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.

MICHAEL S. HODGE
GAS TURBINE SYSTEMS TECHNICIAN THIRD CLASS (E-4), U.S. NAVY

NMCCA 200601124
GENERAL COURT-MARTIAL

Sentence Adjudged: 12 July 2005.
Military Judge: CAPT Daniel O'Toole, JAGC, USN.
Convening Authority: Commander, Navy Region, Mid-Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: CAPT E.S. White, JAGC, USN (27 Jun 2006); CDR T. Riker, JAGC, USN (14 Sep 2007 and 25 Oct 2007).
For Appellant: Cate O'Callahan; LT Dillon Ambrose, JAGC, USN.
For Appellee: LT Elliot Oxman, JAGC, USN; LT Duke Kim, JAGC, USN; LT D.D. Butler, JAGC, USN.

3 March 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

STOLASZ, Judge:

A military judge sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of making a false official statement, three specifications of rape, two specifications of sodomy, and obstruction of justice in violation of Articles 107, 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 920, 925, and 934. The

appellant was sentenced to confinement for 60 years, forfeiture of all pay and allowances, reduction in pay grade to E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged and, pursuant to the pretrial agreement, suspended all confinement in excess of 18 years for the period of confinement served plus 12 months thereafter; suspended adjudged forfeitures in the amount of $508.00 pay per month for six months from the date of his action, and waived automatic forfeitures in the amount of $508.00 pay per month for six months from the date of his action. In an act of clemency, the CA further reduced the appellant's confinement to 16 years because of dilatory post-trial processing. Addendum to the Staff Judge Advocate's Recommendation of 25 Oct 2007; Convening Authority's Action of 25 Oct 2007.

This is the second time this case is before us. On 8 Aug 2007, we set aside the original CA''s action (CAA) of 20 July 2006, and returned the record to the Judge Advocate General for remand to an appropriate CA for proper post-trial processing, after finding that the appellant's trial defense counsel failed to submit matters in clemency to the CA over the objection of the appellant. *See United States v. Hicks,* 47 M.J. 90, 93 (C.A.A.F. 1997); *United States v. Lewis,* 42 M.J. 1, 4 (C.A.A.F. 1995).

The record has now been returned to this court, and after consideration of the record of trial, the brief submitted by the appellant's civilian defense counsel, and the brief submitted by the appellant,[1] the attachments thereto, the reply by the Government, the appellant's response to the Government's reply and attachments thereto, the numerous affidavits submitted by the appellant, and the affidavits submitted by the trial defense counsel and the assistant trial defense counsel, we conclude that the findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

The appellant's *Grostefon* submission asserts his trial defense counsel provided ineffective assistance by: (1) failing to properly investigate the charges; (2) failing to properly present the role alcohol played in the commission of the offenses; (3) failing to present evidence of unlawful pretrial punishment; (4) providing inaccurate advice regarding the pretrial agreement (PTA); and (5) failing to present a proper sentencing case. He further asserts he suffered cruel and

[1] The errors asserted in the brief submitted by the appellant are pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982).

unusual punishment while confined at the United States Disciplinary Barracks, Fort Leavenworth, Kansas, and that his due process rights were violated by unreasonable post-trial delay.[2]

I. Ineffective Assistance of Counsel

We review ineffective assistance of counsel claims *de novo*. *United States v. Anderson,* 55 M.J. 198, 201 (C.A.A.F. 2001). The test for determining ineffective assistance of counsel has two prongs: deficient performance and prejudice. *See Strickland v. Washington,* 466 U.S. 668, 687 (1984). To meet the deficiency prong, the appellant must show his defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To show prejudice, the appellant must demonstrate that any errors made by the defense counsel were so serious that they deprived him of a fair trial. *Id.; United States v. Scott,* 24 M.J. 186, 188 (C.M.A. 1987).

The *Strickland* test governs ineffective assistance of counsel claims in cases involving guilty pleas. *United States v. Osheskie,* 63 M.J. 432, 435 (C.A.A.F. 2006)(citing *United States v. Alves,* 53 M.J. 286, 289 (C.A.A.F. 2000)). The appellant must show not only that his counsel was deficient, but also that "'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Alves,* 53 M.J. at 289 (quoting *Hill v. Lockhart,* 474 U.S. 52, 59 (1985)).

