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

BEFORE

C.L. CARVER **D.O. VOLLENWEIDER** **R.G. KELLY**

UNITED STATES

v.

Lucas B. FARMER
Lance Corporal (E-3), U. S. Marine Corps

NMCCA 200500350 Decided 31 July 2006

Sentence adjudged 9 October 2003. Military Judge: P.J. Ware. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 3d MAW, MarForPac, MCAS Miramar, San Diego, CA.

Maj GREGORY CHANEY, USMC, Appellate Defense Counsel
Capt BRIAN KELLER, USMC, Appellate Government Counsel

CARVER, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of making a false official statement, five specifications of wrongful sale of military property of the United States, and two specifications of larceny of military property of the United States, in violation of Articles 107, 108, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 908, and 921. The appellant was sentenced to a bad-conduct discharge, confinement for 30 months, and reduction to pay grade E-1. Pursuant to a pretrial agreement, the convening authority approved the sentence as adjudged, but suspended all confinement over 21 months, deferred the automatic forfeitures, and waived automatic forfeitures in excess of $750.00 pay per month for 6 months.

The appellant claims that: (1) he was denied his right to speedy post-trial review; (2) a portion of the record of trial was not properly authenticated; and, (3) the Government did not negotiate the pretrial agreement in good faith. After carefully considering the record of trial, the appellant’s assignments of error, and the Government’s response, 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.

Speedy Review

In his first assignment of error, the appellant contends that he was denied his right to a speedy review. We decline to grant relief.

An appellant's right to a 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 67, 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).

Here, there was a delay of over 17 months from the date the sentence was announced until the 211-page record of trial was docketed at our court. We find that the unexplained delay alone is facially unreasonable, triggering a due process review. *See Moreno,* 63 M.J. at 129; *United States v. Brown,* 62 M.J. 602, (N.M.Ct.Crim.App. 30 Nov 2005)(*en banc*).

We next look to the third and fourth factors. We do not find any assertion of the appellant's right to a timely review prior to the filing of his brief. As to the fourth factor, we do not find any evidence of prejudice to the appellant. We therefore conclude that there has been no due process violation due to the post-trial delay.

On 20 April 2004, about 6 months after trial, the appellant requested that he be released from confinement early on 1 July 2004 instead of his normal release date of 29 September 2004 so that he could attend college classes that fall. There is no evidence in the record of trial that the request was submitted to the convening authority (CA) until he took his action on 21 September 2004, which was about 12 months after trial and just a few days prior to the appellant's release from confinement. The appellant reiterated his request for early release on 27 July

2004 and 19 August 2004. On 9 September 2004,[1] in response to the staff judge advocate's recommendation, the appellant requested that his bad-conduct discharge be disapproved.

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). The appellant contends that we should grant relief for the reasons set forth in *United States v. Bell,* 60 M.J. 682, 686 (N.M.Ct.Crim.App. 2004). In *Bell,* we granted sentence relief under Article 66(c) for excessive post-trial delay and because the staff judge advocate failed to forward the appellant's request for early release from confinement in a timely manner. We recommended that all requests for "early relief from confinement should be forwarded to a CA in a timely manner so as to allow the possibility of favorable action, consistent with the request, if the CA elects to grant it." *Id.* We note that *Bell* was not published until 30 June 2004, over 2 months after the appellant's request for clemency was signed, so the admonitions in that case do not apply here. Further, *Bell* recommended, but did not require, that clemency requests for reduced confinement should be forwarded to the CA before the confinement had been served. We strongly agree with that recommendation, but under the circumstances here decline to grant sentence relief.

Authentication of the Record

In his second (summary) assignment of error, the appellant avers that since pages 14-57 of the record of trial were not authenticated, the record of trial should be returned for proper authentication. The Government concedes error, but contends that the error was harmless. We decline to grant relief.

The Government states that the military judge, the trial counsel, and the court reporter for that session are all unavailable to authenticate the record.[2] We granted the Government's request to attach an affidavit of another court reporter that reviewed the transcription and original tapes of that session and found only minor typographical errors in those pages of the record of trial. The appellant did not contest the accuracy of either the record of trial or the new reporter's review of those pages. The unauthenticated pages of the record refer to a pretrial motion to release the appellant from

[1] Date on the facsimile cover sheet for the clemency request dated 8 September 2004.

[2] The Government states that the military judge has retired, the trial counsel is in Iraq, and the court reporter has transferred to another military base. The Government did not indicate why the record of trial and court reporter tapes could not be forwarded to the court reporter for authentication.

confinement. Although the military judge denied the motion, the appellant received day-for-day credit for his pretrial confinement and has not alleged that the denial of that motion was error. Under the circumstances, we agree with the Government that any error is harmless. *See United States v. Merz,* 50 M.J. 850, 854 (N.M.Ct.Crim.App. 1999).

Bad Faith Negotiations Regarding Pretrial Agreement

In his third assignment of error,[3] the appellant claims that the Government did not negotiate the pretrial agreement in good faith. We decline to grant relief.

A term of the pretrial agreement conditioned an increase in the amount of confinement to be suspended on the amount of restitution made by the appellant prior to trial. Specifically, confinement over 18 months would be suspended if the appellant made restitution in the total amount of $2000.00 before trial; confinement over 21 months would be suspended if the appellant made restitution in the total amount of at least $1000.00 but less than $2000.00 before trial; and confinement over 24 months would be suspended if the appellant made no restitution or less than $1000.00 restitution before trial.

During oral argument on sentence, the trial defense counsel complained of bad faith by the trial counsel because he directed the law enforcement officer not to continue seeking to locate the stolen items that were sold by the appellant. As a result, the military judge reopened the inquiry into the pretrial agreement. Both the trial defense counsel and the appellant specifically agreed that they wished to be bound by the terms of the pretrial agreement, including the sentence limitation. After sentencing, both sides agreed that the appellant made restitution in the amount of $1000.00. Therefore, the military judge ruled that the CA must suspend confinement over 21 months, which he later did. Again, both sides and the appellant agreed with the military judge's interpretation of the agreement.

The appellant now raises again the issue of bad faith on the part of the trial counsel because he directed the investigator prior to trial to stop looking for the stolen items. The investigator testified that she did not have enough agents to spend the time to continue the search. Thus, there may have been a valid reason to discontinue the search. Nonetheless, the appellant now contends that the trial counsel was acting in bad faith, implying that if a stolen item had been found prior to trial and if the fair market value of the returned item had been determined, that value would have been substituted for the amount of restitution required by the appellant as part of the pretrial agreement. We cannot so speculate. We note that, although the

[3] Submitted pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982).

terms of the pretrial agreement in question use the word "restitution," there is no mention in the pretrial agreement as to the effect on the pretrial agreement if any of the stolen items were found and returned prior to trial.

We find no evidence of bad faith by either the trial counsel or investigator in refusing to continue the search for the stolen items. Further, the appellant and his trial defense counsel, after notice of the trial counsel's actions, agreed on the record to remain bound by the terms of the agreement and, thus, affirmatively waived any issue regarding the negotiation and implementation of the pretrial agreement.

Conclusion

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

Judge VOLLENWEIDER and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court