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

Before
R.E. VINCENT, E.C. PRICE, J.E. STOLASZ
Appellate Military Judges

UNITED STATES OF AMERICA

v.

OSMAN F. ASIF
AVIATION STOREKEEPER AIRMAN APPRENTICE (E-2), U.S. NAVY

NMCCA 200601040
GENERAL COURT-MARTIAL

Sentence Adjudged: 16 August 2001.
Military Judge: CAPT David Wagner, JAGC, USN.
Convening Authority: Commander, Navy Region, Mid-Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: CDR R.J. Orr, JAGC, USN.
For Appellant: LT Dillon Ambrose, JAGC, USN.
For Appellee: Maj James Weirick, USMC.

7 May 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

STOLASZ, Judge:

Contrary to his pleas, the appellant was convicted, in absentia, by a general court-martial composed of officer and enlisted members, of larceny and forgery in violation of Articles 121 and 123, Uniform Code of Military Justice, 10 U.S.C. §§ 921, and 923. The appellant was sentenced to 4 years confinement, total forfeitures, reduction to pay grade E-1, a reprimand, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

We have examined the record of trial, the appellant's five assignments of error, the Government's answer, and the appellant's reply. [1] 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. Arts. 59(a) and 66(c), UCMJ.

I. TRIAL IN ABSENTIA

A. Background

The appellant asserts that the military judge's decision to proceed with the court-martial in absentia after ruling that the appellant's absence was voluntary was an abuse of discretion. The appellant was arraigned on 5 April 2001. Record at 8. At the close of the arraignment, the military judge advised the appellant that if he was not present at the court-martial's next session, and the absence was determined to be voluntary, then the court-martial would proceed without his presence. *Id.* at 10; *see* RULE FOR COURTS-MARTIAL 804, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). At the next session of the court-martial, on 18 May 2001, the military judge again cautioned the appellant that the court-martial would proceed without him if he was voluntarily absent. Record at 24-25. Trial counsel proffered that in June 2001 an R.C.M. 802, UCMJ, conference was held, during which the appellant and his civilian defense counsel, participating via speakerphone, requested a continuance which was opposed by the Government. The continuance was granted by the military judge, and the appellant's court-martial was scheduled to begin on 14 August 2001. *Id.* at 41, 42; Appellate Exhibit XXIII. On 23 July 2001, the trial counsel sent an email to the civilian defense counsel advising that the court-martial was scheduled for 13-16 August 2001. AE XXV. On 12 August 2001, civilian defense counsel sent an email to the military

---

[1] I. THE MILITARY JUDGE ABUSED HIS DISCRETION IN FINDING THAT APPELLANT VOLUNTARILY WAIVED HIS RIGHTS TO APPEAR AT TRIAL, WHEN APPELLANT WAS NOT PRESENT IN COURT THE DAY TRIAL BEGAN, DESPITE THE SCHEDULED TRIAL DATE BEING A DAY LATER.
II. THE MILITARY JUDGE ABUSED HIS DISCRETION IN NOT GRANTING A CONTINUANCE WHEN (1) THE TRIAL-DEFENSE COUNSEL STATED THAT HE WAS UNPREPARED TO GO TO TRIAL; AND (2) THE TRIAL-DFEENSE COUNSEL EXPLAINED THAT APPELLANT'S ABSENCE WAS DUE TO HIS BELIEF THAT THE TRIAL WAS TO START THE NEXT DAY, WHICH WAS THE AGREED UPON TRIAL-START DATE.
III. BECAUSE APPELLANT'S RECORD OF TRIAL SUFFERS FROM SUBSTANTIAL OMMISSIONS, APPELLANT'S RECORD MUST BE DISMISSED OR DEEMED SUMMARIZED.
IV. BECAUSE APPELLANT'S RECORD OF TRIAL CANNOT BE AUTHENTICATED, APPELLANT'S RECORD MUST BE DISMISSED OR DEEMED SUMMARIZED.
V. APPELLANT'S DUE PROCESS RIGHT TO A SPEEDY POST-TRIAL PROCESSING HAS BEEN VIOLATED BY THE GOVERNMENT'S UNEXPLAINED AND UNREASONABLE 1,863 DAY DELAY IN BRINGING THIS CASE TO THIS COURT.

judge and the trial counsel indicating it was likely the appellant would not appear for the court-martial the following day, 13 August 2001. AE XXXV.

