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

Before
D.E. O'TOOLE, J.A. MAKSYM, D.O. VOLLENWEIDER
Appellate Military Judges

UNITED STATES OF AMERICA

v.

LANCE M. BRONES
AVIATION ORDNANCEMAN THIRD CLASS (E-4), U.S. NAVY

NMCCA 200800639
SPECIAL COURT-MARTIAL

Sentence Adjudged: 17 October 2005.
Military Judge: CDR Lewis Booker, JAGC, USN.
Convening Authority: Commanding Officer, Strike Fighter Squadron ONE ZERO SIX, Virginia Beach VA.
For Appellant: Maj Brian Jackson, USMC.
For Appellee: LtCol John Scott, USMCR; Capt Geoffrey Shows, USMC.

31 July 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VOLLENWEIDER, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant pursuant to his pleas of violating a lawful general regulation by using a government computer to view pornography, of knowingly receiving child pornography, and of knowingly possessing child pornography, in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. The appellant was sentenced to a bad-conduct discharge, confinement for 10 months, and reduction to pay grade E-1. The convening authority approved the sentenced as adjudged.

The appellant alleges that he was denied speedy post-trial review, and that he was prejudiced because his timely request for clemency seeking early release from confinement was not forwarded to the convening authority until 2 years after he was released from confinement. We find that the record does not support the appellant's claimed prejudice.

We have carefully considered the record of trial, the assignment of error, and the Government's response. We conclude that the findings and the sentence are correct in law and fact, and that no error materially prejudicial to the appellant's substantial rights was committed.

Statement of Facts

Almost three years elapsed between the appellant's trial and receipt by this court of the record of trial. A time line clearly shows the events relevant to the appellant's assignment of error:

17 October 2005:	Appellant tried and begins serving his 10 month sentence.
2 December 2005:	Record authenticated.
23 January 2006:	Trial defense counsel's 1st request for clemency addressed directly to the convening authority; seeks early release from confinement
17 May 2006:	1st Legal Officer's Recommendation; recommends early release from confinement.
3 June 2006:	Appellant released from confinement.
30 June 2006:	Trial defense counsel's 2d request for clemency addressed directly to the convening authority; requests suspension of reduction in rate or of the punitive discharge.
28 May 2008:	Email from Commander, Navy Region Mid-Atlantic to trial defense counsel indicating post-trial paperwork must be re-done; conversations with Navy Region Mid-Atlantic personnel indicates that the prior legal officer's recommendation and previous

	clemency requests were not attached to the current record of trial.[1]
29 May 2008:	2d Legal Officer's Recommendation; recommends that the adjudged sentence be approved by the convening authority; no discussion of delay or reasons for delay.
6 June 2008:	Trial defense counsel served with 2d Legal Officer's Recommendation.
10 June 2008:	Trial defense counsel's 3d request for clemency addressed directly to the convening authority; requests disapproval of Art. 134 charge and specifications alleging receipt and possession of child pornography.
12 August 2008:	Convening authority's action; approves findings and punishment adjudged, except approved a reduction to pay grade E-2 vice E-1.
28 August 2008:	Record received by NAMARA.
28 October 2008:	Appellant's Brief and Assignment of Error; alleges post-trial delay.
26 November 2008:	Government Answer.

Post-Trial Delay

The sole issue raised by the appellant at this time is post-trial delay. He was tried in October 2005. The convening authority did not act is this case until August 2008, close to three years later. The sole prejudice alleged by the appellant to be due to post-trial delay relates to a clemency request seeking early release from confinement that the appellant claims was not timely provided to the convening authority. The facts and the law do not support the appellant's claim of prejudice. In light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), and *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006), assuming without deciding that the appellant was denied the due process right to speedy post-trial review and appeal, we

[1] These assertions are made in trial defense counsel's 3d request for clemency. The alleged email is not attached, and no evidence supporting counsel's allegations were attached to the 3d request for clemency, to the record, or to the appellant's appellate pleadings.

conclude that any error in that regard was harmless beyond a reasonable doubt. *See also United States v. Allende*, 66 M.J. 142 (C.A.A.F. 2008).

On appeal, to support his allegation of prejudice due to post-trial delay, the appellant claims that:

> (1) 3 months after he began serving his 10-month sentence to confinement, his trial defense counsel submitted a clemency request to the convening authority seeking early release from confinement;
>
> (2) The legal officer failed to forward the clemency request to the convening authority prior to the appellant's release from confinement upon service of his sentence; and
>
> (3) The appellant was therefore denied an opportunity for meaningful relief from the convening authority.

Appellant's Brief and Assignment of Error of 28 Oct 2008 at 4, 12-14. Clearly, the appellant's argument rests on the assumption that the convening authority did not receive his January 2006 clemency request in a timely manner – indeed, he claims that the legal officer failed to forward the letter to the convening authority for two years.

