

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

BEFORE

J.D. HARTY

R.G. KELLY

W.M. FREDERICK

UNITED STATES

v.

**Justin P. CRABTREE
Machinist's Mate Second Class (E-5), U. S. Navy**

NMCCA 200600460

Decided 6 February 2007

Sentence adjudged 17 January 2001. Military Judge: D.A. Wagner. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS DWIGHT D. EISENHOWER (CVN 69).

LCDR MATTHEW T. SCHELP, JAGC, USNR, Appellate Defense Counsel
LT BRIAN D. KORN, JAGC, USNR, Appellate Defense Counsel
LCDR PAUL D. BUNGE, JAGC, USNR, Appellate Government Counsel
LT JESSICA M. HUDSON, JAGC, USN, Appellate Government Counsel
LCDR MONTE G. MILLER, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HARTY, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, in accordance with his pleas, of wrongfully using marijuana, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to confinement for 150 days, forfeiture of \$850.00 pay per month for five months, reduction to pay grade E-3, and a bad-conduct discharge. Pursuant to the pretrial agreement, the convening authority (CA) approved the sentence as adjudged, but suspended confinement in excess of 60 days for 12 months from the date of sentencing.

We have reviewed the record of trial, the appellant's sole assignment of error claiming post-trial delay, and the Government's response. We conclude that the findings and the sentence 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.

Background

The appellant was caught smoking marijuana with two other Sailors onboard USS EISENHOWER (CVN 69) while underway, shortly before he was scheduled to stand watch. The appellant was a watch-stander in the ship's Reactor Mechanic 2 Plant, where he stood the feed pump watch and the coolant generator watch for the nuclear reactor. He admitted that he felt the effects of smoking the marijuana.

Post-Trial Delay

For his sole assignment of error, the appellant claims that he has been denied his due process right to a speedy appellate review of his case, or in the alternative, that the length of delay affects the sentence that should be approved. The Government argues that there has not been a due process violation, but if there was, it was harmless, and the delay does not affect the sentence that should be approved. We conclude that the delay violated the appellant's due process rights, but that the error was harmless beyond a reasonable doubt. We also conclude the delay does not affect the findings or sentence that should be approved in this case. Due to the extreme delay in this case, we will conduct a due process analysis rather than going directly to a harmless error analysis. See *United States v. Haney*, 64 M.J. 101, 108 (C.A.A.F. 2006)(citing *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006)).

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*, 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.*

Here, there was a delay of 217 days from the date of trial to the date the CA took his action¹ and another 1,784 days elapsed before this 68-page record of trial was docketed with

¹ The appellant was sentenced on 17 January 2001 and the CA took his action on 22 August 2001.

this court on 11 July 2006. This case was tried prior to the date our superior court decided *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). The presumptions of unreasonable delay set forth in *Moreno*, therefore, do not apply here. Nevertheless, we find that the total delay as well as the extreme delay between milestones is facially unreasonable, triggering a due process review. See *United States v. Gosser*, 64 M.J. 93, 97 (C.A.A.F. 2006) (holding that facially unreasonable delay between milestones can, by itself, trigger a due process analysis).

Regarding the second factor, reasons for the delay, the record reflects that the appellant filed a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus on 10 March 2006, requesting that this court order the Government to docket the appellant's record of trial. The Government responded by stating that the appellant's record of trial had been located and had been forwarded to the CA for "proper completion of post-trial processing." Government Answer to the Petition for Extraordinary Relief of 3 May 2006. The CA, however, had already completed his action on 22 August 2001. It appears to this court that the Government simply lost track of the appellant's record of trial.

Looking to the third factor, assertion of the right to a timely appeal, we find no assertion of that right prior to filing the appellant's Petition for Extraordinary Relief in the Nature of a Writ of Mandamus on 10 March 2006. As to the fourth factor, prejudice, the appellant claims only that he has been prejudiced by the length of delay alone. We do not find any evidence of specific prejudice. Thus, we conclude that the appellant has not suffered any prejudice resulting from the extreme delay in his case.

Even without specific prejudice, however, a due process violation may result if the "delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). We conclude that despite the fact that the appellant has failed to show specific prejudice, taking 2,001 days to docket a 68-page record of trial can diminish the public's perception of the fairness of military justice. Therefore, our consideration of the four factors announced in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), leads us to conclude that the appellant was denied his due process right to speedy review and appeal.

