

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

BEFORE

E.E. GEISER

F.D. MITCHELL

J.G. BARTOLOTTA

UNITED STATES

v.

**William C. BRAGG
Staff Sergeant (E-6), U. S. Marine Corps**

NMCCA 200600228

Decided 21 February 2007

Sentence adjudged 17 June 2004. Military Judge: R.S. Chester. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Recruit Depot/Western Recruiting Region, San Diego, CA.

LCDR RICARDO A. BERRY, JAGC, USN, Appellate Defense Counsel
Capt ROLANDO R. SANCHEZ, USMC, Appellate Defense Counsel
LT MARK HERRINGTON, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A general court-martial with enlisted representation convicted the appellant, contrary to his pleas, of two specifications of violating a lawful general order, rape, indecent assault, indecent language, and adultery, in violation of Articles 92, 120, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 920, and 934. The appellant was sentenced to a dishonorable discharge, confinement for five years, total forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

The appellant raises eleven assignments of error.¹ We have examined the record of trial, the assignments of error and the

¹ I - The evidence of rape was legally and factually insufficient; II - the evidence of indecent assault was factually insufficient; III - the military judge erred by failing to suppress the appellant's statements to a civilian polygraph examiner; IV - the military judge erred by excluding evidence of the rape victim's character for aggressiveness and defiance of authority; V -

Government's response. We concur with the appellant that the post-trial delay in this case affects the sentence that should be affirmed. We will take appropriate action in our decretal paragraph. Art. 66(c), UCMJ. We conclude that the findings and sentence, as corrected, 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. We will address the appellant's assignments of error out of order for the sake of clarity.

Ineffective Assistance of Counsel

The appellant asserts that his detailed trial defense counsel was ineffective when he failed to assert the appellant's MILITARY RULE OF EVIDENCE, 502, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), attorney-client privilege regarding a defense procured polygraph report which inadvertently came into the possession of the Government.

In order to prevail on a claim of ineffective assistance, the appellant must overcome the strong presumption that his counsel acted within the wide range of reasonably competent professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The appellant has the burden of demonstrating: (1) his counsel was deficient; and (2) he was prejudiced by such deficient performance. *Id.* at 687. To meet the deficiency prong, the appellant must show that his defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To show prejudice, the appellant must demonstrate that any errors made by his defense counsel were so serious that they deprived him of a fair trial, "a trial whose result is reliable." *Id.*; *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). The appellant "'must surmount a very high hurdle.'" *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998) (quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)). We find that the appellant has not demonstrated deficient performance by his trial defense counsel.

In order to properly assess the appellant's claims, it is necessary to consider the context in which the trial defense counsel's actions or inactions occurred. In connection with a pretrial motion to suppress the polygraph report at issue, the military judge made findings of fact and conclusions of law. Appellate Exhibit XXIX at 60-61. The appellant does not assert that the military judge's findings of fact were in error. Having

the military judge erred by allowing the Government expert witness to testify; VI - ineffective assistance by trial defense counsel; VII - the military judge erred by denying a defense challenge for cause against Lieutenant Colonel (LtCol) Wood; VIII - denial of a fair trial due to cumulative errors; IX - post-trial delay; X - convening authority's action fails to note the appellant's 11 days of "Allen" credit; XI - ineffective assistance by appellate defense counsel.

ourselves reviewed the record, we find that the military judge's findings of fact are supported by the record and we adopt them as our own.

The appellant, a Marine recruiter with over 13 years of exemplary service, was facing, *inter alia*, allegations that he'd raped a 17-year-old female prospective recruit applicant, PS, and that he'd sexually assaulted and used indecent language with another 17-year-old female prospective recruit applicant, EC. The appellant denied these allegations and paid for a civilian polygraph examination in hopes that it would help convince the convening authority not to go forward with the charges - or at least the most serious charge of rape. Appellant's Brief of 7 Aug 2006 at 6.

The civilian examiner conducted the polygraph with the appellant and opined in his report that the appellant was not being deceptive when he said that he did not rape PS and when he said he did not indecently touch or speak to EC. The report also, however, contained statements by the appellant that he had consensual sexual relations with PS. Appellate Exhibit XXIX at 44-47.

