

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

BEFORE

D.O. VOLLENWEIDER

J.W. ROLPH

V.S. COUCH

UNITED STATES

v.

**Timothy V. COOPER
Lance Corporal (E-3), U. S. Marine Corps**

NMCCA 200600652

Decided 28 February 2007

Sentence adjudged 21 July 2004. Military Judge: T.A. Daly.
Review pursuant to Article 66(c), UCMJ, of Special Court-Martial
convened by Commanding Officer, 1st Battalion, 7th Marines, 1st
Marine Division (Rein), FMF, MCAGCC, Twentynine Palms, CA.

LT AIMEE COOPER, JAGC, USNR, Appellate Defense Counsel
LCDR REBECCA SNYDER, USNR, Appellate Defense Counsel
LCDR PAUL D. BUNGE, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

COUCH, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of one specification of wrongful use of marijuana, one specification of wrongful appropriation of a fellow Marine's automobile, and one specification of unlawful entry, in violation of Articles 112a, 121, and 130, Uniform Code of Military Justice, 10 U.S.C. §§ 912a, 921, and 930. The appellant was sentenced to confinement for 90 days, reduction to pay grade E-1, forfeiture of \$750.00 pay per month for three months, and a bad-conduct discharge. The convening authority approved the findings and the sentence as adjudged, but suspended all confinement in excess of 60 days pursuant to the terms of a pretrial agreement.

The appellant's sole assignment of error alleges that his due process right to speedy post-trial review was violated. We have carefully examined the record of trial, the appellant's

assignment of error and the Government's response. While we do not find a violation of the appellant's due process guarantees, this case warrants relief pursuant to our Article 66(c), UCMJ, discretionary authority for unreasonable post-trial delay. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. See Arts. 59(a) and 66(c), UCMJ.

Post-Trial Delay

Convicted service members have a due process right to timely appeal and review of courts-martial. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). In this case, the following dates pertain:

EVENT	DATE	TIME	TOTAL TIME
Court-Martial	21 Jul 2004	0	0
Authentication	3 May 2005	286	286
SJAR	4 Aug 2005	93	379
SJAR Served	7 Oct 2005	64	443
CA Action	28 Nov 2005	52	495
Docketed NMCCA	19 May 2006	172	667

We consider four factors in determining if post-trial delay violates the appellant's due process rights: (1) the length of the delay; (2) the reasons for the delay; (3) the 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 (Toohey I)*, 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.* Moreover, in extreme cases, the delay itself may "give rise to a strong presumption of evidentiary prejudice." *Id.* (quoting *Toohey I*, 60 M.J. at 102).

Length of Delay

Here there was a delay of about 667 days from the date of trial to the date the case was docketed at this court. This case was tried and docketed with this court prior to the date our superior court decided *Moreno*, so the presumptions of unreasonable delay outlined therein do not apply here. However, even for pre-*Moreno* cases, the *Moreno* time periods are instructive:

120 days from trial to convening authority's action.

30 days from convening authority's action to docketing.

Id. at 136.

The record of trial in this case is 62 pages long, and not complicated in any respect. Accordingly, we find that the length of delay in this case is facially unreasonable, triggering a due process review.

Reasons for the Delay

Regarding the second factor, reasons for delay, we look at each stage of the post-trial period, at the Government's responsibility for any delay, and at any explanations for delay. *United States v. Toohey (Toohey II)*, 63 M.J. 353, 359 (C.A.A.F. 2006). We specifically find that every stage of post-trial processing in this case was intolerably slow, especially the creation and authentication of the record of trial (286 days), preparation of the staff judge advocate's recommendation (93 days), and docketing of the case with this court after the convening authority's action (172 days).

The Government provides no specific explanation for any of these delays in its brief. The staff judge advocate provides a general averment in her recommendation of 4 August 2005 to the convening authority:

4. There has been significant delay in this case due to the operational requirements of the 1st Marine Division units located at Twentynine Palms, CA, and the personnel normally assigned to post-conviction review. The current Review Officer, Legal Services Support Section accounts for the delay in enclosure (2).

