

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

**Before
L.T. BOOKER, J.K. CARBERRY, E.C. PRICE
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JACQUE D. GASTON
ENGINEMAN SECOND CLASS (E-5), U.S. NAVY**

**NMCCA 201000339
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 7 April 2006.

Military Judge: CAPT Bruce W. MacKenzie, JAGC, USN.

Convening Authority: Commanding Officer, USS CHAFFEE (DDG 90).

Staff Judge Advocate's Recommendation: LT Carmel T. Tomilson, JAGC, USN.

For Appellant: LT Michael E. Maffei, JAGC, USN; Capt Jeff Liebenguth, USMC.

For Appellee: Maj William Kirby, USMC; Capt Robert E. Eckert, Jr., USMC.

21 October 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:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of false official statement and larceny, violations respectively of Articles 107 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 921. On 7 April 2006, the military judge announced a sentence of confinement for 12 months, a fine of \$9,000.00, reduction to the lowest enlisted pay grade, and a bad-conduct discharge from the U.S. Navy. The convening authority (CA) disapproved the punitive discharge, but otherwise approved the sentence announced in an

action that bears no date. After the CA acted, the case was submitted to a judge advocate for review under Article 64, UCMJ, and that review was completed on 25 September 2006.

The record of trial was transmitted to the Navy-Marine Corps Appellate Review Activity and docketed at this court on 7 June 2010. The appellant now alleges that he was denied his due-process right to timely post-trial processing and appellate review of his record.

We have conducted our own careful review of the record of trial and the briefs submitted by the parties. We are satisfied that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. We therefore affirm the findings and the approved sentence. Arts. 59(a) and 66(c), UCMJ.

Notwithstanding that this case was tried prior to *United States v. Moreno*, 63 M.J. 129, 142-43 (C.A.A.F. 2006), 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).

We have considered the totality of the circumstances, among them the lack of demonstrable prejudice and the possibility of confusion over whether an approved sentence that did not include a punitive discharge, but did include confinement for 12 months, falls within the jurisdiction of this court. See Art. 66(b)(1), UCMJ. We note that the CA granted clemency at the appellant's request and did so no later than September 2006. We are satisfied that the post-trial delay 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 affirmed in the case of this Sailor who stole housing allowances and provided a false statement to effect the theft.

The findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court