Consistent with the defense plan to try to head off at least the most serious charge, the trial defense counsel contacted the staff judge advocate for the convening authority and informed him that the appellant had passed the polygraph. *Id.* at 60. Unbeknownst to the appellant or trial defense counsel, the appellant's wife, in an apparent attempt to be helpful, faxed the entire polygraph report to the appellant's command. *Id.* Upon receipt of the document, the prosecutor approached the trial defense counsel and advised him that the Government was in possession of a faxed copy of the report. The prosecutor further informed the trial defense counsel that there was some difficulty with the clarity of the faxed copy of the report and requested a clearer copy. *Id.* The trial defense counsel provided a clear copy of the report to the prosecutor. *Id.* at 61.

On appeal the appellant asserts that the only "logical explanation" for not asserting the attorney-client privilege in this instance, or later at the Article 32, UCMJ, hearing, is that the trial defense counsel wrongly believed that once the command had the document, he could no longer assert the privilege or that he did not need to assert the privilege. Appellant's Brief at 26. We disagree.

When the appellant's wife faxed a copy of the report to the command, far from being helpful, she put the defense into a serious bind. The defense plan all along had been to try to convince the convening authority not to go forward with a general court-martial or at least not to include a charge of rape or indecent assault. When the Government came into possession of the polygraph report, the defense was left with a hard tactical choice.

They could remain silent and tacitly waive the appellant's attorney-client privilege relating to the report in hopes of getting at least the most serious charges dismissed by the convening authority. The downside of this option, as noted by the appellant on appeal, is that the appellant's statements included in the report constituted compelling evidence of his guilt to the lesser charges of adultery and violation of a lawful general order. Alternatively, the defense could assert the privilege and demand the return of the polygraph report which, while giving the defense more options with respect to the lesser charges, would likely diminish or eliminate any realistic hope of getting the convening authority to drop the more significant rape and indecent assault charges.

We do not find that the trial defense counsel's decision to counsel and pursue the former course of action both immediately upon being advised the Government was in possession of the report and at the Article 32, UCMJ, hearing reflected deficient representation. The trial defense counsel made a hard tactical decision that was well within the wide range of reasonably competent assistance. Had the trial defense counsel successfully persuaded the convening authority to withdraw the rape and sexual assault charges based on the civilian polygraph results, the appellant would no doubt have been extremely pleased with his counsel's advice and performance. We find this assignment of error without merit.

Exclusion of Testimony on PS's Relevant Character Traits

The appellant asserts that the military judge erred when he prohibited the defense from exploring PS's character traits for aggressiveness and defiance of authority. Appellant's Brief at 22-23. Having reviewed the record, we observe that the military judge, in fact, ruled in favor of the defense regarding PS's defiance of authority and permitted the defense to explore that character trait along with her character for truthfulness with two witnesses. Record at 546, 548, 552. The appellant is correct, however, that the military judge did not permit the defense to elicit testimony regarding PS's aggressiveness. *Id.*

A military judge's rulings on the admissibility of evidence are reviewed for an abuse of discretion. *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F 1995). In the instant case, the military judge considered the appellant's request to introduce testimony regarding the victim's (1) truthfulness; (2) aggressiveness; and (3) lack of deference to authority. The military judge considered the defense proffer and heard argument. He determined that testimony regarding the victim's character for truthfulness and lack of deference to authority was admissible under the facts and circumstances presented.

With respect to a character trait for aggressiveness, the defense argued that the victim's statement that she "froze" when

the appellant had sexual intercourse with her was contradicted by the fact that she had engaged in a violent altercation with another female high school student over a boyfriend; had engaged in a violent altercation with her mother after the latter turned her in to the police for drug use; and that PS, while having sexual intercourse with a teenage boy, helped the boy force another teenage girl to participate. Appellate Exhibit XXII. In essence, the appellant argues that a teenage girl who has engaged in these violent episodes is less likely to just "freeze up" when she is sexually attacked by an adult male Marine.

