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

BEFORE

J.W. ROLPH **W.L. RITTER** **E.E. GEISER**

UNITED STATES

v.

James W. FUHRMAN
Intelligence Specialist First Class (E-6), U. S. Navy

NMCCA 200200494 Decided 10 May 2006

Sentence adjudged 8 June 2000. Military Judge: K.J. Allred. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, U.S. Naval Forces, Korea.

LT BRIAN MIZER, JAGC, USNR, Appellate Defense Counsel
LT KATHLEEN A. HELMANN, JAGC, USNR, Appellate Government Counsel

GEISER, Judge:

A military judge sitting as a general court-martial found the appellant guilty, consistent with his pleas, of mishandling classified material, two specifications of murder, and obstruction of justice in violation of Articles 92, 118, and 134, Uniform Code of Military Justice, 10 U.S.C. 892, 918, and 934. The appellant was sentenced to a dishonorable discharge, life imprisonment, total forfeiture of pay and allowances, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged but suspended confinement in excess of 50 years.

The appellant raises five assignments of error. First, the appellant asserts that the record of trial is substantially incomplete. Second, he avers that the military judge improperly considered life without parole as an authorized punishment. Third, he argues that his plea to obstruction of justice was improvident. Fourth, the appellant asserts that he has been denied speedy post-trial review. Fifth, the appellant claims that he was denied due process at trial when he was compelled to identify to the Government specific classified information he intended to present at trial when the Government did not have a

reciprocal duty to disclose potential rebuttal evidence. We have examined the record of trial, the various assignments of error, the Government's responses, and the appellant's reply. We conclude that the findings and sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Incomplete Record of Trial

The appellant contends that the record of trial is incomplete. Specifically, he claims that pages 939-988 of the transcript, Prosecution Exhibits 22 and 23, and several portions of the Article 32 hearing are missing from the record of trial. The appellant acknowledges, however, that the "missing" transcript pages are classified and have been available for review by appellate counsel in a sensitive compartmented information facility (SCIF) on board Washington Navy Yard. The SCIF is physically located on the second floor of the same building in which the Appellate Government Division, the Appellate Defense Division, and this court are housed. In a subsequent submission to this court, the appellant's counsel acknowledges that he has had an opportunity to review the "missing" transcript pages.

With respect to Prosecution Exhibits 22 and 23, the appellant correctly notes that there are no documents in the unclassified record of trial or in the classified portion of the record held in the SCIF marked as Prosecution Exhibits 22 and 23. The SCIF does, however, contain 21 classified documents that are styled as attachments to exhibit C-1. The record of trial specifically identifies the enclosures to exhibit C-1 as the 7 classified documents seized from the appellant's jacket pursuant to his apprehension and the 14 classified documents seized from the appellant's household goods shipment. When initially marked, exhibit C-1 was being considered in the context of a MILITARY RULE OF EVIDENCE 505, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), motion. Record at 939-40.

The Government submitted a declaration from the lead trial counsel in the instant case, Lieutenant Commander (LCDR) Todd Huntley, JAGC, U.S. Navy. LCDR Huntley confirms that exhibit C-1 referenced above does, in fact, contain the 21 classified documents addressed in Charge I. He notes that following the appellant's pleas of guilty, the military judge secured the appellant's agreement that the court could consider the 21 classified documents as matters in aggravation. The documents were referred to as Prosecution Exhibits 22 and 23 and were clearly identified by the military judge as the documents reviewed and discussed during the prior classified Article 39a, UCMJ, session referenced above. The exhibits were apparently never properly remarked. Record at 2030-31, LCDR Huntley declaration of 13 Dec 2005.

The appellant, while contesting that the 21 classified documents are, in fact, Prosecution Exhibits 22 and 23, acknowledges having had an opportunity to review said documents. This court finds that the documents, styled as exhibit C-1, held in the Washington Navy Yard SCIF, are Prosecution Exhibits 22 and 23. With respect to the missing documents from the Article 32, UCMJ, hearing, the Government correctly notes that there is no legal requirement that the contested investigation documents be included in the record of trial. We, therefore, find that the record of trial is complete and decline to grant relief on this assignment of error.

