

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

**Before
F.D. MITCHELL, J.A. MAKSYM, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**NICHOLAS S. MAHARREY
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 200601034
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 22 February 2006.

Military Judge: LtCol Paul Ware, USMC.

Convening Authority: Commanding Officer, Headquarters and Support Battalion, School of Infantry, Training Command, Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: Col W.D. Durrett, Jr, USMC.

For Appellant: LT Dillon Ambrose, JAGC, USN.

For Appellee: CDR C.L. Vanbrackel, JAGC, USN; Maj Elizabeth A. Harvey, USMC.

12 November 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AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.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, consistent with his pleas, of two specifications of unauthorized absence terminated by apprehension, in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886. The appellant was sentenced to confinement for 120 days and a bad-conduct discharge. The convening authority approved the sentence as adjudged, but suspended all confinement in excess of 45 days in accordance with the pretrial agreement.

The appellant was tried and sentenced on 22 February 2006 and the convening authority took its action on 24 May 2006. Over three years elapsed from the date the appellant was sentenced to receipt of the record by this court (20 July 2009). The appellant's sole assignment of error contends that he was denied speedy post-trial processing.

Having reviewed the parties' pleadings and the record of trial, we are satisfied that no error materially prejudicial to the substantial rights of the appellant occurred, and we therefore affirm the findings and the approved sentence. Arts. 59(a) and 66(c), UCMJ.

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 *Moreno*, we nonetheless find, consistent with that case, that the unexplained delays in this case are facially unreasonable. The Government concedes that the convening authority's 1,154-day delay in forwarding this case to this court, after the convening authority had taken action, is unreasonable.

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 he was prejudiced by this delay. The appellant argues that in a case as "simple and straightforward as the appellant's, a delay of this length is in itself, prejudicial." Appellant's Brief of 8 Sep 2009 at 4. We do not agree. While the delay in this case is wholly unacceptable, we will not presume prejudice from the length of the delay alone. *Bush*, 68 M.J. 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, 607 (N.M. Ct. Crim. App. 2005) (en banc). Having done so, we

find the delay does not affect the findings or the sentence that should be approved in this case. We thus decline to grant relief.

The findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court