

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

**Before  
L.T. BOOKER, J.E. STOLASZ, B.G. FILBERT  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**SEAN M. ROCHE  
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 200800423  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 31 May 2007.

**Military Judge:** LtCol Tracy Daly, USMC.

**Convening Authority:** Commanding Officer, 7th Marine Regiment, 1st Marine Division (REIN), 1st Marine Expeditionary Force, Marine Corps Air Ground Combat Center, Twentynine Palms, CA.

**Staff Judge Advocate's Recommendation:** LtCol M.R. Stahlman, USMC (16 Nov 07); **Addenda:** Maj R.J. Ashbacher, USMC (8 Sep 08 and 6 Oct 08).

**For Appellant:** Col Dwight Sullivan, USMCR; Maj Anthony W. Burgos, USMC.

**For Appellee:** LCDR P.D. Bunge, JAGC, USN; LT Timothy Delgado, JAGC, USN.

**25 August 2009**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

FILBERT, Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of two unauthorized absences, false official statement, use of ecstasy,

cocaine, and methamphetamine, and theft of a motorcycle valued at \$5,000.00 owned by a fellow Marine, in violation of Articles 86, 107, 112a, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 907, 912a, and 921. On 31 May 2007, the appellant was sentenced to confinement for 180 days, forfeiture of \$750.00 pay per month for six months, reduction to the lowest enlisted pay grade, and a bad-conduct discharge.

We have carefully examined the record of trial, the appellant's brief and six assignments of error, the Government's answer, and the appellant's reply. We find merit in the appellant's assignment of error that he was entitled to five additional days of pretrial confinement credit.<sup>1</sup> We do not find merit in any of the appellant's other assignments of error. Following our corrective action, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

The appellant raises two assignments of error alleging unreasonable post-trial delay. First, he asserts his due process right to speedy post-trial processing was denied. Second, he asserts his sentence is inappropriately severe in light of appellate delay. He also claims he was denied five days of pretrial confinement credit. He asserts his trial defense counsel's failure to seek this pretrial confinement credit and to catch other post-trial processing errors denied him effective assistance of counsel. The appellant further contends the trial counsel erred in not providing the trial defense counsel the opportunity to examine the record of trial before authentication by the military judge.<sup>2</sup>

The record of trial was authenticated 29 October 2007. A commander subordinate to the convening authority (CA) attempted to act on the case on 14 January 2008. We set aside the invalid CA's action. On 4 November 2008, the proper CA acted on the case. We rejected the record, however, due to missing post-trial documents. The record was subsequently docketed with this court on 30 March 2009.

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<sup>1</sup> At trial, the military judge announced and counsel for the parties concurred that the appellant was entitled to 77 days' credit under *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). Record at 71.

<sup>2</sup> The appellant also claims cumulative error. Given our findings, we find this assignment of error to be without merit.

The Government concedes, and we agree, that the delay in this case is "facially unreasonable." Government's Answer of 29 May 2009 at 4; see also *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2006). Assuming that the appellant was denied the due process right to speedy post-trial review and appeal, we proceed directly to the question of whether any error was harmless beyond a reasonable doubt. *United States v. Bush*, \_\_\_ M.J. \_\_\_ (C.A.A.F. Aug. 17, 2009); *United States v. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006). Here, there is no evidence of any specific prejudice resulting from the delay and the appellant has not alleged any such harm. There is no issue that would afford the appellant relief, no oppressive incarceration resulting from the delay, no particularized anxiety caused by the delay, and no rehearing has been ordered which might be affected by excessive post-trial delay. See *United States v. Haney*, 64 M.J. 101, 108 (C.A.A.F. 2006); *Moreno*, 63 M.J. at 139. Having carefully reviewed the record of trial, the appellant's assignment of error and the Government's response, we conclude that the Government met its burden to show that the assumed error was harmless beyond a reasonable doubt. *United States v. Allende*, 66 M.J. 142, 145 (C.A.A.F. 2008).

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), and *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002), and the factors articulated in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005) (en banc). Having done so, we find the delay does not affect the findings and sentence that should be approved in this case. Therefore, we decline to grant relief.

We agree with the appellant that, contrary to RULE FOR COURTS-MARTIAL 1103(i)(1)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), the record of trial was not sent to the trial defense counsel for examination prior to authentication by the military judge on 29 October 2007. However, we find no prejudice to the appellant. *United States v. Wheelus*, 49 M.J. 283, 288-89 (C.A.A.F. 1998). The record of trial transcript was served on the trial defense counsel, along with the initial staff judge advocate's recommendation, on 16 November 2007. There is no indication that the record transcript is inaccurate. Also, the trial defense counsel had ample time to object or identify inaccuracies in the record of trial prior to the correct convening authority acting on the case on 4 November 2008. He did not do so. See *United States v. Lavoie*, No. S31409, 2008

CCA LEXIS 319, at 7-8, unpublished op. (A.F.Ct.Crim.App. 24 Sep 2008). Thus, we decline to grant relief.<sup>3</sup>

The Government concedes, and we agree, that the appellant is entitled to five days of additional pretrial confinement credit for time spent in the Yucca Valley Regional Jail.<sup>4</sup> The record establishes he was confined by civil authorities for stealing a motorcycle, the same offense of which he was convicted at court-martial. See *United States v. Dave*, 31 M.J. 940, 942 (A.C.M.R. 1990).

Accordingly, we affirm the findings as approved. Recognizing that the appellant has already served the entire confinement portion of his sentence, awarding him the additional five days credit to which he is entitled would not provide him meaningful relief. Therefore, we approve only so much of the sentence as provides for a bad-conduct discharge, 180 days confinement, reduction to pay grade E-1, and forfeiture of \$750.00 pay per month for five months.

Judge STOLASZ concurs.

BOOKER, Senior Judge: (concurring)

I concur in the court's resolution of the assignments of error. I concur specifically in the resolution of the pretrial confinement issue only because I believe that our action is not inconsistent with *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984), and not because our action is mandated by the *dicta* in that case, 17 M.J. at 128 (noting Parole Commission and ABA policies to give credit for detention tied to acts or conduct).

For the Court

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<sup>3</sup> We deny the appellant's contingent motion to compel production of the audio recording of his court-martial. The trial defense counsel had sufficient opportunity to examine the record of trial prior to the CA's action. Additionally, the appellant does not identify any errors or omissions in the transcription of the proceeding. Thus, the appellant provides no valid reason for granting such a motion.

<sup>4</sup> We reject the appellant's claim that he received ineffective assistance of counsel due to his trial defense counsel's failure to seek the five days of pretrial confinement credit at issue. The appellant does not make any showing that the findings or sentence at trial would have been different but for the claimed deficiency. *United States v. Gutierrez*, 66 M.J. 329, 331 (C.A.A.F. 2008). Moreover, we have remedied any possible prejudice to the appellant by reducing his sentence in our decretal paragraph.

R.H. TROIDL  
Clerk of Court