

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
E.S. WHITE, R.E. VINCENT, J.E. STOLASZ
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MARC A. BAKER
SEAMAN (E-3), U.S. NAVY**

**NMCCA 200700567
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 27 January 2006.

Military Judge: CDR John Maksym, JAGC, USN.

Convening Authority: Commanding Officer, USS KITTY HAWK
(CV 63).

Staff Judge Advocate's Recommendation: LCDR Christopher
French, JAGC, USN.

For Appellant: LCDR Thomas Belsky, JAGC, USN.

For Appellee: Capt Roger Mattioli, USMC.

15 April 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

STOLASZ, Judge:

A military judge sitting as a special court-martial convicted the appellant, consistent with his pleas, of two specifications of carnal knowledge in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The appellant was sentenced to confinement for 8 months, reduction to pay grade E-1, a \$5000.00 fine, and a bad-conduct discharge. The convening authority (CA) approved the adjudged sentence and, pursuant to the terms of a pretrial agreement, suspended confinement in excess of 6 months for a period of 12 months from the date of the CA's action.

The appellant asserts three assignments or error.¹ We have examined the record of trial, the appellant's brief, the Government's response, and the appellant's reply. We conclude that the \$5,000.00 fine is inappropriately severe and will take corrective action in our decretal paragraph. Following our corrective action, we conclude the remainder of the sentence and the findings 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.

Background

The appellant had sexual relations with a 15-year-old female on 5 March 2005 and 1 April 2005. The appellant was 20 years old at the time, and admits he knew the female was 15 on the two occasions they engaged in sexual relations. He attributes his conduct to youthful indiscretion and claims that his adjudged and approved sentence, specifically the \$5,000.00 fine, violates RULES FOR COURTS-MARTIAL, 1003(b)(3) and 1107(d)(5), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). He further asserts that his sentence was inappropriately severe, and claims he was denied due process as a result of post-trial delay. We first address the appellant's second assignment of error, since our resolution of that assignment moots his first assignment of error. Finally, we will address the appellant's claim of post-trial delay.

Sentence Severity

The appellant asserts that a sentence which includes a \$5,000.00 fine and a bad-conduct discharge is inappropriately severe, considering the mitigating circumstances and his rehabilitative potential.² The appellant also argues that a \$5,000.00 fine is inappropriate in this case because he was not unjustly enriched. Appellant's Brief of 19 Sep 2007 at 12.

In *United States v. Stebbins*, 61 M.J. 366, 372 (C.A.A.F. 2005), our superior court held that, based on the plain language

¹ I. THE ADJUDGED AND APPROVED SENTENCES, BOTH OF WHICH INCLUDED CONFINEMENT FOR 8 MONTHS, AUTOMATIC FORFEITURES, AND A \$5,000 FINE, VIOLATE R.C.M. 1003(b)(3) AND R.C.M. 1107(d)(5).

II. THE APPELLANT'S SENTENCE WHICH INCLUDED A \$5,000 FINE AND A BAD-CONDUCT DISCHARGE, WAS INAPPROPRIATELY SEVERE FOR TWO ACTS OF CARNAL KNOWLEDGE GIVEN: 1) APPELLANT'S REHABILITATIVE POTENTIAL, AND 2) THAT THE INCIDENTS OCCURRED WITHIN ONE MONTH OF EACH OTHER AND INVOLVED THE SAME FEMALE WHO WAS WITHIN 2 MONTHS OF HER 16th BIRTHDAY.

III. APPELLANT HAS BEEN DENIED TIMELY APPELLATE REVIEW OF HIS COURT-MARTIAL GIVEN THAT IT TOOK 14 MONTHS FROM THE DATE OF THE CONVENING AUTHORITY'S ACTION TO HAVE THIS 85-PAGE RECORD OF TRIAL DOCKETED WITH THIS COURT.

² The appellant cites as mitigating circumstances the fact that the two acts of carnal knowledge occurred within one month of each other, with the same female who was within 2 months of her 16th birthday. Appellant's Brief of 19 Sep 2007 at 9.

of R.C.M. 1003(b)(3) as well as the history of a fine as a punishment, it is not unlawful to impose a fine where there is no unjust enrichment. However, the court also made clear that, while a fine may be a valid legal punishment, it is not an appropriate punishment in all cases. *Id.* at 372 n.46. See *United States v Espineira*, No. 881410, 1988 CMR LEXIS 680 at 1, unpublished op. (N.M.C.M.R. 7 Sep 1988) (disapproving fine where no evidence of unjust enrichment or "any other good reason for the fine"); *United States v. Word*, No. 880316, 1988 CMR LEXIS 415 at 1, unpublished op. (N.M.C.M.R. 21 Jun 1988) (setting aside fine as "an inappropriate, albeit legal, punishment" where no indication accused was unjustly enriched under the circumstances).

