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

BEFORE

D.A. WAGNER **E.B. STONE** **A. DIAZ**

UNITED STATES

v.

Clive A. LEVY
Sergeant (E-5), U. S. Marine Corps

NMCCA 200301566 Decided 23 February 2006

Sentence adjudged 1 November 2001. Military Judge: L.K. Burnett. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Forces Reserve, New Orleans, LA.

LCDR JASON GROVER, JAGC, USN, Appellate Defense Counsel
LT KATHLEEN HELMANN, JAGC, USNR, Appellate Government Counsel

DIAZ, Judge:

Contrary to his pleas, the appellant was convicted by a general court-martial, composed of officer and enlisted members, of false official statement, two specifications of assault, and wrongfully communicating a threat, in violation of Articles 107, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 928, and 934. The convening authority approved the adjudged sentence of confinement for 5 years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge.

We have carefully considered the record of trial, the appellant's assignments of error, the Government's response, and the appellant's reply. Except as noted below, we conclude that the findings and 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.

Ineffective Assistance of Counsel

In his first assignment of error, the appellant asserts that he did not receive effective of assistance of counsel because one of his civilian lawyers, without explanation, absented himself during the sentencing portion of the appellant's court-martial. We conclude that the appellant waived his lawyer's presence and was competently represented by the other members of his defense team.

A. Presence of Counsel

Over a two-year period, the appellant beat his minor daughter repeatedly with a belt and/or a cord, causing cuts, lacerations, and scarring over her face, left arm, back, buttocks, and legs. He then threatened to cut his child's head off if she reported the abuse. When investigators questioned the appellant about his actions, he denied ever leaving any marks on his daughter's back or legs. At trial, the Government's medical expert testified that the marks and breaks on the victim's skin were as extensive as any he had ever seen in his 18 years of practice.

The appellant was represented by two civilian lawyers (Mr. "D" and Mr. "W"), and by his detailed military defense counsel (Capt "S"). All three lawyers were present for the findings portion of the court-martial. Just before the members retired to deliberate on findings, however, the military judge had the following colloquy with the appellant:

> MJ: Also Mr. [D] has indicated that he was going to not be here after this session for a while. Mr. [D] is one of your attorneys, obviously, Sergeant Levy, and you have the absolute right to have all of your attorneys at every session of this court. We can wait until Mr. [D] (sic) or we can proceed on.
>
> **Do you wish to waive his presence at this time?**
>
> ACC: **Yes, ma'am, I do.**

Record at 327 (emphasis added).

The members deliberated for approximately two hours before indicating that they were prepared to announce their findings. Just before calling the members, the military judge again addressed the appellant:

> MJ: Again, we have Mr. [D] is absent.
>
> Sergeant Levy, as I told you previously, you have the absolute right to have all of your attorneys

present at every session of this trial. With that understanding, do you wish – I have been told that the members have completed their deliberation and they're ready to come in. With that understanding, do you wish to waive Mr. [D's] presence or do you not wish to waive his presence?

ACC: I wish.

MJ: You wish to waive his presence?

ACC: Without his presence.

MJ: **You would like to proceed without his presence?**

ACC: **Yes, ma'am.**

MJ: Very well. You have waived his presence.

Id. at 328 (emphasis added).

Following the announcement of the members' findings, the military judge immediately began the sentencing proceedings. The prosecution did not present any additional sentencing evidence. The appellant's two remaining lawyers presented a sentencing case consisting of numerous documents from the appellant's service record book and the appellant's comprehensive unsworn statement.[1]

Just before the members returned to announce their sentence, the military judge again discussed the matter with the appellant:

MJ: Sergeant Levy, as I told you before, you have the right to the presence of your attorneys at all phases of this trial. I have been told that the members have come to a sentence and they are ready to re-enter the courtroom. **Understanding that, do you wish to waive Mr. [D's] presence?**

ACC: **Yes, I do, ma'am.**

Id. at 366 (emphasis added).

The appellant now asks that we ignore his three separate affirmative waivers on the record and return the case for a new sentencing proceeding. Consistent with RULE FOR COURTS-MARTIAL

[1] In that statement, the appellant spoke about his difficult family circumstances growing up in a small town near Kingston, Jamaica, and then later in Pennsylvania. The appellant also recounted the difficulties he faced following the death of his first wife. He summarized his military career for the members, and also told them about the professional counseling he was receiving in an effort to regain custody of his daughter. Finally, he assured the members that he would comply with any treatment protocols deemed necessary to be reunited with his child.

805(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), however, the appellant properly waived his counsel's presence, and thus, there was no error. Even assuming *arguendo,* that there was error, the appellant has failed to show us how he was prejudiced and accordingly, we decline to grant relief.

B. Effectiveness of Remaining Counsel

The test to determine whether an appellant received ineffective assistance of counsel was established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In *Strickland*, the Supreme Court stated that the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. To prove such a claim, the appellant must demonstrate that his defense team's performance was deficient and that the deficiency resulted in prejudice to the appellant. *Id.*

In *United States v. Davis*, 60 M.J. 469 (C.A.A.F. 2005), our superior court provided a comprehensive explanation of ineffective assistance of counsel under the Sixth Amendment. To obtain relief for a complaint that he was deprived of the effective assistance of counsel, the appellant has the burden to show that his defense team's performance fell below an objective standard of reasonableness. Counsel's performance is presumed to be competent and adequate; thus, the appellant's burden is especially heavy on this point. He must establish a factual foundation for his complaint of deficient performance. *Davis*, 60 M.J. at 473.

