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

Before
D.E. O'TOOLE, V.S. COUCH, J.A. MAKSYM
Appellate Military Judges

UNITED STATES OF AMERICA

v.

BRIAN W. FOSTER
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 200101955
GENERAL COURT-MARTIAL

Sentence Adjudged: 03 December 1999.
Military Judge: LtCol Kenneth Martin, USMC.
Convening Authority: Commanding General, 1st Force Service Support Group, MarForPac, Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: Col C.J. Woods, USMC.
For Appellant: David Sheldon; Maj A. Williams, USMC; LT Kathleen Kadlec, JAGC, USN.
For Appellee: Capt Mark Balfantz, USMC; LT D.H. Lee, JAGC, USN; LT K. Hellman, JAGC, USN.

17 February 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

MAKSYM, J., delivered the opinion of the court in which COUCH, S.J., concurs. O'TOOLE, C.J., filed a concurring opinion

MAKSYM, Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of rape, two specifications of aggravated assault, and wrongfully communicating a threat in violation of Articles 120, 128, and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 920, 928, and 934. The appellant was sentenced to

confinement for seventeen years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged.

The appellant initially raised eight assignments of error, including the legal and factual sufficiency of the evidence of rape, and excessive post-trial delay.[1] This court subsequently ordered a *DuBay*[2] hearing and on the return of the that record specified two issues: (1) whether the appellant's convictions were secured contrary to implied or de facto immunity as a result of the appellant's mandatory participation in the domestic violence men's program at the Family Service Center; and (2) whether, after a review of the record, the appellant's convictions should be set aside due to the existence of cumulative error. During the course of our review pursuant to Article 66, UCMJ, we have identified two additional issues as part of our cumulative error analysis that were not raised as assignments of error by appellate defense counsel or previously specified for review by this Court: (1) the receipt of inadmissible expert testimony by the court-martial; and (2) the receipt of incompetent testimony from the alleged victim's six-year-old son, which, after receipt by the members, was then stricken by the military judge.[3]

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[1] The appellant's assignments of error include: (1) the appellant was denied effective assistance of trial defense counsel; (2) the evidence is factually and legally insufficient to sustain the appellant's convictions for raping and assaulting his wife; (3) the military judge erred by permitting the Government to present evidence of uncharged misconduct; (4) the appellant's record of trial is not substantially verbatim due to its failure to include an out of court session between the military judge and the counsel regarding the defense counsel's improper handling of the mental health issue in the case and the exclusion of Appellate Exhibit 17; (5) the appellant's sentence to seventeen years confinement is inappropriately severe; (6) the appellant's trial defense counsel violated attorney-client privilege by providing privileged information to the trial counsel and repeatedly discussing the case with the appellant's commander; (7) the appellant's right to a fair trial was violated when the trial counsel repeatedly made inappropriately inflammatory findings and sentencing arguments and where the trial counsel was seen talking to a member during a recess in the trial; and (8) the appellant's right to a timely appellate review was violated due to the excessive amount of time that passed between the end of his trial and convening authority action (14 months) and between the convening authority action and docketing at this court (9 months).

[2] *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

[3] Given the egregious degree of post-trial delay as discussed *infra*, we depart from our convention of deciding only those issues raised as an assignment of error by the appellant or specified by this court. The appellant's Motion for Oral Argument, filed on 10 September 2004 is denied.

We have carefully considered the record of trial, the appellant's original and subsequent briefs and assignments of error. We have also considered the Government's answers. We conclude that the appellant's conviction for rape cannot withstand the test for legal and factual sufficiency and dismiss it with prejudice. We further find that none of the remaining convictions may stand in the face of the cumulative effect of errors in this case and unacceptable post-trial delay. We set aside the findings and sentence as to the remaining charges and order that the appellant be released from confinement forthwith. A rehearing may be ordered within the restrictions of our decretal paragraph below. Arts. 59(a) and 66(c), UCMJ. In that we have set aside the appellant's convictions and ordered his release from confinement, we need not visit the majority of the appellant's assignments of error or specifically address our first specified issue.

