

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

**Before
D.E. O'TOOLE, F.D. MITCHELL, J.F. FELTHAM
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**PIONELL THOMAS, JR.
SEAMAN (E-3), U.S. NAVY**

**NMCCA 200500939
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 02 April 2004.

Military Judge: CAPT D.M. Hinkley, JAGC, USN.

Convening Authority: Commanding Officer, USS FRANK CABLE
(AS 40).

Staff Judge Advocate's Recommendation: LT W.A. Miani,
JAGC, USN.

For Appellant: Major Jeffrey S. Stephens, USMC; LT
Kathleen L. Kadlec, JAGC, USN.

For Appellee: Major Kevin C. Harris, USMC.

19 June 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FELTHAM, Senior Judge:

This case is before us for the second time. On 2 April 2004,¹ a military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of larceny of a shipmate's ATM card and \$4,205.00 through use of the card at ATM machines, in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. The appellant was sentenced to confinement for 45 days, a bad-conduct discharge, and reduction to pay grade E-1. The military judge recommended that the

¹ Our original decision mistakenly states that the sentence was adjudged on 15 June 2004, instead of the correct date of 2 April 2004.

convening authority suspend the punitive discharge based on a pretrial agreement (PTA) provision waiving the appellant's right to a hearing before an administrative discharge board in the event his command processed him for an administrative discharge. The PTA had no effect on the sentence, and the convening authority ultimately approved the sentence as adjudged.

This court affirmed the trial court's findings and sentence in the first review of the case. *United States v. Thomas*, No. 200500939, unpublished op. (N.M.Ct.Crim.App. 30 Aug 2006). We determined that the 467-day post-trial delay was facially unreasonable for a 70-page record when the appellant demanded speedy trial review in his clemency request, which was submitted 235 days after trial and 232 days before the original docketing at this court.² The Government offered no justification for the post-trial delay. Although we found that the appellant was "impaired in his ability to search for and apply for jobs by the dilatory processing of this case," we did not find that the harm he suffered amounted to "legally cognizable prejudice." *Id.* at 2.

On 30 November 2006, the appellant petitioned the United States Court of Appeals for the Armed Forces (CAAF), our superior court, for review. On 27 April 2007, CAAF set aside our initial decision³ and returned the record of trial to the Judge Advocate General for remand to this court for consideration of the granted issue:

WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED BY FINDING THAT ECONOMIC HARM TO APPELLANT DUE TO POST-TRIAL DELAY IN HIS CASE WAS NOT "LEGAL PREJUDICE" BASED UPON THIS COURT'S DECISION IN UNITED STATES v. MORENO.

² In his clemency request of 23 November 2005, the appellant informed the convening authority that he was having difficulty securing employment to support his family because employers required a prior military applicant to have his discharge papers, specifically a Department of Defense Form 214 (DD-214). The appellant stated that he was only able to find short-term or temporary jobs to support his family. He requested that the convening authority disapprove the bad-conduct discharge and, instead, process him for an Other than Honorable Discharge (OTH), since he had already waived his right to a hearing at an administrative discharge board. The appellant explained that receiving an OTH instead of a punitive discharge would allow him to receive a DD-214 more quickly and, therefore, allow him to secure permanent employment. The appellant's detailed defense counsel also requested that the convening authority disapprove the appellant's punitive discharge to accelerate appellate review of his case.

³ When our superior court sets aside the decision of a Court of Criminal Appeals and remands for further consideration, it does not question the correctness of all that was done in the earlier opinion announcing that decision. *United States v. Ginn*, 47 M.J. 236, 238 n.2 (C.A.A.F. 1997). "All that is to be done on remand is for the court below to consider the matter which is the basis for the remand and then to add whatever discussion is deemed appropriate to dispose of that matter in the original opinion." *Id.* The review process "does not permit or require starting anew or setting aside action favorable towards an accused." *Id.*

Specifically, our superior court ordered this court to consider the granted issue in *United States v. Jones*, 61 M.J. 80 (C.A.A.F. 2005) and *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997). Thereafter, Article 67, UCMJ, 10 U.S.C. § 867 (2000) will apply.

On 4 May 2007, the case was again docketed at this court. On 19 July 2007, the appellant responded that he would not submit further pleadings or documentation. We are mindful that the case has now been docketed at this court for over a year, resulting in further delay in completing appellate review and precluding issuance of a Department of Defense Form 214 (DD-214).

