

**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.**

**Mario P. IGNACIO  
Gunnery Sergeant (E-7), U.S. Marine Corps**

NMCCA 200501080

Decided 16 May 2007

Sentence adjudged 30 July 2003. Military Judge: S.M. Immel.  
Review pursuant to Article 66(c), UCMJ, of General Court-Martial  
convened by Commander, 1st Force Service Support Group, MarForPac,  
Camp Pendleton, CA.

CDR THOMAS FICHTER, JAGC, USN, Appellate Defense Counsel  
LT A.M. SOUDERS, JAGC, USN, Appellate Defense Counsel  
Maj WILBUR LEE, USMC, Appellate Government Counsel  
LT MARK HERRINGTON, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HARTY, Senior Judge:

A military judge sitting as a general court-martial, convicted the appellant, in accordance with his pleas, of unauthorized absence, violating a general order by fraternizing with a subordinate, reckless operation of a vehicle resulting in injury to a person, three specifications of wrongful use of methamphetamine, and distribution of methamphetamine, in violation of Articles 86, 92, 111, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 892, 911, and 912a. The appellant was sentenced to confinement for six years, total forfeiture of pay and allowances, reduction to pay grade E-1, a \$10,000.00 fine, and a dishonorable discharge. Due to the appellant's post-trial misconduct, the convening authority (CA) withdrew from the pretrial agreement and approved the sentence as adjudged, except for the \$10,000.00 fine, and suspended confinement in excess of 54 months for 12 months from the date of his action.

We have reviewed the record of trial, the appellant's three assignments of error challenging the CA's withdrawal from the pretrial agreement based on the appellant's misconduct, his claim of unreasonable 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.

### **Prior History**

The appellant was sentenced on 30 July 2003. Prior to the CA taking his initial action, and while the appellant was serving his confinement, his urine sample tested positive for methamphetamine. The special court-martial convening authority (SPCMCA) held an evidentiary hearing on 14 May 2004 and determined there was "probable cause" to believe the pretrial agreement had been violated. On 19 May 2004, the SPCMCA recommended that the CA withdraw from the pretrial agreement and that the CA should suspend 18 months of confinement rather than the 36 months agreed to in the pretrial agreement. The CA, who was also the general court-martial convening authority (GCMCA), agreed with that recommendation.

In taking his initial action on 20 April 2005, the CA approved the sentence as adjudged, except for the \$10,000.00 fine, and suspended confinement in excess of 54 months for 12 months from the date of his action. On 5 January 2006, this court set aside the CA's action, holding that "probable cause" is the wrong evidentiary standard to determine whether a CA can withdraw from a pretrial agreement based on misconduct. The case was remanded for post-trial processing, including a new evidentiary hearing, if practicable.

Rather than hold a new evidentiary hearing, the SPCMCA who held the original evidentiary hearing merely submitted a new recommendation, dated 19 May 2006, based on the misconduct hearing he held on 14 May 2004. This time, the SPCMCA concluded that the same evidence supported a finding by a preponderance of the evidence that the appellant committed misconduct by wrongfully using methamphetamine on 11 February 2004. The original SPCMCA, however, was no longer the appellant's SPCMCA when he submitted his 19 May 2006 recommendation to the GCMCA.<sup>1</sup>

On 22 May 2006, the GCMCA again considered the evidence previously presented and the prior SPCMCA's new recommendation, and concluded that the same evidence he considered in May 2005

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<sup>1</sup> "I was the Commanding Officer and the special court-martial convening authority for Brigade Service Support Group-1 from October 2003 through October 14, 2004. As the special court-martial convening authority I conducted a vacation hearing on 15 May 04 to determine whether or not Private Ignacio had violated the terms of his pretrial agreement." Colonel Dunlap ltr to the GCMCA of 19 May 2006 at 1.

was sufficient to establish by a preponderance of the evidence that the appellant violated the pretrial agreement by committing misconduct, i.e., the wrongful use of methamphetamine, on 11 February 2004. On 28 July 2006, the GCMCA again approved the original sentence as adjudged, except for the \$10,000.00 fine, and suspended confinement in excess of 54 months for 12 months from the date of his action.

