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.

John JOURDEN
Second Lieutenant (O-1), U. S. Marine Corps

NMCCA 200500086 Decided 27 December 2006

Sentence adjudged 13 May 2003. Military Judge: E.W. Loughran. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Training Command, Quantico, VA.

CDR HANS P. GRAFF, JAGC, USNR, Appellate Defense Counsel
LT ANTHONY S. YIM, JAGC, USNR, Appellate Defense Counsel
MAJOR WILBUR LEE, USMC, Appellate Government Counsel

STONE, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of wrongful possession of marijuana with the intent to distribute, traveling in interstate commerce with the intent to carry on an unlawful activity, and possessing counterfeit Federal Reserve Notes with the intent to defraud, in violation of Articles 112a and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 912a and 934. The appellant was sentenced to confinement for 17 years, total forfeiture of pay and allowances, a fine of $100,000.00, and dismissal. The convening authority approved the adjudged sentence, but suspended confinement in excess of 60 months for a period of six months, in accordance with the pretrial agreement.

The appellant raises three assignments of error. First, he asserts that the post-trial delay of two years between the announcement of sentence and the docketing of the record of trial with this court was unreasonable and unexplained. Second,

he argues that he suffered illegal pretrial confinement. Third, he avers that the sentence was arbitrary and disproportionate.

We have carefully examined the record of trial, the assignments of error, and the Government's response. While we find merit in the contention that the post-trial delay was unreasonable. We nevertheless 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.

Post-Trial Delay

Our superior court has determined that we need not reach the question of whether the appellant has suffered a denial of due process from post-trial delay where we first can determine that any error was harmless beyond a reasonable doubt. *United States v. Allison*, 63 M.J. 365, 371 (C.A.A.F. 2006). In the instant case, the appellant remains confined while advancing no error resulting in relief. As for the appellant's claim that the delay preceding the convening authority action deprived him of an opportunity to be considered for parole, we reject this claim as unsubstantiated in that there is no evidence in the record of trial, other than the assertion of his appellate counsel, that he was actually eligible for parole, or that he was otherwise denied an opportunity to request parole. Most importantly, the unsupported assertion does not establish that, but for the delay, he would have been granted parole. *See United States v. Dunbar*, 31 M.J. 70 (C.M.A. 1990); *United States v. Agosto*, 43 M.J. 853, 854 (N.M.Ct.Crim.App. 1996).

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 v. United States*, 60 M.J. 100, 101-02 (C.A.A.F. 2004) and *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002), and considering the factors we explained in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc), we disagree with the appellant that the delay in this case impacts the sentence that "should be approved." *See* Art. 66c, UCMJ.

Illegal Pretrial Punishment

Article 13 prohibits (1) the intentional imposition of punishment on an accused before his or her guilt is established at trial and (2) arrest or pretrial confinement conditions that

are more rigorous than necessary to ensure the accused's presence at trial. *See United States v. Fricke*, 53 M.J. 149, 154 (C.A.A.F. 2000)(citing *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997)). Our superior court held that "raise or waive" rule established in RULES FOR COURTS-MARTIAL 905(e) [1] and 906(b)(8), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) governs claims of illegal pretrial confinement and punishment. *United States v. Inong*, 58 M.J. 460, 464 (C.A.A.F. 2003).

Although the appellant in the instant case did not raise this issue at trial, we cannot invoke the "raise or waive" standard articulated in *Inong*, since the appellant's trial was held on 13 May 2003 prior to the *Inong* decision of 10 July 2003. Rather, we must analyze the appellant's assertion of illegal pretrial punishment in accordance with *United States v. Huffman*, 40 M.J. 225 (C.M.A. 1994). *See United States v. McKenzie*, 61 M.J. 64, 65 (C.A.A.F. 2005)(summary disposition). The record of trial does not contain evidence indicating that the appellant affirmatively waived an illegal pretrial punishment issue.[2] Accordingly, the appellant has not waived this issue.

