

**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.**

**COREY A. HOWARD  
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 200700900  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 12 December 2006.

**Military Judge:** Col Jon Gant, USMC.

**Convening Authority:** Commanding Officer, Regimental Combat Team 7, Al Asad, Iraq.

**Staff Judge Advocate's Recommendation:** Col J.R. Ewers, USMC.

**For Appellant:** Capt Sridhar Kaza, USMC.

**For Appellee:** LT Duke Kim, JAGC, USN.

**20 May 2008**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**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, contrary to his pleas, of two specifications of failing to obey an order in violation of Article 91, Uniform Code of Military Justice, 10 U.S.C. § 891. The appellant was sentenced to confinement for two months, forfeiture of \$750.00 pay per month for two months, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

The appellant asserts two assignments of error: (1) a sentence including a bad-conduct discharge is inappropriately severe based on a conviction for two minor military offenses; and (2) that post-trial delay totaling 357 days violated his due process rights.

After carefully reviewing the record of trial, the appellant's brief, and the Government's answer, we find the findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

### **I. Inappropriately Severe Sentence**

The appellant was convicted of two specifications of disobeying orders. He disobeyed an order from Master Gunnery Sergeant (MGySgt) Glenn Helm, United States Marine Corps (USMC) not to draw an M9 pistol from the armory, and he disobeyed an order from Gunnery Sergeant (GySgt) James Stevens, USMC, to fill sandbags to make a smoke pit. The appellant does not dispute the findings of guilty, but argues that the minor nature of the offenses suggests they should have been disposed of through counseling or nonjudicial punishment. He contends his outstanding contributions to the morale of his fellow Marines, and to mission accomplishment, mitigate his conduct and render the punitive discharge inappropriately severe. Appellant's Brief of 8 Feb 2008 at 8. We disagree.

#### **A. Principles of Law**

A court-martial is free to impose any legal sentence it deems appropriate. *United States v. Turner*, 34 C.M.R. 215, 217 (C.M.A. 1964); RULE FOR COURT-MARTIAL 1002, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). "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)). A court of criminal appeals must determine whether it finds the sentence to be appropriate. It may not affirm a sentence that the court finds inappropriate. *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005). Courts of criminal appeals are tasked with determining sentence appropriateness, rather than granting clemency. *Healy*, 26 M.J. 395; R.C.M. 1107(b).

## B. Analysis

### 1. Seriousness of the offenses

#### (a) Order regarding the Pistol.

MGySgt Helm testified he directly ordered the appellant not to draw an M9 pistol from the armory. He gave the order while in uniform in the execution of his office, and further indicated that no private in the Marine Corps was to have a pistol. Record at 115. Shortly thereafter, he asked the appellant if he had drawn a pistol from the armory contrary to his order, and the appellant shook his head in an affirmative fashion. *Id.* at 117.

The appellant argues he did not take the pistol for an improper purpose, and claims he had the "putative" approval of the Company chain of command and the armory staff non-commissioned officer. Thus, he claims, there was nothing inherently "wrong" with his actions, other than disobeying what he perceived was an arbitrary order. Appellant's Brief at 9. We find the appellant's assertions misplaced, as obedience to orders in a combat environment is critical to mission accomplishment.

The appellant states he drew a pistol from the armory for personal protection, after he was told to report to Camp Rawah, a combat outpost in Iraq. The appellant had already been issued an M16 rifle, and was fully qualified to operate that weapon. Record at 239. The appellant was neither qualified nor authorized to carry a pistol. *Id.* The appellant's M16 rifle was sufficient to provide him protection in a combat environment. *Id.*

Further, the "putative" approval to draw the pistol given by the appellant's chain of command was procured as a result of the appellant lying to First Sergeant (1st Sgt) Michael Templeton in order to have his weapons card signed.<sup>1</sup> 1st Sgt Templeton testified to induce him to sign the weapons card for the pistol, the appellant told him that MGySgt Helm, who was away at the time on rest and relaxation, authorized him to draw a pistol. *Id.* at 125. We note the appellant denies speaking with 1st Sgt Templeton about his weapons card, claiming he spoke with 1st Sgt Templeton's clerk Corporal (Cpl) Hall, but admits he did not tell anyone in his chain of command that he received a direct order not to draw an M9 pistol. *Id.* at 241. We find the appellant's "putative" approval from the chain of command was procured through deception, and find that the appellant's disobedience of a direct order, and deliberate circumvention of that order, clearly constitute wrongful conduct. We further find the order

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<sup>1</sup> A weapons card is the size of a credit card and contains the type of weapon to be issued along with the serial number of the weapon. It must be signed by someone with authority to do so, and is then presented to the armory to have the weapon issued. Record at 124.

was not arbitrary as the appellant was not qualified to carry a pistol.

(b) Order to fill the Sandbags.

The appellant admits he did not obey the order of GSgt Stevens to fill the sandbags, but claims he was still attempting to accomplish the mission to build a smoke pit. The appellant argues that Marine Corps doctrine provides subordinates with discretion in how to accomplish the mission.<sup>2</sup> Essentially, the appellant argues he should not be punished for utilizing his discretion in accomplishing the mission. Appellant's Brief at 10.

