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

Before
E.E. GEISER, R.E. VINCENT, R.G. KELLY,
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ROBERT W. PAYNE
CRYPTOLOGIC TECHNICIAN FIRST CLASS (TECHNICAL) (E-6)
U.S. NAVY

NMCCA 200501454
GENERAL COURT-MARTIAL

Sentence Adjudged: 10 November 2005.
Military Judge: CAPT Daniel Fry, JAGC, USN.
Convening Authority: Commander, Navy Region Southeast, Naval Air Station, Jacksonville, FL.
Staff Judge Advocate's Recommendation: CDR K.E. Kubas, JAGC, USN.
For Appellant: LT Dillon Ambrose, JAGC, USN.
For Appellee: LT Duke Kim, JAGC, USN.

7 April 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A general court-martial, with enlisted representation, convicted the appellant, contrary to his pleas, of one specification of taking indecent liberties with a female under age 16, and one specification of indecent acts upon a female under age 16, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. Consistent with his pleas, the appellant was also convicted of disobeying a general regulation in violation of Article 92, UCMJ, 10 U.S.C. § 892. The appellant was found not guilty of two specifications of rape, two specifications of forcible sodomy, and one specification of knowingly possessing child pornography. The approved sentence

included confinement for 15 years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. In an act of clemency, the convening authority suspended all confinement in excess of seven years for a period of seven years.

The appellant asserts four assignments of error: (1) the military judge erred in not granting the appellant's challenges for cause against two members; (2) the military judge abused his discretion by limiting the parties closing arguments to 60 minutes;(3) the appellant's adjudged sentence is disparate compared to other similar cases, and is inappropriate; and (4) the appellant's due process right to speedy post-trial processing has been violated by the 771 day delay in docketing his case with this Court.[1]

After considering the record of trial, the appellant's brief and assignments of error, and the Government's answer, we agree that a sentence including 15 years confinement is inappropriate under the facts of this case. We will take appropriate action in our decretal paragraph. Following our corrective action, we conclude that the findings and the sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Challenges for Cause

After voir dire, the appellant challenged three members for cause based on implied bias. The military judge denied the appellant's challenges against both CDR [J] and LCDR [T], without explicitly mentioning the liberal grant mandate. *See United States v. White*, 36 M.J. 284 (C.M.A. 1993). The appellant exercised his peremptory challenge on another member, thereby preserving this issue for appeal. RULE FOR COURTS-MARTIAL 912(f)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

CDR J: The appellant challenged CDR J based on CDR J's sister's work as a social worker who dealt with child abuse issues. She had apparently discussed child abuse issues in the presence of CDR J. As the instant charges involved allegations of the sexual abuse of a child, the appellant argues that a reasonable person would be concerned that CDR J might not be completely impartial. The appellant further challenged CDR J because the CDR had a 13-year-old daughter. Given the similarity in age between the alleged victim and CDR J's daughter, the appellant again asserts that a reasonable person might be concerned that CDR J might not be completely impartial. Finally, the appellant noted that CDR J initially indicated on his member questionnaire that he was concerned about how the convening authority and his commanding officer would view the court-martial verdict.

[1] The appellant initially raised a 5th assignment of error concerning a missing exhibit. After the appellant filed this assignment of error the Government produced the exhibit and the issue was resolved.

We review issues of implied bias for an abuse of discretion, but the objective nature of the inquiry affords less deference to the military judge. *United States v. Townsend,* 65 M.J. 460, 463 (C.A.A.F. 2008)(citing *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000) and *United States v. Napoleon,* 46 M.J. 279, 283 (C.A.A.F. 1997)). However, "[a] military judge who addresses implied bias by applying the liberal grant mandate on the record will receive more deference on review than one that does not." *United States v. Clay,* 64 M.J. 274, 277 (C.A.A.F. 2007).

Implied bias exists when, despite the member's disclaimer, most people in the same position as the member would be prejudiced. *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000). "An accused is entitled to a trial by members who are qualified, properly selected, and impartial." *United States v. Moreno*, 63 M.J. 129, 132 (C.A.A.F. 2006)(citing Article 25, UCMJ); *see also* R.C.M. 912(f)(1)(N). We view implied bias objectively "'through the eyes of the public, focusing on the appearance of fairness. *Clay*, 64 M.J. at 276 (quoting *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998)).

Even assuming, *arguendo*, that the kind of casual knowledge of other generic abuse or even sexual abuse cases would somehow raise the specter of partiality in the public mind, we note that the record reveals that CDR J did not regularly speak to his sister about child abuse and that the last time he interacted with his sister on a regular basis was when they both lived at home with their mother "many years ago." Record at 257-58. And even if decades-old knowledge about unrelated cases was cause for concern, we further note that CDR J's "knowledge" of his sister's work as a social worker stemmed simply from overhearing portions of conversations the sister had with CDR J's mother. *Id.* at 258.