Moreover, even if the appellant demonstrates that his attorneys were incompetent, we are required to test for prejudice by asking whether there is a reasonable probability that, but for counsel's error, there would have been a different result. *Id.* at 474. *Accord United States v. Quick,* 59 M.J. 383, 386-87 (C.A.A.F. 2004).

In this case, the appellant thrice waived Mr. D's presence during the sentencing proceeding. RULE FOR COURTS-MARTIAL 805(c) authorizes such a waiver, so long as one qualified counsel for each party is present. And even assuming that Mr. D's absence amounts to incompetence, the appellant has not demonstrated a reasonable probability that the result in his case (i.e. the sentence) would have been any different had Mr. D been present.

In that regard, we have considered the detailed defense counsel's post-trial clemency package to the convening authority wherein he asserts that it was Mr. D's responsibility to conduct the sentencing portion of the case. Again, even if we accept that allegation as true, the appellant has failed to show us

(1) how the sentencing case that was presented by the other members of the defense team was deficient; or (2) what additional evidence (if any) Mr. D was prepared to bring to the table.[2]

As part of the appellant's written clemency request, Capt S surmises that had he known he was to be the principal lawyer responsible for the sentencing evidence, he would have been prepared to call the Government's medical expert to explain that the victim's injuries were not as severe as they appeared. This statement, however, is the type of "Monday-morning quarterbacking" that the cases make clear is not the standard for assessing the performance of a trial defense counsel. *See United States v. Sanders,* 37 M.J. 116, 118 (C.M.A. 1993).

Capt S's claim also overlooks the expert testimony presented during the Government's case-in-chief as to the severity of the victim's injuries. Indeed, given the medical expert's forceful and compelling testimony on this point, we find no basis for concluding that he would have presented evidence helpful to the appellant's sentencing case.

In sum, we find that the appellant waived Mr. D's presence during the sentencing portion of his court-martial, and has failed to demonstrate any prejudice resulting from this waiver. We also find that the remaining members of the appellant's trial defense team afforded him the effective assistance of counsel. Finally, we are satisfied that the appellant's court-martial produced a reliable and just result. *Strickland,* 466 U.S. at 686. Accordingly, we decline to grant relief.

Error in the Promulgating Order

In his second assignment of error, the appellant asserts that the court-martial promulgating order incorrectly reports that he pled guilty to the sole specification under Charge III. The Government concedes the error.

We find no prejudice to the appellant as a result of this scrivener's error. However, the appellant is entitled to accurate official records concerning his court-martial. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). We therefore direct that the error be corrected in the supplemental court-martial order.

Post-Trial Delay

Finally, the appellant argues that he has been denied speedy post-trial review of his case because of the delay between his trial and the convening authority's action. The following chronology sets the stage for our analysis of this claim:

[2] We also find no merit in the appellant's separate claim that the remaining members of his trial defense team were incompetent for failing to request a continuance of the sentencing proceedings.

01 Nov 01	Sentencing
14 Mar 02	Trial counsel examines record
10 May 02	Military judge authenticates record
01 Jul 02	Trial defense counsel (TDC) examines record
22 Jan 03	Staff judge advocate submits recommendation (SJAR)
03 Mar 03	TDC submits R.C.M. 1105/1106 matter
20 May 03	SJA submits addendum to SJAR
28 May 03	Convening authority takes action
11 Aug 03	Appellate review activity receives record
14 Aug 03	NMCCA dockets record

We consider first the appellant's due process right to speedy review. Specifically, we look to four factors in determining if the delay has violated 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 v. United States,* 60 M.J. 100, 102 (C.A.A.F. 2004)).

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).

Assuming *arguendo* that 19 months is too long to prepare, authenticate, and then take action on a two-volume contested members record of trial (containing 369 pages of testimony and a separate volume of exhibits), and that the delay is unexplained, we find no assertion of the right to a timely appeal until the appellant's counsel filed his brief with this Court. Moreover, the appellant has failed to demonstrate any prejudice from the delay. Finally, we find no "extreme circumstances" that give rise to a strong presumption of evidentiary prejudice.

We conclude that the appellant's due process rights have not been violated as a result of the post-trial processing of this case. We are also aware of our authority to grant relief under Article 66, UCMJ, in the absence of any showing of actual

prejudice. *Id.; see United States v. Oestmann,* 61 M.J. 103 (C.A.A.F. 2005); *Toohey*, 60 M.J. at 100; *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). Applying the factors we recently enumerated in *United States v. Brown,* __ M.J. __, No. 200500873, 2005 CCA LEXIS 372 (N.M.Ct.Crim.App. 30 Nov 2005)(en banc), we do not believe that the post-trial delay affects the findings and sentence that should be approved in this case and therefore, decline to grant relief.

Conclusion

We affirm the findings and sentence as approved by the convening authority, but direct that the supplemental court-martial order correct the error in the convening authority's promulgating order.

Senior Judge WAGNER and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court