

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

**BEFORE**

**D.A. WAGNER**

**R.E. VINCENT**

**E.B. STONE**

**UNITED STATES**

**v.**

**Angel E. GUILAMO  
Sergeant (E-5), U. S. Marine Corps**

NMCCA 200401094

Decided 18 January 2007

Sentence adjudged 07 December 2001. Military Judge: J.S. Brady. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Aircraft Wing, U.S. Marine Forces, Atlantic, MCAB Eastern Area, Cherry Point, NC.

LT ROBERT E. SALYER, JAGC, USN, Appellate Defense Counsel  
LCDR PAUL BUNGE, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VINCENT, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of attempted sodomy on a child under age 16, committing indecent acts on a child under age 16, taking indecent liberties with a child under age 16, and communicating a threat, in violation of Articles 80 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 934. The appellant was sentenced to confinement for six years, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

The appellant raises four assignments of error. His first two assignments of error allege excessive post-trial delay. In his third assignment of error, the appellant contends that the military judge erred by denying his request for a post-trial Article 39(a), UCMJ, session. Finally, the appellant's fourth assignment of error asserts that the evidence was factually insufficient to support the findings of guilty of all the charges and specifications of which he was found guilty.

We have examined the record of trial, the appellant's four assignments of error, and the Government's response. We conclude that the findings are correct in law and fact and that there was no error materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

### Facts

On 15 October 2000, the appellant was babysitting his friend's three minor children at his friend's house. While babysitting the children, the appellant touched the vagina of [CJ], a six-year-old child, with his tongue and hand. The appellant also threatened to "whip her" if she told anyone about what he had done to her, and showed her adult pornographic images on his friend's home computer.

### Post-Trial Delay

Regarding the appellant's first two assignments of error, our superior court has adopted a framework for analyzing post-trial delay, utilizing the four factor analysis of pretrial delay established by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) length of delay; (2) reasons for delay; (3) the appellant's demand for speedy review; and (4) prejudice. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006); see *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey v. United States (Toohey I)*, 60 M.J. 100, 102 (C.A.A.F. 2004). These four factors are balanced, "with no single factor being required to find that post-trial delay constitutes a due process violation." *United States v. Toohey (Toohey II)*, 63 M.J. 353, 359 (C.A.A.F. 2006)(quoting *Moreno*, 63 M.J. at 136). The absence of any one factor does not bar finding a due process violation. *Moreno*, 63 M.J. at 136.

Turning to the facts of this case, we find that the delay of approximately thirty-two months (approximately nineteen months between trial and the convening authority's action and approximately thirteen months between the convening authority's action and docketing with this court) is, on its face, unreasonable. *Toohey I*, 60 M.J. at 103. We also conclude that this delay is so unreasonable that it raises a presumption of prejudice, triggering a balancing of the four *Barker* factors to determine if a due process violation has occurred. *United States v. Adams*, \_\_\_ M. J. \_\_\_, No. 200600767, 2006 CCA LEXIS 332 at 4-6 (N.M.Ct.Crim.App. 19 Dec 2006).

Regarding the first *Barker* factor, we are concerned that the Government needed thirty-two months to docket the case with this court after trial. This factor weighs heavily in favor of the appellant. In addressing the second factor, we note, with considerable dismay, that the Government advances no reason for any of this extensive delay. This factor weighs heavily in favor of the appellant.

Considering the third factor, we note that the appellant did not state his desire for speedy review until he filed his appellate brief on 4 October 2005, almost four years from the date of his sentencing. 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. *Moreno*, 63 M.J. at 138; see *United States v. Harvey*, 64 M.J. 13, 36 (C.A.A.F. 2006).

The appellant addresses the fourth *Barker* factor in his brief by claiming prejudice solely due to the inordinate post-trial delay. He does not provide any evidence that he was prejudiced by suffering oppressive incarceration pending appeal. *Moreno*, 63 M.J. at 139. Neither does the appellant demonstrate that he has experienced "particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision" such that he has suffered prejudice in the form of "constitutionally cognizable anxiety." *Id.* at 140.

Finally, although the appellant's third assignment of error contends that the military judge erred by denying his request for a post-trial Article 39(a) session in order to present newly discovered evidence and his fourth assignment of error asserts that the evidence at trial was factually insufficient, he has not specifically identified "how he would be prejudiced at rehearing due to the delay. Mere speculation is not enough." *Id.* at 140-41 (citing *United States v. Mohawk*, 20 F.3d 1480, 1487 (9th Cir. 1994)).

Balancing all four factors, we conclude that the circumstances of the delay in this case did not rise to the level of a due process violation and decline to grant relief. Although the first and second *Barker* factors weigh in favor of the appellant, this case does not contain any actual prejudice and the presumption of prejudice in this case 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.

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. Having considered the post-trial delay in light of our superior court's guidance in *Toohey*, 60 M.J. at 101-02 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 do not find that the delay in this case impacts the sentence that should be approved. See Art. 66(c), UCMJ.

## Denial of Request for Article 39(a) Session

In his third assignment of error, the appellant contends that the military judge erred by denying his civilian defense counsel's 1 July 2002 post-trial request for an Article 39(a) session pursuant to RULE FOR COURTS-MARTIAL 1102, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). The request indicates that, after trial, the civilian defense counsel employed two private computer "experts" to review the computer forensics expert testimony of Special Agent (SA)[JR], Naval Criminal Investigative Service. The civilian defense counsel attached affidavits from the two computer "experts" to his request.

