

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

**Before
F.D. MITCHELL, J.A. MAKSYM, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**BYRON W. BOCK
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 200900336
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 16 December 2004.

Military Judge: Maj Paul Ware, USMC.

Convening Authority: Commanding Officer, Headquarters and Support Battalion, Marine Corps Base, Camp Pendleton, CA.

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

For Appellant: LT D.J. Ambrose, JAGC, USN.

For Appellee: Capt Mark Balfantz, USMC.

4 March 2010

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, consistent with his pleas, of one specification of unauthorized absence, in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886. The appellant was sentenced to confinement for 75 days, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, but suspended all confinement in excess of 70 days in accordance with the pretrial agreement.

The appellant was tried and sentenced on 16 December 2004. On 18 February 2005, prior to the convening authority taking action, the appellant executed a waiver of appellate review. The

convening authority took action on 29 April 2005. Because a request to waive appellate review had been submitted by the appellant, a review pursuant to Article 64(a), UCMJ, and RULE FOR COURTS-MARTIAL 1112, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) was conducted on 27 May 2005. The appellant at this point presumably thought his post-trial processing had been completed. The waiver of appellate review request executed by the appellant was invalid as it did not comply with R.C.M. 1110(f), which requires that the waiver be filed within 10 days after the accused or his counsel is served with a copy of the convening authority's action. As stated above, the waiver of appellate review was executed prior to the convening authority taking action.

The appellant's record of trial was docketed with this court on 9 July 2009 --over four years after the date the appellant was sentenced.¹ The appellant's sole assignment of error contends that he was denied speedy post-trial processing.

Having reviewed the parties' pleadings and the record of trial, we are satisfied that no error materially prejudicial to the substantial rights of the appellant occurred, and we therefore affirm the findings and the approved sentence. Arts. 59(a) and 66(c), UCMJ.

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

Given the lengthy delay evident from the record, we will assume a due process violation and consider whether the Government has met its burden of showing the violation was harmless beyond a reasonable doubt. *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). We consider whether constitutional error is harmless beyond a reasonable doubt *de novo* based on the totality of the circumstances. *United States v. Bush*, 68 M.J. 96, 102-03 (C.A.A.F. 2009).

The appellant does not assert, and we do not find, that the appellant was prejudiced by this delay. The appellant argues that in a case as "simple and straightforward as Appellant's, a delay of this length is, in itself, prejudicial." Appellant's Brief of 8 Sep 2009 at 6. We do not agree. While the delay in this case is wholly unacceptable, we will not presume prejudice

¹ On 4 March 2009, the Navy and Marine Corps Appellate Review Activity (NAMARA), discovered that subject record of trial had not been received from the convening authority. After NAMARA requested that this record be forwarded to that activity, it was eventually found, forwarded to NAMARA, and delivered to this court.

from the length of the delay alone. *Bush*, 68 M.J. at 104. Considering the totality of the circumstances, we conclude that the Government met its burden to show that the due process error was harmless beyond a reasonable doubt.

We next consider whether this is an appropriate case to exercise our authority to grant relief under Article 66(c), UCMJ, in light of *Toohey 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). Having done so, we find the delay does not affect the findings or the sentence that should be approved in this case. We thus decline to grant relief.

For the Court

R.H. TROIDL
Clerk of Court