

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

**Before
J.A. MAKSYM, E.E. GEISER, J.R. PERLAK
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MATTHEW L. BACHIOCCHI
HOSPITAL CORPSMAN THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 200700680
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 12 September 2006.

Military Judge: Col Steven Folsom, USMC.

Convening Authority: Commanding Officer, Naval Hospital, Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: LT K.M. McGahan, JAGC, USN (21 Oct 2009; 10 Jun 2009; 4 Feb 2009); LtCol W.N. Tigott, USMC (undated).

For Appellant: CAPT Stephen B. White, JAGC, USN.

For Appellee: Maj Jonathan N. Nelson, USMC.

29 April 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

This case is before the court for the fourth time.¹ On three prior occasions, this case was remanded by order of this

¹ A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of one specification of distributing a controlled substance, two specifications of wrongfully using a controlled substance, four specifications of stealing military property of a value of less than \$500.00, one specification of withholding military property of a value of less than \$500.00, one specification of unlawful entry, and three specifications of wrongfully using a prescription medication, in violation of Articles 112a, 121, 130, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 912a, 921, 930, and 934. The appellant was adjudged confinement for 11 months, reduction to E-1, forfeitures of \$700.00 pay per month for 11 months, and a bad-conduct discharge. In accordance with the pretrial agreement, the convening authority approved the sentence as adjudged, but suspended all confinement in excess of 8 months.

court for proper post-trial processing under RULE FOR COURTS-MARTIAL 1106, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). In the order dated 10 March 2009, this court also ordered an evaluation in accordance with R.C.M. 706.² The fourth, and most recent, convening authority's action, dated 11 November 2009, disapproved the appellant's bad-conduct discharge, approved the remainder of the sentence, and suspended confinement in excess of 8 months.

The appellant now raises the following errors: first, that the military judge erred in not reopening providency to conduct an inquiry into mental responsibility and capacity to stand trial after evidence of the appellant's diagnosis of post-traumatic stress disorder and depression were introduced during sentencing, and second that the appellant was prejudiced as a result of violations of his due process right to a timely review of his court-martial.

After considering the record of trial and the submissions by the parties, we find the military judge did not abuse his discretion in accepting the appellant's pleas and the appellant was not prejudiced by the delay in post-trial review. The findings and 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.

Providency

During the providence inquiry, the appellant informed the military judge that he had committed larceny "because [he] was more or less depressed" and that the medication "happened to make [him] feel better." Record at 31. In response, the military judge inquired several times as to whether the appellant's mental state was a justification or excuse for his actions and received a negative response each time. *Id.* at 32, 39, 44, 65-66. Satisfied with the appellant's responses, the military judge accepted his guilty pleas. Then, during sentencing, the appellant submitted statements from family members who, among other things, noted the appellant's behavioral changes after returning from deployment. Defense Exhibit A. The appellant

² Dr. Tracy Price, Staff Psychiatrist, Naval Health Clinic Great Lakes, Illinois conducted the R.C.M. 706 inquiry and diagnosed the appellant with post-traumatic stress disorder, chronic; major depressive disorder, recurrent; opium dependence; and sedative/hypnotic dependence, but concluded that:

At the time of the alleged criminal conduct, [the appellant] was able to appreciate the nature and quality or wrongfulness of his conduct. . . . At the time of his court-martial trial in September 2006, [the appellant] was not suffering from a mental disease or defect that rendered him unable to understand the nature of the proceedings against him or to cooperate intelligently in his defense . . . [and the appellant] is not currently suffering from a mental disease or defect that renders him unable to understand and to conduct or cooperate intelligently in his appellate proceedings.

also introduced a summary note by a psychiatrist who stated the appellant had been treated for "symptoms of depression and PTSD." DE B. The civilian defense counsel asked the military judge to review these statements and exhibits during deliberations. Record at 107. In her sentencing argument, the civilian defense counsel referred to the appellant's "difficult time dealing with what he saw" in Iraq, but she made no reference to depression or PTSD. Record at 111. The military judge did not reopen providency, which is the basis for the alleged error.

