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

Before
E.E. GEISER, L.T. BOOKER, J.K. CARBERRY
Appellate Military Judges

UNITED STATES OF AMERICA

v.

FRANCIS S.T. DAPIAOEN
STOREKEEPER SEAMAN (E-3), U.S. NAVY

NMCCA 200700360
SPECIAL COURT-MARTIAL

Sentence Adjudged: 15 October 2003.
Military Judge: CAPT Carole Gaasch, JAGC, USN.
Convening Authority: Commanding Officer, USS BLUE RIDGE (LCC 19).
For Appellant: LCDR Luis P. Leme, JAGC, USN.
For Appellee: CAPT Karen M. Gibbs, JAGC, USN; Maj Elizabeth A. Harvey, USMC.

22 October 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

On 15 October 2003, a military judge sitting as a special court-martial convicted the appellant, consistent with his pleas, of unauthorized absence terminated by apprehension in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886.

This 44-page record of trial was authenticated on 21 November 2003. On 3 May 2004, the convening authority (CA) acted on the sentence. Approximately three years later, on 23

April 2007, the case was docketed with this court. Due to lack of a legal officer's recommendation (LOR) in the record and the inability to locate the original, new post-trial processing was accomplished. A new LOR was issued on 24 April 2007, the appellant submitted clemency matters, and the CA acted on 14 May 2007. The second CA's action was ambiguous regarding the action taken on the bad-conduct discharge. This court returned the record to the Judge Advocate General for remand to an appropriate CA for clarification and new post-trial processing. A third CA's action was taken on 31 July 2008. The approved sentence was confinement for three months, forfeiture of $700.00 pay per month for a period of one month, and a bad-conduct discharge. The reduction to pay grade E-1 was disapproved. On 25 June 2009, the case was redocketed with this court.

On appeal, the appellant asserts post-trial delay. After carefully examining the pleadings of the parties and the record of trial, we conclude that the finding 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.

Post-Trial Delay

A period of 2,080 days elapsed between the appellant's trial and final docketing of the record with this court. The appellant argues the Government violated his right to speedy post-trial review. We agree, but decline to grant relief.

A due process analysis of post-trial delay begins with a determination whether the delay in question is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). Notwithstanding that this case was tried prior to our superior court's decision in *Moreno*, we nonetheless find a delay of 2,080 days from the date of sentencing to the date the case was docketed at this court to be facially unreasonable, triggering a due process review.

Given the lengthy delay evident from the record, we will assume a due process violation and consider whether the Government has met its burden of showing the violation 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 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.

We next consider whether this is an appropriate case to exercise our authority to grant relief under Article 66(c), UCMJ, in light of *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), and the factors articulated in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc). Having done so, we find the delay does not affect findings or the sentence that should be approved in this case. Therefore, we decline to grant relief.

Conclusion

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

For the Court

R.H. TROIDL
Clerk of Court