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.

William D. KELTIE
Signalman Third Class (E-4), U. S. Navy

NMCCA 200500264 Decided 11 January 2007

Sentence adjudged 12 May 2003. Military Judge: P.L. Fagan. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS ELLIOT (DD 967).

CDR MICHAEL WENTWORTH, JAGC, USN, Appellate Defense Counsel
LT AIMEE SOUDERS, JAGC, USN, Appellate Defense Counsel
Capt BRIAN K. KELLER, USMC, Appellate Government Counsel
LT KATHLEEN HELLMAN, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Senior Judge:

This case is before us for the second time on appeal. The appellant was convicted, pursuant to his pleas, by a military judge sitting as a special court-martial, of five specifications of larceny.[1] The appellant was sentenced to confinement for 170 days, forfeiture of $767.00 pay per month for six months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, but pursuant to a pretrial agreement, he suspended, for 12 months from the date that sentence was announced, the bad-conduct discharge, confinement in excess of 30 days, and forfeitures in excess of $767.00 pay per month for one month. The suspended portions of the sentence were to be remitted at the end of the suspension period unless sooner vacated.

Following trial, but prior to taking action on the court-martial, the convening authority held a hearing under RULE FOR

[1] The offenses violated Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921.

COURTS-MARTIAL 1109(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), to consider evidence of further misconduct that could lead to vacation of the suspended portions of the sentence. As a result of that hearing, the convening authority forwarded a report of the vacation proceedings, in which he recommended to the general court-martial convening authority that the suspended portions of the sentence be vacated in their entirety. The general court-martial convening authority subsequently vacated only those portions of the suspended sentence relating to confinement and forfeiture of pay.

The appellant initially raised two assignments of error before the court: that the vacation of his sentence was in error because the report of the vacation proceedings did not sufficiently evaluate the contested facts and that he was denied speedy post-trial processing of his court-martial. We agreed with the appellant's first assigned error and returned the record of trial to the Judge Advocate General for remand to the special court-martial convening authority to determine whether further vacation proceedings were practicable. *United States v. Keltie,* No. 200500264, unpublished op. (N.M.Ct.Crim.App. 31 Jan 2006). The special court-martial convening authority determined that further vacation proceedings were impracticable and issued a new court martial order approving the sentence as adjudged, but suspending, for twelve months from the date that sentence was announced, the bad-conduct discharge, confinement in excess of 30 days, and forfeitures in excess of $767.00 pay per month for one month. The suspended portions of the adjudged sentence were to be remitted following the suspension period, unless sooner vacated. Because the suspension period has expired, those portions of the adjudged sentence have now been remitted. The appellant now renews his claim of error before the court that he was denied speedy review of his court-martial.

The following chronology of events depicts the post-trial processing of the appellant's court-martial:

Event	Date	Elapsed Days	Cumulative Days
Sentencing	12 May 03	0	0
Authentication of ROT	14 Jun 03	33	33
LO Recommendation	22 Jul 03	38	71
Vacation Hearing	23 Jul 03	1	72
Clemency Petition	12 Aug 03	20	92
CA's Action	26 Aug 03	14	106
Vacation Recommendation	3 Sep 03	8	114
ROT Received by NAMARA	25 Jan 05	511	624
ROT Docketed at NMCCA	16 Mar 05	50	674
Brief & Assign. Error	26 May 05	71	745
Government Answer	21 Dec 05	219	964
NMCCA Decision	31 Jan 06	41	1005
JAG Remand to CA	16 Mar 06	44	1049
2nd CA Action	27 Jun 06	71	1120

ROT Docketed at NMCCA	12 Jul 06	15	1135
Supplemental Brief	31 Jul 06	19	1154
Government Answer	28 Aug 06	28	1182

In reviewing claims of post-trial delay we apply the Supreme Court's analysis of pretrial delays as set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). *Toohey v. United States* (*Toohey I*), 60 M.J. 100, 102 (C.A.A.F. 2004). We consider four factors in determining whether there had been a due process violation resulting from pretrial delay:

(1) the length of the delay;

(2) the reasons for the delay;

(3) the defendant’s assertion of his right; and

(4) prejudice to the defendant.

