

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

**Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DANIEL W. BARTOLO
TORPEDOMAN'S MATE FIRST CLASS (E-6), U.S. NAVY**

**NMCCA 201000212
GENERAL COURT-MARTIAL**

Sentence Adjudged: 10 January 2006.

Military Judge: CAPT Donald J. Sherman, JAGC, USN.

Convening Authority: Commander, Navy Region Northwest,
Silverdale, WA.

Staff Judge Advocate's Recommendation: CDR L.R. Langevin,
JAGC, USN.

For Appellant: LT James Head, JAGC, USN.

For Appellee: Capt Mark Balfantz, USMC.

18 January 2011

OPINION OF THE COURT

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

PAYTON-O'BRIEN, Judge:

A military judge sitting as a general court-martial convicted the appellant, in accordance with his pleas, of two specifications of false official statement, two specifications of indecent acts with a minor, and one specification of indecent acts upon a minor in violation of Articles 107 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 934. The appellant was sentenced to confinement for 70 months, total forfeiture of pay and allowances, reduction to pay grade E-1, and

a dishonorable discharge.¹ Pursuant to a pretrial agreement, the convening authority (CA) disapproved adjudged forfeitures, and deferred and waived automatic forfeitures for the benefit of the appellant's spouse, provided that the appellant established and maintained a dependent's allotment in the total amount of the automatic forfeitures.

The appellant asserts four assignments of error: (1) that the special court-martial convening authority demonstrated unlawful command influence over the Article 32 investigation; (2) that there are substantial omissions from the record of trial; (3) that the Government's unexplained 1,791-day post-trial delay denied the appellant his due process rights; and (4) that the Government's egregious post-trial delay warrants Article 66(c), UCMJ, relief. Appellant's Brief of 21 Jul 2010 at 1. Upon review, we find that corrective action is necessary, which we will take in our decretal paragraph. Following our corrective action, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Background

On 10 January 2006, in Bremerton, Washington, the appellant pled guilty to offenses involving indecent acts with his two minor stepdaughters and providing false official statements to investigators looking into the matters. On 13 June 2006, after receiving the staff judge advocate's recommendation of 19 May 2006 and clemency matters from the detailed defense counsel of 7 June 2006, the CA took action. Records from Region Legal Service Office Northwest (RLSO NW), the prosecution office which handled the appellant's case, indicate that the record of trial was mailed for appellate review in July 2006. Appellant's Brief at 5. There is no evidence that the original record was ever delivered to the Navy-Marine Corps Appellate Review Activity. A copy of the record of trial was received for appellate review on 30 March 2010, and was docketed on 7 April 2010. *Id.* Since the docketed record of trial had not been authenticated by the military judge, on 2 June 2010 we ordered the Government to produce an authenticated record of trial or to show cause as to why we should not set aside the findings and the sentence and dismiss the charges. In response to our order, on 21 June 2010, the Government produced affidavits from the trial counsel and the military judge to explain the rather unique authentication process pertaining to the record of trial.² A total of 1,469

¹ As a result of the adjudged 70 months of confinement and punitive discharge, the appellant's pay and allowances were also forfeited automatically pursuant to Article 58b(a)(1), UCMJ.

² In his affidavit of 17 June 2010, the military judge indicated he moved to the Washington, D.C. area in August 2006. Although he continued to review some records of trial after he moved, his review of his emails revealed no discussion with his clerk of this particular case, leading him to believe he

days had passed from the date of the CA's action until the Government's authentication affidavits were filed.

The docketed record of trial is incomplete. Once the record was discovered missing, the Government reconstructed it, and we note certain exhibits are located in other parts of the record.³ Although the 180-page record of proceedings is a verbatim transcript, one enclosure to an appellate exhibit, some Article 32, UCMJ, investigation exhibits, and some enclosures to the Article 34, UCMJ, advice letter are missing from the record of trial.

