

**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.**

**Myrl F. PACKER III  
Aircrew Survival Equipmentman Airman Recruit (E-1), U. S. Navy**

NMCCA 200600231

Decided 28 February 2007

Sentence adjudged 22 October 2003. Military Judge: R.B. Leo. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Strike Fighter Squadron ONE TWO FIVE, Naval Air Station, Lemoore, CA.

LCDR REBECCA SNYDER, JAGC, USN, Appellate Defense Counsel  
LT S.C. REYES, JAGC, USN, Appellate Defense Counsel  
LT AIMEE M. SOUDERS, JAGC, USN, Appellate Defense Counsel  
Maj BRIAN KELLER, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

MITCHELL, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of disrespect towards a petty officer, failure to obey a lawful order, and wrongful use of Butalbital, in violation of Articles 91, 92, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 891, 892, and 912a. The appellant was sentenced to confinement for 60 days and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

We have examined the record of trial, the appellant's four assignments of error,<sup>1</sup> and the Government's response. The

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<sup>1</sup> I. WHETHER PRAR PACKER'S SENTENCE TO A BAD-CONDUCT DISCHARGE IS INAPPROPRIATELY SEVERE?

II. WHETHER THE GOVERNMENT MATERIALLY PREJUDICED PRAR PACKER'S SUBSTANTIAL RIGHT TO SPEEDY POST-TRIAL REVIEW OF HIS COURT-MARTIAL BY TAKING 996 DAYS TO DOCKET THE RECORD WITH THIS COURT?

appellant's first assignment of error is without merit. With regard to the appellant's second assignment of error averring a denial of speedy post-trial review; while we do not find a due process violation, we do find that this case warrants relief pursuant to our Article 66(c), UCMJ, discretionary authority for unreasonable post-trial processing delay. We will take appropriate action in our decretal paragraph. Otherwise, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

### **Post-Trial Delay**

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 not unreasonable, further inquiry is unnecessary. If we conclude the length of the delay is "facially unreasonable," however, we must balance the length of the delay against the other three factors. *Id.* 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 looking at the facts of this case, there was a delay of 996 days from the date of sentencing to the date this case was docketed by this court. We note that the record of trial is only 127 pages long, and is not complex in any respect. We find the delay in this case was facially unreasonable, triggering a due process review. Accordingly, we must balance the delay with the other three factors.

There is nothing in the record from the Government to explain this delay. Of particular concern is the fact that it took over two years after the convening authority took its action to docket the case with this court. Offering no

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- III. WHETHER PRAR PACKER'S GUILTY PLEAS TO CHARGES I AND II ALLEGING THAT HE USED DISRESPECTFUL LANGUAGE TOWARD A PETTY OFFICER AND WILLFULLY DISOBEYED AN ORDER TO REMAIN SILENT AT PARADE REST ARE IMPROVIDENT WHERE THE RECORD RAISES A QUESTION WHETHER PRAR PACKER'S SUPERIORS ABADONED (SIC) THEIR RANK?
- IV. WHETHER THE MILITARY JUDGE ERRED BY FAILING TO CONSOLIDATE CHARGES I AND II BECAUSE THEY ARE AN UNREASONABLE MULTIPLICATION OF CHARGES?

explanation whatsoever as to why this case was delayed does not strengthen the Government's position with regards to the second factor.

The appellant did not assert his right to a speedy review prior to filing his appellate brief.

With respect to the fourth factor, we evaluate prejudice to the appellant in light of three interests: (1) preventing oppressive incarceration pending appeal; (2) minimizing anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limiting the possibility that a convicted person's ground for appeal, and his or her defenses in case of reversal and retrial, might be impaired. *United States v. Toohy*, 63 M.J. 353, 361 (C.A.A.F. 2006)(quoting *United States v. Moreno*, 63 M.J. 129, 138 (C.A.A.F. 2006)). The appellant must show particular prejudice or concern distinguishable from the normal anxiety experienced by convicted persons awaiting an appellate decision, and that the prejudice or concern is related to the delay.

Attached to appellant's brief is a signed affidavit from appellant that claims, *inter alia*, that he has been prejudiced by this unreasonable delay. The appellant contends that after release from the brig at the conclusion of his sentence, he has been forced to work low-paying jobs because those paying higher salaries for which he is qualified required him to produce his DD-214. He specifically contends that he applied for and would have been offered a job by Boeing but was told he could not be considered further without his DD-214. The appellant's claim notwithstanding, we note there is nothing in the record or appellant's brief with the accompanying affidavit to indicate that Boeing or the other employees understood that the appellant was discharged for drug abuse and disrespect or that he had been awarded a bad-conduct discharge. Thus it is not clear that the appellant would have a reasonable expectation of being hired. We, therefore, find the factual basis for the appellant's claim of prejudice unpersuasive. After a careful review of the record of trial, we find no due process violation.

We next consider whether the delay affects the findings and the sentence that should be approved under Article 66(c), UCMJ. *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602, 607 (N.M.Ct.Crim.App. 2005)(*en banc*). This case is only 127 pages long, simple in nature, and no explanation is provided as to why it took 770 days to perform the ministerial task of copying and mailing this record to this

court. After balancing all the factors under our decision in *Brown*, we hold that the delay in this case impacts the sentence that "should be approved." See Art. 66(c), UCMJ. We therefore hold that the appellant is entitled to sentence relief for excessive post-trial delay, and we will take corrective action in our decretal paragraph.

