

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

**Before
F.D. MITCHELL, J.A. FISCHER, M.K. JAMISON
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**KENNETH R. FOUSE
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201300073
GENERAL COURT-MARTIAL**

Sentence Adjudged: 25 July 2012.

Military Judge: Maj Eric L. Emerich, USMC.

Convening Authority: Commanding General, 2d Marine
Division, Camp Lejeune, NC.

Staff Judge Advocate's Recommendation: Maj J.N. Nelson,
USMC.

For Appellant: CDR Michael C. Pallesen, JAGC, USN.

For Appellee: CAPT Janis D. Monk, JAGC, USN; LT Ian
MacLean, JAGC, USN.

14 November 2013

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of attempted sodomy with a ten-year-old girl, possession of child pornography, and distribution of child pornography, in violation of Articles 80 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 934. The appellant was sentenced to seven years confinement, reduction to pay grade E-1, and a

dishonorable discharge. The convening authority (CA) approved the adjudged sentence, but suspended confinement in excess of forty-eight months from the date of his action until six months after the appellant's release from confinement, in accordance with a pretrial agreement.

Background

The appellant pled guilty at a general court-martial to one specification each of attempting to commit sodomy with a ten-year-old girl and a thirteen-year-old girl, possession of child pornography, and distribution of child pornography. Though the military judge found the two specifications of attempted sodomy multiplicitous for both findings and sentencing, he however failed to state a remedy on the record. Prior to taking action on the record of trial, the CA required clarification as to what charges the appellant had been convicted of and, on 31 October 2012, ordered a post-trial Article 39(a), UCMJ, session.¹

By this time, however, the appellant had been moved from Camp Lejeune, NC, to Miramar, CA, to participate in a sex offender rehabilitation program. The appellant asserted his right to personal appearance at the post-trial Article 39(a) session, requiring arrangement for cross-country transport and a postponement of the scheduled 26 November 2012 post-trial Article 39a session. The next available date for trial defense counsel was 11 December 2012. The Article 39(a) session convened on this date and the military judge clarified that he had dismissed the second specification under Charge I, the attempted sodomy with a thirteen-year-old girl.

The staff judge advocate issued his recommendation on 4 January 2013. On 18 January 2013, the newly appointed defense co-counsel² requested a fourteen-day extension to submit additional clemency matters, which was granted. The CA took action on the case on 12 February 2013.

¹ We leave for another day the question as to what impact, if any, the action by the CA of returning the record of trial to the military judge post-authentication to clarify an ambiguity would have vis-à-vis resetting the CA's post-trial processing clock. See *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006) and RULE FOR COURTS-MARTIAL 1102(e)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.).

² On 8 January 2013, Captain Kelli P. O'Neil, USMC, was appointed co-counsel to assist in representing Sergeant Fouse in post-trial matters.

The appellant was tried and sentenced on 25 July 2012 and approximately 210 days³ elapsed from the date the appellant was sentenced to receipt of the record by this court (20 February 2013). The appellant's two related assignments of error contend that he was denied speedy post-trial processing in that it took the CA over 120 days to take action and, as such, he is entitled to discretionary relief under Article 66(c).⁴

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.

Post-Trial Delay

Whether an appellant has been deprived of his due process right to a speedy appellate review is a question of law we review *de novo*. When such delays occur, claims of due process violations caused by the delay are reviewed under the four-part test laid out in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). In such analysis, we balance the (1) length of delay; (2) reasons for the delay; (3) appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Id.* No one factor is

³ In his petition to this court, the appellant asserts there was a 171-day delay between the adjourning of his court-martial and the CA's action. However, as noted in the Answer of the Appellee and as calculated by this court, the delay in question was actually 202 days.