Unlawful Command Influence

The appellant first avers that the special court-martial convening authority committed unlawful command influence during the conduct of the Article 32 investigation phase of his case. Generally, a plea of guilty waives all defects "which are neither jurisdictional nor a deprivation of due process of law." *United States v. Rehorn*, 26 C.M.R. 267, 268-69 (C.M.A. 1958) (citations omitted); see also *United States v. Paige*, 23 M.J. 512, 513 (A.F.C.M.R. 1986). An issue concerning unlawful command influence occurring during the accusative stage of a court-martial (i.e., defects in the preferral of charges and the forwarding of charges) must be raised at trial to avoid waiver. *United States v. Richter*, 51 M.J. 213, 224 (C.A.A.F. 1999); *United States v. Hamilton*, 41 M.J. 32, 37 (C.M.A. 1994). Here, the appellant alleges a defect in the Article 32 investigative stage of the court-martial process. An Article 32 investigation is part of the accusative stage and, as such, absent plain error or a determination by this court to ignore waiver and forfeiture,⁴ the appellant is required to raise the motion at trial. *Richter*, 51 M.J. at 224 (citing *Hamilton*, 41 M.J. at 37).

We find nothing in the record to support the appellant's position that he raised a pretrial motion for dismissal of the charges based on unlawful command influence. During the Article 39(a) session held on 19 December 2005, only a speedy trial motion was presented to the military judge. Record at 15-75. In opposition to the speedy trial motion, the trial counsel offered to the court copies of a defense Motion for Appropriate Relief

did not review this particular record of trial after he departed Bremerton for Washington, D.C. The military judge estimated he authenticated this record of trial "just prior" to the record being mailed in July 2006 to the appellate review activity.

³ In the Government's 21 June 2010 response to our order of 2 June 2010, the Government refers us to other portions in the record of trial where certain investigating officer (IO) exhibits and enclosures to the Article 34 advice letter are located. While we note that these documents are not attached as IO exhibits to the Article 32 investigation or as enclosures to the Article 34 advice letter, they are in fact present elsewhere in the record.

⁴ We understand that there is a distinction between waiver and forfeiture. See *United States v. Gladue*, 67 M.J. 311 (C.A.A.F. 2009).

(Appellate Exhibit II, a continuance motion) and a Petition for Writ of Prohibition and Stay of Article 32 (Appellate Exhibit III, which had been previously filed with this court in an effort to stay the Article 32 proceedings). Record at 32.⁵ The contents of the speedy trial motion, as well as the civilian defense counsel's entire argument during the Article 39(a) session, focused entirely on the Government's alleged speedy trial violations.⁶ Appellate Exhibit VI; Record at 65-73. At no time was the issue of unlawful command influence discussed during the 19 December 2005 Article 39(a) session, nor was there any reference to the Petition for Writ of Prohibition advanced by the civilian defense counsel during argument on the speedy trial motion. Contrary to the appellant's position that he placed the matter before the military judge at the Article 39(a) session, it was, in fact, the trial counsel who actually presented the Petition for Writ of Prohibition and the defense motion for a continuance of the trial to the military judge as evidence in support of the Government's opposition to the speedy trial motion. In reviewing the record as a whole, it appears the purpose of the trial counsel's advancement of these two documents was to demonstrate a timeline of the case, as well as to document the defense's role in delaying the proceedings.

Furthermore, we find no evidence of a deprivation of the appellant's due process rights in this case that would persuade us not to apply waiver in regard to this issue. The trial judge expressly advised the appellant regarding the submission of motions, Record at 85,⁷ and that his voluntary and unconditional pleas of guilty would waive all litigated motions that were non-jurisdictional in nature.⁸

⁵ In his Petition for Writ of Prohibition, the issue of unlawful command influence was previously raised before us in an effort to halt the Article 32 investigation. We denied the appellant's writ on 18 August 2005.

⁶ The defense basis for the speedy trial motion was an improper withdrawal of the August 2004 charges preferred against the appellant.

⁷ The military judge stated, "Torpedoman's Mate First Class Daniel W. Bartolo, United States Navy, I now ask you, how to you plead? But before receiving your pleas I advise you that any motions to dismiss any charge or to grant any other relief should be made at this point." The Civilian Defense Counsel, Mr. J.B.H., responded, "The motions we have had have been filed, argued and decided. We have no other motions at this time." Record at 85.

