

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

BEFORE

E.E. GEISER

F.D. MITCHELL

J.G. BARTOLOTTA

UNITED STATES

v.

**Jeremiah B. OWENS
Private First Class (E-2), U.S. Marine Corps**

NMCCA 200601333

Decided 16 May 2007

Sentence adjudged 27 August 2002. Military Judge: P.J. Betz.
Review pursuant to Article 66(c), UCMJ, of Special Court-Martial
convened by Commanding Officer, 1st Battalion, 5th Marines, Camp
Pendleton, CA.

CAPT ALBERTO MUNGUIA, JAGC, USN, Appellate Defense Counsel
LCDR MONTE G. MILLER, JAGC, USN, Appellate Government Counsel
LT JESSICA HUDSON, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BARTOLOTTA, Judge:

Consistent with his pleas, the appellant was convicted by a
military judge sitting as a special court-martial of
unauthorized absence terminated by apprehension, in violation of
Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886.
The appellant was sentenced to confinement for 39 days,
reduction to pay grade E-1, forfeiture of \$700.00 pay per month
for two months, and a bad-conduct discharge. The convening
authority approved the sentence as adjudged.

We have considered the record of trial, the appellant's two
assignments of error, and the Government's response. We find
that this case warrants relief pursuant to our Article 66(c),
UCMJ, discretionary authority due to unreasonable post-trial
processing delay. Otherwise, we conclude that the findings and
sentence are correct in law and fact and that no error
materially prejudicial to the substantial rights of the
appellant was committed. See Arts. 59(a) and 66(c), UCMJ.

Post-Trial Delay

In his first assignment of error, the appellant avers his due process rights were violated by the excessive post-trial delay in his case. We disagree. While the 1,486-day delay between sentencing and docketing is facially unreasonable, the post-trial delay in the appellant's case does not rise to the level of a due process violation. *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)); see also *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). Even assuming that the appellant was denied the due process right to speedy post-trial review and appeal, we conclude that any error in that regard was harmless beyond a reasonable doubt. *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006).

We next consider whether this is an appropriate case to exercise our authority to grant relief under Article 66(c), UCMJ, in the absence of a due process violation. *Moreno*, 63 M.J. at 129. Having considered the post-trial delay in light of our superior court's guidance in *Toohey* and *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002), and considering the factors we explained in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(*en banc*), we find that the delay does affect the findings and sentence that "should be approved" in this case. See Art. 66(c), UCMJ.

Improvident Plea

The second assignment of error claims the appellant's guilty plea to unauthorized absence terminated by apprehension is improvident because the military judge failed to inquire into whether the appellant was attempting to turn himself in at the time of apprehension. The appellant contends the basis for this argument is that "the appellant said he planned on turning himself in before he was stopped by military authorities at the border while crossing into the United States from Mexico." Appellant's Brief of 25 Oct 2006 at 7-10. We disagree.

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. Pleas of guilty should not be set aside on appeal unless there is a substantial basis in law and fact for questioning the guilty plea. *United States v. Phillippe*, 63 M.J. 307, 309 (C.A.A.F. 2006)(quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). In order to find the plea improvident, this court must conclude that there has been an error prejudicial to the substantial rights of the

appellant. Art. 59(a), UCMJ. Such a conclusion "must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty." *United States v. Dawson*, 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999); see also RULE FOR COURTS-MARTIAL 910(j), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.).

We find the military judge did not specifically inquire into the circumstances surrounding the appellant's potential intent to surrender to military authorities. However, we also find this inquiry to be unnecessary under the circumstances, because this assignment of error is based on a contention that is not completely accurate. The appellant stated he came back to California from Idaho because he planned on surrendering to authorities. Record at 15. He did not say he was coming to California from Mexico in order to surrender. While the appellant was pondering this decision he was staying at a friend's house in Chula Vista, CA. Sometime during his stay there his friend went to Tijuana, Mexico, couldn't drive back into the United States because of his intoxication, and called the appellant to pick him up at the border. The appellant drove to Tijuana, picked his friend up, and was stopped at the border where he was apprehended. *Id.* At the time, the appellant was not driving into California to surrender himself to authorities. Furthermore, the military judge informed the appellant of each of the elements and more specifically the definition of "Apprehension" and its involuntary nature. *Id.* at 11. The appellant acknowledged that these elements were true. *Id.* at 16. We find that there is no substantial basis in law or fact to question the appellant's guilty plea to unauthorized absence terminated by apprehension. We find, therefore, that the military judge did not abuse his discretion by accepting the appellant's pleas of guilty.

Conclusion

We affirm the approved findings of guilty and only that portion of the approved sentence that extends to reduction to pay grade E-1 and a bad-conduct discharge.

Senior Judge GEISER and Judge MITCHELL concur.

For the Court

R.H. TROIDL
Clerk of Court