With respect to age similarity between CDR J's daughter and the alleged victim, even assuming, *arguendo*, that the cited age similarity would somehow raise concern in the public mind, we note that there was no evidence CDR J's daughter had been the victim of any sort of abuse, much less sexual abuse, and that CDR J clearly indicated that his daughter's age would not impact his impartiality in deciding the case. *Id.* at 267.

Finally, with regard to the concern expressed on CDR J's member's questionnaire that the convening authority and or his commanding officer might fault him for the members' verdict, we note that CDR J explained that he'd checked the boxes on the questionnaire in error and that he had no concern whatsoever regarding how the convening authority or his commanding officer would view the members' verdict. *Id.* at 253-54. We further observe that the record reveals that CDR J laughed when questioned about his mistake and pointed out his own confusion about the question. *Id.* There is no evidence to support the appellant's speculation that CDR J checking two boxes couldn't possibly have been the result of a simple error while rushing through the form.

After carefully considering the public perception issues raised by the appellant, we find nothing about CDR J's responses that would create reasonable concern among the general public about CDR J's ability to be a fair and impartial member. We observe that while the military judge did not expressly cite to the liberal grant mandate when he announced his findings, the liberal grant mandate was referenced during litigation of this motion by the trial defense counsel and we are confident the judge considered it. Even granting no deference whatsoever to the military judge's determination, we have applied the liberal grant mandate and have independently found that the military judge did not abuse his discretion when he denied the appellant's challenge for cause against CDR J.

LCDR T: The appellant challenged LCDR T due to his military justice experience as a member in two courts-martial, a member in one administrative board, his training in a Senior Officer's Course, and his attendance at numerous Captain's Masts. Additionally, the appellant challenged LCDR T due to his knowledge of an Admiral's Mast for another officer in LCDR T's previous command.

The appellant challenged LCDR T based on that officer's general training, his experience with legal proceedings, and his statements about an Admiral's Mast. First, we decline to adopt the appellant's view that public perception of the fairness of the military justice system would be adversely affected in any way by knowledge that a member had previous knowledge of and experience with that system. Such knowledge and experience is common amongst most experienced officers and provides valuable perspective when evaluating a particular case.

With regard to LCDR T's statements regarding the Admiral's Mast involving a fellow officer, we note that LCDR T stated that he "agreed with the outcome, for the most part" but noted a disagreement with the officer's end of tour ranking and award. In fact, LCDR T specifically noted that while he believed that the individual "was DUI," it was never proven because "there was not enough evidence ...." Record at 279. Contrary to the appellant's assertion, we view these comments as reflecting a clear comprehension of the impact the legal burden of proof has on a proceeding. Further, it demonstrates LCDR T's ability to set aside personal feelings on a matter in deference to the legal rules and procedures. We view this as a desirable member trait and certainly not something the public would perceive as suggesting partiality or raising questions about fairness.

As with CDR J, even granting no deference whatsoever to the military judge's determination, we have applied the liberal grant mandate and have independently found that the military judge did not abuse his discretion when he denied the appellant's challenge for cause against LCDR T.

Closing Argument

The day before closing arguments were scheduled to begin, the military judge asked counsel how long they each needed for argument. The trial counsel requested approximately one hour, including the time he needed for rebuttal. The defense counsel stated he would require "no more than an hour and-a-half at the outside." Record at 967. The military judge expressly considered the evidence presented in the case and the desires of counsel before limiting arguments "to an hour apiece." *Id.*

The trial defense counsel asserts in his post-trial affidavit that he told the military judge during an R.C.M. 802 conference that due to the severity of the charges, and length of time over which the charges spanned, he did not think he could complete his closing argument in less than 90 minutes. Affidavit of LT [S] at 2. Despite the trial defense counsel's request, the military judge maintained his one hour time limitation. Record at 967, 1016.

At trial, the trial defense counsel went over the one hour limitation imposed by the military judge. At the 60 minute point, the military judge reminded the trial defense counsel of the time by stating "Counsel, you are at an hour." *Id.* at 1063. The trial defense counsel was permitted to proceed with his argument. Five minutes later, the military judge again reminded the trial defense counsel by saying "Five minutes, counsel." *Id.* at 1067. Trial defense counsel stated that he was "going as fast as possible" and the military judge acquiesced and granted counsel "five more minutes for closing." *Id.* The trial defense counsel concluded his closing argument a short time thereafter.

