

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS  
WASHINGTON NAVY YARD  
WASHINGTON, D.C.**

**BEFORE**

**W.L. RITTER**

**J.F. FELTHAM**

**E.S. WHITE**

**UNITED STATES**

**v.**

**David RODRIGUEZ, Jr.  
Sergeant (E-5), U. S. Marine Corps**

NMCCA 200500298

Decided 28 February 2007

Sentence adjudged 20 May 2003. Military Judge: R.S. Chester. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Marine Wing Communications Squadron 38, MACG 38, 3d MAW, MarForPac, MCAS Miramar, San Diego, CA.

CAPT ALBERTO MUNGUIA, JAGC, USNR, Appellate Defense Counsel  
LT JENNIE L. GOLDSMITH, JAGC, USN, Appellate Defense Counsel  
Capt ROGER MATTIOLI, USMC, Appellate Government Counsel  
Maj KEVIN HARRIS, USMC, Appellate Government Counsel  
LT DEBORAH S. MAYER, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FELTHAM, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of a single specification of wrongful use of cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. He was sentenced to a bad-conduct discharge, confinement for 60 days, forfeiture of \$700.00 pay per month for a period of three months, and reduction to pay grade E-1. The convening authority approved the adjudged sentence, but suspended confinement in excess of 45 days pursuant to a pretrial agreement.

The appellant now claims he has been prejudiced by excessive post-trial delay, and that his trial defense counsel was ineffective because: (1) he counseled the appellant to reject a summary court-martial in favor of a special court-martial; and (2)

"with appellant's consent, trial defense counsel failed to submit clemency matters for the convening authority's consideration."<sup>1</sup>

We have carefully considered the record of trial, the appellant's assignments of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. See Arts. 59(a) and 66(c), UCMJ.

### **Alleged Ineffective Assistance of Counsel**

In order to prevail on a claim of ineffective assistance, the appellant must overcome the strong presumption that his counsel acted within the wide range of reasonably competent professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The appellant has the burden of demonstrating: (1) that his counsel was deficient; and (2) that he was prejudiced by such deficient performance. *Id.* at 687. To meet the deficiency prong, the appellant must show that his defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To show prejudice, the appellant must demonstrate that any errors made by his defense counsel were so serious that they deprived him of a fair trial, "a trial whose result is reliable." *Id.*; *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). The appellant "'must surmount a very high hurdle.'" *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998)(quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)).

"The *Strickland* test governs ineffective assistance of counsel claims in cases involving guilty pleas." *United States v. Osheskie*, 63 M.J. 432, 434 (C.A.A.F. 2006)(citing *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000)). In a guilty plea case, an appellant must show that his counsel's performance was deficient, and "must also meet the prejudice prong under *Strickland*, which requires appellant to show specifically that 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Alves*, 53 M.J. at 289-90 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

The only evidence supporting the appellant's ineffective assistance of counsel claim is a post-trial affidavit, in which he alleges: (1) that his trial defense counsel advised him to refuse the chance to have his case resolved at a summary court-martial and to "request" trial by special court-martial; (2) that he did not "really understand" his trial defense counsel's

---

<sup>1</sup> See *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Having reviewed the record of trial and the appellant's assignments of error, we conclude that the word "with" was used in error in the heading of the second portion of the appellant's brief. This portion of the ineffective assistance allegation only makes sense when construed as a claim that the trial defense counsel failed to submit clemency matters *without* the appellant's consent.

"strategy other than he informed me that the case could be won at a Special Court Martial [sic];" (3) that "when it was nearing the time to face the Court, [my trial defense counsel] informed me that I should plea [sic] guilty at the Special Court Martial [sic];" and (4) that he "entered into a plea [sic] trial agreement without protection from receiving a punitive discharge." Appellant's Affidavit of 9 Dec 2005 at 1-2. The appellant further claims: "Had [my trial defense counsel] counseled me to keep my case at a Summary Court Martial [sic], I would probably still be in the Marine Corps." *Id.*

The appellant's affidavit also claims that the trial defense counsel failed to submit clemency matters to the convening authority. "Captain Stevenson should have presented my positive contributions to the Marine Corps and my almost impeccable record for the Convening Authority's consideration. At minimum [sic], Captain Stevenson should had [sic] put forward the fact that I had been offered a Summary Court Martial [sic] and that a punitive discharge was not warranted given my faithful service and near perfect military record." Appellant's Affidavit of 9 Dec 2005 at 3.

