

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

**Before
R.E. VINCENT, E.S. WHITE, M.F. HUGHES
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**KHABEAH W. HALL
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 200600764
GENERAL COURT-MARTIAL**

Sentence Adjudged: 06 January 2003.

Military Judge: LtCol Frank Delzompo, USMC.

Convening Authority: Commanding General, 1st Marine
Division (Rein), Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: Capt K.M. Navin,
USMC.

For Appellant: LT Anthony Yim, JAGC, USNR.

For Appellee: LCDR Guillermo Rojas, JAGC, USN; Capt
Geoffrey Shows, USMC.

03 July 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HUGHES, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of failure to go to his appointed place of duty, disrespect toward a non-commissioned officer, four specifications of larceny, and three specifications of obtaining services under false pretenses, in violation of Articles 86, 91, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 891, 921, and 934. The appellant was sentenced to confinement for 13 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-

conduct discharge. The convening authority (CA) approved the findings and sentence as adjudged.

We have considered the record of trial, the appellant's brief and two assignments of error,¹ and the Government's answer. We conclude there was no unreasonable multiplication of charges in the appellant's case, but that the post-trial delay in the case violated the appellant's right to due process. Nevertheless, we find that the error was harmless beyond a reasonable doubt. Finally, we find the delay in this case affects the sentence that should be approved. Art. 66(c), UCMJ. We will take corrective action in our decretal paragraph. Following our corrective action, we conclude the findings and sentence are correct in law and fact and that no error materially prejudicial to the rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Factual Background

On three separate occasions in April 2002, the appellant stole the Pacific Marine Credit Union Automated Teller Machine (ATM) card belonging to his roommate, Private First Class (PFC) Carlos A. Molina, USMC, while PFC Molina was sleeping. On each occasion, the appellant went to a Bank of America branch located in Twentynine Palms, CA and withdrew \$300 in cash from PFC Molina's account. On each occasion, the appellant incurred a \$1.50 service charge by the Bank of America for the use of the ATM. The appellant had previously obtained PFC Molina's bank personal identification number (PIN) from a piece of paper his roommate had left on the dresser in the room. On 18 April 2002, the appellant took PFC Molina's bank account number, and using an automated telephone service, paid a third person's cellular telephone bill in the amount of \$484.72.

The appellant was tried and sentenced on 6 January 2003. The record of trial was authenticated on 10 March 2003, 63 days after trial. The staff judge advocate's recommendation (SJAR) was completed on 8 February 2006, 1,129 days after the appellant was sentenced. The CA acted on 13 March 2006, 33 days after completion of the SJAR. The case was docketed with the court on 10 December 2007, 637 days after the CA's action. The total amount of post-trial delay was 1,799 days.

¹ I: WHETHER CONVICTIONS OF ARTICLE 121, UCMJ (LARCENY) AND ARTICLE 134, (OBTAINING SERVICES UNDER FALSE PRETENSES) CONSTITUTE AN UNREASONABLE MULTIPLICATION OF CHARGES.

II: WHETHER APPELLANT HAS BEEN DENIED SPEEDY POSTTRIAL REVIEW OF HIS COURT-MARTIAL WHERE ALMOST FIVE YEARS HAVE PASSED FROM THE DATE OF HIS ADJUDGED SENTENCE UNTIL DOCKETING WITH THIS COURT.

Unreasonable Multiplication of Charges

The appellant asserts his convictions for larceny (Specifications 1 through 3 of Charge I) and obtaining services by false pretenses (Specifications 1 through 3 of Charge II) are essentially three larceny offenses which the Government unreasonably multiplied into three larceny and three obtaining services by false pretense convictions. We disagree.

We apply five non-exclusive factors in evaluating a claim of unreasonable multiplication of charges: (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications; (2) Is each charge and specification aimed at distinctly separate criminal acts; (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality; (4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure; (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges. *United States v. Quiroz*, 57 M.J. 583 (N.M.Ct.Crim.App. 2002)(*en banc*), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition). *Accord United States v. Quiroz*, 55 M.J. 334, 339 (C.A.A.F. 2001)("this approach is well within the discretion of [this court] to determine how it will exercise its Article 66(c) powers"). "These factors must be balanced, with no single factor necessarily governing the result." *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004).

First, the appellant did not raise any objection at trial to these Charges (I and II) constituting an unreasonable multiplication of charges. In fact, when the military judge raised the issue of possible unreasonable multiplication of charges for the larceny and obtaining services by false pretenses charges to the appellant's trial defense counsel, counsel declined to raise the issue. Record at 38.

Second, the appellant's larceny of money on three separate occasions and his obtaining services by false pretenses are separate criminal acts and not a "single offense." *United States v. Neblock*, 45 M.J. 191 (C.A.A.F. 1996); *United States v. Schiftic*, 36 M.J. 1193 (N.M.C.M.R. 1993). The larcenies were distinct and discrete offenses which were completed when the appellant removed the cash from the ATM machine. The offenses of obtaining services under false pretenses, while similar to larceny, were separate and distinct offenses in that the object of the appellant's criminal conduct was to obtain services, namely, the ATM service of providing cash to the ATM user. See *Neblock*, 45 M.J. at 197.

Third, the number of charges does not misrepresent or exaggerate the appellant's criminality. Indeed, they accurately reflect each of the individual and separate choices he made to knowingly violate the UCMJ. This was not "substantially one transaction" turned into many.

