

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

**Before
J.R. PERLAK, M.D. MODZELEWSKI, R.G. KELLY
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**KWESI T. STIGALL
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 201200265
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 4 August 2002.

Military Judge: Col Daniel J. Daugherty, USMC.

Convening Authority: Commanding Officer, Marine Wing Support Group 17, 1st Marine Aircraft Wing, Okinawa, Japan.

Staff Judge Advocate's Recommendation: Col B.T. Palmer, USMC.

For Appellant: CDR R.D. Evans, Jr., JAGC, USN.

For Appellee: LT Keith B. Lofland, JAGC, USN.

30 November 2012

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of attempted larceny and larceny, in violation of Articles 80 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 921. The military judge sentenced the appellant to confinement for four months, reduction to pay grade E-1, and a bad-conduct discharge.

In accordance with a pretrial agreement, the convening authority (CA) deferred and then waived (for six months)

automatic forfeitures in excess of \$650.00 per month. Under the terms of that agreement he was also obligated to suspend all confinement in excess of ninety days for a period of twelve months, and upon the appellant's request and as a matter of post-trial clemency, he agreed to suspended three additional days, allowing the appellant to be released in October 2002.

Shortly thereafter, the CA received reports of additional misconduct by the appellant. Procedures were conducted per RULE FOR COURTS-MARTIAL 1109, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), leading to the CA vacating the appellant's suspended confinement on 12 November 2002.¹ On 24 March 2003, the CA approved the sentence, waived (for six months) automatic forfeitures in excess of \$650.00 per month, and, except for the bad-conduct discharge, ordered the sentence executed. For reasons not discernable from the record before us, the record was not received for our review until 15 June 2012. Affidavit of James Duncan of 14 Jun 2012.

On 14 February 2003, the appellant was convicted at a second special court-martial wherein a bad-conduct discharge was again part of the adjudged and ultimately approved sentence. The second court-martial received timely review at this court, and the appellant merited no relief. *United States v. Stigall*, No. 200400051, unpublished op. (N.M.Ct.Crim.App. 26 Mar 2004). This discharge from the Marine Corps with a bad-conduct discharge was ordered executed by Special Court-Martial Supplemental Order No. 04-1169, 26 August 2004. Duncan Affidavit.

The appellant now assigns a single error: that the nearly ten-year delay from the conclusion of his first court-martial to the beginning of appellate review has violated his due process rights, entitling him to relief under the line of cases that includes *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), or alternatively under Article 66(c), UCMJ. He specifically prays for relief of the punitive discharge approved in this case.

¹ We note that the narrative report of the officer conducting the vacation hearing appears to be missing at a minimum a signature page, if not subsequent pages of text. However, the government exhibits, defense exhibits and list of witnesses are included, along with the entirety of a DD Form 455 report from the investigating officer to the CA. We do not find the potentiality of a missing document to be a material omission to the record which resulted in prejudice to the appellant nor which would prevent our review.

The appellant's assignment of error raises two questions which we review *de novo*: first, was there a violation of his due process right to speedy post-trial review; and second, if there was a denial of due process, was it harmless beyond a reasonable doubt. *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). We must decide the ultimate question of whether, under the totality of the circumstances of the case, any error committed was proven by the Government to be harmless beyond a reasonable doubt. *United States v. Bush*, 68 M.J. 96, 102-03 (C.A.A.F. 2009).

We readily conclude that the over 8-month delay by the CA in taking his action, combined with the apparent loss of the record, resulting in nearly ten years passing prior to docketing, without explanation, is facially unreasonable and establishes a violation of the appellant's due process right to timely appellate review. We next note that there have been no previous assertions of untimely appellate review prior to the appellant's brief of 15 August 2012.

This brings us squarely to the issue whether the error and due process violation committed resulted in prejudice to the appellant. The court-martial involved unconditional guilty pleas, supported by a stipulation of fact, to straightforward offenses involving larceny from his roommate on Okinawa and from another Marine while deployed to Thailand. No assignment of error has been raised that would serve to challenge the providence of those pleas. The adjudged period of confinement has long since been served, followed by a subsequent period adjudged at the appellant's subsequent court-martial. The prospect of anxiety pending appeal is remote, since it is unlikely the appellant would be fully cognizant of or expectant of receiving an additional punitive discharge. While we acknowledge the efforts of appellate defense counsel to contact the appellant have not been successful, we decline to apply a presumption of prejudice on that basis alone. The allegations of possible prejudice in the appellant's brief raise valid eventualities that may occur due to such an extended period of delay, but they are amorphous and speculative. Had this been the appellant's sole court-martial under the jurisdiction of this court, a different result might be warranted. But here, there is an additional circumstance that also serves to convince us that any error was harmless beyond a reasonable doubt: the appellant's second court-martial timely resulted in his bad-conduct discharge from the Marine Corps. Therefore, none of the possible prejudice from an unresolved military status impacting employment, education or other endeavors during the pendency of

a protracted appeal is present. The appellant was in the same position during these intervening years—discharged from the Marine Corps. We hold that on the facts of this case, and in the absence of any demonstrated prejudice, the Government has met its burden of proving that the denial of due process in this case was harmless beyond a reasonable doubt.

We have also considered whether relief is warranted under Article 66(c), UCMJ, in light of *Toohey v. United States*, 60 M.J. 100, 103-04 (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*). From a purely legal, versus equitable perspective, on the facts of this case, we decline to exercise our Article 66(c) prerogatives. This case is anomalous in the context of timely post-trial review normally observed at this court and we depart from the exercise of Article 66(c) in the past to address a circumstance where "(p)ost-trial delay has become a systemic problem for many Navy and Marine Corps SJAs." *Brown*, 62 M.J. at 605. We conclude that any grant of relief would be a windfall for the appellant disproportionate to any putative harm. *United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006).

We find that the error in this case has not resulted in material prejudice to the appellant's substantial rights. The findings and sentence affirmed. Arts. 59(a), 66(c), UCMJ.

For the Court

R.H. TROIDL
Clerk of Court