1. Failure to Investigate

A trial defense counsel "must perform a reasonable investigation, or make a reasonable decision that an avenue of investigation is unnecessary." *United States v. Brownfield,* 52 M.J. 40, 42 (C.A.A.F. 1999). The appellant asserts that his trial defense counsel, Lieutenant (LT) K failed to adequately investigate charges that he raped, orally sodomized on divers occasions, and anally sodomized his former wife, JH,[3] and that he raped his current wife, CH, causing him to plead guilty to

[2] The civilian defense counsel's brief asserts two assignments of error: ineffective assistance of counsel regarding the trial defense counsel's failure to submit the requested clemency matters to the CA. That issue has previously been addressed by this court's order of 8 August 2007. The second assigned error, addressed later in this opinion, is a violation of the appellant's due process rights as a result of unreasonable post-trial delay.

[3] JH was married to the appellant when the offense took place.

crimes he did not commit. Appellate Exhibit M of Motion for Leave to Attach Appellate Defense Exhibits of 6 May 2008, Affidavit of Appellant of 22 Apr 2008.

a. Rape and Sodomy of JH

The appellant's affidavit states he advised LT K to discuss JH's allegations with his mother and sister because they were familiar with JH's motive to fabricate the charges. *Id.* He further asserts that Ms. Amanda Koster and Ms. Dana Green heard JH admit she fabricated the rape and sodomy charges, and references their notarized statements to support this contention. *Id.* at Attachments 1 and 2.

LT K filed an affidavit, pursuant to this court's order of 12 June 2008, in response to the appellant's claims of ineffective assistance of counsel.[4] On 18 August 2008, we also ordered LT T, the assistant trial defense counsel, to file an affidavit in response to the appellant's claims of ineffective assistance.[5] Lt K's affidavit states the rape and sodomy charges concerning the appellant's ex-spouse JH presented the most issues for the defense, primarily because the appellant was drunk during his commission of some of these offenses. LT K recalls JH's testimony during the Article 32, UCMJ, pretrial investigation as compelling, clear, emotional, and not vindictive, as evidenced by her testimony that she wanted the appellant to get help and not punishment. LT K's affidavit further indicates the appellant and his family advised LT K that JH may have made statements indicating that she would not testify against the appellant if she were paid. However, LT K asserts that his investigation of this claim revealed that no one without a vested interest could corroborate this claim, and that calls placed to potential witnesses were fruitless, thus he considered there to be little impeachment value given the gravity of the charges. Affidavit of LT K of 11 Jul 2008 at ¶¶ 14-16.

LT T's affidavit states that JH was cross-examined at the Article 32, UCMJ, pretrial investigation concerning her divorce from the appellant and whether she had sought money from him. LT T remembers JH testifying she twice asked for money from the appellant, but otherwise did not provide a motive to fabricate the charges of rape and sodomy. LT T describes JH's demeanor

[4] Trial defense counsel's affidavit of 11 Jul 2008.

[5] Assistant trial defense counsel's affidavit of 3 Sep 2008.

while testifying as clear on the facts, emotional and not vindictive. Affidavit of LT T of 3 Sep 2008 at ¶ 10.

During the providence inquiry the appellant admitted that after a night of drinking, he returned home and forcefully raped JH by throwing her onto the bed, pinning her down, placing his knee between her thighs and inserting his penis in her vagina. Record at 51-54; Prosecution Exhibit 1 at ¶¶ 25-30.

The appellant testified during the providence inquiry that he clearly remembered only one instance of orally sodomizing JH by pinning her arms down, sitting on her chest and placing his penis in her mouth. Record at 57-60; PE 1 at ¶¶ 31-32. He testified that he did not recall other instances of orally sodomizing JH because of his intoxication. However, after reading JH's statements and hearing her testify at the Article 32, UCMJ, pretrial investigation, he testified that he believed he orally sodomized her on more than one occasion. Record at 88. He further testified that he had no reason to believe JH would lie about these incidents, nor were there any hard feelings that would motivate her to fabricate the incidents. *Id.* at 89.