Fourth, the number of charges and specifications did not unreasonably increase the appellant's punitive exposure. The three specifications of obtaining services by false pretenses increased the appellant's punitive exposure by a total of 18 months. Nevertheless, in our view, this increase did not substantially and unfairly increase the appellant's sentence exposure. See RULE FOR COURTS-MARTIAL 307(c)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Discussion. Most importantly, the military judge stated he considered the three obtaining services under false pretenses specifications to be multiplicitous for sentencing with the three larceny specifications. Record at 40.

Finally, there is no evidence of prosecutorial overreaching or abuse in the drafting of these charges. As conceded by the appellant, the Government did not overreach in charging the obtaining services by false pretenses specifications as evidenced by appellant's pleas of guilt to those crimes. See Appellant's Brief and Assignments of Errors of 6 Feb 2008 at 6. The appellant's claim that we should infer that there has been abuse in drafting the charges is without merit.

Accordingly, we find no unreasonable multiplication of charges in this case.

Post-Trial Delay

In a post-trial delay analysis, the first question to resolve is whether the particular 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)). In this case, the presumption of unreasonable delay established in *Moreno* does not apply because the appellant's court-martial was completed prior to that decision. Nevertheless, given the delay of 1,799 days between the appellant's sentencing on 6 January 2003 and docketing of the case with the court on 10 December 10 2007, we find the delay is facially unreasonable, and a further due process review is necessary. *Id.*

Due process requires the court to balance the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to a timely appeal; and (4) the prejudice to the appellant. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey v. United States (Toohey I)*, 60 M.J. 100, 102 (C.A.A.F. 2004). Each factor must be analyzed and balanced to determine if it favors the Government or the appellant, and no single factor is dispositive. *Moreno*, 63 M.J. at 136. If, upon conducting this analysis, we determine that the appellant's due process right to a 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 (Toohey II)*, 63 M.J. 353, 363 (C.A.A.F. 2006)).

The first factor, the length of the delay, clearly weighs against the Government. Weighing the second factor, the reasons for the delay, we examine each stage of the post-trial period to determine responsibility for the delay and whether any legitimate reasons exist that might explain the delay. *Moreno*, 63 M.J. at 136. The period of delay between the appellant's sentencing (6 January 2003) and the CA's action (13 March 2006) was 1,162 days. The Government explains that this delay was caused by a general lack of manpower due to operational commitments relating to Operation IRAQI FREEDOM. While the court is cognizant of the Government's operational commitments in Iraq, this explanation is in itself inadequate to justify the delay in processing a military judge alone guilty plea court-martial with a 72-page record of trial. The Government's explanation is further undermined by the fact the CA's operational commitments appear not to have arisen until December 2003, almost a year after the appellant's sentencing, and to have ended by 30 April 2005, more than 10 months prior to the CA's action in this case. Nevertheless, little or no action occurred to move the case forward during the time period prior to and following the command's operational commitments. It should be further noted that during the period of operations relating to Operation IRAQI FREEDOM, the command entered into a memorandum of agreement with the Commanding General, Marine Corps Base, Camp Pendleton to act on all post-trial matters for the 1st Marine Division. Nonetheless, little or no action occurred in the form of post-trial processing in this case during that time between December 2003 and April 2005, a period of 17 months.

The period of delay between the CA's action (13 March 2006) and docketing with the court (10 December 2007) was 637 days. This period of delay is unreasonable on its face and the Government fails to provide any explanation for it. This extremely lengthy period of delay is "the least defensible of all" post-trial delays under *Moreno*. *Moreno*, 63 M.J. at 137 (quoting *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990)). We must conclude that the Government was negligent in this case and this period of delay weighs against the Government.

Considering the third factor, there is no evidence that the appellant asserted his right to a timely appeal prior to the filing of his appellate brief. Under the guidance of our superior court, we conclude that this factor weighs against the appellant, but, under the circumstances of this case, not heavily. *Id.* at 138; *United States v. Harvey*, 64 M.J. 13, 36 (C.A.A.F. 2006).

Finally, we consider prejudice to the appellant. The appellant has failed to provide any evidence he was prejudiced in any way by the post-trial delay. In fact, the appellant concedes

he has failed to demonstrate any harm as a result of the delay. See Appellant's Brief at 14. We conclude the appellant did not suffer any actual prejudice due to the post-trial delay. Accordingly, this factor weighs against the appellant.

In determining whether there has been a due process violation, we balance all four *Barker* factors. In the absence of prejudice, we will find a due process violation only if 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." *Toohey*, 63 M.J. 362. The delay in this case is 1799 days, or almost 5 years, much of which is unexplained and cannot be justified. We conclude that the delay is so unreasonable that it undermines the public's perception of the fairness and integrity of the military justice system. Therefore, we find the appellant's right to due process has been violated. However, the lack of prejudice leads us to conclude the error was harmless beyond a reasonable doubt.

We now turn to consider whether the unreasonable delay in this case affects the sentence that should be approved. *Toohey*, 60 M.J. at 103-04, *United States v. Tardiff*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602,605 (N.M.Ct.Crim.App. 2005)(en banc). Considering the factors set out in *Brown*, 62 M.J. at 606-07, we conclude that confinement in excess of eight months should not be approved.

Conclusion

Accordingly, the findings and so much of the sentence as provides for confinement for eight months, reduction to pay grade E-1, forfeiture of all pay and allowances and a bad-conduct discharge are affirmed.

Senior Judge VINCENT and Senior Judge WHITE concur.

For the Court,

R.H. TROIDL
Clerk of Court