⁸ The military judge advised the appellant "[b]y your plea of guilty you also give up your right to appeal the decision I previously made on your motion for denial of speedy trial. Do you understand that?" Record at 89. A denial of speedy trial is not an issue raised by the appellant in this appeal. Although the military judge was inaccurate in his advisement as to the appellant's waiver of his right to appeal the decision on the speedy trial motion, *United States v. Mizgala*, 61 M.J. 122 (C.A.A.F. 2005), the speedy trial motion was fully litigated and was correctly decided in law and fact by the military judge. Additionally, we note language in the appellant's pretrial agreement containing a provision in which the speedy trial motion apparently was an issue preserved for appeal. The military judge's misstatement as to the preservation of the issue for appeal caused no prejudice to the appellant.

Nothing in the appellant's pleas of guilty or pretrial agreement preserved the right to raise this "unlawful command influence" in the preferral and forwarding of charges stages on appeal. See Appellate Exhibits IX and X. The appellant does not claim, nor does the record reflect, that he was unlawfully deterred from raising the unlawful command influence issue pretrial. Accordingly, we find neither plain error nor reason to ignore the appellant's waiver/forfeiture of this issue.

Even if we assume the appellant did not waive the issue of unlawful command influence, under the facts of this case, the appellant has not met the minimum burden of raising the issue of unlawful command influence. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). See also *Richter*, 51 M.J. at 223. On appellate review, the appellant must show that the proceedings were unfair and that unlawful command influence was the cause of that unfairness. *United States v. Ayers*, 54 M.J. 85, 95 (C.A.A.F. 2000). The quantum of evidence required to raise the issue is more than mere allegation or speculation. *Ayers*, 54 M.J. at 95; accord *United States v. Baldwin*, 54 M.J. 308, 311 (C.A.A.F. 2001); *Biagase*, 50 M.J. at 150. We find that the appellant has failed to demonstrate that the Article 32 investigation was unfair in any way.⁹

Omissions from the Record of Trial

In his second assignment of error, the appellant avers that the record of trial is incomplete¹⁰ and, thus, incapable of review under Article 66, UCMJ. While the original record in this case was lost, a duplicate copy of the authenticated verbatim record is before us, absent the documents noted herein. All 180 pages of the verbatim transcript are present in the record of trial, and the appellant does not dispute the accuracy of the transcript, even though a substitute form of a military judge authentication page was provided after the record was reconstructed. We will apply a presumption of regularity to the creation, authentication and distribution of the reconstructed record. See *United States v. Godbee*, 67 M.J. 532, 533 (N.M.Ct.Crim.App. 2008), rev. denied, 67 M.J. 406 (C.A.A.F. 2009).

⁹ Although the appellant claims to only have received 2-days-notice to prepare for the Article 32 investigation, the record indicates an approximate 2-week delay of the Article 32 hearing was granted.

¹⁰ Missing from the record of trial are the following: (1) original authentication page of the military judge; (2) Enclosure 19 to Appellate Exhibit III, which contains the CA's letter dated 15 August 2005 in which she refused to withdraw from the case; (3) two enclosures to the Article 34, UCMJ, letter, containing the special court-martial CA's forwarding letters to the general court-martial CA recommending trial by general court-martial; and (4) enclosures to the Article 32 IO's reports pertaining to witness production issues and evidence considered by the IO.

The law requires that a record of trial be "complete," Article 54(c)(1), UCMJ, and contain a "substantially verbatim" transcript of the proceedings, *United States v. Gray*, 7 M.J. 296, 297 (C.M.A. 1979). Whether a record is complete is a question of law, which we review *de novo*. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000). A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut. *Id.* at 111, (citing *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981), *United States v. Gray*, 7 M.J. 296 (C.M.A. 1979), and *United States v. Boxdale*, 47 C.M.R. 351 (C.M.A. 1973)). Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one. *Henry*, 53 M.J. at 111. The determination of what constitutes a substantial omission from the record of trial is decided on a case-by-case basis. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999).

We conclude that the omissions in this case are not substantial and do not affect any of the charges and specifications. We reach this conclusion for several reasons. First, we note that the appellant pled guilty in accordance with a pretrial agreement, that the trial transcript reflects the verbatim pleas of the appellant, and that on appeal the appellant does not in any way contest the entry of his pleas at trial. Second, the appellant did not raise any pretrial motions in which he contested the fairness of the Article 32 proceedings, objected to the Article 34 advice, or claimed unlawful command influence at the Article 32 stage. Third, the missing documents, which pertain to pre-referral matters, were not considered by the military judge during the findings or sentencing phases of the appellant's case. In light of these facts, based upon our review of the record as reconstructed, we view the omission of these documents as not substantial, and the absence of these documents has not prohibited us from conducting a thorough review as required under Article 66, UCMJ. Furthermore, the appellant has identified no prejudice attributable to our use of the duplicate, reconstructed record. *Godbee*, 67 M.J. at 533.

