

**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.**

**EDWARD J. TERRENZI  
Sergeant (E-5), U. S. Marine Corps**

NMCCA 200600535

Decided 22 January 2007

Sentence adjudged 06 September 2002. Military Judge: D.K. Margolin. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 3rd Assault Amphibian Battalion, 1st Marine Division, FMF, Camp Pendleton, CA.

Maj BRIAN JACKSON, USMC, Appellate Defense Counsel  
LT JESSICA HUDSON, JAGC, USN, Appellate Government Counsel  
Maj ROBERT M. FUHRER, USMCR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BARTOLOTTA, Judge:

A special court-martial composed of officer members convicted the appellant, contrary to his pleas, of wrongful use of a controlled substance, two specifications of assault, and drunk and disorderly conduct, in violation of Articles 112a, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 912a, 928, and 934. The appellant was sentenced to confinement for two months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, but suspended the punitive discharge for a period of six months from the date of the convening authority's action.<sup>1</sup>

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<sup>1</sup> Both the court-martial promulgating order of 7 May 2003, and the staff judge advocate's recommendation (SJAR) of 25 April 2003, incorrectly state Specification 2 of Additional Charge III as an assault consummated by a battery, vice the correct offense of simple assault for which the appellant was convicted. The appellant did not raise this as error and, in the absence of plain error, it is waived. RULE FOR COURTS-MARTIAL 1106(f)(6), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.); *United States v. Scalo*, 60 M.J. 435, 436

The appellant raises two assignments of error: (1) excessive post-trial delay; and (2) reversible error by the military judge in allowing the Government to elicit from a rebuttal witness that the appellant invoked his right to counsel and to remain silent. 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**

The appellant asserts that a delay of 1,344 days from the date sentence was announced to the date the case was docketed with this court is unreasonable. We consider four factors in determining if post-trial delay violates an appellant's due process rights: (1) length of the delay; (2) 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)(hereinafter *Toohey I*)). If the length of the delay is not unreasonable, 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.* In extreme cases, the delay itself may "give rise to a strong presumption of evidentiary prejudice." *Id.* (quoting *Toohey I*, 60 M.J. at 102).

While some of the delay in the instant case may be reasonable, we note with concern that a delay of 1,101 days between the convening authority's action and docketing with this court is certainly not. Our superior court has called delays in forwarding a case for docketing "the least defensible of all" post-trial delays. *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990). We find this period of unexplained delay to be

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(C.A.A.F. 2005)(citing R.C.M. 1106(f); *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). In any case, we do not find this to be plain error as it appears to be a minor clerical mistake which did not materially prejudice the substantial rights of the appellant. See Art. 59(a), UCMJ; see also *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998). To the contrary, even with this mistake, in accordance with the SJAR the convening authority's action suspended the bad-conduct discharge, to be remitted after six months.

facially unreasonable triggering a due process review. *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006); *United States v. Brown*, 62 M.J. 602, 605 (N.M.Ct.Crim.App. 2005)(*en banc*). We balanced the length of delay in this case in the context of the three remaining *Jones* factors.

Regarding the second factor, reasons for the delay, the Government offers no explanation why it took 1,101 days to docket this case. The Government concedes that a 1,101-day delay to deliver this case to the court was "unreasonable" and "inordinate." They also freely admit that they have no "good cause" for this "unexplained delay." Government Response at 4-5. We note that some explanation is better than no explanation whatsoever which implies a callous disregard for the appellant's rights and this court's decisions. Of further concern is the Government's failure to provide any explanation for the 243-day delay between the date of sentencing and the convening authority's action. This weighs heavily against the Government.

With respect to the third factor, we find that the appellant did not assert his right to timely post-trial review before filing his brief with this court. Appellant's Brief of 11 Sep 2006 at 8. This factor is one that the court gives "strong evidentiary weight in determining whether the defendant is being deprived of the right." *United States v. Toohey*, 63 M.J. 353, 361 (C.A.A.F. 2006)(hereinafter *Toohey II*)(quoting *Moreno*, 63 M.J. at 138).

Finally, with respect to the fourth factor, we evaluate prejudice to the appellant in light of three interests: (1) preventing oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired. *Toohey II*, 63 M.J. at 361 (quoting *Moreno*, 63 M.J. at 138-39)(internal quotation marks and citations omitted). 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.

