

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

**Before
E.S. WHITE, F.D. MITCHELL, R.E. VINCENT
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**TIMOTHY D. WEBB
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 200101957
GENERAL COURT-MARTIAL**

Sentence Adjudged: 02 September 2005.
Military Judge: LtCol Paul McConnell, USMC.
Convening Authority: Commander, Marine Corps Base,
Quantico, VA.
Staff Judge Advocate's Recommendation: LtCol J.G. Baker,
USMC.
For Appellant: LCDR Kelvin Stroble, JAGC, USN.
For Appellee: Maj Kevin Harris, USMC.

27 March 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WHITE, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of sodomy on divers occasions with a male under the age of 16 years, committing indecent acts on divers occasions with the same individual, and the receipt and possession, in violation of 18 U.S.C. §§ 2252A(a)(2) and (a)(5), of child pornography. His conduct violated Articles 125 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925 and 934. On 9 May 2000, the appellant was sentenced to 10 years confinement, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the adjudged sentence and, pursuant to a pretrial agreement, suspended

confinement in excess of 8 years for 12 months from the date of trial.

On 18 March 2005, this court set aside the findings of guilty to Specifications 2 and 3 of Charge II (possession and receipt of child pornography) pursuant to *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) and *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003). *United States v. Webb*, No. 200101957, 2005 CCA LEXIS 87, unpublished op. (N.M.Ct.Crim. App. 18 Mar 2005). As a remedy for unreasonable post-trial delay up to that point, the court dismissed Specifications 2 and 3 of Charge II; the court affirmed the remaining findings of guilty. The court also found the civilian defense counsel had been ineffective during the presentencing phase of the trial, and set aside the sentence. The record was returned to the Judge Advocate General for remand to an appropriate CA with a rehearing on sentence authorized. *Id.* At a rehearing on sentence, on 2 September 2005, a military judge sentenced the appellant to 7 years confinement, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge.

The CA acted on the new sentence on 10 March 2006 and the case was re-docketed with this court on 10 May 2006. On 10 July 2006, this court set aside the CA's action as ambiguous, and returned the record for a new CA's action. On 25 September 2006, the CA acted anew on the case, and the record was re-docketed with the court on 18 October 2006. On 4 April 2007, the court again set aside the CA's action as ambiguous and returned the record for yet another CA's action. On 26 June 2007, a fourth CA's action approved a sentence of 3 years, nine months confinement, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge.¹ The case was again docketed with this court on 12 July 2007.

We have examined the record of trial, the appellant's brief and his sole assignment of error² that he has been denied due process by the unreasonable post-trial delay in processing his case, and the Government's answer. We have previously affirmed the findings. We now conclude the post-trial delay in this case violates due process, and take corrective action in our decretal paragraph. After taking corrective action, we find the sentence is 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.

¹ The pretrial agreement required the convening authority to mitigate the adjudged dishonorable discharge to a bad-conduct discharge and to disapprove all confinement over 4 years. The further reduction of confinement to 3 years, 9 months was an act of clemency by the convening authority.

² Appellate defense counsel submitted notice on 23 August 2007 that the appellant stood on his brief of 8 November 2006, and had no additional assignments of error to assert.

In March 2005, this court found post-trial delay requiring remedial action, and dismissed two specifications. That action remedied the delay up to that point. We, therefore, focus on the delay since March 2005.

"[I]n cases involving claims that an appellant has been denied his due process right to speedy post-trial review and appeal, we may look initially to whether the denial of due process, if any, is harmless beyond a reasonable doubt." *United States v. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006). The appellant has not suffered oppressive incarceration pending the resolution of his appeal.³ His ability to defend himself has not been impaired by the delay. Nor has he demonstrated anxiety or concern beyond that normal for people awaiting appellate decisions.

