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

BEFORE

D.A. WAGNER **K.K. THOMPSON** **E.B. STONE**

UNITED STATES

v.

Brian A. JORDAN
Lance Corporal (E-3), U. S. Marine Corps

NMCCA 200400448 Decided 19 April 2007

Sentence adjudged 29 October 2002. Military Judge: E.W. Loughran. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 4th Marine Expeditionary Brigade, Camp LeJeune, NC.

CDR HANS P. GRAFF, JAGC, USN, Appellate Defense Counsel
LT AIMEE SOUDERS, JAGC, USN, Appellate Defense Counsel
LCDR PAUL D. BUNGE, JAGC, USN Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

STONE, Judge:

This case is before us a second time, having been previously remanded for a new staff judge advocate's recommendation and convening authority's action.

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of an unauthorized absence, a false official statement, and three specifications of assault with the infliction of grievous bodily harm to his infant son, in violation of Articles 86, 107, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 86, 907, and 928. The appellant was sentenced to a dishonorable discharge, confinement for 10 years, and reduction to pay grade E-1. As required by the terms of the pretrial agreement, the convening authority (CA) suspended all confinement in excess of 18 months for a period of 12 months from the date of trial, 29 October 2002. However, the staff judge advocate's recommendation (SJAR) and the CA's Action erroneously reported that the adjudged sentence included a bad-conduct discharge. The CA further exacerbated this error by acting to approve the sentence and order it

executed, pursuant to the terms of the pretrial agreement, "except for the bad-conduct discharge." CA's Action dated 30 Oct 2003 at 2.

While it was clear that the CA intended to approve a punitive discharge, thus vesting this court with jurisdiction, his action was ambiguous as to the precise nature of the approved discharge. Therefore, on 16 August 2004, this court set aside the CA's Action and ordered a new SJAR and CA's Action (CAA) to clarify the nature of the punitive discharge. On 25 August 2004, the Office of the Judge Advocate General returned the record to the CA for compliance with our decision and directed that the post-trial processing be completed by 30 October 2004. Substitute defense counsel was detailed to represent the appellant on 8 September 2005. On 30 November 2005, the staff judge advocate completed the Addendum to the original SJAR. On 14 December 2005, the substitute defense counsel was served with the Addendum to the SJAR.

On 18 January 2006, the successor in command to the original CA issued a new CA's action. The record was then sent to this court on 9 May 2006. However, the record was still not complete as it was missing the matters submitted by the appellant pursuant to RULE FOR COURTS-MARTIAL 1105, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) to the CA dated "28" September 2003 and 26 October 2005. The CA stated that he specifically considered the R.C.M. 1105 matters in taking his action. The Court rejected the record as not ready for docketing. The Office of the Judge Advocate general then determined that the initial clemency request was actually dated "2" September 2003 and the date of 28 September was simply a scrivener's error. The R.C.M. 1105 matters submitted to the CA by the appellant were attached to the record and returned to this court. Finally, the case was docketed on 5 July 2006, three years, 10 months, and 28 days after the appellant was initially arraigned.

After careful review of the record, the appellant's brief and four assignments of error, [1] and the Government's response, we conclude that the findings and sentence are correct in law and

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[1]

I. THE APPELLANT'S SUBSTANTIAL RIGHT TO SPEEDY POST-TRIAL REVIEW WAS MATERIALLY PREJUDICED BY THE UNREASONABLE DELAY IN POST-TRIAL PROCESSING.

II. THE 1346-DELAY IN THIS CASE VIOLATES APPELLANT'S ARTICLE 66(c) RIGHT TO SPEEDY POST-TRIAL REVIEW.

III. APPELLANT WAS DENIED COUNSEL DURING A CRITICAL STAGE OF THE POST-TRIAL PROCESSING OF HIS CASE.

IV. THE CA'S ACTION, SUBSTITUTED FOR THE ORIGINAL ACTION IS DEFECTIVE IN THAT THE CONVENING AUTHORITY SUSPENDED CONFINEMENT WHICH HAD ALREADY BEEN REMITTED UNDER THE ORIGINAL CONVENING AUTHORITY'S ACTION AND FAILED TO ORDER THE REMAINING SENTENCE EXTENDING BEYOND A PUNITIVE DISCHARGE EXECUTED.

fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c).