The appellant also testified he was intoxicated on the one occasion he anally sodomized JH, and could not recall the facts of the sexual assault. However, after reading JH's statement regarding the incident and hearing her testify at the Article 32, UCMJ, pretrial investigation, he testified he believed that he was guilty of this offense. *Id.* at 89-93, 156-60; PE 1 at ¶¶ 33, 34, 35.

The sentencing testimony of JH corroborated the appellant's admissions to raping and sodomizing her made during the providence inquiry. JH testified that on the night of the rape, she was still recovering from surgery to remove several cysts. There were complications from the surgery which resulted in an open incision that needed healing. She testified the appellant knew she was under a doctor's orders to abstain from intercourse, but that he proceeded to forcefully rape her nonetheless. Record at 176-79.

JH also testified during sentencing that the appellant orally sodomized her against her will on three to four occasions. She testified that each time he pinned her to the bed, placed his knees on her shoulders and inserted his penis into her mouth. JH testified she was anally sodomized on one

occasion when the appellant forcefully grabbed her pony tail and bent her across the bed. *Id.* at 173-80.

b. Rape of CH

The appellant asserts that he advised LT K that his current wife, CH, did not want to press charges against him, but was harassed by investigators to say things that did not happen. Affidavit of Appellant of 22 Apr 2008 at ¶ 3.

LT K's affidavit indicates the evidence he reviewed regarding the rape of CH included: a sworn statement given by CH to a Naval Criminal Investigative Service (NCIS) agent; a letter CH gave to the agent; photographs of a ripped tee shirt CH described in her statement; medical records from the hospital where CH reported the sexual assault and sought treatment, including CH's statement that between 0200 and 0300 on 9 Sep 2004, the appellant pinned her down and pushed his penis into her vagina and finger in her rectum; and, the appellant's statement that he raped CH.

LT K also interviewed CH, who told him she would not testify at the Article 32, UCMJ, pretrial investigation and further indicated she would assist the defense where possible. LT K further indicated he specifically discussed with the appellant and CH that her refusal to cooperate in the prosecution of the appellant would not prohibit the Government from prosecuting the rape charge utilizing the medical evidence and the statements. Ultimately, LT K decided that further investigation was fruitless based on the state of the evidence, his conversation with CH, and his understanding that CH would not assist in the prosecution. Affidavit of LT K 11 Jul 2008 at ¶¶ 6, 7, 8.

During the providence inquiry, the appellant indicated he consumed 12 beers and a couple of mixed drinks prior to coming home and engaging in consensual intercourse with CH. He further admitted that when CH refused to engage in intercourse a second time, he forcefully raped her, penetrated her rectum with his thumb and bit her right breast. PE 1 at ¶¶ 19-24. CH's testimony during sentencing indicated that the appellant forcefully raped her as she scratched and clawed at him. CH testified that her medical examination the following day showed visible bruises on her arm, a bite mark on her right breast, vaginal pain, and tearing in her rectum as a result of the appellant inserting his finger. Record at 186-89.

Analysis

In *United States v. Ginn,* 47 M.J. 236, 248 (C.A.A.F. 1997), the Court of Appeals for the Armed Forces set forth six principles to determine if a fact-finding hearing is necessary when an appellate court is confronted with conflicting post-trial affidavits regarding allegations of ineffective assistance of counsel. In this case, the fourth and fifth principles apply. Here, pursuant to the fourth *Ginn* principle, the appellant's admissions during the providence inquiry, Record at 39-103, the detailed stipulation of fact signed by the appellant (PE 1), the appellant's expression of satisfaction with his counsel, *id.* at 34 and 123, and the sentencing testimony of JH and CH "compellingly demonstrate" the improbability of the appellant's claims that his trial defense counsel was ineffective. Further, the appellant has provided no facts that would rationally explain why his admissions on the record during the providence inquiry, the stipulation of fact signed by him, and the sentencing testimony of JH and CH are not true.