On 31 July 2006, we ordered the Government to contact the appellant's trial defense counsel and secure, in affidavit form, his responses to the appellant's allegations of ineffective assistance. The Government provided the affidavit on 31 August 2006. In it, the appellant's trial defense counsel, Major J. A. Stevenson, U.S. Marine Corps, indicates he submitted three separate pretrial agreement offers to the convening authority, and that all three offers were rejected. Trial Defense Counsel's Affidavit of 14 Aug 2006 at 1-3. Major Stevenson indicates the first pretrial agreement offer was an attempt to resolve the charges at a nonjudicial punishment proceeding, in accordance with Article 15, UCMJ. *Id.* In making the second offer, Major Stevenson tried to persuade the convening authority to agree to a summary court-martial. *Id.* In the third, he tried to obtain protection from a bad-conduct discharge for the appellant, in exchange for guilty pleas and a confessional stipulation. *Id.*

After the third pretrial agreement offer was rejected, Major Stevenson indicates the convening authority "stated no BCD protection but 30 days would be acceptable." Trial Defense Counsel's Affidavit of 14 Aug 2006 at 2. Although he claims the appellant at first wanted to plead not guilty, Major Stevenson advised him that, based on the evidence in the case and his professional experience, he recommended entering a pretrial agreement. *Id.* The appellant signed a pretrial agreement offer on 13 May 2003, and the convening authority accepted it the following day. Appellate Exhibits II and III.

With regard to the appellant's claim of ineffective post-trial representation, Major Stevenson's affidavit reads as follows:

After trial the affiant spoke with the Convening Authority requesting reprieve from the bad conduct [sic] discharge in light of the federal drug conviction that the [appellant] would subsequently receive. The affiant emphasized the fact that the appellant was a stellar Marine making several references to the witness testimony on behalf of the appellant. The affiant also emphasized the fact that the appellant pled guilty and freely confessed to his wrongdoing to investigative officials. During this plea for mercy the Convening Authority stated that he would not entertain anything less than other Non-Commissioned Officers in his command had received.

The convening authority emphasized the fact that non-NCO's received greater punishment. He further noted that appellant was his 'expletive' legal clerk who was doing the paperwork on several drug cases in the command when the appellant decided to use drugs.

Trial Defense Counsel's Affidavit of 14 Aug 2006 at 3.

On 10 October 2006, we again ordered the Government to contact the appellant's trial defense counsel and obtain, in affidavit form, further responses to the appellant's allegations of ineffective assistance. We specifically directed the trial defense counsel to state: (1) whether or not the charges in this case were ever referred for trial by summary court-martial; (2) whether or not the convening authority, or someone authorized to speak on behalf of the convening authority, ever informed the appellant or the trial defense counsel that the charges could be tried by summary court-martial instead of by special court-martial; (3) whether or not the trial defense counsel advised the appellant to refuse trial by summary court-martial, and, if so, the reason(s) for giving that advice; and (4) whether or not the trial defense counsel ever submitted written comments or corrections to the convening authority in response to the staff judge advocate's recommendation, and, if not, the reason(s) why not.

In response to our order, the Government provided a second affidavit from the appellant's trial defense counsel, Major Stevenson. In it, Major Stevenson indicates the charges in this case were never referred to a summary court-martial. Trial Defense Counsel's Affidavit of 31 Oct 2006 at 1. He asserts that he "zealously advocated" for a pretrial agreement, whereby the charges would be disposed of at nonjudicial punishment or a summary court-martial, but that the convening authority indicated "it would be a tall feat to have the drug charges for a Marine NCO responsible for processing all of [his] drug charges taken care of at anything less than a special court-martial." *Id.* Major Stevenson wrote: "During each negotiation session with the commanding officer and the trial counsel the commanding officer

vehemently denied all requests for anything other than a special court-martial with maximum punishment." *Id.* at 2.