In an Article 39(a), UCMJ, session after closing arguments, the trial defense counsel objected to the military judge's imposition of a time limitation on his closing argument. *Id.* at 1077. The military judge indicated that he had been clear on his time constraint. *Id.* In a post-trial affidavit, the military judge asserted that he determined one hour to be a sufficient amount of time for closing arguments, after observing the entire evidence presentation throughout the court-martial. Affidavit of CAPT Fry at 1-2.

A military judge's decision to limit the time allotted for closing argument is reviewed for an abuse of discretion. *United States v. Gravitt*, 17 C.M.R. 249, 257 (C.M.A. 1954). "The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing." *Herring v. New York*, 422 U.S. 853, 862 (1975). Deference is afforded to the military judge in this area due to his responsibilities, which include the "exercise [of] reasonable control over the proceedings." R.C.M. 801(a)(3). Encompassed within the military judge's control over the proceedings is the ability to determine reasonable "time limits for argument." R.C.M. 801(a)(3), Discussion; *see Gravitt*, 17 C.M.R. at 257.

In determining whether the military judge abused his discretion by imposing a time limitation on trial defense counsel's closing argument, we note that the military judge gave reasonable advanced warning to both counsel. *United States v. Dock*, 20 M.J. 556, 557 (A.C.M.R. 1985)(cautioning against the use of unexpected time constraints placed on closing argument); *see also Lomax v. United States*, 510 A.2d 225, 228 (D.C. Cir. 1986) (noting a preference for alerting counsel as early as possible for any time limitation on closing argument). In addition to providing notice of his closing argument time constraint, the military judge "allowed defense counsel to exceed the preestablished time limit" by permitting him to continue. *United States v. Bernes*, 602 F.2d 716, 722 (5th Cir. 1979). At no point did the military judge terminate the defense counsel's argument. Moreover, the military judge specifically noted that in arriving at his 60-minute time limitation, he had considered the evidence and issues presented at trial. Affidavit of CAPT Fry at 1-2.

The appellant asserts that the time limitation precluded his trial defense counsel from adequately addressing the charges to which the members returned a finding of guilty. We are unpersuaded by this contention. It is clear that the trial defense counsel's strategy in his closing argument was to discredit the victim by marshaling all the various contradictions and changes in testimony evidenced at trial. He had ample time to do this as was evident in the acquittals he obtained on the more serious charges.

We further observe that when the military judge announced his 60-minute limit on argument time, the trial defense counsel acknowledged laughingly that "I've been known to be long-winded." In a similar light-hearted vein, the military judge responded with "well that's why we are going to have limits on it." Record at 967. The appellant speculates that the military judge imposed the time limit in order to complete the trial quickly. The record does not support this. Throughout the trial, the military judge was extraordinarily generous in granting counsel time to attend to various issues and that he routinely started court at 0900 and rarely if ever kept members past 1630 or so. *Id.* at 595, 811, 814, and 920. Accordingly, we are satisfied that the military judge did not limit argument time for personal convenience or in an attempt to rush through the trial. We further note that, notwithstanding the military judge's two gentle reminders regarding the time, the trial defense counsel's argument was not arbitrarily terminated. We are satisfied that both counsel had more than ample time to make their case to the members given the issues and evidence presented at trial. We find, therefore, that the military judge did not abuse his discretion when he set reasonable time limits for closing argument.

Sentence Disparity/Severity

The appellant also asserts that his sentence was disparate when compared to similar or more egregious cases, and that his sentence was inappropriate.

Sentence Disparity

The appropriateness of a sentence generally should be determined without reference or comparison to sentences in other cases. *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985) (citations omitted). We do not engage in comparison of specific cases "'except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.'" *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999)(quoting *Ballard*, 20 M.J. at 283). The burden is upon the appellant to make that showing. *Lacy*, 50 M.J. at 288. If the appellant satisfies his burden, the Government must then establish a rational basis for the disparity. *Id.*

To satisfy his burden, the appellant cites nine cases that he contends are both "closely related" and "highly disparate."[2] "Closely related" cases are those that "involve offenses that are similar in both nature and seriousness or which arise from a common scheme or design." *United States v. Kelly,* 40 M.J. 558, 570 (N.M.C.M.R. 1994)*; see also Lacy*, 50 M.J. at 288. None of the appellant's cited cases, however, satisfy the "closely related" standard. *United States v. Swan*, 43 M.J. 788, 793 (N.M.Ct.Crim.App. 1995)("Merely comparing the sentences based solely on similarities of the offenses committed has little relevance to the individualized consideration that should be given to determining an appropriate sentence."); *see also United States v. Thorn*, 36 M.J. 955, 960 (A.F.C.M.R. 1993)(noting that it is not enough that cases are "somewhat related" but must "involve essentially the same misconduct"). Further, as the appellant acknowledges, all his cited cases involve more serious offenses, which implicitly recognizes that his case is not the "rare instance[]" appropriate for sentence comparison analysis. *Lacy*, 50 M.J. at 288 (citing *Ballard*, 20 M.J. at 283). The appellant, therefore, failed to carry his burden, and our analysis under sentence disparity need go no further.