### **Background**

The appellant, an E-7, used methamphetamine, and on one occasion distributed methamphetamine in his own home to an E-3 subordinate at which time he used methamphetamine with that subordinate. Unrelated to the methamphetamine use, the appellant, on 16 September 2001, drove his vehicle into the back of a vehicle stopped at a stop light, injuring the occupants of the other vehicle, and then fled the scene. He began a period of unauthorized absence the next day, and remained absent until 26 December 2002.

### **Withdrawal from Pretrial Agreement**

For his first three assignments of error,<sup>2</sup> the appellant attacks the CA's action "vacating" a portion of the appellant's suspended sentence based on the recommendation received from the SPCMCA who personally held an evidentiary hearing into whether the appellant committed misconduct.<sup>3</sup> First, the appellant claims that the SPCMCA failed to conduct any analysis of the evidence presented as required by the Due Process Clause and RULE FOR COURTS-MARTIAL 1109, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). Appellant's Brief of 28 Nov 2005 at 2. Second, the appellant claims that the SPCMCA applied the wrong evidentiary standard to the evidence presented at the evidentiary hearing.<sup>4</sup> *Id.* at 7. Third, the appellant claims that the CA erred by relying on the SPCMCA's recommendation, because that recommendation improperly relied on the appellant's prior guilty plea and charge sheet as evidence. Appellant's Supplemental Brief of 26 Sep 2006 at 4. We disagree.

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<sup>2</sup> Assignments of error I and II are contained in the appellant's brief filed prior to remand. Two supplemental assignments of error are contained in the appellant's supplemental brief filed after remand. The supplemental assignments of error are also numbered I and II, however, for our purposes, we will refer to them as assignments of error III and IV.

<sup>3</sup> The appellant incorrectly refers to the CA's action as "vacating" a portion of his suspended sentence. Because the CA had not acted prior to the misconduct hearing, no portion of the sentence had been suspended, and, therefore, there was nothing to vacate. This is an issue of withdrawing from the sentence limitation portion of the pretrial agreement.

<sup>4</sup> This assignment of error was resolved by remanding the case for post-trial processing including another vacation hearing, if practicable. The proper standard of preponderance of the evidence was applied on remand.

After trial but before the CA took his action, the appellant's urine sample, provided in the brig, tested positive for methamphetamine. The pretrial agreement states that the CA may withdraw from the pretrial agreement if the appellant either breaches a provision of the agreement or commits any misconduct before trial. If the breach or misconduct occurs after trial but before completion of sentence, the agreement states that the CA may "order executed the full sentence, following an evidentiary hearing . . . ." Appellate Exhibit I at ¶ 15a and b. Because the appellant's misconduct occurred after trial but before completion of sentence, the CA acted in accordance with ¶ 15b of the agreement by ordering an evidentiary hearing into the misconduct. We read ¶ 15b as authorizing the CA to withdraw from the sentence limitation portion of the pretrial agreement following an evidentiary hearing into misconduct, even though that provision does not specifically use the word "withdraw" or "withdrawal" as does ¶ 15a.

Pursuant to the agreement and R.C.M. 705(d)(4)(B), the CA sought to withdraw from the sentence limitation portion of the pretrial agreement because the appellant committed post-trial misconduct. When a CA seeks to withdraw from a pretrial agreement due to misconduct, R.C.M. 705(c)(2)(D) requires compliance with the procedural rules for vacating a suspended sentence found in R.C.M. 1109. Those procedures require that the individual be notified of the hearing and of his rights at that hearing, including: (1) the right to be represented by counsel; (2) the right to be present at the evidentiary hearing; and, (3) the right to present evidence on his own behalf and to confront the evidence against him. The rules of evidence, with certain exceptions not pertinent here, do not apply at the hearing.

The hearing must be personally conducted by the SPCMCA over the individual, and he or she shall make a summarized record of the proceedings.<sup>5</sup> R.C.M. 1109(d)(1)(A); see *United States v. Miley*, 59 M.J. 300, 303 (C.A.A.F. 2004). That record must include an evaluation of both the contested and uncontested facts including an assessment of witness credibility, and the hearing officer's specific recommendations concerning vacation, or in this case withdrawal from the pretrial agreement, to the GCMCA over the individual. *Miley*, 59 M.J. at 304. The standard of proof is by a preponderance of the evidence. *Hobdy v. United States*, 46 M.J. 653, 655 (N.M.Ct.Crim.App. 1997)(quoting *United States v. Englert*, 42 M.J. 827, 831 (N.M.Ct.Crim.App. 1995)).