We concur with the military judge's assessment that the logical connection between the described episodes of alleged violence and aggression in situations involving her high school classmates and her mother has little if any relevance to her potential reaction when faced with a sexual attack by a large male Marine. The military judge went on to perform a RULE FOR COURTS-MARTIAL 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), analysis and determined that the possible probative value of the evidence was outweighed by the danger of unfair prejudice. Record at 290, 388. Having reviewed the entire record of trial, we find that the military judge did not abuse his discretion.

Legal and Factual Sufficiency

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), aff'd, 54 M.J. 37 (C.A.A.F. 2000); see also Art. 66(c), UCMJ.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; see also Art. 66(c).

Rape

There are two elements to the offense of rape: (1) that the appellant committed an act of sexual intercourse; and that (2) the act of sexual intercourse was done by force and without consent. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 45b(1).

The appellant does not dispute that he and PS, a 17-year-old high school student and prospective Marine Corps recruit applicant, engaged in sexual intercourse in the United States Marine Corps recruiting sub-station in Riverside, California on 10 April 2003. The appellant asserted, however, both at trial and on appeal, that PS consented to the sexual act or in the

alternative, that he made an honest and reasonable mistake of fact as to PS's consent. When an accused is charged with a general intent offense such as rape, a claimed mistake of fact regarding the victim's consent must have existed in the mind of the accused and must have been reasonable under all the circumstances. *United States v. Hibbard*, 58 M.J. 71, 72 (C.A.A.F. 2003). Having carefully reviewed the record of trial, we disagree with both of the appellant's assertions.

PS testified under oath that she did not consent to having intercourse with the appellant. Record at 353. She further testified that the appellant, not she, removed her clothing. PS also testified that when the appellant kissed her lips, she didn't respond or open her mouth. *Id.* at 351. During her description of the rape, at no time did she indicate that she participated in or facilitated the intercourse other than by her mere presence or that she removed any of his clothing or said anything whatsoever. In fact, she specifically testified that she didn't do anything which might indicate her consent to have intercourse with the appellant. *Id.* at 352. Finally, PS testified that as the appellant was driving her to a friend's house after the rape, he "asked her to forgive him and not to lose respect for him," indicating a consciousness of guilt. *Id.* at 357.

The prosecution also offered consistent testimony from an expert witness on victim responses to sexual assault. She testified that PS's self-described "freeze" reaction was consistent with a large percentage of the over 500 sexual assault victims the witness personally worked with. In fact, she testified that active resistance in such situations was the exception. While the defense offered evidence that PS had a reputation with her track coach and teacher for being untruthful and being defiant to authority; neither of these two individuals testified to interactions with PS that would have generated the intense fear and anxiety she testified that she experienced with the appellant in the back room of the recruiting station.

Considering the evidence cited above as well as the entire record of trial in the light most favorable to the Government, we find that a rational trier of fact could have found beyond a reasonable doubt that PS did not consent to having intercourse with the appellant. We further find that a rational trier of fact could have found beyond a reasonable doubt that the appellant's claimed mistake of fact, if it existed at all, was not reasonable under all the circumstances of the case. *Jackson* 443 U.S. at 318-19; *Turner*, 25 M.J. at 325; *Reed*, 51 M.J. at 561-62; *see also* Art. 66(c), UCMJ. In addition, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is also convinced beyond a reasonable doubt that PS did not consent to having intercourse with the appellant and that the appellant's claimed mistake of fact was not reasonable. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

Indecent Assault

There are three elements to the offense of indecent assault: (1) that the appellant assaulted a certain person not the spouse of the appellant in a certain manner; (2) the acts were done with the intent to gratify the lust or sexual desires of the appellant; and (3) that, under the circumstances, the conduct of the appellant was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. MCM, Part IV, ¶ 63b. The appellant concedes that the evidence adduced at trial was legally sufficient, but asserts that it was not factually sufficient. As noted above, the test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; see also Art. 66(c), UCMJ.