Here, the appellant was sentenced to confinement for two months.<sup>2</sup> This fact negates any argument that the appellant suffered oppressive incarceration pending appeal. Similarly,

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<sup>2</sup> The appellant did not serve any time in pretrial confinement.

there is no evidence suggesting the appellant suffered any particular anxiety or concern awaiting the outcome of his appeal. There is also no indication that the appellant's grounds for appeal were impaired by the Government's extensive delay in post-trial processing of the appellant's court-martial. In fact, because the appellant's bad-conduct discharge was suspended and has now been remitted, it appears the appellant suffered no prejudice due to this delay. Moreover, the appellant makes no assertion, and this court finds no evidence, of material prejudice to a substantial right of the appellant resulting from post-trial delay.

The appellant asks this court to presume prejudice, however, based on the passage of time. Appellant's Brief at 8. Our superior court has clearly stated that the mere passage of time, standing alone, does not constitute prejudice. *Moreno*, 63 M.J. at 142. Despite the Government's excessive delay and negligence in its post-trial processing of this case, we conclude that there has been no due process violation due to post-trial delay. *Jones*, 61 M.J. at 83.

We next consider whether the delay affects the findings and sentence that should be approved under Article 66(c), UCMJ. *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002); *Brown*, 62 M.J. at 607. While the appellant asserts no specific harm attributable to the delay, the Government failed to provide any explanation for the substantial delay in this case. We cannot ignore the Government's negligence in its post-trial processing in this case; this factor weighs heavily. 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 will take corrective action in our decretal paragraph.

### **Rulings by the Military Judge**

The appellant's second assignment of error asserts the military judge committed reversible error in two separate instances with respect to the appellant's choice to invoke his right to counsel and to remain silent.<sup>3</sup> In the first instance, the appellant claims the military judge erred when he instructed the members that he would not ask one of the member's proposed questions because the appellant "has a right to remain silent"

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<sup>3</sup> II. THE MILITARY JUDGE COMMITTED REVERSIBLE ERROR WHEN (OVER DEFENSE COUNSEL'S OBEJCTION) HE PERMITTED THE TRIAL COUNSEL TO ELICIT FROM A COMMAND REPRESENTATIVE THAT APPELLANT INVOKED HIS RIGHT TO COUNSEL AND HIS RIGHT TO REMAIN SILENT.

and that he "does not have a duty to report the fact that he may have, even unknowingly, ingested" cocaine. Appellant's Brief at 11-12. In the second, the appellant claims the military judge erred when he allowed a Government rebuttal witness to testify that the appellant invoked his right to counsel the first time he was interviewed regarding the alleged wrongful use. *Id.* at 12-14.

#### **A. Background**

The sole specification under the Article 112a charge alleged the appellant's wrongful use of cocaine occurred on or about 9 April 2002. On that date, as part of a unit sweep urinalysis, the appellant provided a urine sample which later tested positive for benzoylecgonine (BZE), the metabolite for cocaine. Approximately six days after the urinalysis, the appellant was questioned by First Sergeant (1stSgt) William Fitzgerald, the appellant's battalion 1stSgt. Before the interview, 1stSgt Fitzgerald informed the appellant of his Article 31(b), UCMJ, rights. The appellant invoked his right to obtain legal counsel and the interview terminated. Record at 481. Subsequently, after consulting with counsel and being reminded by 1stSgt Fitzgerald of his Article 31(b), UCMJ, rights, the appellant indicated that "he did go out with friends occasionally, and [the cocaine] could have been put into a drink or something he ingested somehow," or words to that effect. *Id.* The appellant did not provide further details.

At trial, the defense claimed the appellant's urine sample may have tested positive for BZE due to the innocent ingestion of cocaine placed into an alcoholic drink by Valerie Taylor, the appellant's then-girlfriend, and unwittingly consumed by the appellant. *Id.* at 413-18. Ms. Taylor testified under a grant of immunity and explained that on or about 5 April 2002, she went to a local bar with the appellant. They did not spend their entire time inside the bar together as Ms. Taylor was dancing and the appellant was either at the bar, pool table or playing video games.

Ms. Taylor further testified that at one point that night, while she and the appellant were physically separated, a college acquaintance of Ms. Taylor's convinced her to put some cocaine in her drink to "wake up." Even though she never tried cocaine before and does not recall this acquaintance's full name, Ms. Taylor willingly accepted the cocaine and put it into her Long Island Iced Tea. At the time, she says that she did not tell the appellant that she laced her drink with cocaine. Shortly

thereafter, the appellant had returned. Ms. Taylor told him she needed to visit the restroom, and placed her drink near the appellant to watch over. When she returned, she discovered that the appellant had consumed the entire cocaine-laced drink. Ms. Taylor then informed the appellant that she had laced her drink with cocaine. No other witness corroborated Ms. Taylor's testimony.