We will not quote extensively from "enclosure (2)" because it is a verbatim copy of the declaration we criticized in *United States v. Sands*, No. 200600447, unpublished op. (N.M.Ct.Crim.App. 13 Sep 2006), except this time it is signed by Captain Miner and dated 28 July 2005. For the same reasons we stated in *Sands*, this declaration fails to explain the delay in *this* case, and to the contrary, describes a negligent system of post-trial review for 31 cases "caught in the seam" between deployed units within

the 1st Marine Division.¹ The 286 days it took to authenticate the record of trial occurred before it was transferred from Twentynine Palms to Camp Pendleton, and thus this record of trial is not covered by the explanations proffered in the declaration. Further, the declaration provides no reason why it took 172 days after the convening authority's action to docket this case with our court, which is a delay that is the "least defensible period of all and worthy of the least patience." *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990). We reject the declaration as a sufficient explanation for why it took so long for this simple case to be authenticated, routed through the staff judge advocate, acted upon by the convening authority, and mailed to the appellate review activity in Washington, D.C. For delay to be justifiable, it must be case-specific, supported by the circumstances of that case, and not "based upon administrative matters, manpower constraints or the press of other cases." *Moreno*, 63 M.J. at 142.

We have previously addressed the Government practice of submitting affidavits in an effort to explain post-trial delay, and have provided guidance that such submissions "should be specific to the case at bar." *Brown*, 62 M.J. at 605 n.2. Affidavits that only provide a generalized rationale for why cases from a specific convening authority or SJA office are delayed are not given great weight. *Id.* In spite of our prior attempts to dissuade this practice, the Government once again attempts to explain its post-trial delay in processing with a generalized, "boilerplate" submission that raises more concerns than it addresses. We decline to give the Government's explanation for the post-trial delay in this case any significant weight.

We recognize the personnel shortages and coordination difficulties caused by the current combat operations in Iraq. However, the same constraints the Government now claims impeded its post-trial review efforts should have slowed the command's ability to staff and coordinate trial proceedings as well, but they did not. *Sands*, unpub. op. at 5 & n.3. The decision of a convening authority to refer a case to trial incurs a corresponding duty to ensure appropriate post-trial processing of that case in the event of a conviction. See Art. 60, UCMJ. The obligation to ensure a timely review and action by the

¹ Comparing the two declarations, Captain Miner was the review officer beginning in June 2005, and Major Emerich held the billet beginning in August 2005. However, both of them state "[m]y office immediately categorized and prioritized these [31] cases base [sic] on dates of trial ranging from 23 Mar 04 - 22 Dec 04." The declaration never states specifically that this case is one of the "31 cases."

convening authority rests upon the Government. *Moreno*, 63 M.J. at 138 (citing *United States v. Bodkins*, 60 M.J. 322 (C.A.A.F. 2004)). The 70% reduction in staffing of the review office described in Captain Miner's declaration may provide a partial explanation for the delay in processing the appellant's case, but not a good one. Accordingly, the Government's failure to provide a legitimate reason for delay of this case is a factor that weighs heavily in favor of the appellant.

Assertion of Right to a Timely Appeal

Turning to the third factor, we find no assertion of the right to a timely appeal prior to the filing of the appellant's brief and assignments of error with this court on 31 July 2006. While this factor weighs against the appellant, the weight against him is slight, given that the primary responsibility for speedy processing rests with the Government. *Moreno*, 63 M.J. at 138.

Prejudice

Concerning the fourth factor, the appellant has made no claim of specific prejudice. In light of the appellant's request for a bad-conduct discharge at trial, we find no prejudice in the sentence approved by the convening authority. We also find that in light of the offenses the appellant pled guilty to, the delay is not "so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohey II*, 63 M.J. at 362. The lack of prejudice to the appellant is a factor that weighs heavily in favor of the Government.

Balancing all four factors, we conclude that there has been no due process violation resulting from the post-trial delay in this case. *Jones*, 61 M.J. at 83. We are aware of our authority to grant relief under Article 66, UCMJ, and in this case choose to exercise it in our decretal paragraph. *Toohey I*, 60 M.J. at 102; *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc).

Conclusion

Accordingly, we affirm the findings of guilty and only so much of the approved sentence as includes forfeiture of \$750.00 pay for two months, confinement for 90 days, reduction in rank to pay grade E-1, and a bad-conduct discharge.

Senior Judge ROLPH and Senior Judge VOLLENWEIDER concur.

For the Court

R.H. TROIDL
Clerk of Court