

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

**Before
E.E. GEISER, R.G. KELLY, V.S. COUCH
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**CALVIN E. SMITH
MASTER GUNNERY SERGEANT (E-9), U.S. MARINE CORPS**

**NMCCA 200100458
GENERAL COURT-MARTIAL**

Sentence Adjudged: 24 March 1999.

Military Judge: LtCol R.H. Kohlmann, USMC.

Convening Authority: Commander, Marine Corps Air Bases
Eastern Area, Marine Corps Air Station, Cherry Point, NC.

Staff Judge Advocate's Recommendation: Col J.F. Feltham,
USMC; **Addendum:** Col R. Harris, USMC.

For Appellant: CDR Kelvin Stroble, JAGC, USN; Maj J.S.
Stephens, USMC.

For Appellee: Maj Tai Le, USMC; LT Craig Poulson, JAGC,
USN.

28 February 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

KELLY, Judge:

On 24 March 1999, a military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of nine specifications of indecent acts and one specification of indecent exposure, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to confinement for six months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

On appeal, the appellant submitted three assignments of error (AOEs). On 30 December 2004, a prior panel of this court set aside the CA's action and returned the record to the Judge Advocate General of the Navy because clemency matters submitted by civilian defense counsel (CDC) were not attached to the record and were not referenced in the CA's Action. *United States v. Smith*, No. 200100458, 2004 CCA LEXIS 283, unpublished op. (N.M.Ct.Crim.App. 30 Dec 2004). This effectively mooted two of the original three AOEs.¹

On 8 July 2005, a new staff judge advocate's recommendation (SJAR) was served on substitute defense counsel (SDC). On 18 July 2005, the SDC requested clemency and demanded speedy post-trial review. On 19 September 2005, the SJA issued an Addendum to the SJAR. On 23 September 2005, the CA disapproved and dismissed Specification 8 of the Charge "as a matter of clemency." He approved the sentence as adjudged. On 19 March 2007, an incomplete copy of the record of trial arrived for docketing. The record was rejected. On 30 April 2007, a reconstructed record of trial was docketed.²

The appellant was provided an opportunity to submit additional matters. On 5 May 2007, the appellant raised four supplemental AOEs.³ We have carefully examined the record of trial, the appellant's five AOEs and the Government's response. We agree with the appellant that the 2,959 day delay in this case affects the sentence that should be affirmed. We will take appropriate action in our decretal paragraph. Following our action, we conclude that the findings and the sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Appellate Delay

The appellant was sentenced on 24 March 1999. The CA acted 665 days later. The record was docketed nearly two years after sentencing. The appellant submitted his brief and AOEs on 28 February 2003, roughly two years after having received the

¹ The remaining AOE asserted that the military judge erred when he permitted the trial counsel to comment on the appellant's failure to present certain kinds of evidence.

² On 11 October 2007, this court specified an issue to consider whether Commander, MCAS Cherry Point, North Carolina had authority to take action in this case which was convened by CG, MCABE. The Letter of Succession dated 4 March 2005 and produced by the Government resolved the matter.

³ The appellant asserts that (1) his pleas were improvident because the military judge failed to re-open the providence inquiry to explore a possible mental responsibility defense; (2) his defense counsel was ineffective when he failed to present evidence regarding the appellant's schizophrenia or to request an R.C.M. 706 board; (3) denial of speedy post-trial review; and (4) his pleas to indecent acts were improvident because he never offered a factual predicate establishing that the acts were indecent.

record. The Government filed its answer on 21 October 2003, and this court issued its decision remanding the case to the CA for proper post-trial processing on 30 December 2004 - over 1,399 days after the case was docketed.

A new SJAR was prepared on 7 July 2005, more than seven months after our remand. On 18 July 2005, the appellant, through substitute defense counsel, responded by asserting his right to speedy post-trial review. An Addendum to the SJAR was issued on 19 September 2005, and on 20 September 2005, the appellant again asserted his right to speedy post-trial review. On 23 September 2005, the CA took action - over 9 months after our decision to remand the case.

Despite the appellant's repeated demands for speedy post-trial review, the case was not forwarded to this court until 19 March 2007, which was 542 days (or roughly one and one-half years) after the CA's action following remand. Moreover, due to the missing original record and original documents, the record was not ready for docketing without substantial reconstruction.

This case reflects an aggregate delay of 2,959 days (roughly eight years, one month and six days) from the date of sentencing to the date the case was re-docketed at this court. Although this case was tried prior to the date our superior court decided *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), we find the delay in this case was facially unreasonable, triggering a due process review.

The Government provides no explanation or justification for the excessive delay in processing this 166-page, military judge alone, guilty plea, record of trial. We note that the appellant asserted his right to speedy post-trial review in his responses to the SJAR and Addendum to the SJAR, filed 18 July 2005 and 20 September 2005, respectively. Despite that assertion, the Government subsequently allowed this case to languish for another year and a half before forwarding following the CA's Supplemental Action of 23 September 2003. Our superior court has called delays in forwarding a case to the appellate court following the CA's action "the least defensible of all" post-trial delays. *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990). Moreover, the delay was further exacerbated by the Government's loss of the original record and original documents from the record of trial, and the additional time expended reconstructing the record. This factor heavily weighs in favor of the appellant.

With regard to prejudice, we consider three interests: (1) preventing oppressive incarceration pending appeal; (2) minimizing anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limiting 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*, 63 M.J. 353 (C.A.A.F. 2006)(quoting *Moreno*, 63 M.J. at

138-39)(quoting *Rheuark v. Shaw*, 628 F.2d 297, 303 n.8(5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981))).

In this case, the appellant was sentenced to only six months confinement, and his incarceration was completed long before his case could ever have completed appellate review, even if processed in a more expeditious manner. Further, the appellant has not asserted any particularized anxiety or concern related to the delay distinct from the anxiety and concern normal for persons awaiting appellate decisions. Finally, since the appellant asserts no error that would require rehearing at which he could be prejudiced by the delay in appellate review, neither is the third interest implicated in this case. In light of the foregoing, we find no specific prejudice to the appellant and conclude that delay in this case did not constitute a due process violation. This does not end our inquiry, however.

We next 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. *See Moreno*, 63 M.J. at 129. Having considered the post-trial delay in light of our superior court's guidance in *Toohey* and *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002), and considering the factors we explained in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc), we find that the 2,959 day delay between the sentencing and docketing with this court to be "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. at 363. Such a delay impacts the sentence that "should be approved." *See Art. 66(c)*, UCMJ. We will take appropriate action in our decretal paragraph.

Conclusion

The appellant's remaining AOE's are without merit. *See United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000)(trial counsel comments); *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)(providence inquiry); and *United States v. Edmond*, 63 M.J. 343, 345 (C.A.A.F. 2006)(ineffective assistance of counsel). The approved findings are affirmed. Only so much of the sentence as extends to a bad-conduct discharge and reduction to pay grade E-1 is affirmed. The remainder of the approved sentence is disapproved.

Senior Judge GEISER and Judge COUCH concur.

For the Court

R.H. TROIDL
Clerk of Court