I. Background

The prosecution's key witness was the appellant's spouse and alleged victim, Mrs. Heather Foster. The appellant and Mrs. Foster were married in 1993, and the Government alleges myriad instances of spousal abuse and one incident of rape over the course of the ensuing six years. The record shows that by 1998, the appellant had retained private counsel and initiated divorce proceedings in California. Later that year, following the expiration of the requisite residency requirement, Mrs. Foster initiated divorce proceedings in Colorado. Over the course of several months, the estranged couple engaged in civil discovery and custody related settlement discussions in California and Colorado. The primary issues pending in both jurisdictions related to the conditions by which the appellant and Mrs. Foster would share legal and physical custody of their two minor children. The civil litigation between the parties was ultimately consolidated under the Uniform Child Custody Jurisdiction Act[4] with a judge from each state joining in pretrial settlement efforts. Indeed, following mediation of the matter, the parties agreed to a provisional agreement on custody in which Mrs. Foster consented to the appellant's joint legal and partial physical custody of their two children. The record is opaque as to the reasons for this agreement's collapse, aside from references to lapses of communication between the two civil attorneys. Thereafter, Mrs. Foster's domestic relations counsel reported the alleged misconduct of the appellant to prosecutorial officials at Camp Pendleton, which led to the charges in this case.

[4] *See generally* CAL. FAM. CODE §§ 3400-3465; COLO. REV. STAT. §§ 14-13-101 – 14-13-403.

II. Sufficiency of the Evidence as to Rape

In his first assignment of error, the appellant contends the evidence that he raped Heather Foster was legally and factually insufficient. We agree.

A. Principles of Law

Military courts of criminal appeals must determine both the factual and legal sufficiency of the evidence presented at trial. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *see* Art. 66, UCMJ. The test for factual sufficiency is whether, after weighing all of the evidence in the record of trial and making allowances for the lack of personal observation, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner,* 25 M.J. at 325. The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt. *Id*. at 324. The term "reasonable doubt" does not mean the evidence must be free of conflict. *United States v. Reed*, 51 M.J. 559, 562 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). The fact-finder may "believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). In reaching our decision regarding the legal and factual sufficiency of the evidence, we have disregarded the evidence admitted in error. *Cf. United States v. Holt*, 58 M.J. 227, 232 (C.A.A.F. 2003).

B. Analysis

The record below reflects that the appellant was convicted of rape solely upon the testimony of his estranged wife, nearly five years after the alleged incident occurred, and corroborated only by the victim’s own statements to her friend nearly two years after the alleged incident. In the time between the alleged act and her sworn testimony, Heather Foster, by her own admission, had voluntarily participated in several instances of intimate sexual contact with the appellant, including the willing production of a sexually explicit video. Record at 299-301. Moreover, the record is void of any forensically related evidence or official report to any authority after the alleged rape took place. Indeed, the alleged rape is “reported” to Marine Corps prosecutorial authorities by the alleged victim’s divorce attorney in the midst of a complicated and contentious custody battle with the appellant. While there is no record of any report of the alleged rape to an official source, the record does include the testimony of two of Mrs. Foster’s close friends, Mrs. Christine Kolstee and Ms. Roxanna Kossen.

Mrs. Kolstee testified that she was one of the Fosters' neighbors during the period when they lived in Hawaii. *Id.* at 348. She further testified that Heather Foster and the witness would perform babysitting duty for each other, shop and otherwise socialize together, becoming "very" close during their time in Hawaii. *Id.* at 348. However, despite their close proximity and regular contact while living in Hawaii, Mrs. Kolstee testified that Mrs. Foster never told her about any instances of abuse at the hands of her husband while they were stationed in Hawaii. *Id.* at 348. Mrs. Kolstee offers some corroboration as to the charge of aggravated assault with a rifle, asserting that she saw what she believed was the end of a rifle barrel through the slot in the door at the Foster residence. *Id.* at 351. Unfortunately, Mrs. Kolstee identified the "weapon" as a pistol in her statement to the Naval Criminal Investigative Service. Her credibility is also hindered by her discussion about the case with the alleged victim the evening before testifying at the Article 32 Investigation. *Id.* at 353. In summary, this witness' testimony is extremely general, at times confusing, and contained factually unsupported opinion. More importantly, throughout her testimony, no reference is made to any knowledge of the alleged rape.

