

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

**Before
E.E. GEISER, L.T. BOOKER, J.K. CARBERRY
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MATTHEW W. SMITH
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 200700043
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 12 October 2005.

Military Judge: Maj David S. Oliver, USMC.

Convening Authority: 3d Low Altitude Air Defense Battalion,
Marine Air Control Group 38, 3d Marine Aircraft Wing, Camp
Pendleton, CA.

Staff Judge Advocate's Recommendation: Col C.J. Woods, USMC
(25 Jan 2006); LtCol Kurt J. Brubaker, USMC (19 May 2009).

For Appellant: CDR Keith Gould, JAGC, USN.

For Appellee: LCDR Paul D. Bunge, JAGC, USN; Maj Elizabeth
A. Harvey, USMC.

30 October 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

In October 2005, a military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of wrongfully using marijuana, a violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant waived his statutory right to a three-day delay between service of charges and any session of the court-martial. Record at 5.

The military judge announced a sentence of confinement for 30 days, forfeiture of \$823.00 pay per month for two months, and a bad-conduct discharge from the United States Marine Corps.

The record of trial arrived at the Navy-Marine Corps Appellate Review Activity (NAMARA) in late November 2006, and it was docketed with this court on 25 January 2007. When this case first came before us, it did not contain a signed convening authority's (CA's) action. We returned it for further appropriate post-trial processing via order of 21 February 2007. The CA acted on 9 July 2009 and approved the adjudged sentence. There is no explanation in the record or the pleadings for the two lengthy periods of delay between trial and submission to NAMARA or between our February 2007 order and the CA's action.

The appellant has now assigned two errors before us: that he has been denied due process because of the lengthy delays in post-trial processing, and that he warrants relief under Article 66 for the excessive and unexplained post-trial delay. 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,¹ 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.

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*

¹ We do note that the military judge received into evidence a record of nonjudicial punishment for assault and provoking words that was "stale," that is, more than two years removed from the offense to which the appellant pleaded guilty. While this was error, we find that it was not prejudicial given the appellant's numerous other nonjudicial punishments during the period from February 2004 through April 2005. The appellant's counsel was afforded the opportunity to comment on this matter during post-trial submissions.

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 the appellant was prejudiced by this delay; he speculates only that, if there is a rehearing in this case, he might have difficulty in locating witnesses. Appellant's Brief of 17 Sep 2009 at 5-6. 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