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 the delay; (2) reasons for the 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 *Jones*, 61 M.J. at 83 (citing *Toohey v. United States [Toohey I]*, 60 M.J. 100, 102 (C.A.A.F. 2004)). When 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. In our initial opinion, this court found that the first three Barker factors weighed in the appellant's favor.

For the fourth factor in our initial decision, we evaluated prejudice to the appellant, in light of these 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 found that the appellant failed to demonstrate any of the three interests for legally cognizable prejudice. Our analysis should not have ended there. We are required to review for prejudice based on interference with the appellant's opportunity to be considered for post-military employment. *Jones*, 61 M.J. at 85; see also *United States v. Allende*, 66 M.J. 142 (C.A.A.F. 2008).

In an unsworn declaration, the appellant asserts that following his release from confinement and transfer to appellate leave status, four employers declined to consider him for employment in the period of May-June 2005 because he did not have his discharge papers (DD-214). The appellant claims that in May 2005, at a job fair at the Holiday Inn in Beaumont, Texas, he applied for a job as a roustabout with Tyco Offshore in Houston,

Texas. The job duties advertised were very similar to his former Navy duties as a deck seaman. The job paid approximately \$13.85 an hour, and provided extensive medical and dental benefits following employment of over 90 days. The potential employee would have been required to work 84 hours a week; the work schedule would have been three weeks on and three weeks off. The appellant claims he took and passed a required written test, administered by Tyco, consisting of 150 questions. One of the job application forms he was required to fill out asked about any prior military service. The appellant claims he explained to the people in charge that he had prior military service, but did not have a DD-214. The appellant alleges that Tyco Offshore personnel advised him that based upon his former U.S. Navy experience, the company would offer him a job if he had a DD-214. However, because he did not provide a DD-214, it declined to hire him.

The appellant further asserts in his declaration that in June 2005, he attended the Texas Workforce Center in Beaumont, Texas, where he was not permitted to apply for three jobs because he did not have his DD-214. One of the jobs offered was at a refinery, where the duties included painting tanks at a rate of payment of approximately \$13.50 an hour. The other two job openings were with Exxon and Motiva. Both companies were seeking workers to install insulation for approximately \$15.00 an hour. All three potential employers required former military applicants to possess a DD-214. Declaration of Appellant of 4 Dec 2005.

The Government has made no effort to rebut the information in the appellant's declaration. "If the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers an affidavit that expressly agrees with those facts, the court can proceed to decide the legal issue on the basis of those uncontroverted facts." *Ginn*, 47 M.J. at 248. In the present case, the appellant provided specific names of unemployment agencies and potential employers, with detailed descriptions of the positions he was offered, or that he would have qualified to apply for, if he had received his discharge papers, specifically a DD-214. However, we find that the appellant failed to offer sufficient evidence to substantiate his claim. *See Allende*, 66 M.J. at 142.

In *Jones*, our superior court determined that the appellant's submission of four unrebutted declarations from officials of a potential employer substantiated his claim that he was prevented from employment because of his lack of a DD-214. More recently, our superior court found that the assumed error from post-trial delay was harmless when an appellant provided his own affidavit, alleging that four employers declined to consider him for employment because he had not been able to show a DD-214. *Allende*, 66 M.J. at 142. In *Allende*, our superior court did not find prejudice because the appellant did not provide "documentation from potential employers regarding their

employment practices, nor [had] he otherwise demonstrated a valid reason for failing to do so." *Id.* at 145.

In the present case, the appellant has not provided evidence from any potential employers or employment agencies indicating that prospective employers required a DD-214 from the applicant for those particular positions. Moreover, the appellant has not given a valid reason for failing to provide such documentation.

Therefore, in re-evaluating the fourth *Barker* factor, we conclude that 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 is lengthy, and significant portions of the delay are unjustifiable, we conclude it is not so egregious as to undermine the public's perception of the fairness and integrity of the military justice system. Therefore, we find that 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 *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, 606-07 (N.M.Ct.Crim.App. 2005)(en banc), we find that the post-trial delay in this case does not impact the sentence that "should be approved." *See* Art. 66 (c), UCMJ.

Conclusion

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

Chief Judge O'TOOLE and Senior Judge MITCHELL concur.

For the Court

R.H. TROIDL
Clerk of Court