Ms. Kossen on the other hand, testified that Heather Foster had reported the rape to her, approximately two years after its alleged occurrence. *Id.* at 362. This rather significant delay seriously undermines the materiality, if not the credibility, of the victim's statement to her friend and that friend's testimony. Moreover, the testimony was admitted as a prior consistent statement per MILITARY RULE OF EVIDENCE 801, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), not an excited utterance or other statement contemporaneous with the alleged rape. Additionally, this witness offers testimony regarding her frequenting night clubs with the alleged victim, and testimony pertaining to yet another allegation of aggravated assault with a weapon in California, which she portrays to investigators as an incident that took place in Hawaii. *Id.* at 370.

In summary, while there is various evidence in the record that the appellant subjected his spouse to myriad instances of abuse and assault, the evidence as to his culpability for rape is anemic at best. Within the four corners of this case, the alleged victim made no report to medical or law enforcement authorities, engaged in long-standing intimate contact with her "rapist" for years following the incident, including a home video in which she plays a starring role. The Government presented no forensic or contemporaneous testimonial evidence that corroborates Mrs. Foster's allegations.

It is clear to this court that the prosecution attempted to bootstrap a rape conviction atop several

instances of assaultive conduct. In short, the Government's evidence of rape in this case, aside from Mrs. Foster's testimony, consisted of prior consistent statements by the alleged victim to her friends and her mother, not made in proximity to the alleged incident. Significantly disturbing to the court, the allegations of rape were made in the midst of a hotly contested divorce and custody battle, after failed attempts at settlement, under the terms of which Mrs. Foster was prepared to surrender partial custody of her children to the man she later accused as an abusive rapist. Considered in the light most favorable to the Government, a reasonable member could choose to believe the victim, and to disbelieve evidence inconsistent with guilt. However, under the facts presented, we are unable to conclude that the appellant is guilty of rape beyond a reasonable doubt. To the contrary, we hold that his conviction of rape was factually insufficient, and was obtained as the result of other errors, discussed below. The rape conviction cannot stand.

III. Admission of Improper Expert Testimony

A. Principles of Law

We begin our treatment of the manner in which expert testimony was admitted during this litigation with the proposition that "the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 592 (1993)(internal footnotes omitted); *see also*, MIL. R. EVID. 702. We also consider the plenary understanding in military law that expert testimony is not permitted to replace the decision-making process of the fact finder or, more specifically, to advance the expert witness' opinion as to the "believability or credibility of victims or other witnesses" in a case dealing with sexual assault. *United States v. Bostick,* 33 M.J. 849, 853 (A.C.M.R. 1991) (citations omitted).

We again restate that "expert testimony is admissible if it is relevant (Mil.R.Evid. 401-02), if its probative value outweighs its prejudicial value (Mil.R.Evid. 403), and if the testimony will assist the trier of fact (Mil.R.Evid. 702)." *United States v. St. Jean*, 45 M.J. 435, 444 (C.A.A.F. 1996). In determining if a military judge has properly admitted expert testimony, we test his decision for an abuse of discretion. *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007).

B. Analysis

Regarding the testimony of Lieutenant Commander Mary Rusher, Medical Corps, U.S. Navy, we hold that the military judge abdicated his role as impartial gatekeeper, and erroneously admitted testimony which compromised the credibility of this trial in its entirety. While the record indicates that Dr. Rusher was a physician, board certified in neurology and psychology, her testimony was that she was, in fact, a psychiatrist, who conducted a single interview with the alleged victim in this matter. Record at 408-12.

The military judge erred in permitting the members to consider Dr. Rusher's testimony. In preparing their case for litigation, the prosecution arranged for Mrs. Foster to meet with Dr. Rusher for evaluation on 10 November 1999. The examination took two hours. *Id.* at 412. Dr. Rusher testified that she took a history from Mrs. Foster, including a review of past substance abuse, history of abuse, social history, medical history, conducted a mental status evaluation, and developed an assessment. *Id.* at 411. Importantly, Dr. Rusher does not simply explain to the members what Mrs. Foster claims. In sharp contrast, she delivers the factual assertions of the victim as a medical diagnosis. The pertinent exchange with trial counsel follows:

> Q: What did you observe during the interview?
> A: I observed that Mrs. Foster did indeed have the symptoms of posttraumatic stress disorder.
>
> Q: And what are those symptoms that you observed?
> A: The symptoms that I observed in her was (sic) ***that she did experience a traumatic – actually, multiple traumatic incidents where her life was threatened and the life*** [sic] ***of her children were threatened; and she re-experienced this trauma through nightmares***.
>
> **She would have nightmares of her husband placing a gun to her head for several hours.** ***She had intrusive memories of the abuse where her life was threatened and the lives of her children were threatened. She had graphic memories where she was told she would be chopped up, and her children would be chopped up*** in small little pieces; and they would have a slow painful death.
>
> . . . .
>
> She also had avoidance symptoms where she had difficulty going places that reminded her of the abuse. For example, it was very difficult for her

> to come to California, because in ***California was one of the places where the abuse occurred.***
>
> She had a numbing of responsiveness where her effect at times or her expression were somewhat flat and emotionless, which again is more -— one of the very common symptoms of posttraumatic stress disorder order [sic].

Record at 412 (emphasis added).

As set forth above, Dr. Rusher went well-beyond a medical analysis of the facts before her. In short, she adopted the facts as advanced by the alleged victim and cloaked them in a physician's white coat, presenting them as scientific findings to the members. It is well-established that "to put 'an impressively qualified expert's stamp of truthfulness on a witness' story goes too far.' An expert should not be allowed to 'go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility.'" *United States v. Harrison,* 31 M.J. 330, 332 (C.M.A. 1990)(citations omitted). We note that the military judge took no action to correct the tone and content of this expert witness' testimony during the tenure of her recitation to the jury. The Court of Appeals for the Armed Forces (C.A.A.F.) has stated that:

> it is [dangerous] for judges to receive uncritically just anything an expert wants to say. The evaluation of expert testimony does not end with a recitation of academic degrees. *Everything the expert says* has to be relevant, reliable, and helpful to the fact finder. A rational and demonstrable basis is the *sine qua non* of expert opinion.

United States v. King, 35 M.J. 337, 342 (C.M.A. 1992) (emphasis in original).

The defense did not object to Dr. Rusher's testimony. Indeed, the defense seemed to advance upon a strategy of attempting to discredit Dr. Rusher's dependence upon the "truth" advanced by the alleged victim during the tenure of their cross-examination. As a result, since the appellant has not preserved an objection to evidence by making a timely objection, that error will be forfeited in the absence of plain error. *Brooks*, 64 M.J. at 328. "To demonstrate that relief is warranted under the plain error doctrine, an appellant must show that: (1) there was error; (2) the error was plain or obvious; and (3) the error was materially prejudicial to his substantial rights." *Id*. The burden rests on the appellant. *United States v. Maynard,* 66

M.J. 242, 244 (C.A.A.F. 2008)(citing *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F 2007)).

Under the circumstances of this case, we conclude the burden has been met. The testimony of Dr. Rusher was plain and obvious error. Though the military judge failed to recognize this and take action to prevent the improper testimony, he ultimately recognized the threat it posed to the neutrality of his members, albeit not until the expert witness had concluded her testimony. At the close of her testimony, the military judge, without defense prompting, provided the members a curative instruction.[5] The law is clear that such a curative instruction is the "preferred" remedy for correcting error when the court members have heard inadmissible evidence, as long as the instruction is adequate to avoid prejudice to the accused. *United States v. Taylor,* 53 M.J. 195, 198 (C.A.A.F. 2000). Generally, courts assume that members are able to comport themselves with a curative instruction in the absence of evidence suggesting otherwise. *Id*. And, we are sure that the members made an honest effort to comport themselves with the trial judge's instruction. However, affording ourselves a view of the testimony in conjunction with the entire trial, we are left convinced that the military judge was unable to "unring the bell." *United States v. Diaz*, 59 M.J. 79, 92-93 (C.A.A.F. 2003)(citing *United States v. Armstrong*, 53 M.J. 76, 82 (C.A.A.F. 2000)). We have further concluded that the error did "substantially sway" the members in their decision to convict the appellant, and to adjudge a punitive discharge and substantial confinement in his case. *United States v. Reyes*, 63 M.J. 265, 268 (C.A.A.F. 2006). Thus, the error materially prejudiced the appellant's substantial rights.