On 13 August 2001, the day the appellant's court-martial was scheduled to begin, he was in an unauthorized absence status. AE XXX. During the 13 August 2001 court session, Naval Criminal Investigative Service (NCIS) Special Agent (SA) Andrew Snowdon testified for the Government regarding his efforts to locate the appellant. Record at 34-41. The trial counsel also proffered that he had spoken with the appellant's uncle and mother, neither of whom had knowledge of the appellant's whereabouts. Further, trial counsel proffered that the appellant met with a paralegal in his attorney's office on 7 August 2001, cancelled an appointment with his attorney on 8 Aug 2001, and advised he was having car trouble prior to a scheduled appointment with his attorney on 10 August 2001.

The defense argued there was insufficient evidence that the appellant was aware of the court date of 13 August 2001, and asserted the appellant was advised that his court-martial was scheduled to begin on 14 August 2001. The defense also claimed the evidence was insufficient to establish the appellant was not involuntarily absent as a result of medical disability. *Id.* at 42. The military judge ruled that based on the evidence presented one could infer that the appellant should have known, and did know, he was to be tried the week of 13 August 2001. The military judge ruled that the case law created an affirmative duty on the appellant to stay in touch with his counsel, and keep apprised of developments regarding his case once R.C.M. 804 warnings are issued, accordingly he ruled the court-martial would proceed in absentia. *Id.* at 45-46.

B. Law

A military judge's decision to proceed to trial in absentia is reviewed for an abuse of discretion. *United States v. Sharp,* 38 M.J. 33, 34 (C.M.A. 1993).

C. Analysis

Notice to the appellant of the exact trial date is not a prerequisite to a court-martial proceeding in absentia. *Id.* at 35. Nor is it a requirement that the appellant be warned that he has a right to be present, and that trial might continue in his absence. *Id.* (citing *Taylor v. United States,* 414 U.S. 17, 19 (1973)). R.C.M. 804 provides for trial in absentia when

there is a voluntary absence post-arraignment. *Id.* at 37. The defense has the burden of offering evidence to refute the inference that the absence was voluntary. *Id.* (citations omitted).

Here, the appellant was arraigned and then warned that trial would proceed in his absence at the 5 April 2001 and 18 May 2001 sessions of the court-martial. Evidence proferred by the Government established that the appellant was placed on notice that his court martial was to proceed the week of 13 August 2001. The email sent by trial counsel on 23 July 2001 advised the defense that trial was scheduled for 13-16 August 2001. Thereafter, on 7 August 2001, the appellant met with a paralegal at the office of his civilian defense attorney. Clearly, the appellant was on notice of the scheduled start date of his court-martial. Further evidence proffered by the Government established the appellant's whereabouts were unknown despite attempts to locate him. The defense offered no evidence to "refute the inference" of a voluntary absence by the appellant, other than speculating about a possible medical disability. *Id.* Further, even if the appellant was somehow unaware that his court-martial was to begin on 13 August 2001, he, nevertheless, failed to appear the following day, 14 August 2001, when he claims his court-martial was scheduled to begin.

We find the military judge did not abuse his discretion by proceeding in absentia.

II. Denial of Continuance Request

A. Background

After the military judge ruled the court-martial would proceed in absentia, the defense moved for a continuance. Civilian defense counsel indicated he was not ready to proceed because of insufficient opportunity to prepare due to the appellant's failure to cooperate. Record at 46. The military judge ruled that there had been plenty of time to prepare the case as the identity and location of witnesses was well known, and depositions had previously been requested and ordered. He further noted the appellant's unauthorized absence began 26 July 2001, and assuming diligence on behalf of the litigants, found it unlikely that counsel waited until August to prepare the case. *Id.* The military judge stated that he would not allow the appellant to benefit from a continuance due to his voluntary lack of cooperation with his counsel. *Id.* at 46-47.

B. Law

Whether to grant or deny a continuance is within the discretion of the military judge, and the decision will be reversed only if it was an abuse of discretion. *Sharp,* 38 M.J. at 37.

C. Analysis

Here, we note charges were preferred on 31 January 2001 and referred on 26 March 2001. The civilian defense counsel entered his appearance on 3 April 2001. AE I. The appellant was arraigned on 5 April 2001, during which he expressed a desire to be represented by civilian as well as detailed military counsel. There was a subsequent session of court on 18 May 2001 during which the civilian defense counsel filed a motion to withdraw, which was granted. The motion to withdraw indicated it was, in part, based on the appellant's failure to cooperate. AE II. The court-martial was set to proceed on 12 June 2001. The civilian defense counsel was rehired on 5 June 2001; he requested, and was granted, a continuance until 14 August 2001. AE XVII; AE XX.