The statements from Amanda Koster and Dana Green suggesting JH fabricated the charges to get back at the appellant are uncorroborated and contain no timeframe as to when JH allegedly made the statements. Furthermore, they are contradicted by the sworn testimony of the appellant during the providence inquiry that JH had no reason to lie, and by JH's sentencing testimony.

We find that LT K's investigation of the rape and sodomy offenses regarding JH was reasonable, as were his attempts to determine if she had a motive to fabricate. LT K indicated he investigated the appellant's assertions that JH was a vindictive ex-spouse, that JH had possibly made statements indicating her willingness not to testify if paid, but that his investigation proved fruitless. He ceased further investigation due to the "*de minimis*" value of this potential impeachment evidence. LT K Affidavit of 11 Jul 2008 at ¶ 16. We also find LT K's explanation of why he believed further investigation was unnecessary regarding the charged rape of CH to be sufficient, particularly after reviewing the statements and medical documents provided by the Government. *Scott,* 24 M.J. at 192-93.

2. Unlawful Pretrial Punishment

The appellant asserts that LT K ignored his assertions concerning unlawful pretrial punishment, and claims if LT K had properly investigated this matter the appellant would be entitled to sentence relief. His primary complaint is that

prior to the court-martial, he was taken from his unit and job specialty, placed in a temporary active duty (TAD) status, and forced to pick up trash with other service members who were on extra duty after receiving nonjudicial punishment or had already been sentenced. He further asserts that LT K advised him there would not be a PTA if they filed a motion for pretrial punishment credit. Affidavit of Appellant of 6 Oct 2008 at ¶ 5b(1). LT K's affidavit does not address this claim.

Even if we assume that the appellant's assertions are accurate, we are not convinced that they constitute unlawful pretrial punishment. The appellant was facing a court-martial on charges of rape, sodomy, making a false statement, and obstruction when he was removed from his unit and job specialty. It is neither uncommon nor a form of punishment for a service member with a pending court-martial to be removed from his unit for purposes of good order, discipline, and unit morale. While picking up trash may not have been the appellant's preferred job, he has made no showing that this assignment was designed as not punishment as opposed to assignment to perform during normal working hours a job that needed to be done. Further, the appellant does not claim he was housed with sentenced prisoners or list other detailed facts which might give more credence to his pretrial punishment claims. Since the facts as alleged by the appellant would not amount to relief for pretrial punishment, we may, pursuant to the first *Ginn* principle, reject his claim of ineffective assistance. *Ginn,* 47 M.J. at 248.

The fifth *Ginn* principle, which provides that when a claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record, unless the appellant rationally sets forth facts that would explain why he made such statements at trial but not upon appeal, is also applicable. *Id.* Here, the military judge specifically asked whether there was a motion for illegal pretrial confinement or punishment. LT K, in the presence of and presumably with the assent of the appellant, answered in the negative. Record at 171. We find no merit to the appellant's assignment of error.

3. The Appellant's Use of Alcohol

The appellant correctly asserts that alcohol played a role in the commission of his offenses. The appellant was evaluated by Commander (CDR) Edward Simmer, MC, USN, a board certified forensic psychiatrist. CDR Simmer's evaluation of the appellant

determined that he was an alcoholic who exhibited traits of an anti-social personality disorder. Record at 196-97. CDR Simmer further testified that the appellant was intoxicated during the commission of each of the crimes, except the false official statement, and that he likely would not have committed the offenses had he not been intoxicated. *Id.* at 200.

The military judge extensively addressed the defense of voluntary intoxication and lack of mental responsibility during the providence inquiry. *Id.* at 72-98, 168-69. The appellant admitted that while he drank a lot, his voluntary intoxication was not a defense to any of the offenses to which he pled guilty.[6] *Id.* at 97. He further admitted that his review of the evidence convinced him that he had committed the offenses even though he was voluntarily intoxicated and could not recall the specific facts of some of the offenses.