In this case, putting aside the issue raised by the appellant's first assignment of error, the \$5,000.00 fine is a valid legal punishment. We, however, do not view the \$5,000.00 fine as an appropriate punishment given the nature of the offenses and the offender. Simply put, we can discern no purpose for the \$5,000.00 fine in a case involving two specifications of carnal knowledge.³

Our determination of sentence appropriateness under Article 66(c), UCMJ, requires us to analyze the record as a whole to ensure that justice is done, and that the appellant receives the punishment that he deserves. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). In order to make this decision, we give individual consideration to the nature and seriousness of the offenses, as well as the character of the offender. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959). Our determination is independent and not deferential to the military judge who awarded the sentence. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We will not award clemency, however, as that is the prerogative of the convening authority. *Id.* at 383; *Healy*, 26 M.J. at 396.

We find the adjudged sentence, except for the \$5,000.00 fine, stringent but appropriate. The appellant plead guilty to having sexual relations with a 15-year-old female. He admitted that he knew she was 15. He further admitted that on one of the occasions he had intercourse with the female while in the house of a Navy Chief Petty Officer and in the presence of that individual's minor daughter. Finally, he admitted that such

³ Our decision to disapprove the fine moots the appellant's first assignment of error. The appellant makes no claim that the fine violates the "Excessive Fines" clause of the 8th Amendment. *United States v. Bajakajian*, 524 U.S. 321, (1998); *Stebbins*, 61 M.J. at 372-74; *United States v. Reed*, 54 M.J. 37, 44-45 (C.A.A.F. 2000). We note the appellant asserts that this court should determine if the fine was "appropriate" under Article 66, UCMJ, rather than apply the conceptually different standard under the Excessive Fines Clause of the Eighth Amendment. Appellant's Reply Brief of 26 Oct 2007 at 7.

conduct was prejudicial to good order and discipline.
Prosecution Exhibit 1 at 2.

We have carefully considered the mitigating factors put forth by the appellant and do not find his argument particularly persuasive. Thus, we find the reassessed sentence, less the \$5,000.00 fine, extending to six months confinement, reduction to pay grade E-1, and a bad-conduct discharge, is appropriate for this offender and his offenses. *Baier*, 60 M.J. at 382; see Arts. 59(a) and 66(c), UCMJ.

Post-Trial Delay

Our post-trial delay analysis begins with whether or not the delay is "facially unreasonable." *United States v Young*, 64 M.J. 404, 408 (C.A.A.F. 2007)(citing *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2006)). As the appellant's case was tried prior to the date our superior court decided *Moreno*, the presumptions of unreasonable delay that apply to post-trial processing do not apply. Nevertheless, considering it took 161 days from the date the appellant was sentenced for the CA to act, and 557 days from the date of sentencing to docket the case with this court, we find the delay is facially unreasonable, and a further due process review is necessary. *Id.*

We look to the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) length of the delay; (2) reason 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); *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)(*Toohey I*). If we determine that the appellant's due process right to speedy post-trial review has been violated, "we grant relief unless this court is convinced beyond a reasonable doubt that the constitutional error is harmless." *Young*, 64 M.J. at 409 (quoting *United States v Toohey*, 63 M.J. 353, 363 (C.A.A.F. 2006)(*Toohey II*)).

The first and second factors clearly favor the appellant. The Government offers no reason for their dilatory processing of the case and, as emphasized previously by our superior court, delay between the CA's action and docketing with this court is the least excusable delay. See *United States v. Oestmann*, 61 M.J. 103, 104 (C.A.A.F. 2005)(criticizing unexplained and unusual period of time to accomplish the routine, nondiscretionary and ministerial task of transmitting the record).

Regarding the third factor, the appellant claims he was ignorant of the appellate process, and believed that the delay in his case was normal. The appellant states that he would have complained about the delay if he knew it would have made a difference. Appellant's Declaration of 29 Aug 2007. We note that the appellant signed an Appellate Rights Statement on 27 January 2006 which explained the appellate process and provided the address of the Appellate Defense Division. We also note that

the appellant advised the military judge that he had reviewed, discussed with his counsel, and understood all of his appellate rights. Record at 83. Thus, we are skeptical of appellant's claim of ignorance regarding the post-trial process since he was clearly advised of the process. Nevertheless, since the Government is primarily responsible for speedy post-trial processing we will not weigh the appellant's lack of complaint too heavily against him. *Moreno*, 63 M.J. at 138.

