

**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.

**CEDRIC D. SMITH
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 200601392
GENERAL COURT-MARTIAL**

Sentence Adjudged: 16 September 2005.

Military Judge: Maj D.S. Oliver, USMC.

Convening Authority: Commanding General, 3d Marine
Aircraft Wing, MCAS Miramar, CA.

Staff Judge Advocate's Recommendation: Col C.J. Woods,
USMC; **SJAR Addendum:** LtCol V.A. Ary, USMC.

For Appellant: CDR Kelvin Stroble, JAGC, USN; Maj R.R.
Sanchez, USMC.

For Appellee: LCDR I.K. Thornhill, JAGC, USN; LCDR J.A.
Thomas, JAGC, USN; LT J.E. Dunlap, JAGC, USN; LT J.M.
Hudson, JAGC, USN.

27 May 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VINCENT, Judge:

A general court-martial, consisting of officer and enlisted members, convicted the appellant, contrary to his pleas, of three specifications of making a false official statement and eight specifications of wrongfully making a check without sufficient funds, in violation of Articles 107 and 123a, UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. §§ 907 and 923a, respectively.

The appellant was sentenced to confinement for 1 year, forfeiture of all pay and allowances, reduction to pay grade E-1 and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

The appellant submitted two assignments of error. In his initial brief, he asserts his 1 December 2004 statement to law enforcement authorities was involuntary because it was the product of an unlawful inducement, and, accordingly, Specifications 1 and 2 of Charge I (false official statements) should be dismissed. In a supplemental assignment of error brief, he contends he was materially prejudiced by the post-trial delay of 11 months and 10 days between the announcement of sentence and the convening authority's action.

We have carefully reviewed the record of trial, the appellant's initial and supplemental briefs, and the Government's responses. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Facts

On 14 October 2004, the appellant filed a written criminal complaint with Sergeant (Sgt) M. E. Valadez, USMC, a criminal investigator with the Criminal Investigation Division (CID) at Marine Corps Air Station, Yuma, Arizona. Specifically, the appellant alleged several of his Navy Federal Credit Union (NFCU) personal checks had been stolen and fraudulently negotiated at the Army and Air Force Exchange Service (AAFES) facility at Hickham Air Force Base, Hawaii in May 2004, and two additional NFCU personal checks had been stolen and fraudulently negotiated at a Sam's Club in Hawaii. The appellant's statement indicated that, although he was stationed in Hawaii at the time the checks were uttered, he did not write these checks since he was on vacation in Jamaica, and now AAFES was garnishing his pay. Prosecution Exhibit 1.

On 1 December 2004, after investigating the appellant's criminal complaint, Sgt Valadez called the appellant in for a follow up conversation. After being apprised of his Article 31(b), UCMJ, rights, the appellant made a second written statement to Sgt Valadez and Staff Sergeant (SSgt) Tremaine Jackson, USMC, another CID criminal investigator. The appellant admitted he knew his 14 October 2004 statement alleging that someone stole and forged his personal checks was false, and he

knew it was false when he made the statement. The appellant admitted that he wrote the checks, that none of his personal checks had been stolen, and that he had filed the false report because he owed a large amount of money. Finally, the appellant apologized to his command and CID for filing a false report.
PE 2.

On 20 January 2005, the appellant made a third written statement to clarify his 1 December 2004 statement. Prosecution Exhibit 3. In this third statement, the appellant said that he wrote the checks in May 2004 to AAFES, but that at the time he made his 14 October 2004 statement, he believed the checks written to AAFES were stolen. He stated AAFES had initially informed him that the checks that had resulted in the garnishment of his pay had been written in June 2004, at a time when he was moving from Hawaii to Yuma, Arizona. In actuality, the checks had actually been written in May 2004.

Suppression of 1 December 2004 Statement

In his first assignment of error, the appellant asserts the military judge erred in admitting Prosecution Exhibit 2 into evidence because his statement was involuntarily induced by means of a promise of leniency. Consequently, the appellant contends two of the false official statement offenses, Specifications 1 and 2 of Charge I, should be dismissed. We disagree.

