

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

J.W. ROLPH

C.L. SCOVEL

J.D. HARTY

UNITED STATES

v.

**Aaron A. OESTMANN
Aviation Support Equipment Technician Airman (E-3), U. S. Navy**

NMCCA 200301443

Decided 14 March 2006

Sentence adjudged 10 December 2001. Military Judge: B.W. MacKenzie. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding Officer, U.S. Naval Support Activity, Naples, Italy.

CDR MICHAEL WENTWORTH, JAGC, USNR, Appellate Defense Counsel
CDR GEORGE F. REILLY, JAGC, USN, Appellate Defense Counsel
LT STEPHEN REYES, JAGC, USNR, Appellate Defense Counsel
Maj RAYMOND BEAL, USMC, Appellate Government Counsel
LT MARK HERRINGTON, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

SCOVEL, Senior Judge:

This case is before this court for review for the second time. On 10 December 2001, a general court-martial, composed of a military judge sitting alone, convicted the appellant, pursuant to his pleas, of conspiracy to wrongfully possess hashish with the intent to distribute; without authority, failing to go to his appointed place of duty to provide a urine sample; violating a lawful general regulation by wrongfully possessing illegal drug paraphernalia; wrongful possession of hashish with the intent to distribute; wrongful use of hashish; and wrongful possession of marijuana, in violation of Articles 81, 86, 92, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 886, 892, and 912a. The adjudged sentence included confinement for 12 months, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. In timely fashion, the convening authority (CA) approved the adjudged sentence. The Navy-Marine Corps Appellate Review Activity received the record of trial 511 days after the CA's action.

In our first review of this case, this court denied relief to the appellant on his assignment of error asserting denial of timely review, but modified two of the findings and reassessed the sentence. Upon reassessment, we affirmed only so much of the sentence as extended to confinement for nine months, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. *United States v. Oestmann*, 60 M.J. 660 (N.M.Ct.Crim.App. 2004), *aff'd and supplemented upon reconsideration*, 60 M.J. 660, 664 (N.M.Ct.Crim.App. 2004), *aff'd in part and remanded*, 61 M.J. 103 (C.A.A.F. 2005).

In our superior court, the appellant renewed his assertion of a denial of timely review. That court noted that, in finding that the appellant had not shown that the delay was unreasonable, we had observed that the appellant did not raise the issue before the CA acted. It concluded that we had not focused on the relevant period of delay. "The issue in this case involves the period after the convening authority acted—the unexplained and unusual period of more than one year and five months to accomplish the routine, nondiscretionary, ministerial task of transmitting the record from the convening authority to the Navy-Marine Corps Appellate Review Activity." *Oestmann*, 61 M.J. at 104. Our superior court affirmed our decision as to the findings but set it aside as to the sentence. It returned the record to us for review of the sentence under *Toohey v. United States*, 60 M.J. 100 (C.A.A.F. 2004); *Diaz v. The Judge Advocate General of the Navy*, 59 M.J. 34 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002); and *United States v. Jones*, 61 M.J. 80 (C.A.A.F. 2005). *Id.*

We offered an opportunity to the appellant to file an additional brief on this issue and to request permission to file supplemental assignments of error. Both parties filed briefs on the issue of whether the 511-day delay in forwarding this 82-page record of trial for appellate review violated the appellant's right to a timely appeal. We conclude that dilatory post-trial processing mandates relief in this case. We will order corrective action in our decretal paragraph.

Post-Trial Delay

The following chronology applies to this issue:

Event	Date	Incremental Delay	Cumulative Delay
Sentence adjudged	12/10/2001	0 days	0 days
Record authenticated	01/25/2002	46 days	46 days
SJAR signed and served on TDC	02/05/2002	11 days	57 days
Clemency request	02/12/2002	7 days	64 days
SJAR addendum signed	02/14/2002	2 days	66 days
SJAR addendum served on TDC	02/19/2002	5 days	71 days
CA's action	02/26/2002	7 days	78 days
Record rec'd in NAMARA	07/22/2003	511 days	589 days
Case docketed in NMCCA	07/23/2003	1 day	590 days
Appellant's first brief	09/12/2003	51 days	641 days

We analyze claims of post-trial delay using a two-step methodology. First, we consider the appellant's constitutional due process right to speedy review. Second, if no constitutional violation is established, we analyze the issue under our broad Article 66(c), UCMJ, power. *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc).

In our constitutional analysis, we consider four factors in determining if post-trial processing delay has violated the appellant's due process rights: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to a timely appeal; and (4) prejudice to the appellant. *Jones*, 61 M.J. at 83 (citing *Toohey*, 60 M.J. at 102). If the length of the delay itself is not unreasonable, there is no need for further inquiry. If we conclude that the length of the delay is "facially unreasonable," however, then we must balance the length of the delay with the other three factors. *Id.* In extreme circumstances, the delay itself may "give rise to a strong presumption of evidentiary prejudice." *Id.* (quoting *Toohey*, 60 M.J. at 102).

In this case, 511 days elapsed between the CA's action and receipt of this 82-page record of trial by the Navy-Marine Corps Appellate Review Activity. Noting that this delay resulted from the failure by a non-deployed command to perform the routine administrative task of forwarding the record of trial after the CA's action, we find this delay facially unreasonable. The Government provides no reason for this delay. The appellant first asserted his right to a speedy review when his counsel filed his first brief with this court. The appellant states that he was prejudiced by a "want of meaningful opportunity for relief," because he had served his adjudged sentence of confinement for 12 months before his case arrived in this court. Appellant's Brief of 8 Aug 2005 at 7 (quoting *United States v. Rodriguez*, 60 M.J. 239, 256 (C.A.A.F. 2004)). We disagree,

finding no prejudice because even if the case had been docketed in a timely manner, little possibility existed that appellate review could have been completed before the appellant's release from confinement. Finally, we find no "extreme circumstances" that give rise to a presumption of evidentiary prejudice. We conclude that there has been no due process violation due to the post-trial delay.

Finding no constitutional violation, we turn next to the question of whether the findings and the sentence in this case should be approved under Article 66(c), UCMJ. We again consider the four factors set forth in *Jones*. In addition, we consider several factors discussed in *Brown*: the length and complexity of the case, both at trial and on appeal; any evidence of gross negligence by the Government; the offenses of which the appellant has been found guilty; and the sentence.

Using the *Jones* factors, we again find that although the delay is facially unreasonable and unexplained, the appellant has not demonstrated prejudice, and we find none. Upon consideration of the *Brown* factors, however, we conclude that the delay affects the sentence that should be approved.

This case is not complex. The appellant pleaded guilty and his trial produced a record only 82 pages long. No complex legal issues were raised at trial or on appeal. We find gross negligence on the part of the Government in taking almost one year and five months to transmit the record to this Court, a process that should have taken a few weeks at most. This delay is all the more troubling because the Government acted diligently throughout the post-trial process until after the CA's action, when forward motion of the record inexplicably stalled. We recognize that the offenses of which the appellant was convicted were serious but, in our opinion, his sentence was relatively light in comparison to them.

We conclude that the post-trial delay affects the sentence that should be approved in this case and we will grant relief in our decretal paragraph.

Conclusion

The findings of guilty, as previously modified by this Court, were affirmed by our superior court on 10 May 2005. We now affirm only so much of the sentence as provides for a bad-conduct discharge and reduction to pay grade E-1.

Chief Judge ROLPH and Judge HARTY concur.

For the Court

R.H. TROIDL
Clerk of Court