We find that LT K was not ineffective in failing to properly present evidence of the appellant's alcohol dependence. It is clear from the record that the appellant was portrayed as an alcohol abuser, and that his alcohol abuse, while not a defense, played a role in his commission of these offenses. It is also clear from the affidavits of LT K and LT T that they discussed the defense of voluntary intoxication with the appellant, including whether the appellant's alcohol abuse rose to the level of an insanity defense, to ensure that the appellant could providently plead to each of the offenses. Further, the military judge extensively addressed the defense of voluntary intoxication with the appellant, specifically in reference to the charge of obstruction, and inquired of the appellant whether he believed he had a defense of voluntary intoxication to any of the offenses. The appellant indicated he was not asserting the defense. *Id.* at 94-97. The fifth *Ginn* principle is dispositive. *Ginn,* 47 M.J.at 248.

4. Appellant's Sentencing Case

The appellant asserts that LT K's lack of preparation and investigation resulted in an ineffective sentencing case. He specifically complains that LT K did not cross-examine CG to mitigate her sentencing testimony regarding the rape and the effect it had on her. CG testified that the appellant drove her to a park at the Little Creek Amphibious Base in Virginia and

[6] The military judge also advised the appellant that voluntary intoxication not amounting to legal insanity was not a defense to general intent crimes like rape and sodomy, but could negate the specific intent required for committing an obstruction of justice. Record at 72, 94.

proceeded to rape her, then drove away, leaving her partially unclothed and unconscious. CG then described flagging down a passer-by and being transported to a doctor's office where a rape kit examination was performed. Record at 144-49.

As a general matter, we will not second-guess the strategic or tactical decisions made at trial by defense counsel. *United States v. Paxton,* 64 M.J. 484, 489 (C.A.A.F. 2007). When attacking trial tactics, an appellant must show specific defects in counsel's tactical decisions that were "unreasonable under prevailing professional norms." *United States v. Quick,* 59 M.J. 383, 386 (C.A.A.F. 2004)(citation and quotation marks omitted). The appellant must also show prejudice. *Strickland,* 466 U.S. at 687. The test for prejudice is whether there is a reasonable probability, that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*

LT K's tactical decision not to cross-examine CG was neither error nor prejudicial. An already sympathetic victim, seeking to in some way discredit CG's testimony or minimize her victimization would have been far more likely to harm the appellant's sentencing case than to invoke sympathy for him.

The appellant also asserts LT K erred by having CH testify as a sentencing witness without being prepared to rehabilitate her after cross-examination. CH testified on direct examination that she loved her husband, that she believed he was sorry for what he did, and that he needed help for his alcohol abuse. She described him as a good person when sober, but prone to anger when drinking. Record at 181-84. On cross-examination, she described the rape and her resulting injuries. *Id.* at 185-89. LT K made a reasonable tactical decision to utilize CH as a sentencing witness for the appellant because she was sympathetic to him, and because her testimony would address the appellant's alcohol abuse and its effect on those around him. Her testimony on cross-examination was a stark portrayal of the rape, albeit one already testified to by the appellant and detailed in the stipulation of fact. In short, we find no error or prejudice to the appellant.

5. Pretrial Agreement

The appellant asserts that LT K advised him he would serve his sentence to confinement at the Charleston Naval Brig, if he accepted the PTA. He further claims that LT K should have included this provision in writing in the PTA, or advised the appellant that if the provision was not in the PTA it was not

part of the agreement. The appellant's clemency petition requests that the CA transfer him to the U.S. Naval Consolidated Brig in Charleston, South Carolina to be closer to his son, but does not claim that his trial defense counsel advised or promised that he would serve his sentence at a designated facility. Clemency Request of 22 Oct 2007 at ¶ 4b and Encl. (1). LT K's affidavit does not address this claim.

A review of the PTA clearly indicates there was not a provision addressing where the appellant would serve confinement. Appellate Exhibit I. Paragraph 2 of the PTA provides that "[t]his agreement constitutes all the conditions and understandings of both the Government and myself regarding the pleas in this case. *Id.* Further, the military judge asked the appellant if the PTA, as written, was the entire agreement between the appellant and the CA, and whether there were any other agreements. The appellant responded negatively. Record at 122-24.

