

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

**Before
R.E. VINCENT, J.E. STOLASZ, P.D. KOVAC
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**WILLIAM F. WALDEN, JR.
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 9901568
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 08 April 1999.

Military Judge: LtCol Robert Nunley, USMC.

Convening Authority: Commanding Officer, 8th
Communication Battalion, II Marine Expeditionary Force,
Camp Lejeune, NC.

Staff Judge Advocate's Recommendation: LtCol G.W. Riggs,
USMC (26 Aug 99); LtCol D.M. Wunder, USMC (3 Dec 01); Col
R.G. Kelly, USMC (8 Sep 04); LtCol M.A. Lawrence, USMC (24
Jan 06).

For Appellant: LCDR Derek Hampton, JAGC, USN.

For Appellee: LCDR Frank Gatto, JAGC, USN; Capt Geoffrey
Shows, USMC.

18 December 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

KOVAC, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of unauthorized absence, violating a lawful general order by driving a motor vehicle on base without a valid driver's license, violating a lawful general order by wrongfully possessing weapons (pocket

knives with blades in excess of three inches), and obtaining telephone services using false pretenses, in violation of Articles 86, 92, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 892, and 934. The appellant was sentenced to confinement for 45 days, reduction to pay grade E-1, forfeiture of \$600.00 pay per month for three months, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

This case is now before us for the fourth time after numerous remands to correct post-trial processing errors. The appellant has submitted four assignments of error¹ and requests the court to disapprove the findings and sentence.

We have carefully reviewed the record of trial, the appellant's brief and assignments of error, and the Government's response. We find merit in appellant's contention that the nine-years of post-trial delay in this case violated his due process rights and will grant relief in our decretal paragraph. Additionally, we have determined that the appellant's remaining assignments of error are without merit.

Following our corrective action, we conclude that the remaining findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.²

¹ I. APPELLANT RECEIVED CONSTITUTIONALLY DEFECTIVE REPRESENTATION DURING THE POST-TRIAL PHASE OF HIS COURT-MARTIAL.

II. APPELLANT'S DUE PROCESS RIGHTS HAVE BEEN VIOLATED BY THE UNTIMELY POST-TRIAL PROCESS AND APPELLATE REVIEW OF HIS COURT-MARTIAL.

III. ARTICLE 66, UCMJ, WARRANTS RELIEF IN THIS CASE DUE TO EXCESSIVE AND UNEXPLAINED POST-TRIAL DELAY.

IV. A SENTENCE INCLUDING A BAD-CONDUCT DISCHARGE IS INAPPROPRIATELY SEVERE GIVEN THE NATURE OF THE OFFENSE AND APPELLANT'S CHARACTER OF PRIOR SERVICE.

² The appellant raised two additional assignments of error in prior appellate briefing. In his brief filed on 20 March 2003, the appellant claimed that the CA erred by attempting to suspend confinement that had already run. In his supplemental brief filed on 15 August 2005, the appellant challenged a previous Staff Judge Advocate's Recommendation claiming that it failed to include a recommendation on the sentence. We have determined that these two assignments of error are moot based upon the corrective action taken in subsequent post-trial processing.

Procedural Background

This case was tried on 8 April 1999. The initial CA's action was completed on 23 September 1999, and the case was first docketed before this Court on 25 October 1999. Upon review, it was discovered that proof of service of the staff judge advocate's recommendation (SJAR) was missing from the record of trial and efforts by the Government to locate the missing document, if it existed at all, were unsuccessful. As a result, an earlier panel of this court set aside the CA's action and returned the case for proper post-trial processing. See *United States v. Walden*, No. 9901568, unpublished op. (N.M.Ct.Crim.App. 18 Sept 2000)(*Walden I*).

The second CA's action was not completed until 5 December 2001 (444 days after *Walden I* and 972 days after trial). The SJAR that preceded the CA's action was served upon civilian trial defense counsel, as opposed to the detailed military defense counsel as the appellant had requested at trial. The case was again docketed with this Court on 30 January 2002. On 20 March 2003, the appellant submitted an affidavit from civilian trial defense counsel dated 3 May 2002 indicating that he was not retained to represent the appellant in post-trial matters and that these matters were the responsibility of the appellant's detailed military defense counsel. Nonetheless, the civilian counsel indicated that he made attempts to locate the appellant, including the hiring of a private investigator in April 2002, but was unsuccessful. On 23 December 2003, an earlier panel of this court set aside the second CA's action and returned the record of trial to the Judge Advocate General because the CA failed to comply with RULE FOR COURTS-MARTIAL 1106(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) by not having the record and new SJAR served upon the appropriate military defense counsel. See *United States v. Walden*, No. 9901568, unpublished op. (N.M.Ct.Crim.App. 23 Dec 2003)(*Walden II*).