The trial judge also permitted the Government to call Dr. Mary Dully, a pediatrician, who testified as to the general subject area of domestic violence. It should be noted that the universe of Dr. Dully's experience is defined by her work in the Camp Pendleton emergency room and her service with the San Diego Police Academy's Primary Aggressor Course, where she taught officers how to identify the person who "may have exerted power and control and been the winner in a physical altercation and helping officers on

[5] "Members of the court, I want to give you one instruction. You're advised that only you, the members of the court, determine the credibility of the witnesses and what the facts of the case are. No expert witness can testify that the alleged victim or any witness' account of what occurred is true or credible; that the expert witness believes the alleged victim to the extent that you believe Lieutenant Commander Rusher testified or implied that she believes the alleged victim as a witness; that the crime occurred, or crimes occurred, or that the alleged victim is credible. You may not consider[] this as evidence that the crime occurred or that the alleged victim is credible." Record at 420-21.

scene who is likingly [sic] the primary aggressor and who is actually the looser [sic] in the physical altercation". Record at 388.

After reciting her professional qualifications, Dr. Dully went on to outline her vision of what domestic violence was based upon her "training and experience." *Id.* at 389. What followed was an extensive colloquy with trial counsel which involved this pediatrician's view of how domestic violence presents itself, and how both the aggressor and victim are likely to act. This discussion included offering the members a rational basis for why a victim might take certain action, such as remaining with her abuser over a long period of time. Notably, trial defense counsel did not *voir dire* the witness. A review of the record reveals that the trial counsel's questions and Dr. Dully's responses substantially mirrored the factual theory of the case presented by the Government. Yet, the record betrays that the witness reviewed no materials specific to this litigation and certainly did not conduct an examination of either the appellant or his estranged spouse in preparation for trial. This outlining of what constitutes abuse by this expert witness, and the close factual nexus between the call of those questions and the Government's position at trial, brings this witness' testimony very close to the nature of profile evidence of an offender which is forbidden under military law. *See United States v. Harrow*, 65 M.J. 190, 203 (C.A.A.F. 2007). While we do not hold that this evidence strayed over the permissible line, having drawn so very close to it, the Government's admission of Dr. Rusher's testimony immediately thereafter, exacerbates the dangerous nature of Dr. Dully's unrestricted testimony.

IV. Cumulative Error

In addition, we find that the accumulation of errors described *supra* require us to evaluate the fairness of the appellant's trial using the cumulative error doctrine. *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996); *see also United States v. Banks*, 36 M.J. 150, 171 (C.M.A. 1992). The court above has recognized that the scope of our evaluation of the errors in a case should be made:

> "against the background of the case as a whole, paying particular weight to factors such as the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the [trial] court dealt with the errors as they arose (including the efficacy -- or lack of efficacy -- of any remedial efforts); and the strength of the government's case."

Dollente, 45 M.J. 242 (quoting *United States v. Sepulveda*, 15 F.3d 1161, 1196 (5th Cir. 1993)). This review

necessarily includes "'all errors preserved for appeal and all plain errors.'" *Id*. (quoting *United States v. Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993)). As well, the court should consider any "traces" of prejudice which might remain even after an error is cured by instruction. *Necoechea*, 986 F.2d at 1282.

We begin by noting that the trial judge permitted the members to hear the testimony of an incompetent witness in the form of Jacob Foster, the six-year-old son of the alleged victim. This testimony was elicited without the military judge conducting an Article 39(a), UCMJ, session so as to make an assessment of the child's competence. Upon discerning that the witness had not been born at the time of one of the charges about which he was testifying, and that he was approximately two years old at the time of the most recent alleged act, the military judge excused the members. After consultation with counsel, the judge ordered the testimony to be stricken and instructed the members to disregard it. Were this the only error, we could rely on the members assiduously abiding by their instructions to mitigate the error. But this testimony amounted to at least the third retelling of the victim's story, including one retelling by a physician as a matter of medical fact.

