

**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.

**JASON A. WEBER
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 200700357
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 12 December 2000.

Military Judge: Col Rodger Harris, USMC.

Convening Authority: Commanding Officer, Marine Wing
Support Squadron 373, Marine Wing Support Group 37, 3d MAW,
MarForPac, San Diego, CA.

Staff Judge Advocate's Recommendation: Col W.D. Durrett,
Jr., USMC.

For Appellant: LT Anthony Yim, JAGC, USN.

For Appellee: LCDR Frank L. Gatto, JAGC, USN; Capt G.S.
Shows, USMC.

20 May 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

KELLY, Judge:

Pursuant to his pleas the appellant was convicted by a military judge sitting as a special court-martial of unauthorized absence terminated by apprehension, in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886. The appellant was sentenced to 60 days confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the findings and sentence as adjudged, but suspended all confinement in excess of 45 days pursuant to the terms of a pretrial agreement.

We have examined the record of trial, the appellant's brief and assignment of error alleging denial of speedy post-trial review and the Government's answer. We find merit in the appellant's assignment of error and will take corrective action in our decretal paragraph. After our corrective action, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantive rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was sentenced on 12 December 2000 at Marine Corps Air Station Miramar, California. The 36-page record of trial was authenticated on 3 January 2002, a delay of 387 days. The staff judge advocate's recommendation (SJAR) was prepared on 7 February 2002 and served on the trial defense counsel on 22 February 2002. The SJAR noted a substantial delay in the processing of the case due to manning issues and the fact that the record of trial was inadvertently misplaced. SJAR of 7 Feb 2002 at 3. The appellant's clemency submission of 4 March 2002 asserted prejudice from the delay, claiming generically that he was unable to secure favorable matters from his former command as many members had moved to different assignments. The appellant provided no specific details.

Additionally, the appellant asserted that the delay affected his ability to seek employment in the civilian community. Again, the appellant provided no specific details in support of his generic claim. The convening authority approved the sentence on 7 March 2002, 450 days after sentencing. The case again languished until it was received by the Navy-Marine Corps Appellate Review Activity (NAMARA) on 6 April 2007, 2,306 days after sentencing and 1,856 days after the convening authority acted. It was docketed with this court on 1 February 2008, some 2,608 days after sentencing.

Post-Trial Delay

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. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004) (hereinafter *Toohey I*)). If the length of the delay is not unreasonable, further inquiry is not necessary. If we conclude that the length of the delay is "facially unreasonable," however, we must balance the length of the delay against the other three factors. *Id.*

In the instant case, there was a delay of 2,608 days from the date of trial to the date this case was docketed with this court. We find this delay to be facially unreasonable. *See*

United States v. Moreno, 63 M.J. 129 (C.A.A.F 2006). Such a substantial delay triggers a due process review.

With respect to the second factor, the Government acknowledges that it failed to track and ultimately misplaced the appellant's 36-page guilty plea record of trial for a substantial period of time. With respect to the third factor, we note that the appellant asserted his right to speedy post-trial review in his clemency petition of 4 March 2002, almost six years before his case was docketed with this court.

With respect to the fourth factor, prejudice to the appellant, we evaluate prejudice in the light of 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, 361(C.A.A.F. 2006)(hereinafter *Toohey II*)(quoting *Moreno*, 63 M.J. at 138-39).

The appellant was sentenced to 60 days confinement and was released long before even the most energetic and proactive post-trial processing could have been completed. He has not asserted that he suffers any particularized anxiety and concern awaiting the outcome of his appeal distinct from that any other person awaiting the outcome of an appeal suffers. No rehearing has been ordered and therefore his defense at a rehearing was not impaired. With regard to the appellant's generic statements of prejudice to his ability to obtain materials from prior command members due to their relocation and his generalized claim of employment prejudice, we find that the appellant has provided insufficient specific information to permit the Government to investigate and potentially rebut his claims. We, therefore, find no specific prejudice to the appellant.

Our finding of no specific prejudice to the appellant does not end our inquiry, however. What is apparent in this case is a "delay 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. We conclude that despite the fact the appellant has failed to show specific prejudice, taking 2,608 days to docket a 36-page record of trial works to diminish the public's perception of the fairness and integrity of the military justice system. Therefore, our consideration of the four factors announced in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), leads us to conclude that the appellant was denied his due process right to speedy review and appeal.

"Having found a due process violation, we now test for harm and prejudice." *United States v. Haney*, 64 M.J. 101, 108 (C.A.A.F. 2006)(citing *United States v. Harvey*, 64 M.J. 13, 25 (C.A.A.F. 2006)). Here, there is no evidence of any specific harm resulting from the delay. There is no appellate issue that

would afford the appellant relief, no oppressive incarceration resulting from the delay, no particularized anxiety caused by the delay, and no rehearing has been ordered which might be impacted by excessive post-trial delay. Thus, we conclude that the appellant has not suffered particularized prejudice from the delay in his case. We, therefore, hold that the inexcusable delay in processing this case was harmless beyond a reasonable doubt.

We will also consider the post-trial delay in this case pursuant to our authority under Article 66(c), UCMJ, and our superior court's guidance in *Toohey I*, 60 M.J. at 101-02 and *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002), and the factors articulated in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc)). The facts in this case demonstrate an extreme lack of professional oversight of the post-trial process by the staff judge advocate's office at the Marine Corps Air Station Miramar, California. Their inexcusable carelessness must be balanced against all of the factors in the record before us, including the crime of which the appellant stands convicted and that portion of the appellant's military record entered into evidence, to include the appellant's prior summary court-martial for unauthorized absence, and the sentence approved by the convening authority. Considering the factors as articulated in *Toohey I*, *Tardiff* and *Brown*, we hold that the delay in this case does affect the sentence that "should be approved." Art. 66(c), UCMJ.

Conclusion

The findings are approved. That part of the approved sentence extending to a bad-conduct discharge is approved. The remainder of the approved sentence including confinement and reduction in rate is disapproved.

Senior Judge GEISER and Judge COUCH concur

For the Court

R.H. TROIDL
Clerk of Court