

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

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

**UNITED STATES OF AMERICA**

**v.**

**BRYAN K. LEDBETTER  
MASTER-AT-ARMS THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 200500009  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 06 April 2004.

**Military Judge:** CAPT Michael Hinkley, JAGC, USN.

**Convening Authority:** Commanding Officer, U.S. Naval Forces  
Marianas Support Activity, Santa Rita, Guam.

**Staff Judge Advocate's Recommendation:** LT S.A. Chiappetta,  
JAGC, USN.

**For Appellant:** LT Darrin MacKinnon, JAGC, USN.

**For Appellee:** Maj James Weirick, USMC.

**10 July 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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**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, pursuant to his pleas, of the following specifications: attempted use of methamphetamine, conspiracy to possess methamphetamine, disrespect to a superior petty officer, resisting apprehension, willful destruction of military property, and unlawful entry<sup>1</sup> in violation of Articles 80, 81,

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<sup>1</sup> The appellant plead not guilty to housebreaking (Charge VI), but guilty to the lesser included offense of unlawful entry. Record at 11, 12. The Government elected to prosecute the housebreaking charge, and the military

91, 95, 108, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 881, 891, 895, 908, and 934. The appellant was sentenced to confinement for five months, reduction to pay grade E-1, forfeiture of \$500.00 pay per month for six months, and a bad-conduct discharge. A pretrial agreement had no effect on the sentence. The convening authority (CA) approved the sentence as adjudged.

This case is now before the court for the third time. On 13 October 2005, the court remanded the record because the staff judge advocate's recommendation (SJAR) had incorrectly advised the CA that the military judge did not recommend clemency.<sup>2</sup> *United States v. Ledbetter*, No. 200500009, unpublished op. (N.M.Ct.Crim.App. 13 Oct 2005). Following a new CA's action, the court remanded the case a second time, holding that the trial defense counsel had failed to take reasonable steps to contact the appellant regarding his desire to submit clemency matters to the CA. *United States v. Ledbetter*, No. 200500009, 2007 CCA LEXIS 314, unpublished op. (N.M.Ct.Crim.App. 14 Aug 2007).

Following a third CA's action, the case is again before the court. The appellant now asserts five assignments or error (AOE).<sup>3</sup> First, he asserts he was denied due process rights by the post-trial delay in his case. Second, he argues his trial defense counsel failed to provide meaningful assistance to prepare him for the providency inquiry. Third, he contends his trial defense counsel was ineffective. Fourth, he claims his pleas were not provident because the military judge did not advise him he was waiving the reasonable doubt standard. Lastly, he asserts his sentence was inappropriately severe.

We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the

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judge found the appellant guilty of only the lesser included offense of unlawful entry. Record at 209.

<sup>2</sup> The military judge recommended suspending the bad-conduct discharge. Record at 229.

<sup>3</sup> The appellant initially assigned a single error alleging a defective SJAR. That error was mooted by the remands for new post-trial processing. When the case was before the court for the second time, the appellant asserted four supplemental assignments of error. Appellant's Brief and Assignments of Error 27 Oct 2006. All of those AOE's, excepting post-trial delay, were decided by our decision in *United States v. Ledbetter*, No. 200500009, 2007 CCA LEXIS 314 (N.M.Ct.Crim.App. 14 August 2007). The one remaining assignment of error alleging post-trial delay is now incorporated into AOE I currently before the court.

substantial rights of the appellant was committed. See Arts. 59(a) and 66(c), UCMJ.

We first address AOE's two and three, followed by AOE five. Lastly, we will analyze AOE I, post-trial delay.<sup>4</sup>

## **I. Meaningful Assistance and Ineffective Assistance of Counsel**

For purposes of analysis, we combine the appellant's second and third AOE's, essentially asserting ineffective assistance by the trial defense counsel. We note that we addressed very similar claims, although supported by somewhat different arguments, in the court's 2007 opinion.

### **A. Meaningful Assistance**

The appellant asserts he was denied the meaningful assistance of his trial defense counsel because: (1) trial defense counsel did not explain the different legal standards that apply to guilty plea and not guilty plea cases; and, (2) the appellant had so little time with his trial defense counsel that she effectively became an agent for the prosecution. Appellant's Brief of 28 Dec 2007 at 12.

In resolving the appellant's first claim we look to the *Ginn* factors, as both appellant and his trial defense counsel submitted "dueling affidavits." *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997).<sup>5</sup> Under the fourth *Ginn* factor, if the affidavit is factually adequate on its face but the appellate filings and the record as a whole "compellingly demonstrate" the improbability of those facts, then the court may discount those factual assertions. *Id.* at 248. The affidavit of LT [W], the appellant's trial defense counsel, and the record of trial, "compellingly demonstrate" the improbability of the appellant's assertion that he was denied the meaningful assistance of his trial defense counsel.

