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

BEFORE

C.L. CARVER **D.O. VOLLENWEIDER** **E.E. GEISER**

UNITED STATES

v.

Herman L. BROWN
Staff Sergeant (E-6), U. S. Marine Corps

NMCCA 200200095 Decided 12 June 2006

Sentence adjudged 9 May 2001. Military Judge: S.A. Folsom. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 3d Marine Aircraft Wing, MCAS Miramar, San Diego, CA.

LCDR ERIC MCDONALD, JAGC, USN, Appellate Defense Counsel
DAVID P. SHELDON, Civilian Appellate Defense Counsel
LT JANELLE LOKEY, JAGC, USNR, Appellate Defense Counsel
Maj WILBUR LEE, USMC, Appellate Government Counsel

CARVER, Senior Judge:

A general court-martial composed of a military judge alone convicted the appellant, contrary to his pleas, of false official statement (three specifications), rape, indecent acts, and providing alcohol to a minor, in violation of Articles 107, 120, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 920, and 934. The appellant was sentenced to confinement for 18 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

The appellant alleges that the evidence is legally and factually insufficient to sustain his convictions for rape and false official statement, that he was improperly placed in pretrial confinement, that he has been denied his right to speedy review by this court, and that his sentence is inappropriately severe. Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant also asserts that he was improperly

transferred to a different pretrial confinement facility, and subjected to cruel and unusual punishment during his confinement.

We have carefully considered the record of trial, the appellant's assignments of error, the Government's response, and the appellant's reply brief. We find merit in the appellant's pretrial confinement and speedy review assignments of error, and provide relief in our decretal paragraph. As modified, we conclude that the findings and sentence are correct in law and fact, and that no other error materially prejudiced the appellant's substantial rights. Arts. 59(a) and 66(c), UCMJ.

Facts

During a liberty port call in Hobart, Australia, in June 2000, the appellant and several other enlisted Marines, who were deployed with the USS JOHN C. STENNIS (CVN 74), visited a local shopping mall. Two of the Marines, Sergeant (Sgt) Johnson and Corporal (Cpl) Malone, had already checked into a local hotel and stocked it with several bottles of gin. While there, the Marines encountered a group of teenage girls, including TP and JB. While talking to the girls, the appellant and Cpl Malone used fictitious names and the appellant further deceived the girls by denying being in the U.S. military and claiming to be an American tourist on vacation. After some conversation, the Marines invited the group of girls back to the hotel room. Although several of the girls initially accepted the invitation, only TP and JB actually went. TP and JB both recall informing the Marines that they were 15 years old. Sgt Johnson also testified that he heard one of the girls state her age as 15 on the cab ride to the hotel.

At the hotel room, the Marines and the girls all drank gin and orange juice. TP, who had never consumed alcohol before, quickly became intoxicated and remembers very little after arriving at the room. Shortly thereafter, JB and Cpl Malone went into the bedroom and engaged in sexual intercourse. TP and the appellant were together on a foldout bed in the living room. Sgt Johnson watched television in the living room, with his back to the foldout bed. Sgt Johnson heard moaning sounds, and observed the appellant on top of TP, moving his hips as though having sexual intercourse. In the other part of the hotel room, JB stopped her encounter with Cpl Malone and came out into the living room. She observed the appellant next to or on top of TP and believed they were having sex but could not tell for certain. Cpl Malone then entered the room and testified that he saw the appellant penetrating TP, and could see that the appellant was not wearing a condom. The appellant ended his encounter with TP and used a bathroom. Sgt Johnson briefly observed Cpl Malone, who was nude, on top of TP. JB, however, denied ever seeing Cpl Malone on top of TP.

By this point, everyone had become aware that TP was severely intoxicated. She was unresponsive, and vomited when the

others attempted to sit her up. The Marines carried TP out of the room and summoned a taxi for her and JB. Eventually, TP was brought to a local hospital, where her blood alcohol concentration was measured at 0.25. Local authorities and the Naval Criminal Investigative Service (NCIS) began an investigation. The hotel room was searched, and several evidentiary items were seized for DNA testing. The DNA evidence did not conclusively link the appellant to sexual intercourse with TP. A condom seized from the hotel room, ostensibly the one Cpl Malone used with JB, also contained traces of TP's DNA. TP underwent an extensive rape kit examination, documenting significant tearing and bleeding to her hymen and vaginal area.