The third CA's action was completed on 25 October 2004 (307 days after *Walden II* and 2,027 days after trial) and this case was redocketed with this court on 7 February 2005. This time, the new SJAR was served upon the appellant's detailed defense counsel, who was off active duty and in an inactive reserve status practicing law as a civilian. This counsel accepted service of the SJAR, reviewed it for error, and indicated that he had no comments, corrections, rebuttal or other matters to submit pursuant to R.C.M 1105 and 1106. In a subsequent affidavit, the detailed defense counsel stated that he had not

consulted with the appellant prior to representing that he had no clemency matters to submit. He further stated that he had not spoken with the appellant since his court-martial in 1999, and his recent efforts to contact the appellant, in October 2004, were unsuccessful. During appellate briefing, the Government submitted a Motion to Remand due to the existence of yet another post-trial error. This time the SJAR failed to comply with R.C.M. 1106(d)(3)(F) by omitting "a specific recommendation as to the action to be taken by the convening authority on the sentence." In an Order dated 19 October 2005, this court remanded the case to correct this error. See *United States v. Walden*, No. 9901568, Order (N.M.Ct.Crim.App. 19 Oct 2005)(*Walden III*).

The fourth and final CA's action was completed on 10 February 2006 (2,500 days after trial). For reasons not explained in the record, this case was not docketed with this Court until 20 May 2008 (3,330 days or 9 years, 1 month, and 12 days after trial).

Constitutionality of Post-Trial Representation

In his first assignment of error, the appellant challenges the constitutionality of his post-trial representation. Specifically, the appellant argues that he "received ineffective assistance of counsel during the post-trial phase of his court-martial because his military defense counsel failed to contact him prior to waiving his rights to file clemency." We disagree.

It is clear that the Sixth Amendment right to effective representation of counsel in our military justice system "extends to assistance in the preparation and submission of post-trial matters." *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001)(citing *United States v. Fluellen*, 40 M.J. 96, 98 (C.M.A. 1994)). When ineffective assistance is alleged, it is the appellant's burden to demonstrate *both* deficient representation and prejudice. *United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004). The failure to prove one of these prongs will be fatal to the appellant's claim. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984)("Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversarial process that renders the result unreliable."). There is also no particular order for analyzing these claims, and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Id.* at 697; see also *Quick*, 59 M.J. at 386.

We deny this assignment of error because the appellant has failed to demonstrate prejudice. "To satisfy this burden, he 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *United States v. Hood*, 47 M.J. 95, 97 (C.A.A.F. 1997)(quoting *Strickland*, 466 U.S. at 694). Here, the appellant argues that "the passage of time is a critical component with respect to prejudice" and that many things might have changed since the trial of this case that could effect the CA's clemency decision. However, the appellant fails to provide any specific information regarding these alleged life changes or any other clemency matter that he would have presented to the CA. The imaginative arguments of counsel alone are insufficient to satisfy the prejudice prong of the ineffective assistance of counsel analysis.

Indeed, our superior court has stated, that in order to demonstrate prejudice, the appellant must produce specific information that he would have submitted to the CA for consideration. *See, e.g., United States v. Perez*, 64 M.J. 239, 244 (C.A.A.F. 2006)("Appellant, however, has not provided specific information about what he or others would have submitted. In the absence of such information, Appellant has not demonstrated prejudice under *Strickland*."); *Hood*, 47 M.J. at 98 ("With respect to appellant's assertion that he had additional clemency materials to submit, we hold that he has not met his burden of showing prejudice because he has not identified any matters that he would have submitted."). Because the appellant failed to proffer any evidence that demonstrates even the slightest bit of prejudice, we do not find any constitutional defect in his post-trial representation.

Post-Trial Delay

In his next two assignments of error, the appellant challenges the post-trial delay in his case. He first alleges a violation of due process claiming that he suffered specific prejudice based upon the untimely post-trial processing and appellate review of his case. Alternatively, the appellant contends that even if specific prejudice is not demonstrated, this court should still grant him relief pursuant to our Article 66(c) authority.

The first step in a post-trial delay analysis requires us to determine whether the delay is "facially unreasonable." *United States v. Young*, 64 M.J. 404, 408 (C.A.A.F. 2007)(citing *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2006)). The

presumption of unreasonably delay that was recognized in *Moreno* does not apply because the appellant's court-martial occurred well before the *Moreno* decision. *Moreno*, 63 M.J. at 142. Nonetheless, we have no trouble determining that over nine years of delay between the appellant's court-martial and final docketing with this court is facially unreasonable.

The next step in our due process review requires us to assess the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (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) the prejudice to the appellant. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *United States v. Bredschneider*, 65 M.J. 739, 741 (N.M.Ct.Crim.App. 2007). The length of delay is considerable and the record contains numerous post-trial missteps by the Government. Accordingly, the first factor weighs in favor of the appellant.

In addressing the second factor, "we look at the Government's responsibility for any delay, as well as any legitimate reasons for the delay, including those attributable to an appellant. In assessing the reasons for any particular delay, we examine each stage of the post-trial period because the reasons for the delay may be different at each stage and different parties are responsible for the timely completion of each segment." *Moreno*, 63 M.J. at 136 (footnote omitted). We note that the Government does not provide any reason for the delay. Most disturbing, the Government does not provide any reason for the two-year delay between the latest CA's action (10 February 2006) and redocketing with this court (20 May 2008), a period of delay long considered "the least defensible of all" post-trial delay. *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990). Accordingly, we conclude that the second factor also weighs heavily against the Government.

