

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

BEFORE

D.A. WAGNER

R.E. VINCENT

E.B. STONE

UNITED STATES

v.

**Lance R. COOPER
Builder Constructionman Apprentice (E-2), U. S. Navy**

NMCCA 200500724

Decided 15 March 2006

Sentence adjudged 29 April 2004. Military Judge: D.J. Daugherty. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Naval Mobile Construction Battalion FIVE, Okinawa, Japan.

LT J.L. GOLDSMITH, JAGC, USN, Appellate Defense Counsel
Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
CAPT MICHAEL DETZKY, JAGC, USNR, Appellate Defense Counsel
Capt ROGER MATTIOLI, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of conspiracy to obstruct justice, willfully damaging military property, willfully damaging non-military property, assault with intent to commit grievous bodily harm, assault and battery, burglary, housebreaking, and obstruction of justice, in violation of Article 81, 108, 109, 128, 129, 130, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 908, 909, 928, 929, 930, and 934. The appellant was sentenced to a bad-conduct discharge, confinement for 10 months, and reduction in rate to pay grade E-1. A pretrial agreement required only that the charges be referred to a special court-martial vice a general court-martial. The convening authority approved the sentence as adjudged.

In his two assignments of error, the appellant claims that the delay in his post-trial processing was unreasonable and that the record of trial is not properly authenticated. A plain reading of the record shows that the second assignment of error

is without basis, as the military judge properly authenticated the record of trial at page 104. After considering the record of trial, the appellant's two assignments of error, the Government's response, and the appellant's reply, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was sentenced on 29 April 2004. The court-martial was conducted overseas, while the appellant and the convening authority were deployed to Okinawa, Japan. The convening authority returned to the United States in June 2004. The record of trial was prepared by the legal support staff in Okinawa and authenticated by the military judge on 22 July 2004. The record was then mailed to the convening authority in October 2004. The original record was not received, apparently because it had an incorrect zip code in the address, so a copy of the record was placed in the mail. In January 2005, both the original and the copy of the record were received by the convening authority. The staff judge advocate's recommendation (SJAR) was completed on 9 February 2005, 296 days after trial. The convening authority's action was completed on 8 March 2005. The record was docketed with this court on 13 October 2005. Appellate defense counsel filed the brief and assignment of error with the court on 29 November 2005.

Post-Trial Delay as a Due Process Violation

We look to four factors in determining if the 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. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Jones*, 61 M.J. at 83. Moreover, in extreme cases, the delay itself may "give rise to a strong presumption of evidentiary prejudice." *Id.* (quoting *Toohey*, 60 M.J. at 102).

(1) Length of Delay.

The 104-page record of trial was docketed at this court over 17 months after trial. The staff judge advocate's recommendation was not completed for over nine months following trial. Applying our holding in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc), we find the delay of more than one year from the adjournment of the court-martial to docketing the 104-page record of trial with this court to be facially

unreasonable, triggering a due process review. The processing of this record was dilatory and is, on its face, unreasonable.

(2) Reasons for the Delay.

The Government asserts clerical errors in mailing the original record of trial to the convening authority as a reason for part of the delay, but asserts no reasons for the seven-month delay in mailing the record to this court after final action by the convening authority.

(3) Assertion of the Right to Speedy Review.

There is no evidence in the record that the appellant asserted his right to a timely appeal prior to the filing of the appellant's brief and assignment of errors on 29 November 2005.

(4) Prejudice to the Appellant.

We do not find any evidence of prejudice suffered by the appellant from the delay in this case. Additionally, the delay in this case is not so egregious as to give rise to a presumption of prejudice. Thus, we conclude that there has been no due process violation due to the post-trial delay.

Post-Trial Delay under Article 66(c), UCMJ

We are cognizant of this court's power under Article 66(c), UCMJ, to grant sentence relief for excessive post-trial delay even in the absence of actual prejudice. *United States v. Oestmann*, 61 M.J. 103 (C.A.A.F. 2005); *Toohey*, 60 M.J. at 100; *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). We are challenged under Article 66, UCMJ, to affirm only the findings and the sentence or part of the sentence that we find "correct in law and fact" and that we "determine, on the basis of the entire record, should be approved."

This court previously published a non-exclusive list of factors we use in determining what part of the findings and sentence should be approved in a case involving post-trial delay. *Brown*, 62 M.J. at 606-07. We apply those factors to the facts before us in the case at bar.

The delay from adjournment of the court-martial to docketing of the record with this court was in excess of one year and is, therefore, facially unreasonable. The aggregate delay, however, while less than optimal, does not demand relief under Article 66(c), UCMJ. The Government advances reasons for that part of the delay involved in mailing the authenticated record from Japan to the United States. The only portion of the delay of substantial concern is the delay between final action by the convening authority and receipt by the court. The seven months that elapsed while the record was waiting to be mailed to the

court is certainly, without explanation, embarrassing for the convening authority, but it does not amount to gross negligence or bad faith on the part of the Government. Also, the appellant did not assert his right to speedy review until his brief was filed with this court. The appellant has made no showing of harm resulting from the delay.

Furthermore, the appellant was convicted of serious crimes. The appellant characterizes the offenses as being "not of extreme gravity" and states that the act of referring the charges to a special court-martial "demonstrates that [the convening authority] did not consider them that serious". Appellant's Reply of 27 Jan 2006 at 4. This argument has no merit whatsoever. The offenses involved not only damage to military and personal property, but the intentional assault on two shipmates resulting in severe injury to one of them, and obstruction of justice in trying to cover up these serious crimes. Because of the nature and severity of his offenses, there is a societal interest in the appellant serving his adjudged sentence that weighs heavily against any relief for the relatively minor post-trial processing delay in this case.

We have, therefore, concluded that the delay in this case does not affect the "findings and sentence [that] 'should be approved' based on all the facts and circumstances reflected in the record." *Tardif*, 57 M.J. at 224.

Conclusion

The findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Judge VINCENT and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court