A "post-trial evidentiary hearing . . . is not required in [a] case simply because an affidavit is submitted by an appellant." *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). *Ginn* established a number of circumstances where an appellate court can "independently resolve the factual and legal issues in the case," despite an appellant's submission of a post-trial affidavit alleging ineffective assistance of counsel. *Osheskie*, 63 M.J. at 434 (citing *Ginn*, 47 M.J. at 248). One of those circumstances (the fourth "*Ginn* factor") is, "[When] the affidavit is factually adequate on its face but the appellate filings and the record as a whole 'compellingly demonstrate' the improbability of the facts." *Id.*

The appellant pleaded guilty to using cocaine on 5 December 2002, and his pleas were supported by a confessional stipulation in which he admitted snorting half a line of cocaine through a one-dollar bill. He testified during the providence inquiry that he participated in a urinalysis on 5 December 2002. From our knowledge of urinalysis testing in the Department of the Navy, we may assume that several days elapsed between the time the appellant provided his urine sample and the date his command was notified that the sample had tested positive for the cocaine metabolite. Considering the likely delay involved in obtaining the results of the appellant's urinalysis, his case proceeded to trial in a remarkably short time, with the convening authority conducting what amounted to a one-day turnaround in preparing the charge sheet.

The charge and specification were preferred on 13 January 2003, and the convening authority referred the charge to trial by special court-martial on the same date. From our examination of the record and the appellate filings, our experience litigating general and special courts-martial, and knowledge gained from advising convening authorities on the administration of military justice, we deem it highly unlikely that the convening authority in this case ever considered resolving the charge at a summary court-martial or nonjudicial punishment proceeding.

The appellant was a sergeant in the Marine Corps, working as a legal clerk for the convening authority, at the time of the offense. His service record reflected a prior nonjudicial punishment for driving under the influence of alcohol. Faced with those facts, we are confident that a special court-martial is the option most convening authorities would have chosen. Indeed, the short period (less than one day) between preferring the charge and referring it to a special court-martial is strong evidence that the convening authority in this case never considered resolving the charge at any other forum. The trial defense counsel's affidavits describing his interaction with the convening authority, and the convening authority's attitude toward the offense, strongly support this conclusion, and

"compellingly demonstrate" the improbability of the assertions in the appellant's affidavit.

Aside from his affidavit, the appellant presents no evidence to prove that his case was ever referred to a summary court-martial, or that his trial defense counsel advised him to refuse a summary court-martial in favor of a special court-martial. In light of the evidence in the record, the appellate filings, and the trial defense counsel's affidavits, the appellant has not carried his burden to show that his counsel was deficient. See *Osheskie*, 63 M.J. at 436 (deciding an ineffective assistance allegation by evaluating conflicting post-trial affidavits, in accordance with *Ginn*, without a post-trial evidentiary hearing).

Another circumstance where ineffective assistance allegations can be resolved without further proceedings, despite an appellant's submission of a post-trial affidavit (the fifth "*Ginn* factor"), is, "[W]hen an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal." *Ginn*, 47 M.J. at 248. These circumstances are present in the instant case, and we find the record adequate for us to decide the issue without a post-trial evidentiary hearing.

Applying the fifth "*Ginn* factor," we note the appellant's admissions of guilt at trial, and in his confessional stipulation, and his in-court expressions of satisfaction with his counsel. The appellant told the military judge that he wished to be represented by his trial defense counsel, and by no one else. Record at 4. He told the military judge he understood the meaning and effect of his guilty pleas, and said that he and his trial defense counsel had discussed his waiver of the right against self-incrimination, the right to a trial of the facts by the court-martial, and the right to confront the witnesses against him or to call witnesses on his own behalf. Record at 11.

The appellant told the military judge that he was satisfied with his trial defense counsel, that he believed his counsel's advice was in his best interest, and that he was pleading guilty voluntarily. Record at 12. He said he discussed his confessional stipulation with his trial defense counsel, that the stipulation was factually correct, and that entering into it was a free and voluntary decision on his part. Record at 13-14. Finally, he told the military judge he had fully discussed his pretrial agreement with his trial defense counsel, and said he was fully satisfied with his counsel. Record at 18. The appellant has provided us with no rational explanation as to why he would have made the aforementioned statements expressing

satisfaction with his trial defense counsel, and his counsel's advice, at trial but not on appeal.

Turning to the allegation that the trial defense counsel failed to submit clemency matters, the appellant claims his trial defense counsel: "[S]hould have presented my positive contributions to the Marine Corps and my almost impeccable record for the Convening Authority's consideration. At minimum, Captain Stevenson should had [sic] put forward the fact that I had been offered a Summary Court Martial [sic] and that a punitive discharge was not warranted given my faithful service and near perfect military record." Appellant's Affidavit of 9 Dec 2005 at 2.

Contrary to these assertions, the two affidavits submitted by the trial defense counsel, taken in context with the record as a whole, indicate zealous (albeit unsuccessful) post-trial advocacy, and demonstrate the improbability of the appellant's claim. In his second post-trial affidavit, Major Stevenson wrote: "The affiant did not file written comments to the convening authority in response to the SJAR. However, the affiant did request clemency from the convening authority which were [sic] summarily denied." Trial Defense Counsel's Affidavit of 31 Oct 2006 at 2.

