

**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.

**Matthew K. TRAVIS
Sergeant (E-5), U. S. Marine Corps**

NMCCA 200600519

Decided 27 February 2007

Sentence adjudged 19 August 2004. Military Judge: D.M. Jones. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Marine Division (REIN), Blue Diamond, Iraq.

LT AIMEE M. SOUDERS, JAGC, USN, Appellate Defense Counsel
CAPT FREDERIC MATTHEWS JAGC, USNR, Appellate Government Counsel
LT JESSICA M. 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AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.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 general court-martial of attempted cruelty and maltreatment, conspiracy to commit cruelty and maltreatment, dereliction of duty, and making a false official statement, in violation of Articles 80, 81, 92, and 107, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 881, 892, and 907.¹

¹ The appellant also pled guilty to attempted assault consummated by a battery, in violation of Article 80, UCMJ, which the military judge dismissed prior to findings as an unreasonable multiplication of charges. Record at 74. The dismissal of this specification and its accompanying guilty plea, however, was not reflected in the staff judge advocate's recommendation (SJAR) of 29 September 2004, or the court-martial promulgating order of 2 December 2005 under RULE FOR COURTS-MARTIAL 1114(c)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). The appellant did not raise this as error and, in the absence of plain error, it is waived. R.C.M. 1106(f)(6); see *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005)(citing *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). We have examined the record of trial including all post-trial documentation and do not find this in any case 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*

The appellant was sentenced to confinement for 15 months, reduction to pay grade E-1, and a bad-conduct discharge. Less than one month after trial the convening authority (CA) deferred automatic forfeitures, pursuant to Article 58b(a)(1), UCMJ, ordering them paid to the appellant's dependents. The CA approved the sentence as adjudged and waived automatic forfeitures in both his 4 December 2004 and 2 December 2005 actions.²

The appellant raises two assignments of error. First, he asserts that he has been denied speedy post-trial processing of his case. Second, the appellant argues that he was prejudiced by the staff judge advocate's failure to timely forward clemency matters to the convening authority.

We have examined the record of trial, the assignments of error, and the Government's response. With respect to post-trial delay and the Government's failure to explain the delay in forwarding the appellant's clemency matters, we concur that relief should be granted pursuant to Article 66(c), UCMJ. We will take appropriate action in our decretal paragraph. Otherwise we conclude that, following our corrective action, the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Post-Trial Delay

While the 624-day delay between sentencing and docketing is 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*,

States v. Powell, 49 M.J. 460, 464-65 (C.A.A.F. 1998). Nevertheless, the appellant is entitled to have his official records correctly reflect the results of this proceeding. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). We will therefore remedy the error in the court-martial order in our decretal paragraph. *United States v. Diaz*, 40 M.J. 335, 345 (C.M.A. 1994); *United States v. Moseley*, 35 M.J. 481, 485 (C.M.A. 1992); *United States v. Graf*, 35 M.J. 450, 467 (C.M.A. 1992)

² The appellant's pretrial agreement had no effect on the sentence.

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 unexplained 363-day delay between the CA's two actions,³ in conjunction with the 152-day delay between the CA's second action and docketing with this court impacts the sentence that "should be approved." Art. 66(c), UCMJ.

Forwarding of Post-Trial Clemency Matters

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 2 December 2005 action. We have examined the record of trial including all post-trial documentation and find no material prejudice to a substantial right of the appellant.

The appellant avers that his clemency submission was received by the staff judge advocate prior to the convening authority's 4 December 2004 action. Based on the record before us we are unable to determine whether these matters were submitted before or after that date. If the matters were in fact received before the convening authority's 2004 action and not considered, then that would be error. R.C.M. 1107(b)(3)(A); *see United States v. Craig*, 28 M.J. 321, 325 (C.M.A. 1989); *see also United States v. Bakcsi*, 64 M.J. 544 (A.F.Ct.Crim.App. 2006). Yet, even if this were determined to be the case, we do not find it necessary to return the record of trial to the convening authority for a new action for this reason because the convening authority's 2 December 2005 action rectified that omission by stating he considered the appellant's clemency matters. *See also United States v. Cook*, 46 M.J. 37, 39-40 (C.A.A.F. 1997); *United States v. Yates*, 39 M.J. 737, 738 (N.M.Ct.Crim.App. 1994). Of course, if the appellant's clemency matters were received after the convening authority's 2004 action there is no error.

The appellant also avers that his clemency submission was held by the staff judge advocate for an inordinate amount of time before the convening authority's 2 December 2005 action. Due to the post-trial history of this case we do not find the staff judge advocate's delay in forwarding the appellant's clemency matters to be a *de facto* denial of the appellant's requested clemency under *United States v. Bell*, 60 M.J. 682 (N.M.Ct.Crim.App. 2004). But we do find troubling the Government's conspicuous failure to explain *why* the convening authority withdrew his initial action in the first place,

³ The CA's action of 2 December 2005, withdrew his action of 4 Dec 2004 and substituted a new action.

particularly in light of the fact the Government claims the convening authority could take no further action on the appellant's case under R.C.M. 1107(f)(2) because the record had already been forwarded, the Government's Answer of 26 September 2006 at 12, and then *why* it took 366 days to do so. Because there is no evidence the record of trial was forwarded until after the CA's second action we find the CA's 2 December 2005 action controlling.⁴ Even though we do not find any material prejudice to the appellant's substantial rights, for these reasons we will further exercise our authority to grant relief under Article 66(c), UCMJ. *See also Cook*, 46 M.J. at 39-40.

Conclusion

Accordingly, we direct that a supplemental court-martial promulgating order correctly reflect the charges, specifications, pleas, and findings. The approved findings are affirmed. Only so much of the sentence as extends to a bad-conduct discharge, confinement for 12 months, and reduction to pay grade E-1 is affirmed.

Senior Judge GEISER and Judge MITCHELL concur.

For the Court

R.H. TROIDL
Clerk of Court

⁴ This may also benefit the appellant because it extends the expiration date of deferred automatic forfeitures until the CA's 2 December 2005 action and extends the waived automatic forfeitures until six months after that action.