### **1. Instruction following member's proposed question.**

During the defense case in chief a panel member posed a question to one of the appellant's good military character witnesses, Staff Sergeant (SSgt) Edward J. Polzin.<sup>4</sup> Trial defense counsel objected and the military judge called an Article 39(a), UCMJ session. Counsel objected on the grounds that, regardless of the answer given, merely asking the question would highlight the appellant's invocation of his right to remain silent under Article 31(b), UCMJ, resulting in the potential for negative inferences. The military judge agreed that the question was improper. When the members returned the military judge instructed them that he would not be asking the question because it was "impermissible." The military judge then went on to instruct the members that:

The reason why is because a Marine, any person, always has the right to remain silent and to not incriminate themselves. Accordingly, a Marine does not have a duty to report the fact that he may have, even unknowingly, ingested a controlled substance. So I will not be allowed to ask that question.

*Id.* at 462.

Trial defense counsel did not object to the military judge's instruction. The members had no further questions.

### **2. Testimony regarding invocation of the right to counsel.**

As part of its rebuttal case, the Government wanted to call 1stSgt Fitzgerald to testify. In its proffer outside the presence of the members, the Government stated in pertinent part:

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<sup>4</sup> The member's question, AE XXII, proposed to ask SSgt Polzin: "Did Sgt. T approach you anytime after 5 April stating that he might have ingested cocaine through a mistake while out w/Valerie Taylor[?]" Record at 458. SSgt Polzin was one of the appellant's supervisors who informed him that his sample tested positive for cocaine.

If allowed, he [1stSgt Fitzgerald] will come in and testify that he read Sergeant Terrenzi his rights. Sergeant Terrenzi invoked his rights, went and sought counsel, like he's permitted to do, and he came back to see First Sergeant Fitzgerald. First Sergeant Fitzgerald, again, read him his rights, and at that point, Sergeant Terrenzi started talking something to the effect of, "Someone may have put something in my drink." The reason why we would like to offer that rebuttal is that, according to First Sergeant Fitzgerald, Sergeant Terrenzi did not identify who that person may have been.

*Id.* at 464.

Trial defense counsel objected on the ground, *inter alia*, that admitting the statement "smacks of the accused's right to remain silent." *Id.* at 465. Trial defense counsel, however, did not object to that part of the proffer in which 1stSgt Fitzgerald would testify that the appellant invoked his right to counsel the first time he was called in for questioning. The military judge overruled the objection, in part based on the proffers of both counsel, the fact the trial defense counsel "open[ed] the door to [this] rebuttal testimony" by presenting evidence of the appellant's innocent ingestion, and the Government's notice compliance with MILITARY RULE OF EVIDENCE 304(d)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). Record at 465, 467-69.

As a result, the military judge allowed 1stSgt Fitzgerald to testify not only as to the post-rights waiver statements the appellant made regarding innocent ingestion, but that these statements were preceded by an earlier interview during which the appellant invoked his right to counsel. The 1stSgt then testified, in pertinent part, as follows:

Q. Do you recall speaking with Sergeant Terrenzi regarding a positive test for cocaine?

A. Yes, I did, sir.

Q. When did that conversation occur?

A. I don't remember the exact date, sir. I believe it was the May time frame.

Q. Six days after the urinalysis?

A. Yes, sir.

Q. How did that conversation go? What did you do?  
A. The first thing I did, I called Sergeant Terrenzi in my office and read him his rights, advising him that I had the naval drug lab results and the screening sheets from the positive tests and, after reading his rights, afforded him the opportunity to see a lawyer. *And at that time, he did opt to see a lawyer.*

Q. Okay. Did you speak with him after he went and talked to an attorney?  
A. Yes, sir, I did.

. . . .

Q. All right. Did he say anything else?  
A. Yes, sir. I asked him, "Well, if you're pleading not guilty, you said that you didn't do this, then how did it get in your system, through osmosis?" I was being sarcastic at the time. There was - it got into his system somehow. He said that he did go out with friends occasionally, and it could have been put into a drink or something he ingested somehow. He didn't indicate exactly when or where, but he said it could have happened without him knowing it.

*Id.* at 481-82 (emphasis added).

Trial defense counsel did not object to 1stSgt Fitzgerald's testimony regarding the appellant's invocation of his right to consult with counsel which the appellant now challenges on appeal.

