *Moreno* bears no responsibility for transmitting the record of trial to the Court of Criminal Appeals after action." (internal citation omitted)). The heavy weight accorded to

the appellant's failure to timely demand post-trial review established by *Barker* has been diminished by the holding in *Moreno*, where the delay is occasioned by the failure of the Government to exert "institutional vigilance." *United States v. Harvey*, 64 M.J. 13, 36 (C.A.A.F. 2006). Under the guidance of our superior court, we conclude that this factor weighs against the appellant, but under the circumstances of this case, not heavily. *Harvey*, 64 M.J. at 36; *Moreno*, 63 M.J. at 138.

Finally, with regard to the fourth *Barker* factor, the appellant advances no specific prejudice suffered as a result of the delay in this case. We are left to rely on the presumption of prejudice that arises from the length of the delay itself. Here, we can, and do, consider the appellant's failure to make any demand for a speedier resolution of his post-trial processing as rebutting, to some extent, that presumption. In this case, we can find no evidence of actual harm or specific prejudice flowing from the delay. In addition, the record reveals no appellate issue that would afford relief to the appellant. The appellant has suffered no oppressive incarceration from the delay, nor has he experienced particularized anxiety from the delay. No rehearing has been ordered at which the delay might become a factor. Under the totality of the circumstances of this case, we conclude that the error was harmless beyond a reasonable doubt.

Our superior court has held, in a case involving a five-year delay in appellate processing, that no harm resulted from the due process violation. *United States v. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006). Likewise, no relief is warranted here. Any relief awarded the appellant in this case on the basis of the due process violation would be punitive in nature in response to the Government's cavalier post-trial processing of this and other similar courts-martial and would result in an undeserved windfall for the appellant.

We have balanced the *Barker* factors and conclude that the circumstances of the delay in this case do not rise to the level of a due process violation. Additionally, even assuming, *arguendo*, that a due process violation occurred, the error would be harmless beyond a reasonable doubt under the circumstances of this case. *Allison*, 63 M.J. at 371.

For the service courts of criminal appeals, however, the analysis of post-trial delay does not end with the due process analysis. Because we are required to determine, in every case before us, what findings and sentence should be approved based on all the circumstances in the record, we must consider the delay in post-trial processing as one factor in that determination. We have published the factors we consider in making such a determination. *United States v. Brown*, 62 M.J. 602

(N.M.Ct.Crim.App. 2005)(*en banc*). The crimes of which the appellant stands convicted are serious and certainly deserving of harsh punishment. On the other hand, the Government's gross negligence and failure to exercise diligence in processing this simple case resulted in a lengthy and unnecessary delay in the appellant receiving appellate review and finality of his court-martial sentence. On the whole, however, we do not believe that the delay affects the findings and sentence we should affirm under Article 66, UCMJ.

Although not raised by the appellant, we note that the court-martial order erroneously states that he was found guilty of unauthorized absence terminated by apprehension in both specifications under Additional Charge I. This is in error, as neither absence was terminated by apprehension. The supplemental court-martial order shall correctly reflect the findings. Following our corrective action, we conclude that the findings are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ. The findings and the sentence are affirmed.

Judge WELLS and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court