The SPCMCA's summarized record of the proceedings "is the basis upon which the GCMCA must 'decide whether the probationer violated a condition of suspension, and, if so, decide whether to vacate the suspended sentence.'" *Miley*, 59 M.J. at 305 (quoting R.C.M. 1109(d)(2)(A)). The GCMCA's review of that summarized

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<sup>5</sup> Unless there is no SPCMCA who is subordinate to the GCMCA, in which case the GCMCA will personally conduct the hearing and no summary record of the proceedings is required. R.C.M. 1109(d)(1)(A).

record of proceedings and "his or her ultimate decision 'represents a substantial right because the [GCMCA] may for any reason or no reason at all decide not to vacate the agreed-upon suspension.'" *Id.* (quoting *United States v. Smith*, 46 M.J. 263, 268 (C.A.A.F. 1997)). Unless the SPCMCA resolves disputed facts and determines witness credibility in his or her summarized record of proceedings, "the GCMCA is left with an insufficient record upon which to base his or her ultimate decision." *Id.*

Here, the former SPCMCA submitted his recommendation to the GCMCA on 19 May 2006 based on the evidence received in May 2004.<sup>6</sup> Within that recommendation, the SPCMCA relates how he resolved disputed facts and determined witness credibility at the prior hearing, stating:

At the vacation hearing I considered the evidence in [the Charge Sheet of 31 March 2004] and [the evidence presented at the vacation hearing on 14 May 2004], the demeanor of Private Ignacio, and his unsworn statement. *I did not find Private Ignacio's explanation that he did not believe the substance he used was methamphetamine to be credible.* I based this decision on his previous guilty pleas and conviction at a general court-martial for wrongfully using and distributing methamphetamine. In conclusion, *I found, by a preponderance of the evidence, that Private Ignacio wrongfully used methamphetamine on or about 11 February 2004* while incarcerated at the Camp Pendleton brig, thereby violating the terms of the pretrial agreement.

SPCMCA letter to the CA of 19 May 2006 at 2 (emphasis added). For his recommendation, the former SPCMCA states "I continue to recommend to the general court-martial convening authority that eighteen months of Private Ignacio's suspended sentence be vacated."<sup>7</sup> *Id.*

Concerning the appellant's first assignment of error, filed before remand, claiming the SPCMCA failed to analyze the evidence presented as required by the Due Process Clause and R.C.M. 1109, we conclude that argument was rendered moot by the former SPCMCA's letter of 19 May 2006, weighing witness credibility and the evidence. We conclude that the SPCMCA's findings, conclusions, and recommendations, while not the detailed findings of fact and conclusions we expect from trial judges, meet the minimum requirements announced in *Miley* before a CA can vacate a suspended sentence, or as in this case, withdraw from the

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<sup>6</sup> The evidence presented at the original evidentiary hearing was sufficient to establish the appellant's misconduct by a preponderance of the evidence, and the new recommendation relates back to that evidence. This is substantively different than the former SPCMCA conducting a new evidentiary hearing when he is no longer the SPCMCA.

<sup>7</sup> Again, a CA cannot vacate a suspension that has not yet occurred.

sentence limitation provisions of a pretrial agreement based on misconduct. The contested fact was whether there was a knowing use of methamphetamine. That fact was resolved against the appellant. As to the appellant's third assignment of error, claiming that the CA relied on the charge sheet and prior guilty pleas to methamphetamine-related offenses as evidence of guilt, we conclude that evidence was properly presented and considered on the issue of whether the appellant's claim of an unknowing use of methamphetamine in the brig was credible.

