

**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.

**JEROME A. HARGROVE
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 200700769
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 04 May 2006.

Military Judge: Maj Devin Winklosky, USMC.

Convening Authority: Commanding Officer, 4th Marine Expeditionary Brigade, II Marine Expeditionary Force, Camp Lejeune, NC.

Staff Judge Advocate's Recommendation: Capt W.J. Schrantz, USMC.

For Appellant: CDR Dale Harris, JAGC, USN.

For Appellee: LT Justin Dunlap, JAGC, USN.

15 April 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VINCENT, Judge:

On 4 May 2006, a military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of violating a lawful general order, wrongful possession of marijuana, and wrongful distribution of marijuana, in violation of Articles 92 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 912(a). The appellant was sentenced to

confinement for 90 days, forfeiture of \$849.00 pay per month for three months, reduction to pay grade E-1, and a bad-conduct discharge. Pursuant to a pretrial agreement, the convening authority (CA) approved the sentence as adjudged, but suspended all confinement in excess of 60 days for twelve months from the date of his action.

The appellant's sole assignment of error alleges excessive post-trial delay. We have reviewed the record of trial, the appellant's brief and assignment of error, and the Government's response. We conclude the post-trial delay in this case does not violate the appellant's due process rights. However, we find this case warrants relief pursuant to our Article 66(c), UCMJ, discretionary authority. Otherwise, we conclude that the findings and sentence are correct in law and in fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. See Arts. 59(a) and 66(c), UCMJ.

Post-Trial Delay

Our superior court has provided a clear framework for analyzing post-trial delay, utilizing the four factors established by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) length of delay; (2) reasons for delay; (3) the appellant's demand for speedy review; and (4) prejudice. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006); see *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005) (citing *Toohey v. United States (Toohey I)*, 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay is "facially unreasonable," we must balance the length of the delay against the other three factors. *Jones*, 61 M.J. at 83. Each factor is weighed and balanced to determine if it favors the appellant or the Government, with no single factor being dispositive. *Moreno*, 63 M.J. at 136.

As the appellant's case was tried prior to the date our superior court decided *Moreno*, the presumptions of unreasonableness that apply to delays in post-trial processing do not apply here. Nevertheless, we find that the 517-day delay between trial and docketing with this court, including 439 days between the date of the CA's action and docketing with this court, is facially unreasonable for a 64-page record of trial, triggering a due process review. See *United States v. Young*, 64 M.J. 404, 408-09 (C.A.A.F. 2007).

In weighing the delay, we note the CA's action was taken on 21 July 2006 and no further action was taken on the appellant's case until it was docketed with this court on 3 October 2007. Accordingly, the first factor weighs in favor of the appellant.

In addressing the second factor, "we look at the Government's responsibility for any delay, as well as any legitimate reasons for the delay, including those attributable to an appellant. In assessing the reasons for any particular delay, we examine each stage of the post-trial period because the reasons for the delay may be different at each stage and different parties are responsible for the timely completion of each segment." *Moreno*, 63 M.J. at 136. We note that the Government does not provide any reason for the delay between the CA's action and docketing with this court, a period of delay long considered "the least defensible of all" post-trial delay. *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990); see also *United States v. Oestmann*, 61 M.J. 103, 104 (C.A.A.F. 2005). Accordingly, we conclude the second factor weighs heavily against the Government.

Considering the third factor, there is no evidence that the appellant asserted his right to a timely appeal prior to his 3 December 2007 appellate brief. On 13 December 2007, the appellant provided this court with an unsworn declaration indicating he had not previously demanded speedy review because, upon release from confinement, he was advised it would take two years to complete his appellate process and, furthermore, he did not know he had the right to request speedy review.

At trial, the appellant was provided an "Appellate and Post-Trial Rights" form and he informed the military judge that he understood all the rights contained in the document. Record at 61; Appellate Exhibit VI. The record of trial also contains the appellant's "Appellate Rights Statement," dated 4 May 2006. Both documents provide detailed information concerning the post-trial and appellate processes, including the appellant's right to counsel. We note neither document indicates how long the post-trial or appellate processes will take to complete.

The appellant's bald assertion that he did not demand speedy review upon his release from confinement because someone told him the appellate process took two years is not persuasive. The appellant could have consulted with his trial defense or appellate counsel and demanded speedy review at any time during the post-trial and appellate processes, but he did not do so

until 3 December 2007. We conclude that this factor weighs against the appellant

We evaluate the fourth factor, prejudice to the appellant, in light of three interests: "(1) prevention of 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." *United States v. Toohey (Toohey II)*, 63 M.J. 353, 361 (C.A.A.F. 2006)(quoting *Moreno*, 63 M.J. at 138 - 39).

We conclude the appellant did not suffer oppressive incarceration or particularized anxiety, and suffered no impairment regarding his defenses or grounds for appeal. Our analysis, however, does not stop there. Our superior court has held that interference with the opportunity to be considered for post-military employment may also constitute prejudice. *Jones*, 61 M.J. at 85; see also *United States v. Allende*, 66 M.J. 142 (C.A.A.F. 2008).