⁴ We note that in his initial clemency request dated 2 August 2012, trial defense counsel requested that "all confinement in excess of 36 months awarded at the court-martial be deferred until convening authority's action and then suspended for the period of time served plus six months thereafter" In a supplemental clemency request dated 11 December 2012, trial defense counsel requested only the suspension of all confinement in excess of 36 months. Both clemency requests were attached to the staff judge advocate's recommendation (SJAR) dated 4 January 2013, which informed the CA that "[t]here have been no requests to defer any part of the sentence, either as adjudged or as mandated under the UCMJ." No matters were submitted by the appellant or his counsel in response to the SJAR. In his action dated 12 February 2013, the CA stated that "[t]here have been no requests to defer any part of the sentence, either as adjudged or as mandated under the UCMJ." Although both the SJAR and CA's action incorrectly note that no deferment request was submitted and the CA did not act in writing on the request, we find no prejudice since the request was to defer "all confinement in excess of 36 months" and the CA took his action long before 36 months had passed and the CA did consider the clemency requests submitted on behalf of the appellant. No remedial action is required.

determinative and the court will decide whether each factor favors the Government or the appellant. *Id.* at 136.

A due process analysis of post-trial delay begins with a determination whether the delay in question is facially unreasonable. *Id.* at 135-36. If the period between completion of the trial and the CA's final action is greater than 120 days, it is presumed to be a facially unreasonable delay. *Id.* at 142. The length of delay between the completion of the court-martial on 25 July 2012 and the CA's Action on 12 February 2013 totaled 202 days. As such, the delay in this case is unreasonable on its face, triggering a full *Barker/Moreno* analysis. *See id.*

The presumption of unreasonableness can be overcome by a showing of legitimate, case specific circumstances. *Id.* at 142-43. *See also United States v. Arriaga*, 70 M.J. 51, 56 (C.A.A.F. 2011). Here, unlike in *Moreno*, the post-trial processing delay was caused by more than just administrative matters and manpower constraints. The CA first reviewed the case well-within 120 days of the completion of trial and determined that the record was ambiguous as to whether two specifications alleging a violation of Article 80 were merged or if one of the specifications had been dismissed. Pursuant to RULE FOR COURTS-MARTIAL 1102, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), the CA ordered a post-trial Article 39(a) session to resolve this ambiguity. Some delay was attributable to necessary coordination on transferring the appellant from a confinement facility in California to the trial situs in North Carolina. Additionally, the post-trial Article 39(a) session was further delayed by the unavailability of the trial defense counsel.

Next, this court looks at whether the appellant objected to the delay or asserted his right to timely review. *See Arriaga*, 70 M.J. at 57. Here, the appellant did not object to the delay or assert his right to a timely review prior to his appeal in this court. However, because the obligation to ensure a timely post-trial process ultimately rests on the Government, this factor only slightly weighs against the appellant. *See id.*

When analyzing the fourth factor, prejudice, the court should consider three interests in a prompt appeal: (1) prevention of oppressive incarceration; (2) minimization of anxiety and concern of those awaiting the outcome of their appeals; and, (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired by the delay. *Moreno*, 63 M.J. at 138-41. While the appellant argues that he suffered

prejudice because of his anxiety and concern pending the results of his clemency request, he must demonstrate he suffered a "particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision.'" *Arriaga*, 70 M.J. at 58 (quoting *Moreno*, 63 M.J. at 140). Here, the appellant contends he experienced particularized anxiety apart from that normally experienced by prisoners because his clemency request was "especially powerful" as it contained an affidavit highlighting the multi-year history of violent childhood sexual abuse he suffered at the hands of his father and his Navy and Marine Corps Achievement Medal with combat "V" citation and summary of action he earned during a combat tour in Afghanistan.⁵ Appellant's Brief of 17 Jun 2013 at 9. We find unpersuasive appellant's argument that he suffered particularized anxiety because he may have anticipated favorable treatment from the CA after submitting his request for clemency.

The other two sub-factors depend on the appellant raising, and/or succeeding on, a substantive issue of the appeal. See *Moreno*, 63 M.J. at 139-40. The appellant has not asserted, nor has this court found, a substantive issue with the record of the case. As such, the appellant was not prejudiced by the post-trial processing delay.

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), *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.

Conclusion

The findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

⁵ It is noted that this information was already part of the record (Defense exhibits C and D, respectively) which the CA is required to consider, prior to taking action.