The above chronology leads us to conclude, as did the military judge, that defense counsel had ample time to prepare their case. The civilian defense counsel was the attorney of record for over 1 month prior to withdrawing; after being re-hired he was granted a continuance of 2 months which clearly provided time for adequate preparation. Notably, leading up to the court-martial, the appellant was always represented by his military defense counsel who attended all of the court-martial sessions, and who continued to represent the appellant during the period of time (18 May 2001 - 5 June 2001) the civilian defense counsel was not involved. Further, the appellant's apparent lack of cooperation with his counsel appears to have been an issue throughout the months leading up to the court-martial, and such conduct should not be rewarded with the benefit of further delay.

We find that the military judge did not abuse his discretion in denying the defense counsel's request for a continuance.

III. Substantial Omissions in the Record of Trial

The appellant asserts that the record of trial suffers from substantial omissions prejudicing his ability to fully analyze and brief his case, and prohibiting the court from conducting its Article, 66, UCMJ review.

The original record of trial was authenticated by the military judge on 15 November 2001. Although it is not entirely clear why or how, it appears that the original record of trial was lost. However, a photocopy of the original record was available. The appellant complains that this photocopy has 369 unnumbered pages, that the bottom of 36 of the pages are cut-off, such that responses to questions are missing, that page 2 of Prosecution Exhibit 87 is missing, and that one full page, not specified, is missing between pages 378-478.

A. Law

A complete record of the proceedings and testimony must be prepared for any general court-martial resulting in a discharge. Art. 54(c)(1), UCMJ; R.C.M. 1103(b)(2)(A). The court-martial related documentation delineated under R.C.M. 1103(b)(2)(D), which includes all appellate exhibits, must be included in order for the record to be considered complete.

Additionally, a verbatim transcript is required for any trial resulting in a bad-conduct discharge. R.C.M. 1103(b)(2)(B). A verbatim transcript includes all proceedings, arguments of counsel, ruling and instructions by the military judge, and matters which the military judge orders stricken from the record or discarded. *Id*., Discussion. However, a complete record does not necessarily mean that the entire record is verbatim. *United States v. McCullah,* 11 M.J. 234, 36 (C.M.A. 1981)(quoting *United States v. Whitman*, 11 C.M.R 179, 181 (C.M.A. 1953)). Moreover, our superior court has long recognized that literal compliance with the verbatim requirement is impossible. *United States v. Lashley*, 14 M.J. 7, 8 (C.M.A. 1982). Accordingly, a record of trial must be substantially verbatim. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000).

Whether a record of trial is complete and substantially verbatim is a question of law we review *de novo. Henry,* 53 M.J. at 110 (C.A.A.F. 2000). The requirement that a record of trial be complete and substantially verbatim in order to uphold the validity of a sentence is one of jurisdictional proportion that cannot be waived. *Id.* (citing *United States v. Gray,* 7 M.J. 296

(C.M.A. 1979)). An incomplete record of trial is one with substantial omissions thus raising a presumption of prejudice that the Government must rebut. *Lashley,* 14 M.J. at 9. Conversely, insubstantial omissions do not raise a presumption of prejudice or affect the record's characterization as complete. *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).

B. Analysis

In this case, the photocopied record of trial contains unnumbered pages, and pages that are incomplete. The unnumbered pages, while an inconvenience, do not amount to substantial omissions and do not affect appellate review of this case as every page appears to be present. We note that the incomplete pages occur primarily during the military judge's preliminary instructions to the members, as well as the group and individual voir dire portion of the court-martial, resulting in an occasional missing response to a question or a question being cut off. Our review notes this occurring at pages: 80-86, 102, 105-06, 107-08, 113, 114, 118, 119, 123, 124, 125, 127, 128, 131, 132, 134, 136, 137, 138, 139, 142, 146, and 151. A careful review of each of these pages leads us to conclude that these omissions are insubstantial, and do not affect the record's characterization as complete. We also note that the appellant claims numerous other pages in the record of trial are missing substantive questions and answers specifically pages 422, 426, 432, 434, 439, 440, and 450. Appellant's Brief of 18 Aug 2008 at n.63. However, our review of these pages confirms that the pages only appear to be incomplete because of sloppy photocopying, and that there are not missing questions or responses to questions on these pages.

We also note that page 2 of PE 87 is located in a supplemental volume of the record of trial containing duplicate prosecution, defense and appellate exhibits and certified to be a true and accurate copy of the original record of trial. PE 87 was one of a series of checks forged by the appellant. PE 87 was admitted without objection into evidence on page 429 of the record of trial. Page 2 of PE 87 is the back side of a check endorsed by the appellant and deposited in his account at the Navy Federal Credit Union. Since page 2 of PE 87 is actually part of the photocopied record of trial there is no basis to argue its omission.