### **Improvident Pleas**

The appellant's third assignment of error contends that his pleas to the charges of disrespect towards a petty officer and failure to obey a lawful order were improvident. Specifically, the appellant now claims that the behavior of the petty officer who was the subject of the disrespectful language and who gave the order departed substantially from the required standard appropriate for his rank and the petty officer therefore lost the entitlement to respect protected by Article 91, UCMJ.<sup>2</sup> We disagree.

A military judge's acceptance of a guilty plea will not be set aside absent an abuse of discretion. See *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). The standard of review to determine whether a plea is provident is whether the record of trial reveals a substantial basis in law and fact for questioning the plea. *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005)(citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). 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(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). Further, where a guilty plea is first attacked on appeal, we must construe the evidence in the light most favorable to the Government. *United States v. Hubbard*, 28 M.J. 203, 209 (C.M.A. 1989)(Cox, J., concurring).

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<sup>2</sup> The military judge conducted an adequate providence inquiry on the two subject charges and found the appellant guilty. During the sentencing phase of the trial, the accused, via unsworn statement, told the military judge that during the time he was told to stand at parade rest and be quiet, the petty officers who were present and in charge of the urinalysis collection were hurling insults at him such as "shit bag, punk kid, and mix-breed conniver." The appellant specifically said that FC1 S, the subject of the disrespectful language and whose order the appellant was charged with violating, called him a "punk kid." The appellant indicated that he responded by telling FC1 S that he was "a sissy hiding behind a crow and badge" the words which formed the basis of the disrespect charge. Record at 68. The military judge shortly afterwards reopened the providence inquiry and determined, based upon the information elicited from the appellant, that the circumstances did not support an "abandonment of rank" defense.

After the appellant gave his unsworn statement to the military judge and raised the specter of an "abandonment of rank" defense, the military judge conducted extensive additional inquiry. Record at 77-82. During this inquiry the appellant expressly stated that even though he was called a "punk kid" by the petty officer, he did not believe this entitled him to be disrespectful towards the petty officer nor did it give him legal justification or reason to disobey the petty officer's orders. *Id.* at 79. Additionally, the trial defense counsel specifically stated that he had considered the potential defense and did not believe it applicable. *Id.* at 80. In determining the providence of the appellant's plea, we must accept his unretracted testimony at face value. *United States v. Lee*, 16 M.J. 278, 281 (C.M.A. 1983).

The appellant relies upon this court's unpublished opinion in *United States v. Ivory*, 1995 CCA LEXIS 387, No. 94-01647 (N.M.Ct.Crim.App. 1995) to support his argument. In *Ivory*, this court held that an officer's use of racial epithets and other verbally abusive behavior directed at the appellant constituted abandonment of rank. Assuming *arguendo* that Fire Controlman First Class (FC1) S did refer to the appellant as a "punk kid,"<sup>3</sup> while arguably unprofessional, it does not rise to the type of abusive behavior the appellant suffered in *Ivory* which departed substantively from the standards required of those in leadership positions. We are satisfied, therefore, that the appellant's answers during the providence inquiry provided a sufficient basis in law and fact to support his pleas of guilty.

#### **Unreasonable Multiplication of Charges**

The appellant's final assignment of error avers that Charge I and its specification (disrespect towards a petty officer) and Charge II and its specification (disobeying a lawful order by talking) are an unreasonable multiplication of charges. We disagree.

We apply the five factors established in *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001). First, we note that the appellant did not object at trial, which suggests that he did not view the charges as an unreasonable multiplication of charges at trial. This significantly weakens his claim before this court. *Id.* at 337. Next we note that the two charges and specifications, although arising out of the same set of

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<sup>3</sup> During the cross-examination of FC1 S by trial defense counsel during sentencing, FC1 S denied calling the appellant a "punk kid" or any other name.

circumstances, are two distinct criminal acts. On the day this misconduct occurred, the appellant was assigned to the restricted facility on base. He and other members assigned were each required to give a urine specimen for testing. In an attempt to maintain good order and discipline in this restricted facility, as well as to accurately process the required paperwork and other tasks associated with the collection of urine specimens in an orderly and professional manner, the appellant was brought into the urinalysis collection area and told to stand at parade rest and not to talk. The appellant's defiance of that order by speaking undermined the good order and discipline the petty officer was tasked with maintaining during the urinalysis collection evolution. Additionally, the specific content of the appellant's statements were contemptuous and intended to insult, demean, and possibly provoke FCl S and significantly detracted from his authority and the respect that he was due. We have little difficulty concluding that the aforementioned charges are two separate criminal acts, with two distinct negative effects.

The two separate charges and specifications do not misrepresent or exaggerate the appellant's criminality and they do not unreasonably increase the appellant's punitive exposure. Finally, there is no evidence of prosecutorial overreaching or abuse in the drafting of the specifications at issue. Consequently, we do not find that the cited specifications constitute an unreasonable multiplication of charges.

Accordingly, we affirm the approved findings of guilty and only that portion of the approved sentence that extends to a bad-conduct discharge and confinement for 30 days.

Senior Judge GEISER and Judge Bartolotto concur.

For the Court

R.H. TROIDL  
Clerk of Court