The appellant was convicted, contrary to his pleas; of rape of TP, indecent acts with TP; and providing alcohol to TP, a minor. The appellant was also convicted of making three false official statements about the incident to Hobart police.

Cpl Malone and Sgt Johnson pled guilty at special courts-martial to various offenses arising out of this incident. Pursuant to their respective pretrial agreements, both agreed to cooperate with the prosecution in the appellant's case. Neither was charged with rape.

Sufficiency of the Evidence

The appellant asserts that the evidence is factually and legally insufficient to sustain the conviction for rape, and factually insufficient to sustain the conviction for false official statement.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ. There are only two elements to the offense of rape: 1) sexual intercourse, and 2) that the intercourse occurred by force and without consent. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 45b(1). Lay and medical testimony clearly established that TP was intoxicated well beyond the capacity to consent to sexual activity. The eyewitness testimony of JB, Cpl Malone, and Sgt Johnson all established that the appellant was on top of TP, when both were nude from the waist down, and the appellant was moving his hips consistent with an act of sexual intercourse. Cpl Malone stated that he actually observed the appellant penetrate TP. Moreover, TP suffered significant physical injuries to her hymen and vaginal area, as documented by a contemporaneous medical examination. This testimony, in the light most favorable to the Government, provided legally sufficient evidence to establish the elements of the offense.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see* Art. 66(c), UCMJ. Reasonable doubt, however, does not mean the evidence must be free from conflict. *See Reed*, 51 M.J. at 562; *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986).

The appellant's arguments at trial and on appeal focus primarily on DNA evidence, submitted in the form of a stipulation of fact with the corresponding lab reports. That evidence, however, was largely inconclusive. TP's DNA was not found on the swab taken from the appellant's penis the next day; however, traces of blood were. Prosecution Exhibit 2 at 6. From the reports as submitted, it is not entirely clear whether this bloodstain is the "minor component" on the appellant's swab that did not match TP's DNA profile, or reflects a separate source. Prosecution Exhibit 2 at 9. In any event, the evidentiary swabs were taken from the appellant several hours after the assault, during which time the appellant had the opportunity to shower.

The appellant correctly points out that his DNA was not found in any of the rape kit swabs taken from TP. TP's DNA and blood were, however, found on the outside of a condom, apparently used by Cpl Malone and retrieved from a wastebasket in the hotel room. The other items in the wastebasket, including a used tissue, were not tested. DNA evidence has in many ways altered the landscape of criminal prosecutions for rape; however, in this case, that evidence cannot carry the day for either side. The lack of DNA evidence directly linking the appellant to an act of sexual intercourse with TP does not exonerate him. Penetration can be achieved without necessarily leaving a DNA fingerprint behind. *See generally United States v. Goode*, 54 M.J. 836, 845 (N.M.Ct.Crim.App. 1991). Nor does the possibility that Cpl Malone raped TP mean that no one else committed a similar act upon her.

Given her significant vaginal injuries, there is absolutely no question that at least one person penetrated TP. There was conflicting testimony regarding whether those injuries could have been caused by intercourse with a lubricated condom, i.e. Cpl Malone, or were more likely the result of unprotected intercourse, i.e. the appellant. It is undisputed that TP was with the appellant for the entire time, save for a brief period when the appellant used the bathroom after TP had lost consciousness. Cpl Malone, for much of that time, was in another room with JB, engaging in consensual sexual activity.

