

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

BEFORE

E.E. GEISER

E.S. WHITE

B.G. FILBERT

UNITED STATES

v.

**Jorge A. MUNOZ
Lance Corporal (E-3), U.S. Marine Corps**

NMCCA 200700197

Decided 16 August 2007

Sentence adjudged 29 March 2004. Military Judge: S.M. Immel.
Staff Judge Advocate's Recommendation: Col C.J. Woods, USMC.
Review pursuant to Article 66(c), UCMJ, of Special Court-Martial
convened by Commanding Officer, Marine Wing Support Squadron 372,
MWSG 37, Camp Pendleton, CA.

LT E. TAYLOR GEORGE, JAGC, USN, Appellate Defense Counsel
LT DEREK BUTLER, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FILBERT, Judge:

The appellant was tried by a military judge, sitting as a special court-martial. Pursuant to his pleas, the appellant was convicted of unauthorized absence, one specification of wrongful use of methamphetamine, and two specifications of wrongful use of marijuana. His offenses violated Articles 86 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 912a. The military judge adjudged a sentence of confinement for 120 days, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant claims that his right to speedy post-trial review was violated by unreasonable delay in post-trial processing. Although not raised by the appellant, we also address whether the appellant's guilty plea to Specification 4 of Charge II was provident.¹

¹ The Government raises in its brief the question whether the military judge's findings as to Specification 4 of Charge II are too ambiguous to be affirmed, and whether the appellant was prejudiced by the "incorrectly listed finding

We have carefully examined the record of trial, the appellant's assignment of error, and the Government's response. We find the appellant's guilty plea to wrongful use of marijuana, Specification 4 of Charge II, was improvident and will take corrective action in our decretal paragraph. Following our corrective action, we conclude the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. See Arts. 59(a) and 66(c), UCMJ.

Post-Trial Delay

The appellant contends that the delay of 1,049 days in the post-trial processing of his case warrants relief. 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)). If the length of the delay is reasonable, 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.* Moreover, in extreme cases, the delay itself may "'give rise to a strong presumption of evidentiary prejudice.'" *Id.* (quoting *Toohey*, 60 M.J. at 102).

In the instant case, the delay from the date of trial to docketing at this court was over 1,049 days. We find this delay to be facially unreasonable, triggering a due process review.

We balance the length of delay in this case against the three remaining *Jones* factors. Regarding the second factor, the Government concedes, and we find, that the delay in post-trial processing of the appellant's case is largely unexplained. With regard to the third factor, the appellant did not assert his right to timely post-trial review until filing his brief with this court. While his failure to demand speedy post-trial

in the SJAR and CA's Action." Government Answer of 1 Jun 2007 at 2. The Government focuses in its brief on the intent of the parties and the military judge with respect to the appellant's plea to Specification 4 of Charge II. Rather than trying to determine the intent of the appellant, military judge, and convening authority with respect to Specification 4 of Charge II, we view the pertinent issue to be whether the appellant providently pled guilty to that specification and address it on that basis alone.

review does not weigh in the Government's favor, neither does it weigh in the appellant's favor.

Regarding the fourth factor, the appellant submitted a declaration claiming, in general terms, that he could not gain employment due to his lack of a DD-214. The appellant has not, however, provided any evidence to support his declaration. Additionally, the declaration contains insufficient detail to permit the Government to verify or rebut his claims regarding prejudice. For example, the declaration provides no information regarding dates when the appellant applied for and was denied employment and no contact information for the people with whom he dealt at prospective employers. Indeed, the declaration does not even identify the prospective employees. Consequently, we find the appellant's claim of prejudice both speculative and conclusory, and reject his claim of specific prejudice on that basis, without ordering a factfinding hearing. *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997); *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990).

We, therefore, find no specific prejudice resulting from the post-trial delay in this case. We also find no "extreme circumstances" that give rise to a strong presumption of evidentiary prejudice. Consequently, after balancing all the factors, we conclude the appellant has not been denied his due process right to speedy post-trial review.

We are also aware of our authority to grant relief under Article 66, UCMJ, even in the absence of actual prejudice. *Toohy*, 60 M.J. at 102; *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc). We conclude that the post-trial delay in this case does not affect the "findings and sentence [that] 'should be approved,' based on all the facts and circumstances reflected in the record." *Tardif*, 57 M.J. at 224.

Thus, we find no merit in this assignment of error and decline to grant the requested relief.

Guilty Plea and Finding to Specification 4, Charge II

At trial, the appellant pled guilty to Specification 4 of Charge II. During the providence inquiry, the military judge questioned the appellant to establish the factual basis for his guilty pleas to Charge I and Specifications 2 and 3 of Charge II. The military judge did not, however, question the appellant about Specification 4 of Charge II. The military judge

announced that "in accordance with your pleas, this court-martial finds you guilty." Record at 28. Neither trial counsel nor trial defense counsel raised any concerns on the record regarding the appellant's guilty plea to Specification 4 of Charge II.

The pretrial agreement indicated that the appellant would plead not guilty to Specification 4 of Charge II. The convening authority agreed in the pretrial agreement to withdraw the charges and specifications to which the appellant pled not guilty. Both the staff judge advocate's recommendation (SJAR) and convening authority's action indicated the appellant pled guilty, and was found guilty, of Specification 4 of Charge II. The appellant does not raise as error the court-martial's guilty finding to Specification 4 of Charge II.

The standard of review for the providence of a guilty plea is whether there is a "'substantial basis' in law and fact for questioning the guilty plea." *United States v. Milton*, 46 M.J. 317, 318 (C.A.A.F. 1997)(quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). If the "factual circumstances as revealed by the accused himself objectively support that plea," the factual predicate is established. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996).

We find that the appellant's guilty plea to Specification 4 of Charge II was improvident in that the military judge established no factual basis to find him guilty of that specification.

Conclusion

We set aside the finding of guilty of, and dismiss, Specification 4 of Charge II. We affirm the remaining findings. We have reassessed the sentence in accordance with *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998), *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990), and *United States v. Sales*, 22 M.J. 305, 307-308 (C.M.A. 1986). In view of the remaining offenses and the appellant's prior misconduct as established by Prosecution Exhibit 2, and taking into account the fact that the military judge did not actually hear or consider any facts pertaining to the marijuana use alleged in Specification 4 of Charge II, we are satisfied that the military judge would have adjudged no lesser punishment for the remaining charges and specifications. Further, we are satisfied that the convening authority would not have taken any more favorable action on the sentence than he did actually take had he not

considered the appellant to have been found not guilty of Specification 4 of Charge III. Accordingly, we affirm the sentence as approved by the convening authority.

Senior Judge GEISER and Judge WHITE concur.

For the Court

R.H. TROIDL
Clerk of Court