[2] *United States v. Wedemeier*, No. 200600191, 2006 CCA LEXIS 305, unpublished op. (N.M.Ct.Crim.App. 6 Nov 2006); *United States v. Colley*, 29 M.J. 519 (A.C.M.R. 1989); *United States v. Simpson*, 54 M.J. 281 (C.A.A.F. 2000); *United States v. Berger*, 23 M.J. 612 (A.F.C.M.R. 1986); *United States v. Orben*, 28 M.J. 172 (C.M.A. 1989): *United States v. Major*, No. 36304, 2007 CCA LEXIS 264, unpublished op. (A.F.Ct.Crim.App. 8 Jun 2007); *United States v. Fuller*, No. 200501607, 2007 CCA LEXIS 545, unpublished op. (N.M.Ct.Crim.App. 6 Dec 2007); *United States v. Woodard*, No. 36838, 2007 CCA LEXIS 537, unpublished op. (A.F.Ct.Crim.App. 23 Nov 1994); *United States v. Winstead*, No. 30164, 1994 CCA LEXIS 62, unpublished op. (A.F.Ct.Crim.App. 23 Nov 1994).

Sentence Appropriateness

The appellant also alleges that his sentence is inappropriately severe. Our determination of sentence appropriateness under Article 66(c), UCMJ, requires an analysis of the record to ensure that justice is done and that the accused receives the punishment he deserves. *United States v. Healy,* 26 M.J. 394, 395-96 (C.M.A. 1988). In making this assessment, we consider the nature and seriousness of the offenses as well as the character of the offender. *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982). We recognize that the appellant had over 17 years of service and an unblemished record. This must be balanced, however, against the fact that his misconduct not only involved showing a young girl of tender age pornographic videos on multiple occasions, but that it involved him showing her pornographic videos starring her own mother and step father. We can think of little that would be more shattering to a young child. Such an act, coupled with the appellant's sexual touching, is abhorrent.

We note that in an act of clemency, the convening authority suspended over 50% of the appellant's confinement. We find that the seven years confinement approved and ordered executed by the convening authority, while significant, is appropriate for this offender and his offenses. *United States v. Baier,* 60 M.J. 382, 384-85 (C.A.A.F. 2005); *Healy,* 26 M.J. at 395; *Snelling,* 14 M.J. at 268. We will take action in our decretal paragraph to disapprove the suspended portion of the confinement.

Post-Trial Delay

Finally, the appellant asserts that he was denied his right to speedy post-trial processing, due to a delay of 771 days between the appellant's adjudged sentence and docketing of his case before this court. Because the appellant's case was tried prior to the date our superior court decided *Moreno,* the presumptions of unreasonable delay set forth therein do not apply; nevertheless, we view the *Moreno* presumptions as instructive, and find a delay of 771 days to be facially unreasonable. *Moreno*, 63 M.J. at 136.

Accordingly, we will assume, without deciding, that the appellant was denied due process in his right to a speedy post-trial review and appeal, and will proceed to determining whether the error was harmless. *United States v. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006). The appellant asserts that he was prejudiced by missing an opportunity before the Naval Clemency and Parole Board due the convening authority's delay in acting on his case. Notwithstanding the significant benefit the appellant received through the convening authority's clemency action, we observe that assertions of prejudice from a missed opportunity at a clemency and parole board hearing is speculative at best and wholly unverifiable. It is certainly not of a specific enough nature to warrant relief. *United States v. Agosto*, 43 M.J. 853,

854 (N.M.Ct.Crim.App. 1996); *United States v. Prowis*, 12 M.J. 691, 694 (N.M.C.M.R. 1981); *see United States v. Allende*, 66 M.J. 142, 145 (C.A.A.F. 2008). Therefore, we hold that any due process violation that might have occurred in processing this case is harmless beyond a reasonable doubt. *Allison* 63 M.J. at 370-71.

We also examined the post-trial delay in this case under our authority pursuant to Article 66(c), UCMJ, our superior court's 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 the factors, we conclude that the post-trial delay in this case has no effect on the findings and sentence that should be approved.

Conclusion

The findings and only so much of the approved sentence as provides for confinement for seven years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge is affirmed. That portion of the approved sentence extending to confinement in excess of seven years is set aside.

Senior Judge VINCENT and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court