

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

E.E. GEISER

J.G. BARTOLOTTA

M.W. PEDERSEN

UNITED STATES

v.

**Stephen S. WIEST
Lance Corporal (E-3), U.S. Marine Corps**

NMCCA 200700024

Decided 31 July 2007

Sentence adjudged 2 August 1999. Military Judge: J.F. Havranek. Staff Judge Advocate's Recommendation: Maj C.M. Reynolds, USMCR. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Marine Division (Rein), Camp Pendleton, CA.

LCDR MATTHEW T. SCHELP, JAGC, USN, Appellate Defense Counsel
LT FRANK L. GATTO, JAGC, USN, Appellate Government Counsel
LT JUSTIN E. DUNLAP, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PEDERSEN, Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of thirteen specifications of larceny and three specifications of forgery, in violation of Articles 121 and 123, Uniform Code of Military Justice, 10 U.S.C. §§ 921 and 923. The appellant was sentenced to confinement for thirty months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged, except that he approved total forfeitures "until such time as the approved and unsuspended confinement is lawfully terminated and, thereafter, forfeiture of two-thirds pay per month is approved until the discharge is ordered executed."

The appellant's assignments of error are: (1) unreasonable post-trial delay and (2) inappropriately severe sentence.¹ We

¹ I. APPELLANT'S SUBSTANTIAL RIGHT TO SPEEDY POST-TRIAL REVIEW WAS MATERIALLY PREJUDICED BY THE UNREASONABLE DELAY IN POST-TRIAL PROCESSING.

have carefully considered the record of trial, the two assignments of error, and the Government's response. 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. We will consider these assignments of error in reverse order.

Sentence Severity

The appellant asserts that the approved sentence was inappropriately severe. We disagree. "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). Courts of Criminal Appeals are tasked with determining sentence appropriateness, as opposed to bestowing clemency, which is the prerogative of the convening authority. *Healy*, 26 M.J. at 395. A sentence should not be disturbed on appeal, "unless the harshness of the sentence is so disproportionate as to cry out for sentence equalization." *United States v. Usry*, 9 M.J. 701, 704 (N.C.M.R. 1980).

The appellant was found guilty of 13 instances of larceny and three instances of forgery, with a total loss to the victims amounting to over \$2,000.00. He faced a maximum punishment of 44 years of confinement, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. Record at 14.

The appellant's first victim was Private First Class (PFC) James Staley, whom he described as a friend and who shared a barracks room with the appellant. While PFC Staley was away on temporary duty, the appellant stole a box of PFC Staley's checks and forged PFC Staley's name on three of them to obtain cash from PFC Staley's bank account. Record at 25-28. The second victim, Timothy Doyle, was the father of the appellant's girlfriend. She had invited him to her father's house, and while there, the appellant stole Mr. Doyle's credit card, a debit card, and a blank check, which he later forged, obtaining \$200.00 in cash. *Id.* at 32, 36-37, 39. He used the credit and debit cards to make purchases. *Id.* at 40-41, 43-46. His third victim, Corporal (Cpl) J.E. Kivelin, was the appellant's roommate for one night. The appellant took a blank check belonging to Cpl Kivelin that he found lying on top of the desk in their room. *Id.* at 46. He then forged the stolen check and used it to purchase a \$612.00 motorcycle helmet and visor. *Id.* at 47.

II. WHETHER A SENTENCE INCLUDING A DISHONORABLE DISCHARGE AND 30 MONTHS CONFINEMENT IS INAPPROPRIATELY SEVERE GIVEN THE NATURE AND SERIOUSNESS OF THE OFFENSES.

The appellant never gave the helmet back and never paid Cpl Kivelin the \$612.00. *Id.* at 49. Although restitution was made to PFC Staley, it was made by the bank, which automatically withdrew funds from the appellant's account when it learned of the fraud, and not by the appellant. *Id.* at 33-34. Finally, while Mr. Doyle's credit card companies did not hold him responsible for the fraudulent charges, there is no evidence in the record indicating the companies from whom the appellant made the fraudulent purchases ever received restitution.