Considering the improper testimony of Dr. Rusher, when combined with that of Dr. Dully and the stricken testimony of the child witness, along with the fact that the military judge acted late to provide a curative instruction as to both Dr. Rusher's improper testimony and the child's coached recitation, which we have found was of questionable efficacy, we believe that these errors call into question the fairness of the appellant's trial. We are driven to this conclusion in part because the Government's case was not strong. As determined in the initial section of this opinion, it was based almost entirely on the statements of the victim, and some testimony that the appellant was an abusive spouse. But for the cloaking of the victim's statements in the physician's lab coat, we are unable to discern whether the members would have convicted the appellant on any charge, based solely on what we will broadly characterize as a muddled, hearsay-based case. Thus, we cannot conclude with fair assurance that the cumulative impact of the errors in this case, and in particular the inflammatory nature of the expert witness' testimony, did not substantially affect the judgment in the appellant's trial. *Dollente*, 45 M.J. at 243 (citing *Banks*, 36 M.J. at 162 and *United States v. Walker*, 42 M.J. 67, 74 (C.A.A.F. 1995)). We must, therefore, vacate the findings.

V. Post-Trial Delay

The appellant next alleges that he was denied speedy post-trial processing. In this case, the following dates pertain:

EVENT	DATE	TIME	TOTAL TIME
Court-Martial Conviction	03 Dec 99	0	0
Authentication	09 Aug 2000	250	250
SJAR	14 Nov 2000	97	347
SJAR Served on Defense Counsel	20 Nov 2000	6	353
Addendum SJAR and service of addendum SJAR on Defense Counsel	23 Jan 2001	64	417
CA's Action	09 Feb 2001	17	434
Docketed at NMCCA	27 Nov 2001	291	725
Civilian Counsel files Notice of Appearance after a 10th enlargement	19 Mar 2003	477	1202
Appellant's Brief filed (after a total of 20 enlargements)	19 Dec 2003	275	1477
Government's answer filed (5 Enlargements granted)	16 Aug 2004	241	1718
Appellant's Response filed (1 Enlargement granted)	10 Sep 2004	25	1743
Appellant's Motion to Substitute/Withdraw Appellate Counsel	22 Sep 2004	12	1755
Appellant's Motion to Substitute Appellate Counsel Granted	12 Oct 2004	20	1775
Appellant's Motion for Expedited Review	21 Jun 2006	617	2392
DuBay Order issued	06 Jul 2006	15	2407
DuBay Record authenticated	24 Apr 2007	292	2699
DuBay record docketed at NMCCA	12 Jun 2007	49	2748
Appellant's Brief filed (1 Enlargement granted)	16 Aug 2007	65	2813
Government's Answer filed	13 Sep 2007	28	2841
NMCCA Order issued	30 Oct 2008	413	3254
Appellant's Response to NMCCA Order filed	21 Nov 2008	22	3276
Government Response to NMCCA Order filed	05 Dec 2008	14	3290

In his eighth assignment of error, the appellant claims that his due process right to timely review of his conviction was violated because it took 250 days to authenticate the record of trial, an additional 96 days to complete the staff judge advocate's recommendation (SJAR), and an additional 81 days for the CA to act on the sentence.[6] Appellant's Brief of 16 Aug 2007 at 39.

[6] We are unable to determine how the appellant calculated that it took 96 days to complete the SJAR following authentication, and 81 days for

We consider four factors in determining if post-trial delay violates the appellant's due process rights: (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) prejudice to the appellant. *Toohey v. United States (Toohey I),* 60 M.J. 100, 102 (C.A.A.F. 2004)(citing *Barker v. Wingo,* 407 U.S. 514, 530 (1972)). Once this due process analysis is triggered by a facially unreasonable delay, the four factors are balanced, with no single factor being required to find that post-trial delay constitutes a due process violation. *United States v. Moreno,* 63 M.J. 129, 136 (C.A.A.F. 2006). In extreme cases, the delay itself may "'give rise to a strong presumption of evidentiary prejudice.'" *United States v. Jones,* 61 M.J. 80, 83 (C.A.A.F. 2005)(quoting *Toohey I,* 60 M.J. at 102). We look at "the totality of the circumstances in a particular case" in deciding whether relief is warranted. *United States v. Allison,* 63 M.J. 365, 371 (C.A.A.F. 2006). The standard of review for a claim alleging denial of speedy post-trial review and appeal is *de novo*. *United States v. Dearing,* 63 M.J. 478, 486 (C.A.A.F. 2006).