LT W's affidavit indicates she specifically discussed which charges the appellant could plead guilty to, and engaged the appellant in detailed preparation for the providence inquiry. She further explained each element, and let the appellant determine if he met the elements. Affidavit of LT W of 24 Nov

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<sup>4</sup> We find AOE four to be without merit. See *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

<sup>5</sup> The appellant submitted two affidavits: one dated 14 October 2006 and one dated 8 January 2008.

2006 at 1. The appellant's second affidavit agrees that he was prepared for providence with mock questions. Appellant's Affidavit of 8 Jan 2008 at 2. The appellant's plea to a lesser included offense on Charge IV indicates, contrary to his claims, that he understood the difference between pleading guilty and not guilty. Further, the military judge advised the appellant that he had a legal and moral right to plead not guilty and to make the Government prove its case by legal and competent evidence, beyond a reasonable doubt. The appellant affirmatively acknowledged he understood these rights. Record at 13. The military judge also advised the appellant of the elements of the offenses, and that the Government would have to prove the elements beyond a reasonable doubt if he chose to plead not guilty. *Id.* at 20. The appellant was also advised that, by pleading guilty to the charges, there would not be a trial of any kind for those offenses. *Id.* at 14.

Further the appellant plead not guilty to the charge of housebreaking, and guilty to the lesser included offense of unlawful entry. *Id.* at 11, 12. The Government elected to prosecute the housebreaking charge, and failed to prove its case beyond a reasonable doubt. Clearly, the record demonstrates, in theory and practice, that the appellant was advised and understood that the Government had the burden of proving each and every element beyond a reasonable doubt to the charge of housebreaking, and not to the other offenses to which he plead guilty. We find the appellant was adequately advised by his trial defense counsel and the military judge of the applicable legal standards, and waived his rights knowingly and voluntarily.

We find no support for the appellant's claim that LT W became an agent for the prosecution. LT W was detailed to the case in January 2004, and trial was held on 6 April 2004. LT W had almost three months to prepare the case. The affidavits of both LT W and the appellant indicate LT W had multiple discussions with the appellant regarding his options to contest the case, entirely or in part, or to enter into a pretrial agreement. Affidavit of LT W of 24 Nov 2006 at 1; Appellant's Affidavit of 8 Jan 2008. At trial, the appellant told the military judge he had had enough time to discuss the case with his counsel, and believed her advice was in his best interest. Record at 16. The record "compellingly demonstrates" the improbability of the appellant's claim. See also Appellate Exhibit I, ¶ 5.

Further, the fifth *Ginn* factor allows us to decide an appellant's contested claim of ineffective representation when matters within the record of a guilty plea contradict his claims on appeal, unless the appellant sets forth facts that rationally explain why he would make such statements at trial but takes a contrary position on appeal. Here, the appellant completely fails to explain why he expressed satisfaction with his counsel at the trial, and stated that he had adequate time to prepare, but takes a contrary position on appeal. In fact, the pretrial agreement also states that the appellant was satisfied with his detailed defense counsel in all respects, and considered her qualified to represent him. AE I, ¶ 2.

### **B. Ineffective Assistance of Counsel**

We reject the appellant's claim that LT W was ineffective in failing to advise him that by pleading guilty he would waive the reasonable doubt standard, for the reasons already discussed, both in this opinion and in our previous opinion. *Ledbetter*, 2007 CCA LEXIS 314 at 17. We find neither deficient performance nor prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984).

## **II. Inappropriately Severe Sentence**

The appellant asserts his offenses do not warrant the lifelong stigma of a punitive discharge. Appellant's Brief at 31. We disagree.

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 COURTS-MARTIAL 1002, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 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).

The appellant plead guilty to, and was sentenced for, serious offenses, including attempted use of methamphetamine, conspiracy to possess methamphetamine, disrespect, resisting apprehension, destruction of military property and unlawful entry. He presented some evidence indicating that he had an alcohol problem, and that his command would not refer him for treatment due to manpower concerns. Record 215-17. He also presented evidence of solid work performance. Defense Exhibits N and O. The military judge carefully considered this evidence, and recommended suspension of the bad-conduct discharge, in part because the appellant had already spent 91 days in pre-trial confinement, and had a provision in his pretrial agreement waiving his right to a hearing before an administrative discharge board. Record at 228, 229.

We have carefully considered the offenses of which the appellant stands convicted, the evidence he presented in extenuation and mitigation, including his attempts to get treatment for his alcohol problem, as well as the evidence of his good work performance. After considering these factors, we find the approved sentence appropriate for this offender and his offenses.

### **III. Post-Trial Delay**

The appellant asserts he has been denied due process as a result of post-trial delay of nearly four years. In our previous decision, we noted our concern with the following: (1) the 820 days elapsed from the date of sentencing to the time that this case was docketed with this court for the second time; (2) the 156 days elapsed from the date of sentencing to the completion of the SJAR; (3) the 129 days elapsed from the first CA's action to docketing with this court; (4) the 119 days elapsed from the second CA's action to docketing with this court the second time. We also noted there was no explanation for the length of time it took to prepare the SJAR, nor for the time it took to docket the case with this court following the CA's action, a clerical task which our superior court has noted is the "least defensible of all post-trial delays." *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990). We are also aware that the appellant did not demand speedy post-trial review prior to our first remand of the case, and recognize that post-trial delay herein, up to that point, may have benefited the appellant, by providing him the opportunity to rehabilitate himself prior to submitting clemency matters to the CA.