This is admittedly a close case on the element of penetration by the appellant. As he points out, all of the eyewitness testimony at trial was influenced by alcohol, self-interest, or both. The trier of fact may believe one portion of a witness's testimony but disbelieve others. *See United States*

v. Harris, 8 M.J. 52, 59 (C.M.A. 1979). JB, Cpl Malone and Sgt Johnson all observed the appellant in bed with TP while both were in a state of undress. Sgt Johnson heard moaning and saw the appellant thrusting his hips forward as though engaging in sexual intercourse. Cpl Malone testified that he saw actual penetration. This case turns on the credibility of those witnesses, and we must make allowances for the fact that the military judge at trial had the opportunity to observe those witnesses. Art. 66(c), UCMJ. After carefully reviewing all of the foregoing testimony and evidence, we are convinced beyond a reasonable doubt that the appellant is guilty of rape.

Similarly, we are convinced that the appellant's statements to law enforcement that he did not know TP's age and never had sex with her were false. JB and TP both stated that they relayed their ages to the appellant during the taxi ride to the hotel. Sgt Johnson likewise heard at least part of this conversation. We find that the evidence is factually and legally sufficient to support the false official statement specifications.

Pretrial Confinement

The appellant contends that he is entitled to additional credit under RULE FOR COURTS-MARTIAL 305, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) for unlawful pretrial confinement. We agree.

The appellant was informed within hours of the incident that he was suspected of rape, and a trial date in Australia was set for November. At that time, he was released to military authorities and kept on board the USS JOHN C. STENNIS (CVN 74) for the remainder of the liberty calls in Hobart. Testimony at an Article 39(a), UCMJ, hearing on this issue established that the appellant had remained free on his own recognizance for over two months after the USS JOHN C. STENNIS (CVN 74) returned to the United States. During that time, the appellant worked his normal schedule, and took at least three periods of authorized leave. In September, however, the United States obtained jurisdiction over the case. The appellant's newly reported commanding officer, LtCol Stalmaker, believed that the appellant might "run" based on the seriousness of the charges and potential sentence. The appellant and his detailed counsel vigorously opposed confinement at the initial review hearing, offering evidence of the appellant's family and church ties to the local area, and his wife's full-time employment in the area. After referral of charges, the appellant made a timely motion for additional confinement credit under R.C.M. 305, and also requested his immediate release. The military judge denied both motions. It is undisputed that the appellant spent 210 days in pretrial confinement.

Whether a pretrial detainee suffered unlawful pretrial punishment is a mixed question of law and fact that qualifies for independent review. *See United States v. Pryor*, 57 M.J. 821, 825 (N.M.Ct.Crim.App. 2003). The burden of proof is on the appellant

to show a violation of Article 13, UCMJ. *See United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). Article 13 prohibits two things: (1) the intentional imposition of punishment on an accused before his or her guilt is established at trial, i.e., illegal pretrial punishment, and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the appellant's presence at trial, i.e., illegal pretrial confinement. *See United States v. Inong*, 58 M.J. 460, 463 (C.A.A.F. 2003).

The "punishment prong" of Article 13, UCMJ, focuses on intent, while the "rigorous circumstances" prong focuses on the conditions of pretrial restraint. *See Pryor*, 57 M.J. at 825 (citing *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997)). Conditions are not deemed "unduly rigorous" if, under the totality of the circumstances, they are reasonably imposed pursuant to legitimate governmental interests. *See McCarthy*, 47 M.J. at 168; *United States v. Singleton*, 59 M.J. 618, 621 (Army Ct.Crim.App. 2003), *aff'd*, 60 M.J. 409 (C.A.A.F. 2005); *see also United States v. Sittingbear*, 54 M.J. 737, 741 (N.M.Ct.Crim.App. 2001).

The seriousness of the offenses and the corresponding potential sentence clearly are relevant factors that may be considered in determining whether to place a servicemember in pretrial confinement. *See United States v. Anderson*, 49 M.J. 575, 577 (N.M.Ct.Crim.App. 1998). However, this court has warned of the danger of basing pretrial confinement decisions *solely* on the seriousness of an offense or the maximum punishment authorized. *See, e.g., United States v. Kinzer*, 56 M.J. 741, 742 (N.M.Ct.Crim.App. 2002), *aff'd*, 58 M.J. 287 (C.A.A.F. 2003); *Mosby*, 56 M.J. at 310. In this case, the appellant had already demonstrated that he was not a flight risk for an extended period of time. He was aware of the charges against him, and although the maximum punishment under military jurisdiction was significantly greater, he was nonetheless facing several years of confinement in a foreign prison even before the United States obtained jurisdiction. During that time, he was allowed to work his normal hours and take out-of-state leave, without any incident or difficulty.