Mr. Doyle testified that before discovering the appellant's crimes, he was pleased that his daughter was dating a Marine. However, the appellant's criminal behavior, "gave me a very bad taste in my mouth. . . . I thought very badly of the Marines." *Id.* at 70. Mr. Doyle also testified that it took him a couple of months to clear up all the problems the appellant caused by his thefts. *Id.* He testified he spent 24 hours making affidavits in connection with the appellant's crimes against him, and then he had to deal with the mental issue of having been victimized and violated. *Id.* at 67, 69. Even the appellant alluded in his unsworn statement to the detrimental effect his actions had on the relationship between Mr. Doyle and his daughter. *Id.* at 73-74.

A dishonorable discharge "should be reserved for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized in civilian jurisdictions as felonies . . . , [whereas] a bad-conduct discharge . . . is designed as a punishment for bad-conduct rather than as a punishment for serious offenses." RULE FOR COURTS-MARTIAL 1003(b)(8)(B) and (C), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). As this court has previously stated:

Larceny is commonly recognized at common law as a serious felony crime. . . . Larceny crimes strike at the very heart of society's ability to exist as a community, and this is certainly no less important in a military community. It is commonly recognized that the crime of larceny against a fellow service member takes on even more significance in the military community where the very lives of men at arms often rest upon the complete trust and confidence of their fellow combatants. This trust is emphasized and nurtured in the United States Marine Corps from a Marine's first experiences in bootcamp and throughout his Marine Corps career. Basic to this philosophy is an expectation that your batterymate will not steal from you.

Usry, 9 M.J. at 703 (internal citation omitted). The appellant's conduct richly warranted a dishonorable discharge and, after reviewing the entire record, we find that the adjudged and approved sentence is entirely appropriate for this offender

and these offenses. We, therefore, decline to grant relief for the appellant's second assignment of error.

Post-Trial Delay

We turn now to the appellant's argument that, notwithstanding the absence of actual prejudice, he is entitled to relief because of unreasonable post-trial delay. The appellant asserts that a delay of more than 89 months from the date sentence was announced to the date the record of trial 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) 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 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 the instant case, there was a delay of 2,734 days from the date of sentencing to the date the case was docketed with this court. We find this unexplained delay of almost seven and one-half years to be facially unreasonable. *See United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). This substantial unexplained delay triggers a due process review.

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 whatsoever for the delay.² With respect to the third factor, we find no evidence that the appellant asserted his right to timely post-trial review any time prior to filing his appellate brief. Finally, regarding the fourth factor, the appellant makes no assertion, and this court finds no evidence, of material prejudice to a substantial right resulting from post-trial delay in this case. Considering all four factors, we conclude that there has been no due process violation due to post-trial delay.

We next consider whether this is an appropriate case to exercise our authority to grant relief under Article 66(c), UCMJ,

² The docketed record of trial was a copy. Attached to that copy was a paper styled as an "Affidavit," dated 27 October 2006, from Review Officer-in-Charge, Legal Service Support Section, 1st Marine Logistics Group, Camp Pendleton, California, in which the officer states that the original record of trial was mailed in the same box as the record of trial for case NMCCA 200100351, docketed with the Court on 12 February 2001. Neither appellate counsel mentions the document. We note that the purported affidavit is not in the proper form of a notarized affidavit, or an unsworn declaration made subject to penalty of perjury pursuant to 28 U.S.C. § 1746. Thus, we will not consider it. N.M.CT.CRIM.APP. RULE 4-7.3(b).

in the absence of a due process violation. The facts in this case demonstrate a significant lack of professional oversight of the post-trial process by the Staff Judge Advocate's Office, 1st Marine Division, Camp Pendleton, California. That office's failure to either mail the record of trial, or monitor the mailing to ensure it was successful, must be balanced against all of the factors in the record before us, including the crimes of which the appellant stands convicted, that portion of the appellant's military record entered into evidence, and the sentence approved by the convening authority. Having done so, we conclude that the only meaningful relief available (i.e., disapproving the dishonorable discharge) would be an undeserved windfall for the appellant and disproportionate to any possible harm the appellant suffered as a result of the post-trial delay. Therefore, we find that the delay in this case does not affect the findings or sentence that should be approved. Art. 66(c), UCMJ.

Conclusion

The approved findings and sentence are affirmed.

Senior Judge GEISER and Judge BARTOLOTTA concur.

For the Court

R.H. TROIDL
Clerk of Court