The appellant's brief states generally that EC's description of the events in the van was "incredible." He also argues that EC's testimony indicated that she, herself, didn't perceive the appellant's actions to be a crime until she was influenced by PS's later allegation of rape. We agree with the Government that this assertion misconstrues the evidence. At trial, EC specifically testified that she was uncomfortable being touched so intimately by the appellant at the time it occurred. She further testified that the reason she did not immediately come forward was because she feared she would not be believed. Record at 405. While EC might not have been thinking in terms of whether the appellant's touching was a "crime," the evidence is abundantly clear that she perceived it as something she didn't like and something she had not invited or consented to.

With regard to whether the appellant engaged in the touching in order to gratify his lust or sexual desires, the evidence is equally solid. EC testified that the appellant preceded his touching of her breasts with a monologue involving talk of pornographic movies, the small size of his sexual member, and his advice regarding EC's potential sexual relationships with high school boys; all of which she found to be distasteful. Record at 397-401. He also bizarrely twisted EC's frustrated comment that her mother knew how to push her buttons into something sexual by asking if he stripped her down naked, where would he find her buttons. Record at 397. We find the appellant's contention that EC's failure to actively object to his sexual monologue was somehow indicative of her consent to be touched to be meritless and unworthy of further comment. Appellant's Brief at 16.

After weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced beyond a reasonable doubt of the appellant's guilt to Specification 1 of Charge III (indecent assault). *Turner*, 25 M.J. at 325; see also Art. 66(c), UCMJ.

Post-Trial Delay

The appellant next asserts that a delay of 626 days from sentencing to docketing is excessive. Of particular note, he points to the 161 day delay between the convening authority's action and docketing with this court. We consider four factors in determining if post-trial delay violates appellant's due process rights: (1) length of the delay; (2) reasons for the delay; (3) appellant's assertion of the right to a timely appeal; and (4) prejudice to the appellant. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay is not unreasonable, further inquiry is not necessary. If we conclude that the length of the delay is "facially unreasonable," however, we must balance the length of the delay against the other three factors. *Id.* We find a delay of 626 days to be facially unreasonable. See *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). Such delay triggers a due process review.

We balanced the length of delay in this case in the context of the three remaining *Jones* factors. Regarding the second factor, reasons for the delay, the Government offers an explanation for at least some of the delay prior to the convening authority's action but none, whatsoever, for the 161 day delay in forwarding this case for review following that action. We further note that this is a rather lengthy record with a number of complex motions.

With respect to the third factor, we find that the appellant asserted his right to speedy post-trial processing in a Petition for Extraordinary Relief addressed to our superior court in February 2006. Finally, regarding the fourth factor, the appellant asserts prejudice due to his inability to file a petition with the Naval Clemency and Parole Board and his inability to locate a witness who allegedly has information regarding PS's sexual activities at some time after the incident at bar. We find the appellant's assertions unpersuasive. This court finds no evidence of material prejudice to a substantial right of the appellant resulting from post-trial delay in this case. Considering all four factors, we conclude that there has been no due process violation due to post-trial delay in this instance.

We next consider whether this is an appropriate case to exercise our authority to grant relief under Article 66(c), UCMJ, in the absence of a due process violation. See *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). Having considered the post-trial delay in light of our superior court's guidance in *Toohey* and *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002), and considering the factors we explained in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc), we agree with the appellant that the delay in this case impacts the sentence that "should be approved." See Art. 66(c), UCMJ. We

will take appropriate action in our decretal paragraph both with respect to post-trial delay and with respect to the convening authority's failure to expressly note 11 days of confinement credit in his action. The appellant's remaining assignments of error are without merit.

Conclusion

The approved findings are affirmed. So much of the approved sentence as extends to a dishonorable discharge, forfeiture of all pay and allowances, reduction to pay grade E-1, and confinement for four years and eleven months is affirmed. We direct that the supplemental court-martial order indicate that the appellant is entitled to 11 days confinement credit. See *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984).

Judge MITCHELL and Judge BARTOLOTTO concur.

For the Court

R.H. TROIDL
Clerk of Court