The appellant was ordered by GSgt Stevens to fill two bundles, or approximately 1000 sandbags, for a smoke pit. Record at 133. The appellant did not fill the sandbags. Instead he procured a HMMWV that had fifteen to twenty sandbags already filled, and then trucked the sandbags to the location where he was directed to build the smoke pit. We find the appellant not only disobeyed the order to fill the two bundles of sandbags, but also failed to build the smoke pit. Thus, contrary to his claim, his attempt to utilize discretion in accomplishing the mission failed miserably. Further, when given a direct and explicit order to perform some particular act, a Marine is not at liberty to substitute some other action that he believes to be better suited to accomplish the perceived mission. Rather, he is obliged to obey the order as given.

## **2. Character of the offender**

Prior to his special court-martial, the appellant received nonjudicial punishment twice, and a summary court-martial conviction. The appellant attempts to minimize his prior discipline as the byproduct of problems resulting from the "toxic" influence of his wife. While there is some evidence to suggest the appellant's wife was not a positive influence in his career, there is also ample evidence to suggest senior enlisted and staff noncommissioned officers within his chain of command spent considerable time and resources counseling and guiding the appellant regarding these issues. There is also evidence that the appellant's failure to follow orders and lack of attention to detail required constant supervision from his superiors, and forced other Marines to fill the gap created by his shortcomings. Record at 279-82.

## **C. Conclusion**

After reviewing the entire record, we find the sentence is appropriate for this offender and his offenses. *Baier*, 60 M.J. at 382; *Healy*, 26 M.J. at 395-96; *Snelling*, 14 M.J. at 268.

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<sup>2</sup> The appellant cites to the Marine Corps Doctrinal Publication (MCDP) for this proposition.

## II. Post-Trial Delay

The appellant asserts that his due process right to timely post-trial review of his case was materially prejudiced by unreasonable delay of 357 days between the date of sentencing and docketing of the case with this court. Our 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 after our superior court's decision in *Moreno*, the presumption of unreasonable delay set out in that decision applies to this case, requiring that we balance the four factors set out in *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005). These four factors are: (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. *Jones*, 61 M.J. at 83 (citing *Toohey v. United States (Toohey I)* 60 M.J. 100, 102 (C.A.A.F. 2004)). Here, since the length of the delay is "facially unreasonable," pursuant to the presumption of *Moreno*, we must balance this consideration against the other three factors. *Id.*

### A. Reason for the Delay

We note the Government provides a reason for the post-trial delay in this case. The Government indicates that shortly after the record was authenticated by the military judge on 31 January 2007, personnel from Legal Service Support Section Iraq (LSSS-Iraq) redeployed to the United States. This redeployment occurred in February 2007. As part of the redeployment, the authenticated record of trial was mailed to the United States, and arrived at Camp Pendleton in March 2007. It was then discovered that the record of trial in this case was intermingled with other records, and required page-by-page reassembling. During the reassembly, it was also discovered that pleas were not entered into the record. There were numerous unsuccessful attempts to retrieve the audio tapes from the court reporter during the time period of March 2007 until 16 July 2007. Ultimately, a draft staff judge advocate's recommendation (SJAR) was completed, revised, forwarded, and signed on 10 August 2007, followed by the CA's action which was signed on 25 September 2007. Convening Authority Memorandum of 25 Sep 2007.

We consider the explanation for the delay in this case reasonable, and note that it addresses and explains the rather lengthy period of time (approximately 192 days) between authentication and production of the SJAR. We also consider that the record of trial comprises two volumes with 343 pages not including prosecution, defense and appellate exhibits, and note this was a contested case. Further, the memorandum explaining

the delay is signed by the Commanding General, I Marine Expeditionary Force, the CA.<sup>3</sup>

We find that this factor weighs only slightly in favor of the appellant considering the Government's plausible explanation regarding the period of delay between authentication and the SJAR.

#### **B. Assertion of the Right to Timely Appeal.**

The appellant concedes he did not assert his right to timely appeal prior to the filing of his brief and assignments of error with this court. We find this factor is neutral.

#### **C. Prejudice**

The appellant claims he was prejudiced because the original CA, Regimental Combat Team 7 (RCT-7), stood down as a unit prior to submission of the appellant's request for clemency. Thus, the appellant argues, the commander who was best able to assess his clemency request was not the commander who took action. Appellant's Brief at 16. We find that the appellant has not demonstrated prejudice.

The appellant submitted his clemency request on 20 August 2007, seven days after he received the SJAR. However, the appellant could have submitted his clemency request any time post trial. R.C.M. 1105(c)(1). If he had done so, his clemency request likely would have been addressed by the commander of RCT-7. We also note that prior to issuing his action, the CA considered the entire record of trial as well as the clemency request of the appellant. CA's Action of 25 Sep 2007 at 2. Further, the appellant has provided no evidence of when RCT-7 stood down, and has also therefore failed to demonstrate that any prejudice arising from RCT-7 not being the CA to act on his clemency request was due to unreasonable post-trial delay in his case. Thus, we find no evidence to support the appellant's claim of prejudice.

We next examine 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." *United States v. Toohey II*, 63 M.J. 353, 362 (C.A.A.F. 2006). Especially in light of the explanation for the delay in this case, we conclude that it is not so egregious that tolerating it would adversely affect 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. We further find the delay does not affect the findings and

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<sup>3</sup> The information provided by the CA in this case is far more useful to the court than was, for example the declaration from a review officer in *United States v. Sands*, No. 200600447, 2006 CCA LEXIS 255, unpublished op. (25 Oct 2006).

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).

### **III. Conclusion**

Accordingly, we affirm the findings and sentence as approved by the CA.

Senior Judge WHITE and Judge VINCENT concur in this opinion.

For the Court

R.H. TROIDL  
Clerk of Court