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

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

UNITED STATES OF AMERICA

v.

JAMES T. CLAY III
FIREMAN (E-3), U.S. NAVY

NMCCA 200700132
SPECIAL COURT-MARTIAL

Sentence Adjudged: 04 December 2000.
Military Judge: CAPT John Hiller, JAGC, USN.
Convening Authority: Commanding Officer, USS JOHN F.KENNEDY (CV 67).
Staff Judge Advocate's Recommendation: CDR F.T. Katz, JAGC, USN.
For Appellant: CAPT Patricia Leonard, JAGC, USN.
For Appellee: LT Timothy Delgado, JAGC, USN.

22 October 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of two specifications of unauthorized absence, one specification of missing movement, and one specification of wrongful use of a controlled substance, in violation of Articles 86, 87, and 112a of the Uniform Code of Military Justice, 10 U.S.C. §§ 886, 887, and 912a. The military judge sentenced the appellant to confinement for 30 days, reduction to pay grade E-1, and a bad-

conduct discharge. The convening authority approved the sentence as adjudged and, with the exception of the bad-conduct discharge, ordered it executed.

The appellant raises the following two questions for our review: 1) whether the appellant's due process rights have been violated due to untimely post-trial processing and appellate review of his court-martial; and 2) whether the excessive and unexplained post-trial delay in this case warrants relief under Article 66, UCMJ. Upon consideration of the record of trial and the pleadings of the parties, we conclude that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Factual Background

The facts underlying the appellant's conviction are not in dispute. On 8 June 2000, the appellant, without authorization, left the unit to which he was assigned, the USS JOHN F. KENNEDY (CV 67), homeported in Mayport, Florida, and did not return to his unit until 7 August 2000. During that period of absence, and with knowledge of the ship's operational schedule, the appellant missed the movement of the KENNEDY on 25 June 2000. Upon returning to his unit on 7 August 2000, the appellant, once again without authorization, left the ship on 9 August 2000 and remained absent from his unit until apprehended on 20 September 2000. Finally, during the appellant's second period of absence, he smoked marijuana.

Procedural Background

The appellant's sentence was adjudged on 4 December 2000. The record of trial was authenticated on 12 February 2001. There is no record of either the original staff judge advocate's recommendation (SJAR) or proof of service of the SJAR. The convening authority's original action was not completed until 31 October 2002, but was not included in the original record forwarded to this court. The record of trial was received by the Navy and Marine Corps Appellate Review Activity (NAMARA) on 2 February 2007 and forwarded to this court on 8 February 2008 following NAMARA's unsuccessful efforts to locate the missing convening authority's action and SJAR. On 23 April 2008, this court issued an order directing the Government to produce the missing documents. On 2 May 2008, the Government informed this court that it had located the convening authority's action of 31 October 2002 and moved to attach it, however neither the original SJAR nor proof of its service were ever located. As a

result, upon a motion from the appellant requesting relief from post-trial processing error, we set aside the convening authority's action and remanded the case for new post-trial processing on 15 May 2008. On 8 April 2009, a new SJAR was completed and on 5 June 2009 a new convening authority's action was taken. The appellant's case was again docketed with this court on 23 June 2009, 3,123 days from the date the appellant's case was adjudicated.

Discussion

The appellant alleges that the 3,123-day lapse from the date of trial to docketing at this court is excessive and facially unreasonable.[1] Appellant's Brief of 3 Aug 2009 at 8; see *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2006).

Assuming that a delay of 3,123 days between the date of the appellant's trial and docketing of his case with this court constituted a denial of the appellant's due process right to speedy post-trial review and appeal, we proceed directly to the question of whether that error was harmless beyond a reasonable doubt. *United States v. Allende*, 66 M.J. 142, 145 (C.A.A.F. 2008); *United States v. Allison,* 63 M.J. 365, 370 (C.A.A.F. 2006).

We consider whether constitutional error is harmless beyond a reasonable doubt *de novo* based on the totality of the circumstances. *United States v. Bush*, 68 M.J. 96, 102-03 (C.A.A.F. 2009). The appellant does not assert, and we do not find, that the appellant was prejudiced by this delay. While the delay in this case is wholly unacceptable, we will not presume prejudice from the length of the delay alone. *Id.* at

[1] Much of the post-trial timeline in this case coincides with the decommissioning of the KENNEDY. The court does not excuse any delay on that basis and, to the contrary, assumes a denial of due process. Once the case was under the purview of NAMARA, the court is troubled by the prolongation of that delay, specifically the 194 days from the date of our order remanding the case for corrective post-trial processing, to the date that the record was returned to the convening authority. Delays between the convening authority's action and docketing with this court have been characterized as "'the least defensible of all' post-trial delays." *United States v. Moreno*, 63 M.J. 129, 136-37 (C.A.A.F. 2006)(quoting *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990)). The role of NAMARA in returning a record to a convening authority for further post-trial processing is roughly analogous to the role of the convening authority in forwarding a record to this court and, albeit in the reverse, we do not see, and have not been offered, any reason why NAMARA should, absent good cause, deviate from a 30-day benchmark such as that imposed upon convening authorities in accomplishing their forwarding task. *Id*. at 142.

104. Considering the totality of the circumstances, we conclude that the Government met its burden to show that the due process error was harmless beyond a reasonable doubt.

Even if such error were not harmless, any relief we could fashion in this case "would be disproportionate to the possible harm generated from the delay." *United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006).

The appellant also alleges that the post-trial delay in this case warrants relief under Article 66(c), UCMJ. Appellant's Brief at 8. In assessing this claim under Article 66(c), UCMJ, we consider the Court of Appeals for the Armed Forces' guidance and the factors we articulated as applicable in assessing post-trial delay. *Toohey 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); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc). After balancing those factors, we conclude that the post-trial delay in this case has no effect on the findings and sentence that should be approved.

Conclusion

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

For the Court

R.H. TROIDL
Clerk of Court