Article 31(d), UCMJ, prohibits the admission into evidence of any statement that is "obtained . . . through the use of coercion, unlawful influence, or unlawful inducement" *United States v. Ellis*, 57 M.J. 375, 378 (C.A.A.F. 2002)(quoting Art. 31(d), UCMJ). An involuntary statement made by an accused generally may not be received into evidence if the accused makes a timely motion to suppress the evidence. MILITARY RULE OF EVIDENCE 304(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) Once the accused challenges the voluntariness of his statement at trial, the Government has the burden to establish the admissibility of the statement by a preponderance of the evidence. MIL. R. EVID 304(e).

We conduct a *de novo* review of the voluntariness of a confession. *United States v. Cuento*, 60 M.J. 106, 108 (C.A.A.F. 2004)(quoting *United States v. Bubonics*, 45 M.J. 93, 94-95 (C.A.A.F. 1996)); *Ellis*, 57 M.J. at 378. In determining voluntariness, "[t]he necessary inquiry is whether the confession is the product of an essentially free and

unconstrained choice by its maker. If, instead, the maker's will was overborne and his capacity for self-determination was critically impaired, use of his confession would offend due process. *Cuento*, 60 M.J. at 108 (quoting *Bubonics*, 45 M.J. at 94-95). This determination is made by examining "'the totality of all the surrounding circumstances'" of the confession, including "'both the characteristics of the accused and the details of the interrogation.'" *United States v. Ford*, 51 M.J. 445, 451 (C.A.A.F. 1999)(quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)).

The appellant's motion to suppress was thoroughly litigated at trial. Sgt Valadez, SSgt Jackson, and the appellant testified extensively concerning the appellant's numerous interviews and statements. The military judge prepared written essential findings of fact, conclusions of law, and denied the motion to suppress. Record at 92; Appellate Exhibit IX.

During the motion session, Sgt Valadez testified that he investigated the appellant's 14 October 2004 criminal complaint and suspected the appellant had provided a false statement concerning stolen checks. Record at 16, AE IX, at 2. Therefore, prior to questioning the appellant on 1 December 2004, he provided Article 31(b), UCMJ, rights warnings to the appellant. The appellant waived his rights and admitted he had signed and registered the checks he previously indicated were stolen. *Id.*

The appellant indicated in his 1 December 2004 written statement that he made his statements based on his "own free will, and without any threats or promises having been extended to" him. PE 2 at 1. However, at trial and on appeal, he alleges that, although no specific promises or threats were made by the investigators, SSgt Jackson made promises of leniency if the appellant told the truth. We agree with the military judge's finding of fact that SSgt Jackson encouraged the appellant to tell the truth and, furthermore, this encouragement "did not overbear the [appellant's] will to resist" AE IX at 3. While SSgt Jackson's advice to the appellant concerning the general potential benefits of telling the truth may have contributed to his confession, we believe this did not transform appellant's otherwise voluntary confession into an involuntary one. *Ellis*, 57 M.J. at 379 (citing *Colorado v. Connelly*, 479 U.S. 157, 164 (1986)).

Upon our careful review of the record, we are satisfied the military judge properly applied the law governing the admissibility of confessions and admissions. We hold the military judge's essential findings of fact and conclusions of law are supported by the evidence at trial, are not clearly erroneous, and adopt them as our own. AE IX. We conclude, based upon the totality of all the surrounding circumstances, that the appellant's statement provided to criminal investigators on 1 December 2004 was voluntary and, therefore, admissible. Accordingly, we hold that PE 2 was properly admitted

Post Trial Delay

The appellant alleges he was prejudiced by the 344-day delay between trial and the CA's action. Specifically, he contends the delay denied him the opportunity to receive clemency from the Navy Clemency and Parole Board (NC&PB) before the conclusion of his one year sentence. In support of his allegation, the appellant notes a 26 January 2006 recommendation by the Camp Pendleton Base Brig's Parole and Clemency Board (Disposition Board) that appellant be granted clemency in the form of a three month reduction in his sentence.