The appellant has submitted no evidence that would support his claim that the convening authority did not receive the letter in a timely fashion, or that the legal officer ever received the letter, or if the legal officer did receive the letter, that the legal officer did not forward it to the convening authority. The appellant does not tell the court how the clemency request was forwarded to the convening authority by his trial defense counsel. The appellant's trial defense counsel addressed the letter directly to the convening authority. No "via addressees" are listed. The only "copy to addressee" was the appellant. Absent evidence to the contrary, we will presume that in the normal course of business the convening authority received, in a timely fashion, correspondence from the trial defense counsel properly addressed to the convening authority. Therefore, as we assume that the convening authority in this case received the request for clemency in a timely fashion, consistent with Article 1156 of Navy Regulations, the appellant's argument logically fails. *See United States v. Wise*, 20 C.M.R. 188, 194 (C.M.A.

1955)(convening authority's actions enjoy presumption of regularity), *cited with approval* in *United States v. Del Carmen Scott*, 66 M.J. 1, 8 (C.A.A.F. 2008). *See also United States v. Schrode*, 50 M.J. 459, 460 (C.A.A.F. 1999)(applied presumption of regularity when CA's action stated that CA had considered defense submissions that in fact never existed).

The single published case cited by the appellant related to pre-convening authority action clemency requests does not help his cause. In *United States v. Bell*, 60 M.J. 682 (N.M.Ct.Crim.App. 2004), this court dealt with what it termed a "pocket veto" by the staff judge advocate who did not forward the appellant's clemency request in a timely fashion. *Id.* at 683-84. In *Bell*, unlike this case, the clemency petition requesting early release from confinement had been submitted to the convening authority via his staff judge advocate, who did not forward it to the convening authority until well after the appellant's release from confinement. *Id.* at 684. Then Chief Judge Dorman wrote: "While it is in the best interests of military justice for the CA to respond to a request for early release, there is no legal requirement to do so. Accordingly, as applied to cases tried after the date of this decision, *a CA's failure to respond after being presented with the request will be deemed a denial.*" *Id.* at 687 (emphasis added). In this case, as we presume in the absence of contrary evidence that the convening authority received the appellant's January 2006 clemency request in a timely fashion, we must deem the failure of the convening authority to respond a denial of the appellant's request for early release from confinement. *Cf. United States v. Doughman*, 57 M.J. 653, 655 (N.M.Ct.Crim.App. 2002)("In the absence of evidence to the contrary, we will presume that the convening authority has considered clemency matters submitted by the appellant prior to taking action.").

The Court of Appeals for the Armed Forces has ruled that the courts of criminal appeals are not to speculate whether or not a convening authority would have granted clemency where the appellant was denied an opportunity to be heard on clemency by the convening authority. *United States v. Lowe*, 58 M.J. 261, 263-64 (C.A.A.F. 2003)(staff judge advocate's review not served on defense counsel prior to convening authority's action). The Court stated that "Where an appellant makes a colorable showing that he was denied the opportunity to put before the convening authority matters that could have altered the outcome, this Court and the courts of criminal appeals will not speculate as to what the convening authority would have done." *Id. See also United States v. Travis*, 66 M.J. 301 (C.A.A.F. 2008)(no

prejudice found where SJA did not forward clemency request for early release to CA for over a year, where the CA's action indicated the clemency request was considered by the CA prior to taking action on the appellant's sentence – even though the CA's action was dated after the appellant had served his confinement).
We do not speculate what the convening authority would have done. Rather, we find that the appellant has not made a colorable showing that his clemency petition was not forwarded to the convening authority in a timely fashion, and we further deem the convening authority's failure to respond a denial of the appellant's request for clemency. The appellant has shown no facts to support his complaint of prejudice due to post-trial delay. *Cf. United States v. Goetzelt*, No. 200500648, unpublished op. (N.M. Ct. Crim. App. 14 Mar 2006)(per curiam).

Even if there was some harm to the appellant due to the delay, to fashion relief that would be actual and meaningful in this case would be disproportionate to any possible harm generated from the delay. *United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006). The delay also does not affect the findings and sentence that should be approved in this case. *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.[2]

Chief Judge O'TOOLE and Judge MAKSYM concur.

For the Court

R.H. TROIDL
Clerk of Court

[2] We note that the record of trial does not include pages 8-28 of Prosecution Exhibit 1 (Stipulation of Fact). The missing pages contained images of child pornography that were ordered sealed by the trial judge. In light of the fact that the appellant pleaded guilty to the child pornography specification, and personally described during the providence inquiry the content of the pornography he received and possessed, and absence of any complaint of prejudice due to record incompleteness by the appellant, we find no substantial omission and no prejudice.