We note that the victim of these offenses was several thousand miles away, so her safety was not an issue. The appellant apparently had an otherwise clean criminal record, and had significant ties to the local community. Although the Government points to additional evidence discovered during that time, it appears that a considerable amount of that evidence was also favorable to the appellant. We see nothing in this record suggesting that the appellant was any more of a flight risk in September than he was in July and August, when his liberty was completely unrestricted.

The only thing that truly changed in September was the entity having jurisdiction over the case. We do not regard that

as a proper reason, standing alone, to advance from zero restrictions to pretrial confinement since the appellant was free while awaiting disposition of the offenses by a foreign government. On the limited facts presented at the initial review hearing, and before the military judge at trial, we find an abuse of discretion at both stages of the process. Were we to adopt the Government's position, this court would essentially establish a *per se* rule allowing anyone suspected of rape to be held in pretrial confinement regardless of the other evidence presented. Accordingly, we grant the appellant an additional 210 days of credit toward his adjudged sentence.

Speedy Review

An appellant's right to timely review extends to the post-trial and appellate process. *See Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003). This right is embodied in Article 66, UCMJ, as well as the Due Process Clause of the Fifth Amendment. *See United States v. Moreno,* 63 M.J. 129 (C.A.A.F. 2006); *Toohey v. United States*, 60 M.J. 100, 101-02 (C.A.A.F. 2004); *Diaz*, 59 M.J. at 37-38.

We consider four factors in determining if post-trial delay violates 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*, 60 M.J. at 102). 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. *Id*. 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).

In this case, our opinion will be issued some 5 years after the appellant was sentenced. Most of that delay has occurred at the appellate level. The convening authority took his action approximately 4 months after the last session of trial. The record was docketed with our court approximately four months later. It took over a year for military appellate counsel to review the case. After obtaining civilian appellate counsel, it took another six months for appellate defense counsel to file an initial brief, and another six months for the Government to respond. All pleadings were finally before this court on 22 April 2004, nearly three years after the appellant was sentenced. The massive record of trial includes more than 850 pages of text; several volumes of trial exhibits (including videotapes in an Australian format requiring special equipment to view); and multiple volumes of motions, pleadings, and attachments. The large record and the complexity of the issues adequately explain some of the delay at this level.

But regardless of the reasons for the delay, we find that the delay is facially unreasonable, triggering a due process

review. We next look to the third and fourth due process factors. The appellant filed a motion for expedited review on 2 June 2004, which was granted by this court on 14 June 2004. The judge who granted that motion retired before completing review, resulting in a reassignment to another lead judge about 1 March 2006. Notwithstanding that the appellant waited more than three years to assert this right, the third factor favors the appellant.

The fourth factor favors the Government. In neither his supplemental assignment of error, nor in his motion to expedite review, has the appellant asserted any significant specific prejudice resulting from the delay. He did allege that he suffered financial hardship as a result of hiring civilian appellate counsel to represent him after the military appellate counsel failed to file a brief in a timely manner. The appellant has continued to serve his confinement while his appeal is pending, so there is no possibility of lost job opportunities or other adverse effects. *Cf. Jones*, 61 M.J. at 83. Prejudice is the "central legal issue" in determining whether a due process violation has occurred. *Id*. We, therefore, conclude that there has been no due process violation due to the post-trial delay.

We are also aware of our authority to grant relief under Article 66, UCMJ, even in the absence of specific prejudice. *Jones*, 61 M.J. at 83; *United States v. Oestmann*, 61 M.J. 103 (C.A.A.F. 2005); *Toohey*, 60 M.J. at 100; *Diaz*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). Because of the unwarranted delay in this court's review of the record, particularly after granting the appellant's motion to expedite appellate review some 2 years ago, we believe this case is an appropriate one to exercise that authority. Accordingly, we grant relief by reducing the period of confinement by one year.