Barker, 407 U.S. at 530. The first factor, the length of the delay, is a triggering mechanism. The Supreme Court has stated that, until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. *Id.* The Court of Appeals for the Armed Forces, however, has stated that the *Barker* inquiry is triggered whenever the delay is facially unreasonable. *Toohey I*, 60 M.J. at 103. We are bound to apply the threshold standard established by our superior court, although we have urged reconsideration of that standard. *See United States v. Adams,* __ M.J. __, No. 200600767 (N.M.Ct.Crim.App. 6 Dec 2006). The delay in this case, specifically the 569 days between the convening authority's action and docketing of the case with this court, is unreasonable on its face and triggers a due process analysis.

The delay in processing this 80-page record of trial is so unreasonable, that it also gives rise to a presumption of prejudice, at least sufficient to trigger a due process analysis under *Barker*. The first factor weighs in favor of the appellant. We then must balance the delay against the remaining factors in order to determine if a due process violation has occurred. *Barker,* 407 U.S. at 530-31. Turning to the second factor, the Government advances no reasons for the delay. Our superior court has categorized delay in transmission of the record of trial as the "least defensible" of all delay. *United States v. Moreno*, 63 M.J. 129, 137 (C.A.A.F. 2006)(quoting *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990)). The second factor weighs heavily in favor of the appellant.

The appellant did not assert his right to a speedy review until the filing of the initial brief and assignments of error with this court on 26 May 2005, 745 days after sentencing. In

addressing this third factor, the Supreme Court set forth the following standard:

> The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

Barker, 407 U.S. at 531-32. Our superior court, however, has declined to hold the appellant responsible for failing to complain about dilatory processing of the record of trial. *Moreno*, 63 M.J. at 138 ("The obligation to ensure a timely review and action by the convening authority rests upon the Government and Moreno is not required to complain in order to receive timely convening authority action. Similarly, Moreno bears no responsibility for transmitting the record of trial to the Court of Criminal Appeals after action."(internal citation omitted). The heavy weight accorded to the appellant's failure to timely demand post-trial review established by *Barker* has been diminished by the holding in *Moreno*, where the delay is occasioned by the failure of the Government to exert "institutional vigilance." *United States v. Harvey*, 64 M.J. 13, 36 (C.A.A.F. 2006). 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; *Harvey*, 64 M.J. at 36.

Finally, with regard to the fourth *Barker* factor, we find that the appellant served additional confinement beyond the 30 days he was required to serve under the pretrial agreement. We find specific prejudice in that the appellant had a meritorious appellate issue that was not timely raised with the court due to dilatory post-trial processing and, therefore, the issue of presumed prejudice is moot.

We have balanced the *Barker* factors and conclude that the circumstances of the delay in this case did rise to the level of a due process violation. The length of the delay, the relatively simple record of trial, the absence of any explanation or justification for the delay, the Government's lack of institutional vigilance in processing the record of trial, and the prejudice suffered by the appellant in delaying favorable action on his assignment of error, all weigh in favor of the appellant's cause. Only the appellant's failure to assert a timely demand for speedy review weighs against the appellant and we are directed by the decisions of our superior court not to afford this factor great weight. *Harvey*, 64 M.J. at 36.

The appellant has already benefited from remission of his adjudged bad-conduct discharge and all but 30 days of confinement and one month's forfeiture of $767.00. These benefits, however,

inured to him as a result of his pretrial agreement and the second convening authority's action did no more than put the appellant in the place he would have been but for the erroneous vacation process. Although the appellant can be compensated for any forfeitures he wrongfully suffered as a result of the improper report of the vacation proceedings, time spent incarcerated is simply time lost. We, therefore, will take additional corrective action in our decretal paragraph for the due process violation.

The findings, as approved by the convening authority, are affirmed. The sentence is disapproved. Following our corrective action, we do not believe that the delay affects the findings and sentence we should affirm under Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866. We also conclude that the findings are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Articles 59(a) and 66(c), UCMJ.

Judge VINCENT and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court