

**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.

**Ryan C. PARKER
Fireman (E-3), U. S. Navy**

NMCCA 200600270

Decided 28 February 2007

Sentence adjudged 17 July 2003. Military Judge: C.L. Reismeier. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS JOHN C. STENNIS (CVN 74).

LCDR THOMAS BELSKY, JAGC, USNR, Appellate Defense Counsel
LCDR R.W. SARDEGNA, JAGC, USN, Appellate Government Counsel
LT JESSICA M. HUDSON, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Chief Judge:

A military judge, sitting as a special court-martial convicted the appellant, consistent with his pleas, of unauthorized absence terminated by apprehension, disrespect to a superior petty officer, and two specifications of use of methamphetamine.¹ On 17 July 2003, the military judge sentenced the appellant to confinement for 6 months, forfeiture of \$767.00 pay per month for 6 months, reduction to pay grade E-1, and a bad-conduct discharge. On 5 December 2003, the convening authority acted on the case. The original record of trial, however, was never received for appellate review. This fact was not discovered until sometime in May 2006. Subsequently, a duplicate record of trial was received by the court, but the staff judge advocate's recommendation was unsigned. The record was returned by our order of 24 July 2006 for proper post-trial processing. The convening authority acted on the record again on 23 September 2006 and the record was docketed with the court on 15 November 2006. The appellant, in his sole assignment of error,

¹ The appellant's offenses violated Articles 86, 91, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 891, and 912a.

asserts that he was denied his right to speedy post-trial processing.

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 1,218 days between sentencing and docketing of a complete record of trial, 1,204 days of which were expended between the initial and subsequent convening authority's actions, is unreasonable on its face and triggers a due process analysis.

The delay in processing this 145-page record of trial is so unreasonable, that it gives rise to a presumption of prejudice sufficient to trigger a due process analysis under *Barker*. *See, Adams*, 2006 CCA LEXIS 332 at 4-6. 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 as the major reason for the delay the unexplained loss of the record of trial after it had been initially acted on in 2003. The loss of the record of trial was made worse by the failure of anyone in the Government to monitor the movement of the record, allowing it to go unnoticed for two and one-half years. The second factor weighs in favor of the appellant.

The appellant did not assert his right to a speedy review until the filing of the brief and assignments of error before

this court on 12 December 2006. 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. *United States v. Moreno*, 63 M.J. 129, 138 (C.A.A.F 2006) ("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. *Id.* 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, as we noted at the outset, the delay in this case raises a 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 not rise to the level of a Due Process violation. The length of the delay, the relatively simple record of trial, and the presumption of prejudice suffered by the appellant all weigh in favor of the appellant's cause. On the other hand, the appellant's failure to assert a timely demand for speedy review weighs against the appellant, albeit not heavily, as we are directed by the decisions of our superior court not to afford this factor great weight. *Harvey*, 64 M.J. at 36. In addition, however, the Government does explain that the original record of trial was somehow lost after the original convening authority's action was signed. This is not the usual case of the Government simply not acting on the record. We note, however, the Government's lack of institutional vigilance by failing to monitor the progress of the record of trial and to discover its disappearance sooner.

Our analysis does not end with the finding that no due process violation occurred. We must also determine whether the delay affects the findings and sentence that should be approved in this case under our board Article 66 (c), UCMJ, powers. *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc). In light of the extraordinary lack of vigilance by the Government in failing to monitor the progress of the post-trial process, and even considering the seriousness of the appellant's offenses, some relief is warranted.

The findings, as approved by the convening authority, are affirmed. Only so much of the sentence that includes confinement for four months, forfeiture of \$767.00 pay per month for four months, reduction to pay grade E-1, and a bad-conduct discharge is affirmed. 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. Arts. 59(a) and 66(c), UCMJ.

Judge VINCENT and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court