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

BEFORE

J.W. ROLPH **E.E. GEISER** **F.D. MITCHELL**

UNITED STATES

v.

DAVID A. HERNANDEZ-ALVERADO
Staff Sergeant (E-6), U. S. Marine Corps

NMCCA 200600037 Decided 21 November 2006

Sentence adjudged 05 November 2004. Military Judge: D.M. Jones. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, 1st Force Service Support Group, MARFORPAC, Camp Pendleton, CA.

LT BRIAN L. MIZER, JAGC, USNR, Appellate Defense Counsel
Capt ROGER E. MATTIOLI, USMC, Appellate Government Counsel

GEISER, Senior Judge:

A general court-martial with enlisted representation convicted the appellant, contrary to his pleas, of violating a lawful general order, two specifications of maltreatment of a subordinate, burglary, and three specifications of indecent assault, in violation of Articles 92, 93, 129, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 893, 929, and 934. The appellant was sentenced to a dishonorable discharge, confinement for fifteen years, and reduction to pay grade E-1. The convening authority disapproved the finding of guilty to one specification of indecent assault and approved only so much of the sentence as extended to a dishonorable discharge, confinement for six years, and reduction to pay grade E-1.

The appellant raises seven assignments of error.[1] We have examined the record of trial, the assignments of error, and the

[1] I - Military judge erred by denying a Government request to replace the trial defense counsel due to his inability to provide timely representation; II - prosecutorial misconduct; III - military judge erred by denying the appellant's challenge for cause against Gunnery Sergeant D; IV - legal and factual sufficiency of finding of guilty to Specification 2 of Charge IV; V -

Government's response. We address the appellant's contention that the military judge erred by denying a Government request that the court order the appointment of a new trial defense counsel; his contention that the evidence was legally and factually insufficient to support a finding of guilty to Specification 2 of Charge IV; and his assertion of post-trial processing delay. We have considered the appellant's remaining assignments of error, and find they are without merit. 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.

Appointment of a New Trial Defense Counsel

The appellant asserts that the military judge erred when he denied a Government request that a new trial defense counsel be appointed to represent the appellant due to the detailed trial defense counsel's heavy workload. We find this assignment of error to be wholly frivolous. We observe that the argument advanced by the appellate defense counsel is based in part on a skewed reading of the record of trial and in part on wholly inaccurate factual citations to the record. We further note that, while counsel's exposition of the appellant's version of events throughout the Appellant's Brief and Assignment of Errors of 25 May 2006 is substantially accurate, the lack of even passing reference to the existence of other contradictory testimony creates the potential to mislead this court.

By way of example, we note that the appellant's brief, at page 15, asserts in connection with this assignment of error that the military judge stated that "he was powerless to enforce Appellant's statutory and Constitutional rights." What the military judge actually said in connection with a defense motion for a continuance and a Government request that the military judge assign new counsel, was that "there was no authority for the military judge to order counsel to be detailed to the accused." Record at 24. The military judge went on to state that the Government had the power to assign additional counsel and need not come to the military judge to accomplish this action. In fact, the Government shortly thereafter did assign an assistant trial defense counsel to alleviate the trial defense counsel's workload issues. Record at 29. The military judge granted the defense request for a continuance to allow the new attorney to get up to speed and to have input into any potential defense motions. Record at 30-31.

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military judge erred when he permitted the Government to bolster the testimony of CLS with an excited utterance; VI - military judge erred by failing to grant a mistrial when the Government proceeded on charges about which it knew it would present no evidence; and VII - post-trial processing delay. In addition, the appellant has a pending motion for a new trial which is denied.

We share the military judge's frustration that the trial defense counsel, notwithstanding his busy schedule, had failed over several months to request assistance from his chain of command or to have the appellant submit an individual military counsel request. The Government could also have been far more proactive in getting additional assets assigned once they became aware of the issue rather than simply dumping everything in the lap of the military judge to sort out. We commend the military judge for effectively steering counsel to an appropriate solution which ensured the appellant received adequate counsel and sufficient time to prepare for trial. We decline to provide relief.

Legal and Factual Sufficiency

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 offense beyond a reasonable doubt. *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.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ. 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, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

There are three elements to the offense of indecent assault: (1) that the appellant assaulted a certain person not his spouse in a certain manner; (2) that the acts were done with the intent to gratify the lust or sexual desires of the appellant; and (3) that under the circumstances, the conduct of the appellant was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 63b. On appeal, the appellant does not seriously contest that there was evidence that he touched the victim's buttocks or that such a touching, if done to gratify his lust or sexual desires, would have been prejudicial to good order and discipline and service discrediting. At issue is whether there was sufficient direct or circumstantial evidence to prove beyond a reasonable doubt that, when touching the victim, the appellant had an intent to gratify his lust or sexual desires.

This court is convinced that a rational fact finder could have found the appellant guilty of this offense. The victim testified that he touched her buttocks and that when she turned and gave him a dirty look, he just smiled. She also testified to the appellant's words and actions throughout the day, including that he openly discussed the fact that he and his wife were together "only for the sake of the children," that he inquired into the circumstances of her marriage, that he specifically

inquired whether her husband "satisfied her," that he openly discussed how long it had been since he'd had sex, and that he was repeatedly asking her for a kiss. Record at 491-93. The witness also testified that during a drive to inspect the 22 area, the appellant began rubbing her shoulders and playing with her hair while commenting on how nice her hair was. Record at 497. After weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt to Specification 2 of Charge II beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

Post-Trial Delay

The appellant also asserts that a delay of "more than one year and six months" from the date sentence was announced to the date the case was docketed with this court is unreasonable. We consider four factors in determining if post-trial delay violates an appellant's due process rights: (1) length of the delay; (2) 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)). 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*.

In the instant case, there was a delay of about 480 days from the date of sentencing to the date the case was docketed with this court. While much of the delay was reasonable, a delay of 147 days between the convening authority's action and docketing with this court was not. We find this period of unexplained delay to be facially unreasonable triggering a due process review. *See United States v. Moreno*, 63 M.J. 129 (C.A.A.F 2006); *United States v. Brown*, 62 M.J. 602, 605 (N.M.Ct.Crim.App 2005)(en banc).

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 offers no explanation why it took 147 days to docket this case. We note that some explanation, even an acknowledgement of simple negligence on the part of the convening authority, is better than no explanation whatsoever which implies a more callous disregard for the appellant's rights and this court's decisions. With respect to the third factor, we find that the appellant first asserted his right to timely post-trial review in a 20 January 2006 petition for an extraordinary writ filed with this court. We note that the case was docketed 39 days later. Finally, regarding the fourth factor, the appellant makes no assertion of and this court finds no evidence of, material prejudice to a substantial right resulting from post-trial delay in this case.

The appellant asks this court to presume prejudice, however, based on the passage of time. Our superior court has clearly stated that the mere passage of time, standing alone, does not constitute prejudice. *Moreno*, 63 M.J. at 142. Considering all four factors, we conclude that there has been no due process violation due to post-trial delay.

We next consider whether this is an appropriate case to exercise our authority to grant relief under Article 66(c), UCMJ, in the absence of a due process violation. Having considered the post-trial delay in light of our superior court's guidance in *Toohey* and *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002), and considering the factors we explained in *Brown*, we decline to provide relief.

Conclusion

The approved findings and sentence are affirmed.

Chief Judge ROLPH and Judge MITCHELL concur.

For the Court

R.H. TROIDL
Clerk of Court