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. 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. We weigh and balance each factor to see 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 unreasonable delay set out in that decision do not apply. Nevertheless, we find the periods of time from the date of sentencing to docketing with this court facially unreasonable, requiring further due process review. *Unite States v. Young*, 64 M.J. 404, 409 (C.A.A.F. 2007).

The second factor directs us to examine the reasons for the delay. The Government offers no reason for the delay, but claims there is no evidence to suggest bad faith or gross negligence contributed to the delay. Further, the Government claims the appellant did not demand speedy review until 27 October 2006. Government Brief of 23 Feb 2008 at 6. Nevertheless, we conclude the second factor weighs against the Government as they bear primary responsibility for post-trial processing.

In considering the third factor, we note the appellant asserted his right to speedy post-trial processing, through his appellate counsel, after this case was remanded by the court for the first time. Appellant's Brief and Supplemental Assignment of Errors of 27 October 2006 at 25. The appellant also asserted his right to speedy post-trial processing in his clemency request to the CA on 19 October 2007, after we remanded the case the second time. LT L.E. Whitehead's Clemency Petition of 19 Oct 2007 at ¶ 3. We also note the delays in this case, including the SJA's failure to mention the military judge's clemency recommendation, and the trial defense counsel's failure to contact the appellant concerning possible clemency, cannot be considered attributable to the appellant. We find that this factor weighs in favor of the appellant.

The fourth factor requires us to evaluate 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. 138-39).

We evaluate the oppressive incarceration sub-factor by looking at "the success or failure of an appellant's substantive appeal. If the substantive grounds for the appeal are not meritorious, an appellant is in no worse position due to the delay, even though it may have been excessive." *Moreno*, 63 M.J. at 139 (citation omitted). Conversely, "if an appellant's substantive appeal is meritorious and the appellant has been incarcerated during the appeal period, the incarceration may have been excessive." *Id.*

Here, the appellant was sentenced to five months of confinement, and was credited with 91 days of pretrial confinement. Thus, the appellant had approximately two months of his adjudged confinement to complete after sentencing. We conclude the appellant would have served all of his confinement prior to the date on which post-trial processing should reasonably have been completed, even if timely completed under the time parameters as articulated in *Moreno*. Therefore, the delay in this case has not resulted in any confinement that otherwise would not have been served. Accordingly, we find that the appellant has suffered no prejudice that could be termed oppressive incarceration as a result of post-trial delay. See *Moreno*, 63 M.J. at 139.

We also conclude the appellant has not demonstrated he has suffered from any particularized anxiety other than that normally associated with prisoners awaiting an appellate decision. Nor do we find the appellant has suffered impairment of his defenses or grounds for appeal as a result of the delay.

We note that the appellant claims specific prejudice in that he has been unable to secure reliable and steady employment because he does not have his discharge certificate (DD-214). The court, however, has consistently found an appellant's mere assertions insufficient to establish prejudice when they lack sufficient detail to establish that the claims are more than speculative and to allow the Government to rebut or validate

them. 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). Here, the appellant has not provided any detail showing he has applied for particular employment and been rejected because of his lack of a DD-214. See *United States v. Allende*, 66 M.J. 142 (C.A.A.F. 2008). We also note the appellant's claim is contradicted by a letter contained in his clemency petition indicating he began work at Puleo's Grille in Knoxville, Tennessee, and eventually was promoted to unit manager. That letter further indicated the appellant left that job to pursue other opportunities. L.E. Whitehead Clemency Petition of 19 Oct 2007 at enclosure (1). Thus, we find no specific prejudice to the appellant.

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." *Toohey II*, 63 M.J. at 362. While the delay in this case was facially unreasonable and unexplained, we conclude that it is not so egregious that it undermines the public's perception of the fairness and integrity of the military justice system. We find the appellant's right to due process has not been violated. Even assuming error, the lack of prejudice would lead us to conclude such error was harmless beyond a reasonable doubt.

Finally, we 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; see also *United States v. Simon*, 64 M.J. 205 (C.A.A.F. 2006). Having considered the post-trial delay in light of our superior court's guidance in *Toohey I*, 60 M.J. at 102, and *United States v. Tardiff*, 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 does not impact the sentence that "should be approved." See, Art. 66(c), UCMJ. Accordingly, we decline to grant such relief in this case.

**Conclusion**

The findings and sentence, as approved, are affirmed.

Senior Judge VINCENT and Senior Judge WHITE concur.

For the Court

R.H. TROIDL  
Clerk of Court