In their affidavits, the two computer "experts" indicate that they reviewed SA [JR]'s testimony at trial and Prosecution Exhibits 6 and 7, which contain SA [JR]'s computer forensic analysis. They note that a stored computer file can be accessed without being actually opened and viewed. They also indicate that a file can be highlighted, which can give the false impression that a file was accessed. They also assert that, although pornographic movies were on the list of accessed files, the media player, which is required to view the films, does not appear to have been accessed on 15 October 2000. They also assert that there is no way to verify that the time and date on the computer was accurate, and that SA [JR] used an outdated forensic software system.

The civilian defense counsel requested that the military judge set aside the guilty findings and reopen the trial in order to obtain additional evidence from computer forensics and child sexual abuse expert witnesses. Although the record of trial does not appear to contain the military judge's ruling on the request, the substitute detailed defense counsel's 8 May 2003, R.C.M. 1105 submission indicates that the military judge denied the request.

"Petitions for new trial 'are generally disfavored.'" *United States v. Rios*, 48 M.J. 261, 267 (C.A.A.F. 1998)(quoting *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993)). A petition for a new trial can be authorized "on the grounds of newly discovered evidence or fraud on the court." Article 73, UCMJ. R.C.M. 1210(f)(2) provides additional guidance for petitions for a new trial based on an assertion of newly discovered evidence:

- (A) The evidence was discovered after the trial;
- (B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
- (C) The newly discovered evidence, if considered by a court-martial in light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

In the instant case, the appellant has not demonstrated why he could not have requested and employed the assistance of computer experts at the time of trial. See Art. 46, UCMJ; MILITARY RULE OF EVIDENCE 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.); R.C.M. 703 (d). The appellant was well-aware in advance of trial that he was charged with taking indecent liberties with a child under age 16 by showing her pornographic images from a computer located in the victim's home and was equally well-aware that SA [JR] would testify at his trial, since he testified at the Article 32, UCMJ, hearing. Accordingly, if the appellant had exercised due diligence prior to trial, he could have discovered the evidence that he belatedly obtained after trial.

Additionally, we have reviewed the two affidavits submitted by the appellant. Although the civilian defense counsel identified the affiants as computer "experts," the affidavits do not contain sufficient evidence to establish this fact. Finally, upon review of the facts asserted in the two affidavits, we conclude that, in light of all the other pertinent evidence adduced at the appellant's court-martial, even if the military judge, as the trier of fact, had been presented with this evidence, it would not have produced a substantially more favorable result for the appellant. Accordingly, this assignment of error is without merit.

#### **Factual Sufficiency**

In his fourth assignment of error, the appellant's contends that the evidence at trial was not factually sufficient to prove his guilt to attempted sodomy, committing indecent acts and taking indecent liberties with [CJ], a child under age 16, and communicating a threat towards [CJ], on 15 October 2000. We disagree.

The test for factual sufficiency is, whether after weighing the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); see also Art. 66(c), UCMJ. Proof beyond a reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). Furthermore, this court, in its factfinding role, "may believe one part of a witness' testimony and disbelieve another." *United States v. Lepresti*, 52 M.J. 644, 648 (N.M.Ct.Crim.App. 1999)(quoting *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979)).

The appellant asserts that [CJ]'s testimony is not credible due to inconsistencies in her testimony and possible manipulation by her parents. [CJ], who was six years old at the time of the offenses and eight years old when she testified at trial, provided extensive testimony that the appellant, while he was

babysitting her and her two brothers on 15 October 2000, touched her vagina with his tongue and his hand and threatened to "whip her" if she told anyone about what he had done to her. Record at 83-91; 97. Furthermore, Captain Suzanne Stelmach, MC, U.S. Navy, who was recognized without defense objection as a child sexual abuse medical expert at trial, provided testimony explaining it is normal for child sexual abuse victims to sequentially disclose details concerning the events and also noted that "inconsistencies of a child's disclosure is part of this business, . . . ." Record at 304.

Additionally, the appellant contends that he had a longstanding adulterous relationship with [RJ], the victim's mother. He alleges that [RJ] had a motivation to manipulate [CJ]'s testimony because she was jealous of the appellant's relationship with his wife, upset that the appellant would not leave his wife for her, and upset that the appellant had a sexual relationship with [RJ]'s sister. At trial, [RJ] denied these allegations.

To the extent that there were inconsistencies in [CJ]'s testimony and conflicting testimony between [RJ] and the appellant, we find that so long as the Government presents competent evidence as to each element of the offense, it is for the fact-finder in the first instance to evaluate the credibility of witnesses and resolve any inconsistencies. *United States v. Damatta-Olivera*, 37 M.J. 474, 477 (C.M.A. 1993). We also find that the evidence adduced at trial was factually sufficient to establish that the appellant attempted to orally sodomize [CJ], committed indecent acts upon [CJ], and communicated a threat to [CJ].

Regarding the offense of committing indecent liberties with [CJ] by showing her pornographic images, [CJ] testified that the appellant used her parents' computer to show her a man and a woman doing "nasty stuff" to each other while bare-chested. Record at 91-93. Additionally, SA [JR] provided expert testimony that many pornographic websites were accessed on the computer in [CJ]'s home on 15 October 2000. Thus, we also find that the evidence adduced at trial was factually sufficient to establish that the appellant committed indecent liberties with [CJ] by showing her pornographic images.

After careful review of the record of trial, and recognizing that we did not personally observe the witnesses, as did the trial court, we are convinced beyond a reasonable doubt that the appellant is guilty of Charge I and its specification, and Specifications 1, 2, and 3 of Charge III, and Charge III.

### **Conclusion**

Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Chief Judge WAGNER and Judge STONE concur.

For the Court

R.H. TROIDL  
Clerk of Court