Further, although the appellant claims there is a missing page somewhere between pages 378 and 478, our review suggests otherwise.

In short, while there are omissions in the photocopied record of trial, they are not substantial, and have not prohibited this court from conducting a thorough review as required by Article 66, UCMJ.

IV. Authentication

A. Background

The appellant asserts that the record of trial cannot be properly authenticated, that it is inaccurate, and that his case should be dismissed or the record deemed summarized. R.C.M. 1103(f)(1). The record of trial was authenticated by the military judge on 15 November 2001. Record at 626. However, the record of trial was subsequently lost necessitating the utilization of a photocopy of the original record of trial. The military judge would not authenticate the photocopy of the record of trial because he was no longer certified as a military judge. E-mail from Captain D.A. Wagner, JAGC, USN, dated 21 Feb 2008. The trial counsel and assistant trial counsel could not authenticate the photocopy because they were no longer on active duty. However, another assistant trial counsel who was in court during the Article 39(a) session involving the arraignment of the appellant, provided substitute authentication for that part of the photocopied record on 7 March 2008. On 5 March 2008, the senior member provided substitute authentication for the part of the record of trial for which he was present. R.C.M. 1104(B). Thus, there are parts of the photocopied record that were not authenticated, specifically the individual voir dire of other members as well as Article 39(a) sessions because neither the senior member nor the assistant trial counsel were present. Appellant’s Brief at 19 n.74.

B. Law

Authentication errors are reviewed *de novo* under a harmless error analysis, and we determine the prejudicial impact, if any, to the appellant. *United States v. Merz,* 50 M.J. 850, 854 (N.M.Ct.Crim.App. 1999).

C. Analysis

While the record reviewed in this case is not an original, we are satisfied that the original record of trial was authenticated. The photocopied record includes an authentication page with the signature of the military judge on 15 November 2001. It also includes the signature of the trial counsel certifying that he examined the record of trial on 23 October 2001 prior to authentication by the military judge. Record at 626.

The record of trial also includes civilian defense counsel's acknowledgement of receipt of the record of trial, as well as a letter he submitted on 11 January 2002 detailing allegations of legal error committed during the trial in which he repeatedly cites to the record of trial in support of his claims. Thereafter, on 10 April 2002, the civilian defense counsel acknowledged receipt of the staff judge advocate's recommendation, and requested a twenty day extension to examine the record and submit allegations of legal error and clemency materials. On 10 May 2002, the civilian defense counsel submitted a request for clemency on behalf of the appellant, and did not allege any discrepancy in the record of trial. The convening authority's action of 29 May 2002 notes he considered the record of trial, results of trial, the staff judge advocate's recommendation and the clemency matters submitted by the appellant on 11 January 2002 and 10 May 2002 prior to taking his action.

In addition, the record includes all pages, prosecution exhibits, defense exhibits, appellate exhibits and allied papers. The allied papers are internally consistent and supported by the record and include all of the post-trial documents in sequence.

Applying a presumption of regularity in the handling and authentication of this record, the appellant has failed to make a threshold colorable showing of possible prejudice that would require the Government to prepare another record. *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998). Neither the court-martial process nor a "substantial right of the accused" is infringed upon by the use of a complete, duplicate copy of an authenticated record of trial. *United States v. Godbee*, 67 M.J. 532, 533-34 (N.M.Ct.Crim.App. 2008)(citing Article 59(a), UCMJ; *United States v. Ayers*, 54 M.J. 85, 92 (C.A.A.F. 2000); *Wheelus*, 49 M.J. at 288; *Merz*, 50 M.J. at 853-54). For us to require the Government to prepare another record in this case or

deem the record summarized would be to elevate form over substance, which we decline to do. *Id.* (citations omitted); *see also United States v. Galaviz*, 46 M.J. 548, 551 (N.M.Ct.Crim.App. 1997). The original record of trial was authenticated by all parties to the court-martial; while the photocopied record contains omissions, they are neither substantial nor infringe upon the completeness of the record reviewed.

We find no prejudice to the appellant either to submit matters under Article 38, UCMJ, to obtain post-trial clemency under Article 60, UCMJ, or to present an issue to the court under Article 66, UCMJ. *United States v. Allende,* 66 M.J. 142, 145 (C.A.A.F. 2008). We conclude this assignment of error is without merit.

V. Post-Trial Delay

The appellant asserts that his due process right to speedy post-trial processing has been violated by unreasonable post-trial delay.

