

**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.

**ROBIN A. STAGNER
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201000390
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 11 July 2006.

Military Judge: LtCol Jeffrey Meeks, USMC.

Convening Authority: Commanding Officer, 3d Battalion, 11th Marines, 1st Marine Division (REIN), FMF, MCA GCC, Twentynine Palms, CA.

Staff Judge Advocate's Recommendation: Capt G.T. Funk, USMC.

For Appellant: LT Michael Hanzel, JAGC, USN.

For Appellee: LT Ritesh Srivastava, JAGC, USN.

28 February 2011

OPINION OF THE COURT

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

CARBERRY, Senior Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of one specification of violating a lawful general order and one specification of aggravated assault, in violation of Articles 92 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 928. The military judge sentenced the appellant to one year of confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority disapproved the bad-conduct discharge and approved the remainder of the sentence. Pursuant

to the terms of the pretrial agreement, the convening authority suspended all confinement in excess of six months.

The appellant raises two assignments of error: (1) he was denied his right to conflict-free counsel because his detailed defense counsel had transferred to the trial counsel section and the assistant trial counsel was now his defense counsel's Reviewing Officer; and, (2) he was denied speedy post-trial review.

After carefully considering the parties' briefs and examining the record of trial, we are convinced that the findings and the sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Background

The charges against the appellant were referred to special court-martial on 7 February 2006. On 1 March 2006, the military judge called the first Art. 39(a), UCMJ, session to order and the appellant expressed his desire to be represented by Captain G. On 11 July 2006, the appellant pled guilty pursuant to a pretrial agreement. It appears that sometime between 5 May 2006, the date of the last Article 39(a), UCMJ, session prior to the date of the appellant's pleas, Captain G was assigned trial counsel duties. The assistant trial counsel, Major E, was Captain G's Reviewing Officer for evaluation purposes on 11 July 2006.

At trial, the military judge noted that he held a conference pursuant to RULE FOR COURTS-MARTIAL 802, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), at which counsel notified him of Captain G's reassignment and the fact that the assistant trial counsel (ATC), Major E, was currently Captain G's Reviewing Officer. Record at 334. The following colloquy with counsel and the appellant then occurred.

MJ: Now, counsel notified me in an 802 prior to the court beginning today that, since the last session of the Court, Captain [G] had become a government counsel and currently is working for and apparently as the reporting senior as the Lieutenant - excuse me - as Major [E]; is that correct?

ATC: Not reporting senior, sir. I'd be - I guess would be the reviewing officer.

MJ: You'd be the reviewing officer?
ATC Yes, sir.

MJ: Is that correct, Captain [G]?
DC: Sir, that's correct.

MJ: First of all, do you believe there is any issue?
DC: I do not, sir
MJ: All right.

MJ: Lance Corporal Stagner, have you discussed this issue with Captain [G]?
ACC: Yes sir, I have.

MJ: Now, you understand that you have a Constitutional right to be represented by a counsel who has undivided loyalty to you and your case?
ACC: Yes, sir.

MJ: Do you understand that lawyers ordinarily should not represent more than one client when that representation involves a matter arising out of the same incident? Now, in this particular case Captain [G] has - in his government duties - has no involvement in this case; is that correct, Captain [G]?
DC: Sir, that is correct.

MJ: Okay. After discussing these matters, Lance Corporal Stagner, with Captain [G], have you decided for yourself that you would like him to still represent you even though he is now in other cases acting as a prosecutor?
ACC: Yes, sir, I have?

DC: Sir, If I may. I think it also important to note for the record I have not been formally detailed to any prosecution case at this time.

MJ: Okay, so you currently have just changed jobs, but you don't have any cases that you are representing?
DC: That is correct, sir.

MJ: Okay. It would appear that there is no actual conflict of interest in this particular case. Now, understanding that even and if an actual conflict of interest does not necessarily presently exist between your defense counsel representing you and his current billet as a prosecutor, but that one could possibly develop, do you still wish to be represented by Captain [G]?
ACC: Yes, sir.

MJ: Do you understand that you are entitled to be represented by another lawyer who has no conflict of interest?

ACC: Yes, sir.

MJ: Knowing this, please tell me why you want to give up your right to conflict-free counsel and be represented by Captain [G].

ACC: Sir, Captain [G] has been my defense counsel since the case has started, and he is pretty familiar with my case. I prefer him, sir.

MJ: Do you have any questions about your right to a conflict-free counsel?

ACC: No, sir.

