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.

Edward L. DALY
Gunner's Mate Third Class (E-4), U. S. Navy

NMCCA 200400545 Decided 22 February 2006

Sentence adjudged 11 January 2002. Military Judge: C.J. Gaasch. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS CURTIS WILBUR (DDG 54).

LT STEPHEN REYES, JAGC, USNR, Appellate Defense Counsel
LT CRAIG POULSON, JAGC, USNR, Appellate Government Counsel

STONE, Judge:

This case is before us for a second time. On 11 January 2002, a military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of wrongful use, introduction and distribution of ecstasy on board a vessel used by the Armed Forces in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The military judge sentenced the appellant to confinement for four months, forfeiture of $300 pay per month for four months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, and except for the bad-conduct discharge, ordered it executed; however, all confinement in excess of 30 days was suspended for 12 months from the date of trial in accordance with a pretrial agreement. On 21 September 2004, we set aside the convening authority's (CA) action and returned the record of trial to the Judge Advocate General for remand to an appropriate convening authority for post-trial processing pursuant to RULE FOR COURTS-MARTIAL 1105 through 1107, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). More than one year later, on 6 October 2005, and pursuant

to a show cause order issued from this court, the post-trial processing of the record of trial was completed and the case was again docketed.

We have examined the record of trial, the appellant's sole remaining assignment of error that he was denied the right to speedy review of his court-martial, and the Government's response. We agree with the appellant that he is entitled to relief due to dilatory post-trial processing of his court-martial. We will order corrective action in our decretal paragraph.

The Post-Trial Delay

The appellant argues that he was denied a speedy post-trial review of his court-martial because 1,364 days passed between his court-martial and docketing of the case before this court. We analyze claims of post-trial delay first as a constitutional right of every appellant, and second, if no constitutional violation is established, under our broad Article 66(c), UCMJ mandate. *United States v. Brown*, ___ M.J. ___, No. 200500873, 2005 CCA LEXIS 372 (N.M.Ct.Crim.App. 30 Nov 2005)(en banc).

A. *The Constitutional Analysis*

We look to 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. *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)). As for the first two factors, the Government provides no substantial reason for the 1,364 day delay. Regarding the third factor, the record of trial reveals that the appellant first asserted his right to speedy review 17 months ago on 30 June 2004. While we observe that more than 17 months have passed since the appellant has asserted his right to a speedy review, we also observe that the appellant waited more than 30 months after the date of trial to first assert his right to speedy review. In any event, we do not find any evidence of prejudice suffered by the appellant from the delay in this case, and we likewise do not find that the delay in this case is 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.

B. *Article 66(c) Review*

In determining whether or not the findings and sentence in this case should be approved under Article 66, UCMJ, we again consider the four factors set forth in *Jones*. In addition, we also consider several factors discussed in *Brown*: the length and complexity of the case, both at trial and on appeal; any evidence of gross negligence on the part of the Government; the offenses of which the appellant has been found guilty, and the sentence.

Regarding the *Jones* factors, we again find that although the length of the delay is facially excessive and unexplained, the appellant has not demonstrated, and we do not find, prejudice. Consideration of the *Brown* factors, however, reveals that although the delay in the case does not offend the Due Process Clause of the Constitution, the delay nevertheless affects the findings or sentence in the case that should be approved. Indeed, we find that the case is not complex; it is a simple guilty plea and the record of trial is only 77 pages long. We also find that no complex legal matters were raised at trial or on appeal. We also find gross negligence on the part of the Government in the post-trial processing of this case. Not only did this simple 77-page record of trial take more than 900 days to be originally docketed, after our initial decision it took more than a year to obtain the second CA's action. We find especially egregious the fact that the appellant had to move this court to compel the production of the record of trial and new CA's action more than 300 days after initial remand. Finally, we observe that the offenses for which the appellant was found guilty were severe, and that the sentence he received was relatively light compared to the offenses.

In conclusion, we believe 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 approved by the convening authority, are affirmed. However, only so much of the sentence

as provides for a bad-conduct discharge and reduction to pay grade E-1 is affirmed.

Senior Judge WAGNER and Judge VINCENT concur.

For the Court

R.H. TROIDL
Clerk of Court