

**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.

**Rodolfo RODRIGUEZ, Jr.
Airman (E-3), U. S. Navy**

NMCCA 200600271

Decided 5 April 2007

Sentence adjudged 14 November 2004. Military Judge: D.M. White. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Carrier Strike Group SIX.

CAPT ALBERTO MUNGUIA, JAGC, USN, Appellate Defense Counsel
LT AIMEE M. SOUDERS, JAGC, USN, Appellate Defense Counsel
LT JESSICA M. HUDSON, JAGC, USN, Appellate Government Counsel
LT ROSS WEILAND, 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AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.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 general court-martial of communicating a threat and concealing stolen military property, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to confinement for 18 months, reduction to pay grade E-1, 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.

Sentence Disparity and Sentence Appropriateness

The appellant contends that the sentence he received was inappropriately severe for these offenses and that his sentence is disparately severe when compared with the disposition of Airman (AN) Andrea Leon's case. Appellant's Brief of 26 Sep 2006 at 6-8. According to the appellant, AN Leon was the Sailor who asked him to conceal the stolen items for which he was convicted. He claims AN Leon was neither court-martialed nor received nonjudicial punishment for her part in these offenses and suggests the disparity was a result of racial discrimination.¹ *Id.* at 6-7.

A. Disparity

As a general matter, we should not engage in comparing the sentences imposed in different cases. *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994). Sentence comparison is appropriate, however, in closely-related cases involving highly disparate sentences. *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999). The appellant bears the burden of demonstrating that cases are closely-related and that the sentences are highly disparate. Once the appellant meets that burden, the Government must show that there is a rational basis for the disparity. *Id.* at 288.

We note that the appellant offers no evidence beyond the assertions of counsel. As we have often stated, the arguments of counsel are not evidence. As there is no evidence concerning AN Leon's participation in these offenses or whether she was ultimately punished for these or other offenses; we find, that the appellant has failed to meet his burden.² We find that

¹ At trial the appellant did not allege that he was the "victim of discriminatory prosecution" or that it was "unlawful to refer the charges against him to a court-martial," nor does he contend on appeal that the proceedings were unlawful. *United States v. Noble*, 50 M.J. 293, 294 (C.A.A.F. 1999). According to the pretrial agreement, the appellant agreed to "testify truthfully if called as a witness in the potential case of United States v. AN Andrea K. Leon[,] ... including any potential administrative separation hearing and/or Article 15 proceeding involving AN Andrea K. Leon." Appellate Exhibit I at 4. Moreover, the appellant fails to provide any evidence that he is a "Mexican-American" or that AN Leon is an "Anglo Saxon," to support his claim of racial discrimination. Appellant's Brief at 3. Sentence disparity based on racial discrimination is a serious and highly volatile accusation. We are concerned that the appellant raises it with casualness and a complete lack of proof.

² Because the appellant has failed to demonstrate sentence disparity, it is not necessary to evaluate the Government's rational basis for the alleged

portion of this assignment of error alleging disparate treatment to be without merit.

B. Appropriateness

We have considered the appellant's record, the military judge's clemency recommendation, and the entire record of trial. We have also considered the seriousness of his offenses. The appellant admitted to knowingly concealing, *inter alia*, a stolen "ARS control box," which is the component that electronically controls the S-3 Viking aircraft's capability to refuel other planes in flight. Without it, the S-3 cannot operate the fuel probe necessary for air-to-air refueling. This particular ARS control box was one of only a few replacement boxes for the squadron, was vital to the appellant's unit's mission of refueling planes in flight in a combat zone, was problematic to replace while the ship was underway, and was worth over \$20,000.00. Prosecution Exhibit 1. Moreover, the appellant committed this offense merely for the potential of rekindling a romantic relationship with AN Leon. The appellant also admitted to communicating a threat to injure members of his command or their families upon his return from deployment because he was angry that the command suspected him of the theft of this ARS control box, two other ARS control boxes, and a set of keys.

The maximum punishment for these offenses is six years confinement, total forfeitures, a fine, reduction to pay grade E-1, and a dishonorable discharge. We conclude the approved sentence is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982).

Post-Trial Delay

The appellant claims he was denied speedy post-trial processing because it took 548 days after sentencing for the case to be docketed with this court. The convening authority's action is undated,³ but inasmuch as it referenced the 3 June 2005 staff judge advocate's recommendation and the appellant's

disparity. *United States v. Durant*, 55 M.J. 258, 262 (C.A.A.F. 2001); see also *Lacy*, 50 M.J. at 288. Similarly, because he has failed to provide any evidence of discrimination concerning case disposition it is not necessary to evaluate the alleged disposition disparity. *United States v. Houston*, 12 M.J. 907, 909 (N.M.C.M.R. 1982).

³ Although not an assignment of error we discuss this below.

clemency requests of 18 April and 11 June 2005, we conclude it occurred sometime after 11 June 2005; 209 days after trial.⁴

While the 548-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. We will take corrective action in our decretal paragraph.

Undated Convening Authority Action

As mentioned above, we note that the convening authority's action is undated. The appellant makes passing note of this in his brief, however he neither argues this omission as an assignment of error nor alleges prejudice. *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998). We have examined the record of trial including all post-trial documentation and find no prejudice to a substantial right of the appellant.

Prior to taking action on the sentence, a convening authority must consider the results of trial, the recommendation of the staff judge advocate or legal officer, and any clemency submission by the accused. *United States v. Alexander*, 63 M.J. 269, 273-74 (C.A.A.F. 2006); RULE FOR COURTS-MARTIAL 1107(b)(3)(A), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). All of these documents are referenced in the convening authority's action.

⁴ The chronology sheet to the record of trial indicates the convening authority's action was taken on "29 Jun".

Conclusion

We affirm the approved findings of guilty and only that portion of the approved sentence that extends to a bad-conduct discharge, reduction to pay grade E-1, and confinement for 16 months.

Senior Judge GEISER and Judge MITCHELL concur.

For the Court

R.H. TROIDL
Clerk of Court