As for the fourth factor, the appellant states that his lack of Department of Defense Form 214 (DD-214), resulted in rejection for every job for which he applied. The appellant was released from confinement on 22 June 2006, and returned to Pensacola, Florida where he began to look for work. He submits he was rejected for at least 25 jobs and by a school where he would have trained for a commercial driver's license. He specifically cites Wal-Mart and Ahern Trucking Company as companies that refused to hire him because he lacked a DD-214. He claims his inability to obtain a job resulted in a corresponding inability to support himself. Appellant's Declaration of 29 Aug 2007. The Government presented no information to rebut the appellant's declaration.

We have consistently found an appellant's assertions insufficient to establish prejudice when they lack sufficient detail to allow the Government the opportunity to rebut or validate a purported claim of prejudice. The appellant has the burden to provide substantive, verifiable evidence from people with direct knowledge of the pertinent facts establishing specific prejudice. *See United States v. Gosser*, 64 M.J. 93, 98 (C.A.A.F. 2006); *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990).

In a recently published decision, this court found the appellant met his burden by a preponderance of the evidence and demonstrated that he had suffered prejudice because of post-trial delay. *United States v. Bush*, _ M.J. _, No. 200700137, 2008 CCA LEXIS 84 (N.M.Ct.Crim.App. 11 Mar 2008). In *Bush*, the appellant asserted he was denied employment by the Costco store in Huntsville, Alabama, three to four years after his trial specifically because he lacked his DD-214. He further asserted he was qualified for the job, as evidenced by his former employment by Costco in a similar position. This court determined the appellant's assertion of denial of employment by a specific store in a specific town during a specific timeframe provided the Government with "adequate detail" to either verify or dispute the assertions.⁴ *Id.* (quoting *Gosser*, 63 M.J. at 98).

One day after *Bush* was published, our superior court decide a similar issue. *See United States v. Allende*, 66 M.J. 142

⁴ This court noted the Government was free to submit its own affidavit detailing efforts made to verify or rebut the appellant's factual contentions and in what way his declaration lacked sufficient details for it to be able to do so. *Bush*, n.3.

(C.A.A.F. 2008). In *Allende*, the appellant asserted he was unable to procure a job because of a lack of a DD-214. He claimed that four employers declined to hire him in the August-October 2000 timeframe for lack of a DD-214, approximately one year after completion of his trial -- and two employers refused to hire him in 2007 for the same reason. The court found the appellant failed to provide documentation from potential employers regarding their employment practices, and did not offer a valid reason for not doing so. *Id.* (citing *United States v. Jones*, 61 M.J. 80, 84-85 (C.A.A.F. 2005)(relying upon affidavits from a prospective employer to confirm that lack of a DD-214 caused employer to deny application for employment.))

Here, as in *Allende*, the appellant has failed to provide documentation from any of the alleged potential employers regarding their employment practices, or otherwise demonstrated a valid reason for failing to do so. Unlike the appellant in *Jones*, the appellant in this case has not provided declarations from third parties like Wal-Mart and Ahern Trucking Company indicating he would have been hired if he possessed his DD-214. Thus, while the appellant has presented some un rebutted evidence in his declaration, he has not presented sufficient evidence to state a factually adequate legal claim of prejudice. Nor has the appellant provided sufficient specificity and detail as to permit the Government to verify or rebut his claims as the appellant in *Bush* had done. Thus, we decline to find the appellant suffered material prejudice.

We next examine whether "the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohy II*, 63 M.J. at 362. Although we do not excuse the delay in this case, we do not find it so egregious that it would adversely affect the public perception of the fairness and integrity of the military justice system. We, therefore, find that the appellant's right to due process has not been violated. We also find that the delay does not affect the findings and sentence that should be approved in this case. Art. 66(c), UCMJ; *United States v. Tardiff*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc).

Conclusion

We affirm the findings, and that part of the sentence extending to a bad-conduct discharge, confinement for 6 months, and reduction to pay grade E-1. The fine of \$5,000.00 is set aside. Confinement in excess of six months was remitted in July 2007. Arts. 59(a) and 66(c), UCMJ. We direct that the supplemental court-martial order reflect the plea and findings as to Specification 2 under Charge I.

Senior Judge WHITE and Judge VINCENT concur.

For the Court

R.H. TROIDL
Clerk of Court