MJ: Finally, the accused has knowingly and voluntarily waived his right to a conflict free counsel and may be represented by Captain [G] at this court-martial.

Record at 335-36.

Conflict of Interest

The appellant argues that Captain G was conflicted because he had assumed duties as a trial counsel and the assistant trial counsel, Major E, was Captain G's Reviewing Officer; that this conflict was not waived; and, we should presume prejudice.

The Sixth Amendment guarantees an appellant the right to the effective assistance of counsel. The right to effective counsel means the right to counsel who is conflict free. *Cuyler v. Sullivan*, 446 U.S. 335, 345 (1980). To demonstrate a Sixth Amendment violation, the appellant must establish (1) his counsel actively represented a conflicting interest, and (2) that this conflict adversely affected his lawyer's performance. *Id.* at 349-50.

Notwithstanding the troubling image of a defense counsel pitted against an assistant trial counsel who is also his Reviewing Officer, military jurisprudence has for some time declined to consider a command relationship between opposing counsel to be prejudicial *per se*. See *United States v. Hubbard*, 43 C.M.R. 322, 324 (C.M.A. 1971) (the fact that trial counsel was the immediate superior of defense counsel and assistant defense counsel and endorsed their efficiency reports was not prejudicial *per se*); see also *United States v. Nicholson*, 15 M.J. 436, 438 (C.M.A. 1983) (accused was not prejudiced as a result of participation at trial of defense counsel's immediate superior, who prepared input to his efficiency reports, as assistant trial counsel where defense counsel fully disclosed relationship to accused and accused consented to continued representation). Thus, the appellant must demonstrate that Captain G's performance was adversely affected by his reassignment as a trial counsel and his Reviewing Officer's role as assistant trial counsel.

The appellant, however, offers no evidence and the record contains none demonstrating that Captain G was in any way restrained from pursuing a vigorous defense on behalf of the appellant. Rather, the appellant points to the fact that Captain G did not request an expert witness in this case of aggravated assault upon his infant stepson and speculates that Captain G may have been influenced without his even knowing it. We note that the appellant admitted to a Naval Criminal Investigative Service agent and a family advocacy member that he was tired and frustrated with his two-month-old son's crying and shook him on two occasions. In light of the appellant's admissions, one of which Captain G was successful in having suppressed, the potential benefit of an expert is speculative at best, and pursuit of a pretrial agreement was a sound and prudent course.

Moreover, the record indicates that Captain G mounted a robust defense by filing numerous pretrial motions, negotiating a very favorable pretrial agreement that called for suspension of all confinement in excess of six months and suspension of the bad conduct discharge,¹ made numerous objections to the admission of prosecution exhibits and aggravation testimony, see Record at 388-416, conducted effective cross-examination of the Government's aggravation witness and presented mitigation witnesses who testified on the appellant's behalf. We further note that in litigating a suppression motion, Captain G was pitted against Major E and prevailed. Record at 235-95.

Based on our review of the record, we are convinced that Captain G's performance was not adversely affected by his reassignment as a trial counsel or by the fact that his Reviewing Officer was the assistant trial counsel. Accordingly, we find that the appellant has failed to establish prejudice.

Moreover, to the extent that a conflict of interest may have existed, we find that the appellant made a knowing and intelligent waiver of the potential conflict when he stated to the military judge that he had discussed this matter with Captain G, understood that Captain G was working as a prosecutor, but nonetheless wanted to be represented by Captain G. We are not persuaded by the appellant's argument that his waiver was not knowingly made because he most likely did not know what a "reviewing officer" was. In that this exchange took place in the appellant's presence, then a Marine with more than 4 years of active service, we are convinced that in the context in which the term "reviewing officer" was used, the appellant understood that Major E was in Captain G's chain of command and would be evaluating Captain G. To the extent that a conflict existed, we find that the appellant made a knowing and voluntary decision to continue to be represented by Captain G. Thus, we find waiver.

Because the appellant has failed to establish that the conflict adversely affected his military trial defense counsel's

¹ Ultimately the convening authority disapproved the bad-conduct discharge.

performance and in view of the appellant's knowing waiver of the alleged conflict, we find no merit in this assignment of error.