Pursuant to the fifth *Ginn* principle, we find the record before us, including the appellant's clemency request, contradicts his assertion that LT K advised him where he would serve his sentence. *Ginn,* 47 M.J. at 248. The plain language of the PTA and the military judge's review of the PTA clearly put the appellant on notice that the CA had not agreed to recommend the appellant be placed in a designated facility to serve his sentence. We find neither deficient performance nor prejudice regarding LT K's representation.

II. Cruel and Unusual Punishment

The appellant asserts he was subjected to cruel and unusual punishment while confined in maximum custody at the U.S. Disciplinary Barracks, Fort Leavenworth, Kansas. We review allegations of cruel and unusual punishment *de novo. United States v. White,* 54 M.J. 469, 471 (C.A.A.F. 2001). An evaluation of a constitutional allegation of cruel and unusual punishment requires us to apply the Supreme Court's Eighth Amendment jurisprudence "in the absence of any legislative intent to create greater protections in the UCMJ." *United States v. Lovett,* 63 M.J. 211, 215 (C.A.A.F. 2006). The Eighth Amendment prohibits punishments that are "incompatible with evolving standards of decency that mark the progress of a maturing society, or which involve the unnecessary or wanton infliction of pain." *Id.* at 214 (quoting *Estelle v. Gamble,* 429 U.S. 97, 102-03 (1976)).

The appellant's complaint concerns his classification in maximum security, which he admits was due to the offenses he was convicted of committing. The classification of prisoners is a decision within the discretion of prison officials based on criteria applicable to all prisoners. *See* Appellate Defense Exhibit G of 26 Mar 2007 (Initial Custody Classification Worksheet, dated 1 Sep 2005). Any adjustment to that classification is also within their discretion, and the appellant's complaint needs to be addressed through their administrative processes not this court.

III. Post-Trial Delay

The appellant asserts that unreasonable post-trial delay caused him unnecessary stress and anxiety while waiting for the CA to take his action limiting the appellant's confinement.

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 408 days from the date of sentence to the initial action by the CA is facially unreasonable.[7] We agree, and proceed to analyze the four *Barker* factors.

The Government offers no explanation for the length or reasons for the delay and therefore the first two factors weigh in favor of the appellant. The appellant claims he would have asserted his right to timely review and appeal as part of his clemency petition, but could not because of trial defense

[7] The delay in this case is actually longer than 408 days because the initial CAA was set aside as a result of trial defense counsel's failure to submit clemency matters requested by the appellant. The record was received by this court on 19 March 2008, although it was not ready for review at that point because affidavits were required from the trial defense counsel and assistant trial defense counsel, which amounts to additional delay of approximately 599 days, for a total delay of 1007 days.

counsel's failure to submit clemency matters. This factor weighs in favor of the appellant. The appellant asserts that he suffered prejudice in the form of undue stress and anxiety as a result of the delay, because he did not know whether the CA approved his adjudged confinement of 60 years or the confinement negotiated as part of his pretrial agreement for 18 years. However, the appellant offers no proof of particularized anxiety or concern that is distinguishable from the normal anxiety and concern experienced by prisoners awaiting an appellate decision. *Moreno,* 63 M.J at 140. Moreover, the military judge specifically explained the sentence limitation portion of the pretrial agreement to the appellant, including that part of the agreement in which the CA agreed to suspend confinement in excess of 18 years. Record at 278-79.

In the absence of any actual 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." *United States v. Toohey,* 63 M.J. 353, 362 (C.A.A.F. 2006). While the delay in this case was facially unreasonable and unexplained, we conclude that it is not so egregious that it undermines the public's perception of the fairness and integrity of the military justice system. We find the appellant's right to due process has not been violated. Even assuming error, the lack of any substantiated evidence of prejudice would lead us to conclude such error was harmless beyond a reasonable doubt. *United States v. Allende,* 66 M.J. 142, 145 (C.A.A.F. 2008). Further, the CA addressed the appellant's post-trial delay concerns by granting clemency, and suspending the sentence in excess of 16 years confinement, rather than the 18 years of confinement negotiated as part of the PTA. Any further relief would amount to a windfall for an otherwise undeserving appellant.

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 our superior court's guidance 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.

IV. 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