Life Without Possibility of Parole

The appellant next contends that the military judge erred when he improperly considered a punishment of life without possibility of parole as an authorized punishment in the appellant's case. While the appellant acknowledges that he was not awarded this punishment, he nonetheless asserts that he was prejudiced because the military judge "clearly intended to sentence the Appellant to less than the maximum punishment." Appellant's Brief of 2 Sep 2004 at 15. We do not agree.

The appellant's speculation about possible prejudice based on what he perceives the military judge intended to do is without evidentiary basis. The military judge and counsel expressly discussed the applicability of a punishment of confinement for life without possibility of parole. The trial defense counsel noted that, while he was waiving his motion regarding the legal maximum punishment pursuant to the pretrial agreement, the issue could resurface on appeal should the military judge award a sentence including life without parole. Record at 1972-74. The necessary although unspoken implication of the defense statement is that they perceived no prejudice to the appellant unless the military judge, in fact, awarded a sentence including life without parole. We independently discern no prejudice to the appellant and decline to grant relief for this assignment of error. Given that we find no prejudice, we need not reach the appellant's contention that an existing sentencing provision of the MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.) automatically limits a subsequent congressional increase to the maximum authorized punishment for an offense under the Uniform Code of Military Justice.

Improvident Plea to Obstruction of Justice

The appellant asserts that his plea to Charge III (obstruction of justice) was improvident because the actions described by the appellant during the providence inquiry reflected a desire to avoid detection as opposed to a desire to obstruct justice. The appellant states that at the time he burned the bodies of his wife and son, he had no reason to

believe there were or would be criminal proceedings pending against him. Appellant's Brief at 18.

In order to reject a guilty plea on appellate review, the record must show a substantial basis in law and fact for questioning the plea. *United States v. Irvin*, 60 M.J. 23, 24 (C.A.A.F 2004)(citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)). In order to sustain an obstruction of justice charge, there is no requirement that criminal proceedings actually have commenced. It is enough that the appellant had reason to believe that such proceedings would be commenced. *United States v. Gussen*, 33 M.J. 736, 738 (A.C.M.R. 1991). Each instance of alleged obstruction of justice must be resolved on a case-by-case basis, considering the specific facts surrounding the alleged obstruction. *See United States v. Finsel*, 36 M.J. 441 (C.M.A. 1993).

Under the specific circumstances of this case, we find that the appellant's articulated actions in washing and dressing his boy, loading the bodies in his vehicle, driving around town looking for a suitable spot to destroy the bodies, his actual destruction of the bodies and his subsequent statements to investigators, command members, and friends that he was bewildered about where his wife and child might have gone, suggests far more thought and planning than the panicked reaction evident in the case of *United States v. Housley*, No. 9701456, 1998 CCA LEXIS 486, unpublished op. (N.M.Ct.Crim.App. 4 Dec 1998) cited by the appellant. On the contrary, the appellant's actions were calculated and methodical. We find that there is no substantial basis in law and fact to question the appellant's plea of guilty to Charge III.

Speedy Post-Trial Review

The appellant asserts that a delay of 1,797 days from the date sentence was announced to the date the appellant filed this supplemental assignment of error on 11 May 2005[1] is excessive. We have carefully considered the record of trial, the assignment of error regarding post-trial processing delay, and the Government's answer. We consider four factors in determining if post-trial delay violates appellant's due process rights: (1) length of the delay; (2) reasons for the delay; (3) 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 is not unreasonable, further inquiry is not necessary. If we conclude that the length of the delay is "facially unreasonable," however, we must balance the length of the delay against the other three factors. *Id*.

