

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

**Before
F.D. MITCHELL, L.T. BOOKER, M. FLYNN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MICHAEL A. WILD
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 200700108
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 15 June 2004.

Military Judge: LtCol David Jones, USMC.

Convening Authority: Commanding Officer, MALS-11, MAG-11,
3d Marine Aircraft Wing, MCAS Miramar, CA.

Staff Judge Advocate's Recommendation: LtCol K.J. Brubaker,
USMC.

For Appellant: Maj Anthony Burgos, USMC; LCDR Derek
Hampton, JAGC, USN.

For Appellee: LT David Lee, JAGC, USN.

30 September 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AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.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, pursuant to his pleas, of wrongfully possessing drug paraphernalia and of introduction, distribution, and use of marijuana on board a Navy vessel, in violation of Articles 92 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 912a. The military judge sentenced the appellant to confinement for 6 months, reduction to pay grade E-1, and a

bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged. A pretrial agreement in the case had no effect on the sentence.

The appellant's court-martial concluded on 15 June 2004. The CA took action on the case on 4 March 2005. Nearly two years later, three copies of the record of trial were received at the Navy-Marine Corps Appellate Review Activity (NAMARA). On 1 February 2007, NAMARA forwarded a copy of the record to this court for action. Attached to the record was a letter from the head, NAMARA Case Management Branch, which informed the Court that three copies of the record of trial had been forwarded to NAMARA without an original, and after attempting to resolve the issue with the command, NAMARA had been informed that the original record of trial was no longer available. Head, NAMARA Case Management Branch letter of 1 Feb 2007.

The case was first docketed before this court on 7 March 2007. On 11 October 2007, we found merit in the appellant's second assignment of error¹ and found that the copy of the record of trial received at this court was not an authenticated record as contemplated by Article 54(b), UCMJ, or RULE FOR COURTS-MARTIAL 1104(a)(2)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). Accordingly, we set aside the CA's action and returned the matter to the Judge Advocate General for remand to the CA for proper authentication of the record of trial in accordance with R.C.M. 1103, 1104(a)(2)(B), and 1104(c), and for proper post-trial processing. In light of our decision, we deferred consideration of the appellant's first assignment of error, that he has been denied speedy post-trial processing. We turn to that issue now.

Before this court, the appellant's sole assignment of error is post-trial delay. In his initial brief, he pointed out the nearly three years (995 days) between his trial in June 2004 and initial docketing with this court in March 2007, and that 733 days of the delay took place after the CA took action. Appellant's Brief of 7 May 2007 at 3-4. Since then, an additional period of two years has elapsed. The appellant was offered, on 22 April 2009, an opportunity to provide additional briefing, but he elected to rest on his earlier pleading. Appellant's Submission of 1 Jun 2009. The appellant does not allege any specific prejudice due to the delay, other than suggesting that the loss of the record may have been related to

¹ Whether, in accordance with RULE FOR COURTS-MARTIAL 1104(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), the Government should be required to cause another record of trial to be prepared for authentication in this matter.

the delay. Appellant's Brief at 8, 10. The Government concedes that the delay is facially unreasonable. Government's Answer of 6 Jun 2007 at 3; see also *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2006). We agree that the nearly five-year delay between the adjournment of trial and redocketing with this court is unreasonable and we note the lack of administrative oversight in this case.

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. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006). Here, there is no evidence of any specific harm 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 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. Additionally, we note that the appellant was convicted, pursuant to his pleas, of wrongfully possessing drug paraphernalia and of wrongfully introducing, distributing, and using marijuana on divers occasions. Further, with the exception of two instances of use, all the misconduct took place onboard a warship. He has not raised any issues regarding the conduct of his trial and, in his 26 March 2009 request for clemency, he states that he "has already found employment and has performed extremely well in his civilian career. His life in the Marine Corps is so remote now that his future potential employers, if needed, will be more concerned with his current work product than what he did 5-7 years ago at age 22." Defense Request for Clemency of 26 Mar 2009 at ¶ 5.

Under the totality of circumstances in this record, we conclude that the Government has met its burden to show that the post-trial delay in this case, while unacceptable, was harmless beyond a reasonable doubt. *United States v. Allende*, 66 M.J. 142, 145 (C.A.A.F. 2008). "To find otherwise would essentially adopt a presumption of prejudice in cases where [we find] a due process violation as a result of unreasonable post-trial delay" a standard the Court of Appeals has repeatedly declined to adopt. *United States v. Bush*, 68 M.J. 96, 2009 CAAF LEXIS 932, at 26 (C.A.A.F. 2009).

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 conclude that the only meaningful relief available, disapproving the adjudged bad-conduct discharge, would be an undeserved windfall for the appellant and disproportionate to any possible harm the appellant suffered as a result of the post-trial delay. *United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006). Therefore, we find that the delay in this case does not

affect the findings or sentence that should be approved. Art. 66(c), UCMJ.

Accordingly, the findings and approved sentence are affirmed.

For the Court,

R.H. TROIDL
Clerk of Court