Because the appellant's case was tried prior to the date the court above decided *Moreno,* the presumptions of unreasonable delay set forth in that case do not apply. Nevertheless, we view the *Moreno* presumptions as instructive, and note that: (1) the CA did not take his action within 120 days of the completion of the trial; and (2) the record of trial was not initially docketed at this court for another nine months – well beyond the 30-day presumption period established for cases tried 30 days after *Moreno*. *See Moreno*, 63 M.J. at 142. We find the 725-day period between the date of trial and the date of initial docketing of the case at this court to be facially unreasonable, thus triggering a due process review.

Regarding the second factor, reasons for delay, we look at each stage of the post-trial period, at the Government's responsibility for any delay, and at any explanations for delay. *United States v. Toohey (Toohey II)*, 63 M.J. 353, 359 (C.A.A.F. 2006). In its brief, the Government provides no explanation for the 291-day delay from the CA's action to docketing the appellant's court-martial with this court. While the appellant does not reference the 752-day delay in filing his initial brief, we note that the appellant filed twenty enlargements of time, ten of which were filed before he retained civilian appellate counsel, citing other caseload commitments. We additionally note that the Government filed five enlargements of time before filing its

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the convening authority to act on this case. We calculate that it took 97 days to complete the SJAR following authentication, and 87 days for the Convening Authority to act, and will use the numbers set forth in this opinion in conducting our analysis of post-trial delay.

answer to the appellant's brief. But, the bulk of delay in this case is attributable to the manner in which this court failed to properly advance this litigation. The delay incurred by this court's ineffective action amounts to nothing less than judicial negligence.

Specifically, we acknowledge a 664-day delay from the filing of the appellant's reply to our issuing a *DuBay* order, and 413-day delay from the filing of the Government's answer to our issuing an order specifying two issues for consideration. Based upon the precedent set by the court above, we do not hold the appellant "responsible for the lack of 'institutional vigilance' that should have been exercised in this case." *Dearing,* 63 M.J. at 486 (quoting *Moreno,* 63 M.J. at 137). We find, therefore, that the reason for delay in processing the appellant's court-martial is a factor that weighs heavily in favor of the appellant.

Turning to the third factor, we find no assertion of the right to a timely appeal prior to the filing of the appellant's brief and assignments of error with this court on 19 December 2003. While this factor weighs against an appellant, the weight against him is usually slight, because the primary responsibility for speedy processing rests with the Government. *Moreno*, 63 M.J. at 138.

Regarding prejudice, we find that this case is one in which the post-trial delay is so extreme as to "'give rise to a strong presumption of evidentiary prejudice.'" *Jones*, 61 M.J. at 83 (citations omitted).[7] We conclude that based upon the record before us, the appellant was prejudiced by the post-trial delay after his general court-martial, and consider this a factor that weighs heavily in favor of the appellant. Of primacy in our evaluation is the determination that the Government failed to prove the appellant guilty of rape by legal and competent evidence beyond a reasonable doubt. We conclude that had one of the seven previous lead judges in this matter conducted a thorough assessment of the record of trial in a timely fashion, the extensive errors embracing this case would have been discovered and the appellant would have faced the prospect of a new trial on all but the rape charge. In short, nearly ten years of delay makes a difference in a case where the alleged instances of misconduct took place years before the actual trial. The court above has spoken as to the appropriateness of dismissal in an instance where an appellant has remained in confinement, in part, for an

[7] By way of example, the appellant asserts that the appellate delay was responsible for civilian defense counsel's failure to recall events that occurred during the trial. Indeed, the military judge, during the *DuBay* hearing, noted that the delay affected the recollection of civilian trial defense counsel. Appellant's Brief of 16 Aug 2007 at 41.

offense of which he was wrongfully convicted. *Moreno,* 63 M.J. at 139, n.15. Here, we have determined that Sergeant Foster's conviction for rape was improper as the Government did not establish his guilt. Therefore, the appellant has served nearly ten years of confinement, in part, for an offense of which he should not have been convicted.