We review *de novo* the appellant's claim that he has been denied the due process right to speedy post-trial review and appeal. *United States v. Moreno,* 63 M.J. 129, 135 (C.A.A.F. 2006). The review is conducted pursuant to the four factors set forth in *Barker v. Wingo,* 407 U.S. 514, 530 (1972) specifically: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *United States v. Jones,* 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey v. United States,* 60 M.J. 100, 102 (C.A.A.F. 2004). If we determine that the delay is facially unreasonable, the four factors are balanced with no single factor being dispositive. *Barker,* 407 U.S. at 533.

Here, the appellant claims that a delay of 1863 days from the date of sentence to the docketing of the case with the court is facially unreasonable.[2] We agree, and proceed to analyze the four *Barker* factors.

The Government concedes that this lengthy delay primarily occurred because the original record of trial was lost. Thus, the first two factors, regarding length and reasons for the delay, clearly weigh in favor of the appellant.

[2] The record of trial was initially received at the Navy-Marine Corps Appellate Review Activity (NAMARRA) in July 2006, but because of deficiencies in the record was not suitable for docketing.

The third factor also weighs in favor of the appellant. On 18 June 2007, the appellant sent a letter to the Office of the Judge Advocate General, Code 20, requesting information on the status of his case and assignment of appellate counsel. Appellant's Letter of 18 Jun 2007 at Appendix B. On 17 December 2007, the appellant filed a *pro se* motion with the court to docket or dismiss his case. In response, the Government requested and was granted three enlargements of time on 21 December 2007, 25 January 2008, and 11 February 2008 to reconstruct the record of trial prior to docketing. The appellant opposed each of these requests. On 29 February 2008, the Government requested a fourth enlargement of time which was denied. The Government was ordered to docket the record of trial by 18 March 2008. On 17 March 2008, the Government filed the record of trial. Thereafter, on 21 March 2008, the appellant filed a Petition for Extraordinary Relief in the Nature of a Writ of *Habeas Corpus*.[3]

The fourth factor is prejudice and includes three similar interests: (1) preventing oppressive incarceration pending appeal; (2) minimizing anxiety and concern of those convicted awaiting the outcome of their appeal; and (3) limiting the possibility that a convicted person's grounds for appeal, and his or her defenses in cases of reversal and retrial, might be impaired. *United States v. Toohey,* 63 M.J. 353, 361 (C.A.A.F. 2006)(quoting *Moreno,* 63 M.J. at 138-39). Our assessment of these interests leads us to conclude that the appellant suffered no prejudice.

Preventing Oppressive Incarceration

Since we find that the substantive grounds for this appeal are not meritorious, the appellant was in no worse position as a result of the delay even though the delay may have been excessive. *Moreno,* 63 M.J. at 139 (citations omitted). In other words, the appellant would have served the same period of incarceration regardless of the delay. *Id.* (citations omitted).

Anxiety and Concern

The appellant must show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision. *Id.* at 140. Here, the appellant has not provided evidence to suggest his anxiety was distinguishable.

[3] The Petition was denied by the court. *Asif v. United States,* No. 200601040, unpublished op. (N.M.Ct.Crim.App. 22 Apr 2008)(*per curiam*).

Impairment of Ability to Present a Defense at Rehearing

As discussed above, the appellant's appeal is not meritorious thus no rehearing is authorized and no prejudice ensues.

In the absence of any actual prejudice or any specific prejudice, we will find a due process violation only if, in balancing the other three factors, the delay 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. The delay in this case was facially unreasonable and attributable to sloppy administrative oversight by the Government. In this case, we find that losing or misplacing a record of trial for 5 years, and then further requesting a period of time to reconstruct the records is exactly the type of situation which undermines the public's perception of the fairness and integrity of the military justice system, thus violating the appellant's right to due process.

Having found a due process violation, we now test for prejudice. In this case, we have determined that the issues raised on appeal are not meritorious, and have not found the appellant suffered particularized anxiety and concern. While we do not condone either the length of the delay or the reasons for it, we conclude that the delay in this case was harmless beyond a reasonable doubt.

We also consider whether this is an appropriate case to exercise our authority to grant relief under Article 66(c), UCMJ. We have considered the post-trial delay in light of the guidance of the Court of Appeals for the Armed Forces in *Toohey*, 60 M.J. at 102, and *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002), and considered the factors explained in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc), and we decline to grant relief under Article 66(c), UCMJ.

Conclusion

The findings and sentence as approved by the convening authority are affirmed.

Senior Judge VINCENT and Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court