Post-Trial Delay

The appellant's third and fourth assignments of error concern the post-trial delay in his case. The appellant was convicted on 10 January 2006. The CA took action in the appellant's case on 13 June 2006, but the authenticated record of trial was not docketed until 21 June 2010, over four years after the appellant's sentencing.¹¹ We note with grave concern that most of the delay occurred after the CA's action and before the

¹¹ While the appellant alleges there were 1,791 days of post-trial delay, such computation of the number of days is inaccurate. From sentencing until the record of trial (with the authentication certificates) was received by this court, 1,623 days had passed. From CA's action until the record of trial was received, 1,469 days had passed.

case was received for docketing. The record of trial had apparently been lost in the mail, yet neither the sender, nor the CA, nor trial defense counsel made any effort to discover why this case was not docketed for appellate review despite the fact that over four years had passed from the date of trial.¹²

We consider four factors in determining if post-trial delay violates the appellant's due process rights: (1) the length of delay; (2) the reasons for delay; (3) the 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)). If the length of delay is not unreasonable, further inquiry is unnecessary. If we conclude that the length of delay is "facially unreasonable," however, we must balance the length of delay against the other three factors. *Id.*

We agree with the appellant that the delay in the case was facially unreasonable, triggering a due process review. Regarding the second factor, reasons for the delay, the record fails to contain an adequate explanation. Regarding the third factor, we find no assertion by the appellant of his right until 27 May 2010, over four years after his court-martial. Appellant's Consent Motion to Compel Production of Authenticated Record of Trial, at 2. Regarding the fourth factor, prejudice, although the appellant claims he was prejudiced by our inability to address the unlawful command influence issue at the Article 32, we disagree with his assertion. We find no actual prejudice in this case, nor do we find any presumption of prejudice. Thus, balancing all the factors, we conclude there has been no due process violation resulting from post trial delay. *Jones*, 61 M.J. at 83.

We next consider whether the delay affects the findings and the sentence that should be approved under Article 66(c), UCMJ. *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005) (en banc). We note that the appellant was convicted pursuant to his pleas of only five specifications, two involving false official statements and three involving indecent acts with or upon two minors. The record was only 180 pages, with the first 75 pages of the record containing the pretrial motions sessions, while the remaining 105 pages contained the providence inquiry and sentencing. This case was not complex, and we cannot ignore the Government's negligent mishandling of the case in its post-trial processing. We therefore find that the delay affects the sentence that should be approved.

¹² We note that an inquiry was not made concerning the record of trial until 25 March 2010, when a brig official where the appellant was confined contacted the Navy-Marine Corps Appellate Review Activity, as the appellant was about to be released from confinement. Statement of James Duncan undtd. In fact, the appellant's brief reflects that the appellant had been released from confinement prior to the filing of his brief in July 2010, which filing was 54 months after the appellant was sentenced without having served any pretrial confinement.

Conclusion

Accordingly, we affirm the findings and only so much of the sentence as provides for confinement for 70 months, total forfeiture of pay and allowances, reduction to pay grade E-3, and a dishonorable discharge.¹³

Senior Judge MAKSYM concurs.

Judge PERLAK (concurring in part and dissenting in part):

I concur in the court's analysis and resolution of the assigned errors. The post-trial history of this appeal reveals significant but preventable risk to the parties and the process. However, I am not persuaded that compelling the Government to plumb expired military pay accounts, for the benefit of a third party, can meaningfully affect a mitigation of that risk. On the facts of this case, and notably in the absence of prejudice to this appellant, I would decline to exercise the court's Article 66 prerogatives per *Brown* and would affirm the findings and the sentence as approved by the CA.

For the Court

R.H. TROIDL
Clerk of Court

¹³ Under the terms of the pretrial agreement, the CA agreed to defer automatic forfeitures in favor of the appellant's dependents. By our action today, the dependents will be entitled to the difference between E-3 and E-1 pay from the date of trial until the date of the CA's action.