The appellant did submit an unsworn statement alleging he lost a well-paying job when recalled to active duty for the rehearing, and that the delay in his release from military confinement delayed the start of his probation pursuant to the sentence of a Virginia state court.⁴ This statement, however, was not accepted by the court, as it is neither sworn nor made under penalty of perjury. Even if the court were to consider this statement, it would fail to demonstrate specific prejudice. It does not contain sufficient detail to permit the Government to verify or rebut its claims,⁵ and it speculates about what actions the Navy Clemency and Parole Board might have taken if the appellant had received a lesser sentence at his original trial. We conclude there was no prejudice to the appellant from the post-trial delay in this case.

Nevertheless, we may still find a due process violation when, balancing the length of the delay, the reasons for the delay, and whether the appellant had asserted his right to speedy post-trial review, "the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness

³ The appellant was released from confinement sometime before this court's decision of 18 March 2005.

⁴ The appellant was convicted on 27 January 2000, in the Circuit Court of Prince William County, Virginia, of sodomy in violation of Virginia Code § 18.2-361. Prosecution Exhibit 23 at 2. That charge concerned one of the acts of sodomy included in the sole specification under Charge I at the appellant's general court-martial. On 5 April 2000, the appellant was sentenced to five years incarceration, with four years, six months suspended. The court placed the appellant on supervised probation for five years, beginning upon release from incarceration. *Id.* at 3.

⁵ See *United States v. Gosser*, 64 M.J. 93, 98 (C.A.A.F. 2006) (appellant failed to demonstrate prejudice where no substantive evidence from persons with direct knowledge of pertinent facts, nor adequate detail to give Government fair opportunity to rebut contentions); *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990) (claims of prejudice must be verified or verifiable; burden is on appellant to demonstrate prejudice).

and integrity of the military justice system." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006).

Between this court's 18 March 2005 decision and the final re-docketing of the case with the court, 846 days -- or 2 years, 3 months, and 24 days -- elapsed. It took 418 days, or over 1 year, to complete the sentence rehearing and return the record to this court. Within that time, it took 142 days to authenticate the 59 page record of the rehearing. After the case was returned to this court, another 199 days elapsed during remands to correct ambiguous CA's actions.⁶ The Government's lackadaisical efforts and repeated lack of attention to detail in the post-trial processing of this case are aggravated by the fact they occurred *after* the appellant had complained of post-trial delay in his initial appearance before this court.

On balance, we conclude the post-trial delay subsequent to 18 March 2005 is egregious and could affect the public's perception of the fairness and integrity of the military justice system. Accordingly, we find the appellant has been denied his due process right to speedy post-trial review.

Nevertheless, any meaningful relief in this case would be disproportionate to the harm from the delay and would constitute an unjustified windfall to the appellant. *See United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006). At the time of trial, the appellant's enlistment had expired; presumably he remained on active duty in a legal-hold status.⁷ As a result, once convicted and confined, he was not entitled to any pay and allowances, and the adjudged forfeitures had no effect. *See* Dep't of Defense Financial Management Reg. 7000.14-R, Vol 7A, ¶ 030207.C (Feb 1999). Additionally, by the time the appellant was re-sentenced, he had already served over 4 years confinement and been released on parole. Consequently, neither a reduction in confinement nor a reduction in the forfeitures would provide meaningful relief. The only remaining punishments -- reduction to pay grade E-1 and a bad-conduct discharge -- are highly fitting for the offenses of which the appellant stands convicted. To mitigate either would be disproportionate to the harm from the due process violation and constitute an unjust windfall to the appellant.

⁶ That figure excludes the time the case was pending before this court between remands.

⁷ The charge sheet reflects that the appellant's then-current term of enlistment was for four years, beginning 28 December 1995. He was originally sentenced on 9 May 2000.

Conclusion

The findings of guilty have previously been affirmed. We now affirm the sentence as approved by the convening authority.

Judge MITCHELL and Judge VINCENT concur.

For the Court

R.H. TROIDL
Clerk of Court