Notwithstanding the above, the military judge was not obligated to reopen providency. Should an accused "'set[] up matter[s] inconsistent with the plea' at any time during the proceeding, the military judge must either resolve the apparent inconsistency or reject the plea." *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996) (quoting Art. 45(a), UCMJ); see RULE FOR COURTS-MARTIAL 910(h)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). Thereafter, appellate courts will accept a military judge's decision to accept an accused's guilty plea and to enter findings consistent with that plea unless there is a substantial basis in law or fact for questioning the plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). A "mere possibility" of conflict between the accused's guilty pleas and other evidence on the record is not a substantial basis to overturn the findings. See *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007).

In this case, the military judge could properly resolve any inconsistencies between the appellant's pleas and matters raised in sentencing by using the ample evidence developed in the providence inquiry and the evidence before the court. In particular, we note that when questioned, the appellant assured the military judge that he could appreciate the wrongfulness of his actions, statements which were entirely consistent with the stipulation of fact. See Record at 30, 46; Prosecution Exhibit 1. Furthermore, the appellant denied that his depression served as an excuse or justification for his actions, statements also paralleling those contained in the stipulation of fact. See Record at 32, 39, 65-66; PE 1.

Apart from the appellant's verbal assurances, the military judge could also presume that mental capacity or responsibility was not at issue because the civilian defense counsel chose not to pursue that defense; evidenced by her presentation of the exhibits during sentencing and not before, her request to the military judge to review the evidence during deliberations and not before, and her articulation of a carefully crafted sentencing argument. See *Shaw*, 64 M.J. at 463.

Post-Trial Delay

The appellant's record of trial was docketed with this court for the fourth time on 23 December 2009, over three years after

the date the appellant was sentenced.³ We review his allegation of error in the denial of his right to speedy post-trial review.

A due process analysis of post-trial delay begins with a determination of whether the delay in question is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). Consistent with that case, we agree that the delays in this case are facially unreasonable.

Given the lengthy delay, we presume a due process violation and now consider whether the Government has met its burden of showing the violation was harmless beyond a reasonable doubt -- a *de novo* review based on the totality of the circumstances. *United States v. Bush*, 68 M.J. 96, 102-03 (C.A.A.F. 2009); *United States v. Allende*, 66 M.J. 142, 145 (C.A.A.F. 2008); *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006).

To demonstrate the harm and prejudice he suffered from the delay, the appellant asserts first that he had trouble obtaining treatment for post-traumatic stress disorder as a result of his bad-conduct discharge, and second that the length of delay alone caused harm and prejudice. Appellant's Brief of 22 Jan 2010 at 18-19. We disagree. The appellant's assertion that his bad-conduct discharge created difficulty in obtaining treatment is unfounded. In sharp contrast, a bad-conduct discharge is not finalized until all appellate processes have been exhausted, during which time the appellant was entitled to his medical benefits. Arts. 66 and 76, UCMJ. Moreover, the appellant no longer faces a punitive discharge as his bad-conduct discharge has been disapproved. While we do not condone the length of delay in this case, prejudice should not be presumed solely from the length of the delay. See *Bush*, 68 M.J. at 104. Considering the totality of the circumstances, the Government met its burden to show that the due process error was harmless beyond a reasonable doubt.

Finally, we consider whether this is an appropriate case to exercise our authority to grant relief under Article 66(c), UCMJ, in light of *Toohy v. United States*, 60 M.J. 100, 101-02 (C.A.A.F. 2004), *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, 607 (N.M.Ct.Crim.App. 2005) (en banc). In doing so, we find the delay does not affect the findings or the

³ The appellant's case was originally docketed with this court on 29 August 2007. On 28 January 2008, this court set aside the first convening authority action because the staff judge advocate's recommendation in the record of trial was neither signed nor dated and the record did not contain proof of service on trial defense counsel. The case was docketed again on 24 February 2009, and on 10 March 2009 this court granted the appellant's request for a mental health inquiry in accordance with R.C.M. 706. Following the inquiry, the case was docketed again on 17 August 2009. On 29 September 2009 the court once again set aside the convening authority's action because the record did not demonstrate the staff judge advocate's recommendation had been properly served to the trial defense counsel. This case was most recently docketed on 23 December 2009.

sentence that should be approved in this case and thus decline to grant relief.

Conclusion

The findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court