Post-Trial Delay

In his first and second assignments of error, the appellant alleges excessive post-trial delay. Indeed, the delay in the case is egregious, more than 1300 days. The appellant, however, does not allege, and we do not find, prejudice flowing from this delay. Nevertheless, in light of the excessive nature of the delay the appellant urges that we presume prejudice or, in the alternative, that we utilize our powers under Article 66(c), and approve a sentence that does not include a punitive discharge. We decline to do so.

Our superior court has held that we may dispose of a due process issue by "assuming error and proceeding directly to the conclusion that any error was harmless." *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). In this case, we find no possibility of prejudice and conclude that any error was harmless beyond a reasonable doubt. In making this determination we have considered, chief among other factors, that the appellant, as well as this court, are unable to ascertain facts in the record that support even the most modest claim of prejudice. We also find that the delay does not affect the findings and sentence that should be approved in this case. *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim. App. 2005)(*en banc*). In making this determination, we have considered the severe nature of the appellant's misconduct, which included multiple acts of traumatic bodily harm to an infant, the mitigation of the dishonorable discharge to a bad-conduct discharge by the convening authority, and the exceptionally generous terms of the pretrial agreement. This assignment of error is without merit.

Failure of the Appellant to Keep the Convening Authority Apprised of his Whereabouts

In his third assignment of error, the appellant alleges that he was denied counsel during post-trial processing of his case. The appellant, however, failed to provide the convening authority with a current address while he was on appellate leave. As is normally the case, the appellant was assigned a substitute detailed defense counsel for post-trial matters. Predictably, however, as a result of the appellant's failure to provide the convening authority with a current address, the detailed defense counsel could not contact the appellant for the purpose of representing the appellant in accordance with R.C.M. 1105-06. Now, on appeal, the appellant complains that his substitute defense counsel was unable to contact" him although the appellant acknowledges that the substitute counsel diligently attempted to locate him. The appellant cites to *United States v. Hultgren,* 40 M.J. 638 (N.M.C.M.R 1994), for the proposition that when a "required post-trial attorney-client relationship" did not exist, the convening authority's action should be set aside.

Additionally, the appellant, cites to *United States v. Howard,* 47 M.J. 104 (C.A.A.F. 1997), for precedence that this court is required to return this case to the convening authority for a new recommendation and action. The appellant is entirely incorrect.

Hultgren and *Howard* are inapposite. Those cases did not involve appellants who, like the appellant in this case, failed to keep the convening authority and their counsel apprised of their whereabouts and thereby prevented their counsel from establishing an attorney-client relationship. Rather, completely to the contrary, in *Hultgren* and *Howard*, it was the defense counsel who failed to establish the attorney-client relationship by failing to contact the client. In the case at bar, the SJAR alleges that the appellant could not be located at the address and phone number he provided to the convening authority as a condition of his being granted appellate leave. The SJAR further reveals that the detailed defense counsel tried diligently to contact the appellant, even enlisting the assistance of the convening authority and the Naval Criminal Investigative Service. The appellant, on the other hand, does not allege that he was ever located at the address that he provided, or that he kept his appellate address current, or that he was in any way prevented from doing so. Under these circumstances the appellant will not be heard to complain. This assignment of error is without merit.

CA's Failure to Order the Sentence Executed

In his fourth assignment of error, the appellant correctly states that the CA failed to order the sentence portion executed. However, the sentence may be ordered into execution following the completion of appellate review. *See generally,* Art. 71 UCMJ; R.C.M. 1113.

Conclusion

The findings and sentence, as approved by the convening authority, are affirmed.

Chief Judge WAGNER and Judge THOMPSON concur.

For the Court

R.H. TROIDL
Clerk of Court