Considering the third factor, we note the appellant did not request his right to a timely appeal until his 2005 supplemental appellate briefing. Since his request was filed six years after his trial, under the guidance of our superior court, we conclude that this factor weighs against the appellant, but, under the circumstances of this case, not heavily. *Moreno*, 63 M.J. at 138; *United States v. Harvey*, 64 M.J. 13, 36 (C.A.A.F. 2006).

As to the final factor, prejudice, there is no significant evidence that the appellant suffered oppressive incarceration, particularized anxiety, or an impairment to his appellate defense. See *United States v. Toohey*, 63 M.J. 353, 361

(C.A.A.F. 2006)(quoting *Moreno*, 63 M.J. at 138)(analyzing prejudice in light of the three interests noted). Nonetheless, we find a due process violation because "the delay in this case is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohey*, 63 M.J. at 362; see also *Bredschneider*, 65 M.J. at 742 (due process violation for a 2,571 day post-trial delay); *United States v. Nunez*, No. 200700087, 2008 CCA LEXIS 93, unpublished op. (N.M.Ct.Crim.App. 20 Mar 2008)(due process violation for a 2,200 day post-trial delay).

Having found a due process violation, "we grant relief unless this court is convinced beyond a reasonable doubt that the constitutional error is harmless." *Young*, 64 M.J. at 409 (quoting *Toohey*, 63 M.J. at 363). We apply a *de novo* standard of review for this consideration bearing in mind that the Government has the burden of proving that the error was harmless. *Id.*; *United States v. Brewer*, 61 M.J. 425, 432 (C.A.A.F. 2005).

Considering the totality of the circumstances, we cannot be confident that this constitutional error was harmless beyond a reasonable doubt. *Toohey*, 63 M.J. at 363. The post-trial delay in this case of over nine years clearly impacts the fairness and integrity of the military justice system. The majority of this delay is attributed to the consistent failure to follow straightforward post-trial processing rules in a case involving an uncomplicated guilty plea record of 57 pages. Our tolerance is further limited in the area of post-trial delay when three remands are required to correct relatively simple matters such as service of the SJAR upon the appropriate defense counsel and drafting an SJAR that contains a recommendation regarding the action a CA should take on a sentence.

Moreover, when these remands occurred, the command did not always move with alacrity. For example, we issued our first decision, *Walden I*, on 18 September 2000, but the case was not returned to the Court until 30 January 2002. We then issued our second decision, *Walden II*, on 23 December 2003, but yet again, it took until 7 February 2005 for the case to return. There is also unexplained delay, that we attribute to the Government, from the most recent CA's action (dated 10 February 2006) until the record was redocketed with this court over two years later on 20 May 2008. Under these circumstances, the integrity and fairness of our military justice system has certainly been brought into question. See *id.* ("Although we do not presume prejudice based on the length of the delay alone, we are mindful

of the egregious delay in this case and the adverse impact such delays have upon the public perception of fairness in the military justice system."). Accordingly, we cannot conclude that the due process error in this case was harmless beyond a reasonable doubt.

We next consider the question of what relief is appropriate for this constitutional error. In making this determination, we consider the totality of circumstances and the types of relief that may be available. *Rodriguez-Rivera v. United States*, 63 M.J. 372, 386 (C.A.A.F. 2006); *Moreno*, 63 M.J. at 143. We note that the appellant's offenses are fairly serious, his record of service unremarkable, and he had a prior nonjudicial punishment. During post-trial processing and appellate review, the appellant could not be located by his attorneys and has not otherwise shown any active interest in the resolution of his appeal. Under these circumstances, the setting aside of the appellant's discharge, as he argues, would simply amount to an unreasonable windfall that is disproportionate to any harm generated by this delay. Accordingly, after careful consideration, we will grant the appellant relief by setting aside the adjudged forfeitures and 45 days of confinement.

We have also considered the appellant's additional plea for relief pursuant to our Article 66(c) authority. Given our remedial action for the due process violation, we decline to grant any further relief under Article 66(c), UCMJ.

Sentence Appropriateness

In his final assignment of error, the appellant asserts that the portion of his sentence adjudging a bad-conduct discharge is inappropriately severe. We disagree. The appellant committed serious misconduct to include obtaining another Marine's long distance calling card number and then using that number under false pretenses for numerous long distance calls. We have also considered the appellant's undistinguished character of service and very average proficiency and conduct marks. There is no doubt in our minds that the appellant's conduct, along with the all the other evidence presented in this case, merits the bad-conduct discharge that was adjudged in this case. Accordingly, based on our review of the entire record, we find the sentence of an unsuspended bad-conduct discharge appropriate in all respects for this offender and his offenses.. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *United States v. Healy*, 26

M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Conclusion

Accordingly, the findings of guilty are affirmed. Based upon our finding of a due process violation, we affirm only that portion of the approved sentence that extends to a bad-conduct discharge and reduction to pay grade E-1.

Senior Judge VINCENT and Judge STOLASZ concur.

For the Court

R.H. TROIDL
Clerk of Court