[1] The appellant first raised the issue of speedy post-trial review in a written "Opposition to Government's Fourth Enlargement of Time" filed with this court on 4 March 2005.

In the instant case, there was a delay of about 1,797 days from the date of sentencing to the date the appellant raised this assignment of error. We find this unexplained delay of almost five years to be facially unreasonable, triggering a due process review.

We balanced the length of delay in this case in the context of the three remaining *Jones* factors. Regarding the second factor, reasons for the delay, the Government points to the complicated nature of the charges, the length of his trial, and the lengthy - 2609 page - record of trial. With respect to the third factor, we find no evidence that appellant asserted his right to timely post-trial review any time prior to filing his opposition to the Government's request for an enlargement of time. Finally, regarding the fourth factor, the appellant asserts that the "missing" portions of the record of trial make his incarceration "oppressive" in that an incomplete record will support no more than 6 months confinement. Appellant's Supplemental Brief of 11 May 2005 at 4. We find the appellant's claim of prejudice unpersuasive. We find no evidence of material prejudice to the appellant's substantial rights resulting from post-trial delay in this case. Considering all four factors, we conclude that there has been no due process violation due to post-trial delay.

We are also aware of our authority to grant relief under Article 66, UCMJ. *Toohey*, 60 M.J. at 103; *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). Considering the factors we articulated in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim. App. 2005)(en banc), we decline to do so.

Denial of Due Process

The appellant also argues that he was denied constitutional due process when, during pretrial motions, he was required by the military judge, under MIL. R. EVID. 505, to disclose what specific classified material the defense potentially intended to introduce while the Government had no comparable disclosure requirement. A presumption exists that a rule of evidence is constitutional unless a lack of constitutionality is clearly and unmistakably shown. To prevail, the appellant must demonstrate that MIL. R. EVID. 505 violates a fundamental principle of justice, *United States v. Wright*, 53 M.J. 476, 481 (C.A.A.F 2000)(quoting *Montana v. Egelhoff*, 518 U.S. 37, 43-45 (1996)) and that no set of circumstances exist under which the rule would be valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

The gravamen of the appellant's argument is that application of MIL. R. EVID. 505 would have, in the instant case, required him to "disclose his entire defense to the government" and that the government had no similar disclosure requirement. Appellant's

Supplemental Brief of 12 Oct 2005 at 1. We do not agree with this broad assessment. MIL. R. EVID. 505 does not require that the defense reveal their trial strategy; rather, it only requires that the accused identify whatever classified information he or she plans to use at trial. *United States v. Bin Laden*, 2001 U.S. Dist. LEXIS 719 (S.D.N.Y. 2001). The intent behind these disclosure requirements in MIL. R. EVID. 505 "is to prevent disclosure of classified information by the defense until the government has had an opportunity to determine what position to take concerning the possible disclosure of that information." (*See* Analysis to MIL. R. EVID. 505(h)). The Government's interest in protecting classified materials has withstood constitutional challenge. *Schmidt v. Boone*, 59 M.J. 841, 855 (A.F.Ct.Crim.App. 2004).

MIL. R. EVID. 505 adequately protects the appellant from government overreaching. The military judge is authorized to impose various sanctions up to and including dismissing charges with prejudice if the Government objects to disclosure of classified material that the military judge determines must be disclosed in the interests of justice. MIL. R. EVID. 505(i)(4)(E). Classified information will be disclosed when the military judge determines such information is relevant and necessary to an element of an offense or a legally cognizable defense. *United States v. Lonetree*, 31 M.J. 849, 856 (N.M.C.M.R. 1990). These requirements adequately protect a defendant's right to a level playing field. We find, therefore, that MIL. R. EVID. 505 is neither facially unconstitutional nor, given the appellant's pleas of guilty, was it unconstitutional in application in this case.

Conclusion

We affirm the findings and the sentence approved by the convening authority.

Chief Judge ROLPH and Senior Judge RITTER concur.

For the Court

R.H. TROIDL
Clerk of Court