U.S. Navy–Marine Corps Court of Criminal Appeals.
UNITED STATES
v.
Ryan Q. DELACRUZ, Seaman (E–3), U.S. Navy.

NMCCA 200401385.
Sentence Adjudged 10 Dec. 2003.
Decided 19 Oct. 2006.

Sentence adjudged 10 December 2003. Military Judge: J.W. Rolph. Review pursuant to Article 66(c), UCMJ, of Special Court–Martial convened by Commanding Officer, USS LABOON (DDG 58).
LT A.M. Cooper, JAGC, USNR, Appellate Defense Counsel.

LCDR Brian Bouffard, JAGC, USNR, Appellate Defense Counsel.

Capt Roger Mattioli, USMC, Appellate Government Counsel.

Before CARVER and VOLLENWEIDER, Senior Judges, and COUCH, Appellate Military Judge.

IN AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

CARVER, Senior Judge:

***1** A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of unauthorized absence and five specifications of wrongful use of Ecstasy, in violation of Articles 86 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 912a. The appellant was sentenced to a bad-conduct discharge, confinement for 100 days, and reduction to pay grade E–1.

The appellant was tried and sentenced on 10 December 2003. Pursuant to a pretrial agreement, the convening authority (CA) on 5 May 2004 originally approved the sentence as adjudged, but suspended all confinement over 90 days. In response to the request of the appellant, we remanded the record of trial on 21 June 2005 for proper post-trial processing because there was no evidence that the staff judge advocate had reviewed the record prior to action by the CA. The CA took action again on 12 August 2005, but used different language than he had in the previous CA's action. On 15 December 2005, the appellant moved to dismiss the case from our review due to a lack of jurisdiction, alleging that the new language in the CA's action did not approve a bad-conduct discharge. The Government opposed the motion to dismiss for lack of jurisdiction, but admitted that the language in the action was ambiguous and requested that the record be remanded for another CA's action. On 5 January 2006, we remanded for yet another CA's action.

On 10 March 2006, the CA took action again, using exactly the same operative language from the second CA's action. The appellant filed another motion to dismiss for lack of jurisdiction due to the disapproval of the bad-conduct discharge. The Government again opposed the motion to dismiss but requested that we remand the case for a new CA's action. On 11 July 2006, we denied both the motion to dismiss and the Government's motion to remand for a fourth CA's action. We concluded "that further remand is unnecessary as the CA has indicated to our satisfaction that he disapproved the bad-conduct discharge." N.M.Ct.Crim.App. Special Court–Martial Order of 11 July 2006 at 1. We retained jurisdiction under *Boudreaux v. United States Navy–Marine Corps Court of Military Review,* 28 M.J. 181, 182 (C.M.A.1989).

After carefully considering the record of trial, the appellant's assignment that he was denied his right to speedy post-trial review, and the Government's response, we conclude that the findings and sentence approved by the CA 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.

Speedy Review

***2** In his assignment of error, the appellant contends that "the unreasonable post-trial delay in this case

materially prejudiced appellant's substantial right to speedy appellate review, and affects the findings and sentence this court should approve." Appellant's Brief and Assignment of Error of 10 Aug 2006 at 1. We decline to grant relief on this basis.

Service members have a due process right to timely review and appeal of courts-martial convictions. *Toohey v.* United States, 60 M.J. 100, 101 (C.A.A.F.2004); *Diaz v. The Judge Advocate General of the Navy,* 59 M.J. 34, 37–38 (C.A.A.F.2003). We review *de novo* an appellant's claim that he has been denied the due process right to a speedy post-trial review and appeal. *See* United States v. *Rodriguez–Rivera,* 63 M.J. 372, 385–86 (C.A.A.F.2006). In conducting this review, we utilize the four factors set forth in *Barker v. Wingo,* 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972):(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. United States v. Jones, 61 M.J. 80, 83 (C.A.A.F.2005); *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. *Jones,* 61 M.J. at 83. A facially unreasonable delay will trigger the due process analysis. The four factors are then balanced, with no single factor being required to find that post-trial delay constitutes a due process violation. *Barker,* 407 U.S. at 533; United States v. Moreno, 63 M.J. 129, 136 (C.A.A.F.2006).

Here the appellant has complained of a delay of 944 days from sentencing to the third and final CA's action. We find that the length of the delay alone is sufficient to trigger the due process analysis. As for the second factor, there is an explanation for the delay, but it is not entirely satisfactory. Most of the delay is attributable to errors in the post-trial process. As for the third and fourth factors, we find no evidence that the appellant ever complained of the delay or requested speedy review, nor do we find any evidence that this delay prejudiced. On the contrary, the Government's failure to process the first CA's action properly resulted in subsequent CA actions which we found to have disapproved the bad-conduct discharge. Balancing the factors, we find no due process violation.

We are also aware of our authority to grant relief under Article 66, UCMJ, even in the absence of specific prejudice, but we decline to do so. *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. at 37; *United States v. Tardif,* 57 M.J. 219, 224 (C.A.A.F.2002). In particular, we have considered the factors set forth in *United States v. Brown,* 62 M.J. 602, (N.M.Ct.Crim.App. 30 Nov 2005)(*en banc*).

Conclusion

***3** Accordingly, the findings of guilty and only so much of the sentence as provides for confinement for 90 days and reduction to pay grade E–1 are affirmed.

Senior Judge VOLLENWEIDER and Judge COUCH concur.

N.M.Ct.Crim.App.,2006.
U.S. v. Delacruz
Not Reported in M.J., 2006 WL 4573111 (N.M.Ct.Crim.App.)