Sentence Appropriateness

Sentence appropriateness involves the *individualized* consideration of the particular accused on the basis of the nature and seriousness of the offense and character of the offender. *See United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Courts of criminal appeals are tasked with determining sentence appropriateness, as opposed to bestowing clemency, which is the prerogative of the convening authority. *See United States v. Mazer*, 58 M.J. 691, 701 (N.M.Ct.Crim.App. 2003), *rev'd on other grounds*, 60 M.J. 344 (C.A.A.F. 2004). Thus, a sentence should not be disturbed on appeal unless the harshness of the sentence is so disproportionate as to "cry out for sentence equalization." *United States v. Usry*, 9 M.J. 701, 704 (N.C.M.R. 1980). After carefully considering the providence inquiry, evidence in aggravation and mitigation, including the appellant’s unsworn statement, we conclude that the appellant’s sentence is not inappropriately severe. Art. 66(c), UCMJ.

The appellant stands convicted of raping a defenseless 15-year-old girl. The victim required hospitalization as a result of her severe intoxication, and sustained significant trauma to her vaginal area as a result of the assault. Testimony in aggravation showed that the rape has essentially consumed TP and her entire family, and strained relations between the U.S. military and the Hobart community. Although the appellant's co-actors received drastically reduced sentences at a lesser forum, neither of those individuals was charged with, let alone convicted of, rape. *See United States v. Noble*, 50 M.J. 293, 295 (C.A.A.F. 1999). We are mindful that DNA evidence submitted at trial strongly suggests that one of the co-actors could have also been involved. However, that fact alone does not in any way excuse or mitigate the appellant's conduct in this case.

We have reduced the appellant's sentence and also directed an additional credit of 210 days as relief for two of the assigned errors, and find that the sentence, as modified, is appropriate for these offenses and this offender. We decline to grant further relief.

Post-Trial Confinement Conditions

The appellant, pursuant to *Grostefon*, complains of several conditions of his pretrial and post-trial confinement at Camp Pendleton and Fort Leavenworth. First, he claims to have been improperly transferred from the Navy Consolidated Brig at Miramar, California, to the Marine Corps Brig at Camp Pendleton while awaiting trial. For relief, he requests additional day-for-day credit for the 62 days spent at Camp Pendleton. We decline to grant relief.

No prisoner has a legal entitlement to a particular custody classification, location, or parole. Further, this court does not participate in the day-to-day administration of confinement facilities. *See United States v. Jenkins*, 50 M.J. 577, 582 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 12 (C.A.A.F. 2000). According to the appellant's declaration, his transfer was to separate him from Sgt Johnson, a witness against him who was confined at Miramar. We find no legal error resulting from that decision by the Government.

Second, the appellant claims that post-trial conditions at the Camp Pendleton brig and Fort Leavenworth Disciplinary Barracks violated his Eighth Amendment rights. We disagree. The conditions of a military confinement facility are without question austere, but we do not believe any of the conditions rise to the level of cruel or unusual punishment. *See generally United States v. Avila*, 53 M.J. 99 (C.A.A.F. 2000)(surveying civilian cases on the issue and holding that solitary confinement alone did not constitute cruel and unusual punishment). Moreover, several of the appellant's complaints have been addressed administratively via the facility's grievance process.

See United States v. White, 54 M.J. 469, 472 (C.A.A.F. 2001). We have reviewed the remainder of the appellant's declaration and find nothing warranting relief. On the record before us, we find no violation either of the Eighth Amendment or Article 55, UCMJ.

Conclusion

Accordingly, the findings and only so much of the sentence as provides for a dishonorable discharge, confinement for 17 years, forfeiture of all pay and allowances, and reduction to pay grade E-1, are affirmed. In addition, the appellant shall be credited with having served an additional 210 days of confinement.

Judge VOLLENWEIDER and Judge GEISER concur.

For the Court

R.H. TROIDL
Clerk of Court