As this due process error is one of constitutional magnitude, we are obliged to test this error for harmlessness. See *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *Chapman v. California*, 386 U.S. 18, 24 (1967). To rebut a showing of constitutional error, "the Government must show that this error was harmless beyond a reasonable doubt." *United States v. Brewer*, 61 M.J. 425, 432 (C.A.A.F. 2005)(quoting *United States v. Miller*, 47 M.J. 352, 359-60 (C.A.A.F. 1997)). Because we find that the appellant has not suffered specific prejudice, however, we conclude that the error in processing this case was harmless beyond a reasonable doubt. See *Gosser*, 64 M.J. at 99. This does not end our inquiry.

A court of criminal appeals may grant relief for excessive post-trial delay under its broad authority to determine sentence appropriateness under Article 66(c), UCMJ. *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). "Because a sentence appropriateness analysis under Article 66(c), UCMJ, is highly case specific, the details of a servicemember's post-trial situation constitute an important element of a court's analysis." *United States v. Simon*, 64 M.J. 205, 207 (C.A.A.F. 2006)(citing *United States v. Bodkins*, 60 M.J. 322, 324 (C.A.A.F. 2004)).

The appellant's case includes a post-trial delay of 1,784 days in performing the routine, nondiscretionary, ministerial task of transmitting the record from the CA to this court. See *United States v. Oestmann*, 61 M.J. 103, 104 (C.A.A.F. 2005). The failure to perform this ministerial task in a timely fashion, combined with the total delay, raises substantial questions under a sentence appropriateness analysis. Upon consideration of the non-exclusive factors announced in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc), combined with the facts of the case and the sentence adjudged and approved, we conclude that the delay does not affect the sentence that should be approved.

This case is not complex. The appellant pleaded guilty and his trial produced a record only 68 pages long. No complex legal issues were raised at trial or on appeal. We find gross negligence on the part of the Government in taking almost five years to transmit the record to this Court, a process that should have taken a few weeks at most. This delay is all the more troubling because the Government acted diligently throughout the post-trial process until after the CA's action, when forward motion of the record inexplicably stalled.

On the other hand, the appellant was sentenced to 150 days of confinement, forfeiture of \$850.00 pay per month for five months, reduction to pay grade E-3, and a bad-conduct discharge. The CA suspended all confinement in excess of 60 days for 12 months from the date of sentencing. The appellant has already served his unsuspended term of confinement and his suspension period has already run. Therefore, the remaining 90 days of confinement have already been remitted. Reduction of the adjudged confinement will not afford the appellant meaningful confinement relief or protect him from vacation of unsuspended confinement.

Reduction of the adjudged forfeitures will not provide meaningful relief in light of the provisions for automatic forfeitures. See Art. 58b, UCMJ.² A significant impact upon collected forfeitures could be achieved by approving a sentence that does not include adjudged forfeitures and confinement, or does not include adjudged forfeitures and a bad-conduct discharge. This would allow the appellant to recoup all collected forfeitures; however, such a remedy is unwarranted under the circumstances of this case, and highly disproportionate to any possible harm caused by the delay. We could restore lost pay grades; however, that will not provide meaningful relief in light of the provisions for automatic reduction to the lowest pay grade at the time the CA acts on the sentence. See Art. 58a, UCMJ.

Any relief that would be actual and meaningful, given the light sentence awarded under the facts of this case, would be an unwarranted windfall for the appellant and disproportionate to any possible harm resulting from the delay.³ Our superior court has found that under certain circumstances no meaningful relief is available for a due process speedy review violation, because it would be disproportionate to the harm caused by the due process error. See *United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006). Likewise, we conclude that there is no meaningful relief that we can grant the appellant under Article 66(c), UCMJ, that would not be disproportionate to any possible harm the appellant may have suffered as a result of the post-trial delay in his case. Therefore, we conclude that the

² Effective 14 days after sentencing at a special court-martial, a service member automatically forfeits two-thirds of his pay and allowances if sentenced to confinement for six months or less and a bad-conduct discharge.

³ While we found no specific prejudice under our due process analysis, harm or the lack thereof is also one factor we consider in conducting our Article 66(c), UCMJ, analysis of post-trial delay. *Brown*, 62 M.J. at 607.

delay in this case does not affect the findings or sentence adjudged and approved.

Conclusion

Accordingly, the findings and sentence as approved below are affirmed.

Judge KELLY and Judge FREDERICK concur.

For the Court

R.H. TROIDL
Clerk of Court