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 unreasonable delay that apply to post-trial processing by this court do not apply here. Nevertheless, we find that the 439-day delay between trial and docketing with this court, including 344 days between trial and the date of the CA's action, is facially unreasonable, triggering a due process review. See *United States v. Young*, 64 M.J. 404, 409 (C.A.A.F. 2007).

In weighing the length of the delay, we specifically note the 439-day delay between trial and docketing with this court, including 344 days between trial and the date of the CA's action, as well as the 95-day delay between the CA's action and docketing with this court. Accordingly, the first factor weighs in favor of the appellant.

As we analyze 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 offer any reason for this delay and, accordingly, we conclude that the second factor weighs heavily against the Government.

Considering the third factor, we note the appellant did not specifically assert his right to timely appeal in his third clemency request, which was submitted to the CA on 30 March 2006.¹ His trial defense counsel did however, inform the CA in the third clemency request that "the slow pace of the appellate review process" has denied the appellant the opportunity to receive clemency consideration from the NC&PB.² Capt D. M. Steinberg's clemency letter of 30 Mar 2006 at ¶ 2(c). In support of this request, the trial defense counsel provided the Camp Pendleton Base Brig Parole and Clemency Board's 26 January 2006 recommendation to award clemency in the form of a three-month reduction of the appellant's confinement period. *Id.* at enclosure (2).

Although the appellant did not specifically assert his right to timely appellate review on 30 March 2006, he provided the CA a detailed reason why timely post-trial processing might afford him the opportunity to receive clemency consideration from the NC&PB. Accordingly, we have determined this factor weighs in favor of the appellant.

¹ The appellant filed clemency requests on 16 September 2005 and 12 January 2006. He also filed a fourth clemency request on 6 July 2006. The CA denied all four requests.

² The trial defense counsel informed the CA that NC&PB required a copy of the appellant's record of trial (ROT) in order to approve clemency and further indicated he had not received a copy of the ROT. Although the ROT was authenticated by the military judge on 26 March 2006, it appears the staff judge advocate did not provide the ROT to the appellant's trial defense counsel until 22 Aug 2006.

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).

The "oppressive incarceration" sub-factor is directly related to 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 oppressive." *Id.* In this case, since we have determined the appellant's substantive ground for appeal is not meritorious, he has not suffered from oppressive incarceration. We also conclude he did not suffer from any particularized anxiety, and suffered no impairment regarding his defenses or grounds for appeal.

Our analysis of prejudice, however, does not stop there. We have previously held that when an appellant alleges post-trial delay between trial and the convening authority's action adversely affects parole and/or clemency considerations, he must demonstrate "verified or verifiable prejudice." *United States v. Agosto*, 43 M.J. 853, 854 (N.M.Ct.Crim.App. 1996). An appellant's claim that this delay "deprived him of an opportunity **to be considered** for parole, does not establish that, but for the delay, he would have been **granted** parole." *Agosto*, 43 M.J. at 854 (emphasis in original).

Secretary of the Navy Instruction (SECNAVINST) 5815.3J of 12 June 2003 governs actions by the NC&PB. To be eligible for consideration for clemency or parole by the NC&PB, the offender's sentence must be approved by a convening authority. Therefore, the NC&PB could not have acted upon the Disposition Board's clemency recommendation in the appellant's case until the convening authority acted.

It is impossible to ascertain whether the NC&PB would have followed, rejected or modified the Disposition Board's recommendation. The Disposition Board's recommendation, and the

convening authority's denial of the appellant's numerous clemency requests, are two of many factors considered by the NC&PB. *Id.* at ¶ 407. It is too speculative to determine whether the NC&PB would have granted clemency based on the record before us.

Since the appellant has failed to show that he had a reasonable likelihood of receiving clemency from the NC&PB, rather he has merely speculated he might have received clemency, we find that there is no prejudice shown in this case. 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." *Toohey II*, 63 M.J. at 362. While the delay in this case between sentencing and the convening authority's action exceeds the *Moreno* timeline, 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; 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. 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 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

Accordingly the findings and sentence in this case are affirmed.

Senior Judge WHITE and Judge STOLASZ concur.

For the Court

R.H. TROIDL
Clerk of Court