## **B. Discussion**

Evidentiary motions not raised at trial are waived absent plain error. Contrary to the appellant's assertion on appeal, we find that the trial defense counsel objected to the member's question but not to the instruction given by the military judge after the defense objection was sustained. Consequently, we review this portion of the appellant's second assignment of error under a plain error analysis. "We analyze a claim of plain error under the three-part standard of *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998); that is, (1) whether there was an error; (2) if so, whether the error was plain or obvious; and (3) if the error was plain or obvious

error, whether it was prejudicial." *United States v. Kahmann*, 59 M.J. 309, 313 (C.A.A.F. 2004); see also *United States v. Brewer*, 61 M.J. 425, 432 (C.A.A.F. 2005); Art. 59(a), UCMJ. If the appellant meets this test, the burden shifts to the Government to show that the error was harmless beyond a reasonable doubt. *Brewer*, 61 M.J. at 432; *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005). The court reviews these questions *de novo*. *United States v. Dearing*, 63 M.J. 478, 482 n.12 (C.A.A.F. 2006); *United States v. Simpson*, 58 M.J. 368, 378 (C.A.A.F. 2003).

We find no plain error. *Powell*, 49 M.J. at 463-65. The military judge's instruction, although unnecessary, was accurate and proper. It was apparently made in an effort to educate the members, and in particular, the panel member who posed the question, while simultaneously protecting the rights of the appellant. As we find no error, no further inquiry is required.

Similarly, trial defense counsel did not object to admission of that portion of 1stSgt Fitzgerald's testimony regarding the appellant's invocation of his right to obtain counsel, nor did he at any time request a specific instruction regarding that invocation. Even though the Government's previous proffer indicated the 1stSgt would testify the appellant invoked his right to counsel, the trial defense counsel, the Government and the military judge focused solely on the appellant's innocent ingestion statements following the second Article 31(b) rights advisement. The failure to object waives this issue absent plain error. *United States v. Cardreon*, 52 M.J. 213, 216 (C.A.A.F. 1999); *United States v. Boyd*, 55 M.J. 217, 222 (C.A.A.F. 2001); MIL. R. EVID. 103(d); see also R.C.M. 920(f).

The Government argues that the admission of this evidence was not error because it was not offered to infer guilt, was not presented in the Government's case in chief, was not argued or otherwise highlighted by the Government, and the members were previously instructed on the appellant's rights. *United States v. Gilley*, 56 M.J. 113, 122 (C.A.A.F. 2001). We do not agree.

The fact that the appellant invoked his right to seek counsel was irrelevant and not admissible. Allowing testimony on it was error. See MIL. R. EVID. 301(f)(3); see also *United States v. Riley*, 47 M.J. 276, 279-80 (C.A.A.F. 1997); *United States v. Garrett*, 24 M.J. 413, 418 (C.M.A. 1987); *United States v. Ibarra*, 53 M.J. 616, 619 (N.M.Ct.Crim.App. 2000); *United States v. Miller*, 48 M.J. 811, 816 (N.M.Ct.Crim.App. 1998).

Having found error we now turn to the question of whether this error was harmless beyond a reasonable doubt. We must consider all the circumstances surrounding its presentation. *United States v. Sidwell*, 51 M.J. 262, 265 (C.A.A.F. 1999); *Ibarra*, 53 M.J. at 620.

The reference to the appellant's invocation of his right to consult with counsel was fleeting and isolated. Further, it was brought out on rebuttal and not exploited by the Government as substantive evidence of his guilt. *Gilley*, 56 M.J. at 122. Trial defense counsel apparently perceived no prejudice as he neither objected to the admission of this testimony, nor requested a specific instruction pertaining to it. Moreover, although the military judge provided no curative instruction at the time, the previous instruction cited by the appellant addressing the panel member's question and the standard instructions provided before deliberations sufficiently addressed any potential prejudicial impact.<sup>5</sup> As a result, we find that the error was harmless beyond a reasonable doubt. *United States v. Moore*, 1 M.J. 390, 392 (C.M.A. 1976).

After weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt to the Article 112a charge and its sole specification beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). We are also convinced beyond a reasonable doubt that this error did not in any way contribute to the guilty verdicts with respect to the other charges.<sup>6</sup>

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<sup>5</sup> The military judge did not give the "comment on rights to silence or counsel" instruction, Military Judges' Benchbook, Dept of the Army Pamphlet ("Benchbook") 27-9, ¶ 2-7-20, but he did give the standard instructions on false exculpatory statements, Record at 517-18; Benchbook at ¶ 7-22, and the appellant's failure to testify and right to remain silent, Record at 520; Benchbook at ¶ 7-12.

<sup>6</sup> The other charges occurred approximately three months after the appellant invoked his Article 31(b) rights and later spoke with 1stSgt Fitzgerald about the charge of wrongful use of cocaine, and had no connection with that offense. Additionally, the military judge properly instructed the members that each offense must stand on its own and could not be used to support another (the "spill-over" instruction). Record at 520; Benchbook at ¶ 7-17.

### **Conclusion**

Accordingly, 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 one month.

Senior Judge GEISER and Judge MITCHELL concur.

For the Court

R.H. TROIDL  
Clerk of Court