In resolving the issue of whether the appellant has been subjected to illegal pretrial punishment in violation of Article 13, UCMJ, we must first determine whether the appellant has met the minimal requirements for raising the issue. To raise the issue, the burden is on the appellant to present evidence to support his claim of pretrial punishment. *United States v. Crawford*, 62 M.J. 411, 414 (C.A.A.F. 2006)(citing *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002)).

The appellant asserts that his trial defense counsel did not raise the Article 13, UCMJ issue at trial because he was not aware of the conditions imposed upon the appellant's pretrial confinement. The appellant raised the issue of illegal pretrial punishment for the first time in his request for clemency dated 30 August 2004. In the request for clemency, the trial defense counsel acknowledged that he periodically inquired into the appellant's custody classification during his pretrial

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[1] "Failure by a party to raise defenses or objections or to make motions or request which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver. . . . Other motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case and, unless otherwise provided . . . failure to do so shall constitute waiver." R.C.M. 905(e)

[2] We note that the appellant agreed to waive all motions as part of his pretrial agreement. Record at 67-68. However, this does not constitute an affirmative and fully developed waiver. See *Huffman*, 40 M.J. at 227.

confinement and was told by brig personnel that the appellant "was being held in Special Quarters 1 solely because he was facing more than 5 years confinement." Yet, despite his admitted knowledge and monitoring of the appellant's pretrial confinement, he did not raise the issue at trial. The appellant's failure to litigate this issue at trial is "strong evidence" that Article 13, UCMJ, was not violated. *United States v. Garcia*, 57 M.J. 716, 731 (N.M.Ct.Crim.App. 2002)(quoting *Huffman*, 40 M.J. at 227), *set aside on other grounds*, 59 M.J. 447 (C.A.A.F. 2004).

Moreover, the appellant does not allege that Quantico brig personnel intentionally imposed punishment prior to trial. Accordingly, we must evaluate the appellant's assertions to determine whether he has met his burden by presenting sufficient evidence indicating that his pretrial confinement conditions were more rigorous than necessary to ensure his presence at trial.

"The nature and seriousness of the offenses and the potential length of confinement resulting therefrom are relevant factors that brig officials may consider in determining whether to place a detainee in special quarters." *Garcia*, 57 M.J. at 731 (citing *United States v. Anderson*, 49 M.J. 575, 577 (N.M.Ct.Crim.App. 1998)). Additionally, if the conditions of pretrial restraint are reasonably related to a legitimate Government objective, an appellant is not entitled to relief. *See* United *States v. McCarthy*, 47 M.J. 162, 167 (C.A.A.F. 1997).

The appellant bases much of his argument before the court on the claims of his trial defense counsel that the appellant was segregated from other inmates for 23 out of 24 hours and was shackled every time he left his cell, including during showers. Appellant's Brief at 9 (citing to the trial defense counsel's 30 Aug 2004 clemency submission). The appellant, however, fails to provide any evidence to factually substantiate these allegations. There is no affidavit or other similar source of facts to support the bald assertions of counsel. We, therefore, conclude that the appellant has not met his burden of presenting sufficient evidence indicating that his pretrial confinement conditions were more vigorous than necessary to ensure his presence at trial.

Sentence Appropriateness

The appellant argues that the adjudged fine of $100,000 is disproportionate to the offenses and seeks to have the fine

disapproved. We disagree. The appellant refers to more than a dozen cases in which a fine was not imposed for roughly similar offenses. Each of these cases, however, involved enlisted service members, whereas the appellant was a commissioned officer. As a commissioned officer he paid $15,000 cash for 140 pounds of marijuana and traveled from Arizona to Kansas, where he intended to sell the marijuana for approximately $700.00-$800.00 per pound to multiple individuals. We find that the sentence is appropriate to this offender and these offenses. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Conclusion

Accordingly, we affirm the findings and sentence, as approved by the convening authority.

Senior Judge WAGNER and Judge VINCENT concur.

For the Court

R.H. TROIDL
Clerk of Court