Balancing all four factors, we conclude that there has been a due process violation resulting from the post-trial delay in processing this case. We find the delay in this case "'is so egregious that tolerating it would adversely effect the public's perception of the fairness and integrity of the military justice system.'" *United States v. Haney,* 64 M.J. 101, 108 n.36 (C.A.A.F. 2006)(quoting *Toohey II,* 63 M.J. at 362). Further, we conclude that the error created by the unreasonable delay is not harmless beyond a reasonable doubt. Even if it was, we are aware of our authority to grant relief under Article 66, UCMJ, and in this case, irrespective of the due process violation, we would choose to exercise that authority because of the unique circumstances in this case.

As to an appropriate remedy, we have considered dismissing all charges and specifications with prejudice. We would do so if we had evidence that the appellant was unable to defend himself against the remaining charges at any rehearing. However, we have no such evidence before us. Accordingly, we will set aside the findings and sentence and return the record to the Judge Advocate General for remand to an appropriate convening authority with a rehearing authorized. However, so as to compensate the appellant for the actual prejudice we have discerned from ten years of confinement, served in part, for an offense which we have dismissed herein, we will limit the appellant's further exposure to any adjudged sentence other than a punitive discharge. Should the rehearing result in conviction, we believe that limiting the appellant's sentence will serve as adequate relief for the deprivation of his right to speedy post-trial review.

VI. Conclusion

The charge of rape is dismissed with prejudice. The remaining findings and the sentence are set aside. The record is returned to the Judge Advocate General for remand to an appropriate CA with a rehearing authorized. In the event of conviction, the convening authority may approve only so much of the sentence as includes a punitive discharge, if one is awarded. The appellant is ordered released from confinement forthwith.

Senior Judge COUCH concurs.

Chief Judge O'TOOLE concurring.

I associate myself entirely with the majority opinion. I write separately to address the egregious delay that is so evident.

This is a case of moderate length and of some complexity. Nevertheless, there is no readily perceived reason for the expenditure of 434 days to authentication by the military judge, or another 291 days to docket the record with this court. Thereafter, among themselves, appellate counsel (including civilian appellate defense counsel) required 26 enlargements; and, with the court, consumed five years to brief the case, and for this court to order a *DuBay* hearing, which thereafter took nearly another year to complete. While there certainly can be circumstances to justify appellate counsel requesting enlargements, the sheer volume of time consumed should have caused counsel and supervisory counsel on both sides to pause and consider the earnestness of representation. I am not ascribing blame to anyone in particular, and most certainly not on the part of those who ultimately moved this case through to its conclusion after nearly 10 years. But, I do want to re-emphasize in the strongest possible terms, that all those in our military justice community should take note that there is some responsibility for delayed justice in this case at every level of practice; delay that, in the future, both bench and bar must more critically evaluate, and urgently address at every phase of trial and post-trial. With respect to this case, however, the principal responsibility for delay rests with this court.

Though the Court of Appeals for the Armed Forces has usually taken a more flexible view of delay by the Courts of Criminal Appeals in the exercise of their judicial decision - making authority, *see United States v. Moreno,* 63 M.J. 129, 137 (C.A.A.F. 2006)(citing *Diaz v. Judge Advocate General of the Navy,* 59 M.J. 34, 39-40 (C.A.A.F. 2003) and *United States v. Dearing,* 63 M.J. 478, 486 (C.A.A.F. 2006)), I do not want that to dilute my point: the inability of the court to dispose of this case in a more timely manner was, and is, intolerable. Having said this, I hasten to add that it is not my purpose to castigate our predecessors. It is only to provide context in which the legal basis for our ultimate disposition must be understood. Looking forward, I know I can speak for all of my colleagues in asserting that this court will take heed of the lessons learned here: delay of this nature represents a failure in the performance of our duty to provide every appellant "even greater diligence and timeliness than is found in the civilian system" regarding their appeal of right. *Toohey V. United States,* 60 M.J. 100, 102 (C.A.A.F. 2004). We failed to do that in this case.

Finally, it would be unfair to fail to take notice of changes initiated by the Judge Advocate General in response to cases such as this one. The establishment of a military justice litigation career track, the appointment of adequate and more specialized appellate counsel and staff, and expanded appointments to this court, including more experienced trial judges, all contributed to the ultimate resolution of this case. However, these institutional changes will only result in timely disposition in every case if assigned counsel, supervisors, and judges remain vigilant. Nothing less is acceptable.

For the Court

R.H. TROIDL
Clerk of Court