Post-Trial Delay

The appellant alleges that his due process rights have been violated by the excessive post-trial delays in processing and appellate review of his court-martial, or, alternatively, that relief under Article 66, UCMJ, is warranted due to excessive and unexplained post-trial delay. In support, the appellant points to the nearly four years (1459 days) between trial and docketing with this court. Appellant's Brief of 9 Sep 2010 at 25. He does not allege any specific prejudice due to that delay. *Id.* at 28. The Government concedes that the delay is facially unreasonable. Government's Answer of 8 Dec 2010 at 20; see also *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2006). Notwithstanding the mistaken belief that this case did not require Article 66, UCMJ, review because the convening authority disapproved the bad-conduct discharge and all confinement in excess of six months was suspended, we nonetheless find that delay in this case is unreasonable.

Assuming that the appellant was denied the due process right to speedy post-trial review and appeal, we proceed directly to the question of whether any error was harmless beyond a reasonable doubt. *United States v. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006). Here, there is no evidence of any specific harm resulting from the delay and the appellant has not alleged any such harm. There is no issue that would afford the appellant relief: no oppressive incarceration resulting from the delay, no particularized anxiety caused by the delay, and no rehearing which might be affected by excessive post-trial delay. See *United States v. Haney*, 64 M.J. 101, 108 (C.A.A.F. 2006); *Moreno*, 63 M.J. at 139. Additionally, we note that the appellant never requested speedy post-trial review.

Under the totality of circumstances in this record, we conclude that the Government has met its burden to show that the post-trial delay in this case, while unacceptable, was harmless beyond a reasonable doubt. *United States v. Allende*, 66 M.J. 142, 145 (C.A.A.F. 2008). "To find otherwise would essentially adopt a presumption of prejudice in cases where [we find] a due process violation as a result of unreasonable post-trial delay," a standard the Court of Appeals has repeatedly declined to adopt. *United States v. Bush*, 68 M.J. 96, 104 (C.A.A.F. 2009).

We next 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), and *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 (N.M.Ct.Crim.App. 2005) (en banc). Having done so, we conclude that any meaningful relief available would be an undeserved windfall for the appellant and disproportionate to any

possible harm the appellant suffered as a result of the post-trial delay. *United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006). Therefore, we find that the delay in this case does not affect the findings or sentence that should be approved. Art. 66(c), UCMJ.

Conclusion

Accordingly, we affirm the findings and sentence as approved by the convening authority.

Senior Judge BOOKER concurs.

PRICE, Judge (concurring in the result):

I concur in the result as the appellant failed to establish that trial defense counsel's concurrent assignment as a prosecutor, and his advocacy in opposition to his reviewing officer, the assistant trial counsel in this case, adversely affected trial defense counsel's performance. See *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). I write separately to note that these apparent conflicts of interest expose a deeply flawed practice and raise fundamental questions of ethics and fairness. I also find the record insufficient to conclude the appellant waived the potential conflict created by trial defense counsel's advocacy opposite his reviewing officer.

First, trial defense counsel's concurrent assignment as a prosecutor raises longstanding ethical concerns, while his advocacy in opposition to his reviewing officer raises even more insidious potential conflicts. See generally *United States v. Lee*, 66 M.J. 387, 388-89 (C.A.A.F. 2008) (citing 1 Op.Off. Legal Counsel 110, 112 (1977) and ABA Comm. on Ethics and Prof'l Responsibility, Informal Ops. 1235 (1972) and 1474 (1982)). Although neither potential conflict is currently "prejudicial *per se*" in military courts; they "should be closely scrutinized for possible prejudice." *United States v. Hubbard*, 43 C.M.R. 322, 324 (C.M.A. 1971). A better practice is to avoid this scenario, and in the rare circumstance where military necessity may compel such potential conflicts, all involved, including assignment authorities, supervisory judge advocates, counsel, and the military judge, must be sensitive to issues inherent to those potential conflicts.

In this case, appropriate recognition of those issues may have prevented trial defense counsel's reassignment in the first instance, or resulted in resolution of the more insidious issue through termination of assistant trial counsel's participation in the case, once he assumed reviewing officer responsibilities over trial defense counsel.

Second, the limited record, which lacked any discussion of "likely consequences" of trial defense counsel's advocacy opposite his reviewing officer, is insufficient to find a

"knowing intelligent" waiver of that apparent conflict. *Lee*, 66 M.J. at 388. To conclude otherwise is contrary to indulgence of "every reasonable presumption against the waiver of this right." *Id.* (citation and internal quotation marks omitted).

What happened here, though not reversible error under current case law, reveals a deeply flawed practice, suggests a lack of appreciation of the detrimental effect of potential conflicts, and inevitably undermines both confidence in and the appearance of fairness in our system of justice.

For the Court

R.H. TROIDL
Clerk of Court