Major Stevenson's first affidavit provides a more detailed description of his post-trial advocacy on behalf of the appellant. "After trial the affiant spoke with the Convening Authority requesting reprieve from the bad conduct [sic] discharge in light of the federal drug conviction that the [appellant] would subsequently receive. The affiant emphasized the fact that the appellant was a stellar Marine making several references to the witness testimony on behalf of the appellant. The affiant also emphasized the fact that the appellant pled guilty and freely confessed to his wrongdoing to investigative officials. During this plea for mercy the Convening Authority stated that he would not entertain anything less than other Non-Commissioned Officers in his command had received." Trial Defense Counsel's Affidavit of 14 Aug 2006 at 3. "The affiant recalls that the final discussion with the convening authority, after his return from Iraq, was something to the effect that the appellant got what he deserved and lesser punishment would not be considered no matter what." *Id.*

Although the appellant claims, in his affidavit, that his trial defense counsel failed to submit clemency matters to the convening authority on his behalf, we find that the appellate filings, the affidavits submitted by the trial defense counsel, and the record as a whole "compellingly demonstrate" the improbability of the appellant's assertions. In light of our previous discussion, we find the claim that the trial defense counsel should have reminded the convening authority that the appellant had once been offered a summary court-martial to be both unpersuasive, and premised upon improbable facts.

We find that the appellant has failed to prove either prong of the *Strickland* test with regard to his allegations of ineffective assistance on the part of his trial defense counsel. The trial defense counsel was competent, and zealously represented the appellant during the post-trial phase of his court-martial, and we find that the appellant was not prejudiced by his actions and advice. We reject the assignment of error claiming ineffective assistance of counsel.

### **Post-Trial Delay**

We consider four factors in determining if post-trial delay violates the appellant's due process rights: (1) the length of the delay; (2) the reasons for the 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 the delay is not unreasonable, further inquiry is not necessary. If we conclude that the length of the delay is "facially unreasonable," however, we must balance the length of the delay against the other three factors. *Id.* Moreover, in extreme cases, the delay itself may "give rise to a strong presumption of evidentiary prejudice." *Id.* (quoting *Toohey*, 60 M.J. at 102).

Here, there was a delay of about 661 days from the date of trial to the date the case was docketed at this court. Although the record of trial contains only 39 pages of transcript, it took 321 days after the record was authenticated to complete the staff judge advocate's recommendation (SJAR), and 111 days after service of the SJAR for the convening authority to act on the case. This case was tried and docketed at this court prior to the date our superior court decided *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), so the presumptions of unreasonable delay set forth in that case do not apply here. Nonetheless, we find the delay in this case facially unreasonable, triggering a due process review.

Regarding the second factor, reasons for the delay, the record contains no explanation.

Turning to the third factor, we find no assertion of the right to a timely appeal until 8 February 2006, nearly 33 months after the trial, when the appellant filed a motion to attach his affidavit of 9 December 2005. Concerning the fourth factor, the appellant's affidavit claims he was twice denied employment because he does not have a discharge certificate (DD-214), and that he had to borrow money to meet his obligations.

In *Jones*, the appellant submitted his own declaration and declarations from three officials of a potential employer stating that despite his bad-conduct discharge, he would have been considered for employment as a truck driver, and likely hired, if

he had possessed a DD-214. Our superior court held that these un rebutted declarations were sufficient to demonstrate that unreasonable post-trial delay prejudiced Jones by interfering with his opportunity to be considered for employment. *Jones*, 61 M.J. at 84-85.

Unlike Jones, the appellant in the instant case did not provide any evidence to support his assertions, and he cites no specific occasions on which lack of a DD-214 caused him to be denied employment or to experience financial difficulties. Therefore, we find no evidence of specific prejudice. We also find no "extreme circumstances" that give rise to a strong presumption of evidentiary prejudice. Thus, we conclude that there has been no due process violation resulting from the post-trial delay. *Jones*, 61 M.J. at 83.

We are also aware of our authority to grant relief under Article 66, UCMJ, but we decline to do so. *Toohey*, 60 M.J. at 102; *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(*en banc*).

#### **Conclusion**

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

Senior Judge RITTER and Judge WHITE concur.

For the Court

R.H. TROIDL  
Clerk of Court