

**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.

**Edson MICHEL
Lance Corporal (E-3), U. S. Marine Corps**

NMCCA 200601193

Decided 18 January 2007

Sentence adjudged 14 April 2000. Military Judge: M.J. Griffith. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 8th Engineer Support Battalion, 2d FSSG, U.S. MarForLant, Camp Lejeune, NC.

CAPT M.A. GROVER, JAGC, USNR, Appellate Defense Counsel
LT AIMEE SOUDERS, JAGC, USNR, Appellate Defense Counsel
Maj BRIAN KELLER, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Chief Judge:

The appellant was convicted, contrary to his pleas, by a military judge sitting as a special court-martial, of attempted larceny, unauthorized absence, and two specifications of larceny.¹ The appellant was sentenced to confinement for six months, forfeiture of \$500.00 pay per month for six months, a fine of \$1,000.00, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged. The appellant raises as his sole assignment of error before the court that he was denied speedy post-trial processing of his court-martial. We agree with the appellant and will take corrective action in our decretal paragraph.

¹ The offenses violated Articles 80, 86, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 886, and 921.

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

Event	Date	Elapsed Days	Cumulative Days
Sentencing	14 Apr 00	0	0
Clemency Petition	27 Jul 00	104	104
Authentication of ROT	14 Aug 00	18	122
SJAR	2 Feb 01	172	294
CA's Action	7 May 01	94	388
ROT Received by NAMARA	9 Aug 06	1,920	2,308
ROT Docketed at NMCCA	22 Aug 06	13	2,321
Brief & Assign. Error	20 Nov 06	90	2,411
Government Answer	15 Dec 06	25	2,436
NMCCA Decision	18 Jan 07	34	2,470

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, 2006 CCA LEXIS 332 (N.M.Ct.Crim.App. 19 Dec 2006). The delay in this case, specifically the 1,920 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 195-page record of trial is so unreasonable, that it gives rise to a presumption of prejudice, more than sufficient to trigger a due process analysis under *Barker*. *See, Adams*, 2006 CCA LEXIS 332 at

4-6. The first factor weighs heavily 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 before this court on 20 November 2006, 2,411 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."). 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, 34 (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. *Harvey*, 64 M.J. at 36; *Moreno*, 63 M.J. at 138.

Finally, with regard to the fourth *Barker* factor, the appellant establishes no specific prejudice flowing from the delay. However, the extreme delay in this case raises a strong presumption of prejudice. *Toohey I*, 60 M.J. at 102. In this regard, we note that the presumption that the delay has prejudiced the appellant intensifies over time. *Doggett v. United States*, 505 U.S. 647, 652 (1992).

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 presumption of prejudice suffered by the appellant 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. In light of the extreme length of delay in this case and the resulting strength of the presumption of prejudice, we cannot say with any certainty, by applying a harmless error analysis, that the appellant has not suffered prejudice resulting from the delay. *United States v. Toohey (Toohey II)*, 63 M.J. 353, 363 (C.A.A.F. 2006).

The findings, as approved by the convening authority, are affirmed. Only so much of the sentence that includes confinement for six months, forfeiture of \$500 pay per month for six months, reduction to pay grade E-1, and a fine of \$978.00² is affirmed. 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 remains. Articles 59(a) and 66(c), UCMJ.

Judge VINCENT and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court

² We note that, although not raise as error, the total amount of forfeitures and fines in this case exceeded the jurisdictional limit of the court-martial by \$22.00. Our action corrects this error.