The appellant, in an unsworn statement at the misconduct hearing, did not contest that his urine sample was positive for methamphetamine. Rather, he claimed that a prisoner in the brig had a three-inch wide by one-inch high pile of white powder on a table that the prisoner claimed to be methamphetamine. The appellant thought that it looked more like sugar combined with salt and believed it was not methamphetamine, so he wetted his finger and touched his finger to the pile of white substance and then put his finger in his mouth. When it tasted bitter, he realized that it was not salt and sugar.<sup>8</sup> The appellant claimed this happened just before lights out. He planned to provide this information to the chain of command in return for a clemency letter the next day. Unfortunately, a urinalysis was conducted first thing the next morning before he could get this information into the correct hands. However, as soon as he provided his urine sample, the appellant asked to meet with the brig commanding officer and the brig warden in order to provide them with information concerning drug use in the brig. Hearing Record at 5-8.

Based on the appellant's prior involvement with methamphetamine, as evidenced by the charge sheet in his general court-martial, and his guilty pleas to the methamphetamine-related charges therein, the SPCMCA did not believe the appellant's statement that he did not recognize the substance in the brig as methamphetamine. SPCMCA ltr to GCMCA of 19 May 2006 at 2. The issue of credibility was resolved against the appellant. Accordingly, we resolve all assignments of error concerning the withdrawal from the sentence limitation portion of the pretrial agreement against the appellant, and decline to grant relief.

### **Post-Trial Delay**

For his fourth assignment of error, the appellant claims that he has been denied his due process right to a speedy appellate review of his case, and requests that his punitive discharge be set aside. 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

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<sup>8</sup> The appellant's urine sample contained 15,243 nanograms of methamphetamine per milliliter of urine. SPCMCA ltr to the GCMCA of 19 May 2004 at enclosure (4).

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.

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)(citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972))). 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 630 days from the date of trial to the date the CA took his initial action, and another 89 days elapsed before this 112-page record of trial was first docketed with this court on 18 July 2005. Another 171 days elapsed before the case was remanded for a new CA action which took the CA 204 days to complete. This time, however, it only took the CA 27 days to return the record for docketing. The total delay from date of trial to final docketing with this court is 1,121 days. The length of delay weighs against the Government.

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 CA returned from an extended deployment in February 2005 in support of Operation Iraqi Freedom II, at which time he considered the SPCMCA's recommendation of 15 May 2004. Staff Judge Advocate ltr to Commanding General, 1st FSSG, of 16 Mar 2005 at 1. Looking to the third factor, assertion of the right to a timely appeal, we find no assertion of that right prior to the appellant's filing his Supplemental Assignment of Error on 26 September 2006. As to the fourth factor, prejudice, the appellant does not claim nor do we find any prejudice resulting from the length of delay.

Weighing the four *Barker* factors, we conclude the appellant has not suffered a *Barker*-type post-trial due process violation. 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 1,121 days<sup>9</sup> to docket a 112-page record of trial can diminish the public's perception of the fairness of military justice, particularly when a large part of that delay resulted from the Government's failure to apply the correct burden of persuasion at an evidentiary hearing, and taking more than one year from the SJAR to complete a CA's action. Therefore, our weighing and balancing of the first three factors announced in *Barker v. Wingo*, 407 U.S. at 530, leads us to conclude that 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." *Toohey*, 63 M.J. at 362. Therefore, we find that the appellant was denied his due process right to speedy review and appeal, even without specific prejudice.

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, 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, however.

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)).

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 this case, the sentence adjudged and approved, and the clemency already granted, 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 115 pages long. No complex legal issues were raised at trial or on appeal. We find

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<sup>9</sup> This includes the period from date of trial until the record was finally docketed following remand; 30 July 2003 to 24 August 2006.

negligence on the part of the Government in taking more than one year from the SJAR to complete a CA action, and the failure to properly evaluate the evidence presented at the appellant's evidentiary hearing, resulting in a remand. On the other hand, the appellant's sentence included, in part, a fine of \$10,000.00 and six years of confinement. Even with the appellant's post-trial misconduct, the CA disapproved the \$10,000.00 fine and suspended 18 months of confinement, acts of clemency he was not required to perform.

Any relief that would be actual and meaningful, given the clemency already granted, would be an unwarranted windfall for the appellant and disproportionate to any possible harm resulting from the delay.<sup>10</sup> Therefore, we conclude that the delay in this case does not affect the findings or sentence adjudged and approved.

### **Conclusion**

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

Judge KELLY and Judge FREDERICK concur.

For the Court

R.H. TROIDL  
Clerk of Court

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<sup>10</sup> 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.