In his unsworn declaration, the appellant asserts that, following his release from confinement and transfer to appellate leave status,¹ he was denied employment by Firestone, a company in Wilson, North Carolina, and West Corporation, a company in Rocky Mount, North Carolina, because he did not possess final discharge papers. He further asserts Saint Augustine College, located in Raleigh, North Carolina, was unable to process his financial assistance application because he did not possess final discharge papers. We note the appellant provided the street address and telephone numbers for both companies and the telephone number for the Admission and Financial Aid offices at Saint Augustine College. The appellant indicated he cannot recall the names of any of the individuals with whom he spoke at either of the two companies or the college.

In order to analyze the appellant's assertion of post-trial employment and educational prejudice, we must review the specific information contained in the appellant's unsworn declaration, as well any supporting documentation from the two prospective employers and Saint Augustine College. We note the Government did not present any evidence to refute the appellant's claims of prejudice. Upon review of all of the evidence presented by the appellant, we must determine whether

¹ The record of trial indicates the appellant was released from confinement and placed on appellate leave in late May 2006.

the appellant has provided "adequate detail to give the Government a fair opportunity to rebut" his assertions. *United States v. Gosser*, 64 M.J. 93, 98 (C.A.A.F. 2006).

In *Gosser*, the appellant, through his defense counsel, alleged he was repeatedly unable to apply for and receive financial aid for college for three years because he did not possess a DD-214. *Id.* Our superior court concluded the appellant failed to demonstrate any prejudice since he did not provide any "substantive evidence from persons with direct knowledge of the pertinent facts, nor was there adequate detail to give the Government a fair opportunity to rebut the contention." *Id.* Addressing the appellant's assertion of prejudice based on his attempts to receive financial assistance in order to attend Saint Augustine College, we note he has failed to establish prejudice. First, he did not provide any evidence that he was admitted, or even possessed the academic qualifications for admittance, into the college. Second, even though he has provided the name of a college and some phone numbers, he has not provided any evidence from the school itself or from any of the school's representatives, concerning the requirement of producing military discharge documentation in order to process financial aid.

Recently, in *Allende*, our superior court addressed a post-trial employment issue where the appellant submitted an affidavit asserting numerous employers would not consider him for employment because he did not possess discharge papers. Our superior court noted the appellant had failed to provide any documentation "from prospective employers regarding their employment practices, nor has he demonstrated a valid reason for failing to do so." *Allende*, 2008 CAAF LEXIS 321 at 10. Similarly, in the instant case, the appellant has failed to provide (1) any written documentation from Firestone or West Corporation regarding their specific employment practices; (2) any written correspondence from officials at either company addressing employment practices; or, (3) any reason for failing to obtain this information.

One day before *Allende* was published, this court, in *United States v. Bush*, _ M.J. _, No. 200700137, 2008 CCA LEXIS 84 (N.M.Ct.Crim.App. 11 Mar 2008), found post-trial employment prejudice based on the detailed information contained in the appellant's declaration and the Government's failure to rebut the assertions. In *Bush*, the appellant submitted a declaration indicating he was denied employment at a Costco store in Huntsville, Alabama, during a specific post-trial timeframe,

because he did not possess his final discharge papers. The appellant also asserted "he was fully qualified to perform the job", since he had previously held the same position at a Costco store in California. *Id.*, 2008 LEXIS 84 at 7. We found that the appellant's declaration had provided "adequate detail" to permit the Government to inquire further in order to verify or dispute the appellant's assertions." *Id.* (footnote omitted). Since the Government made no attempt to refute the appellant's assertions, we further held the appellant "sustained his burden by a preponderance of the evidence that he suffered prejudice due to post-trial delay." *Id.* at 8.

Here, the appellant has provided the names of two companies, their addresses and phone numbers. He has also indicated he sought employment between his release from confinement in late May 2006 and 13 December 2007, the date of his declaration. However, unlike the appellant in *Bush*, he has not provided any evidence, or even asserted, that he possessed the requisite qualifications for either job. Additionally, as we previously noted, the appellant has failed to provide any evidence that he was admitted, or even possessed the academic qualifications for admittance, into the Saint Augustine College.

Therefore, in evaluating the fourth *Barker* factor, we conclude the appellant has failed to demonstrate he was prejudiced by the post-trial delay. This factor weighs against him.

In the absence of any actual prejudice, we will find a due process violation only if, in balancing the other three factors, 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. While the delay in this case is lengthy, and significant portions of the delay are unjustifiable, we conclude it is not so egregious that it undermines the public's perception of the fairness and integrity of the military justice system. We, therefore, find the appellant's right to due process has not been violated. Additionally, even assuming error, the lack of a showing of prejudice would lead us to conclude such error was harmless beyond a reasonable doubt.

We also 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 *Toohy I*, 60 M.J. at 102, and

United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002), and the factors described in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc), we find the post-trial delay in this case impacts the sentence that "should be approved." See Art. 66(c), UCMJ. We will take appropriate action in our decretal paragraph.

Conclusion

Accordingly, the findings of guilty are affirmed. Only so much of the sentence as provides for confinement for 45 days, reduction to pay grade E-1, and a bad-conduct discharge, is affirmed.

Senior Judge WHITE and Judge STOLASZ concur.

For the Court

R.H. TROIDL
Clerk of Court