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

BEFORE

C.L. CARVER **D.O. VOLLENWEIDER** **E.E. GEISER**

UNITED STATES

v.

Lloyd C. LITTLEJOHN, Jr.
Airman (E-5), U. S. Navy

NMCCA 200400495 Decided 15 June 2006

Sentence adjudged 11 March 2002. Military Judge: R.N. Johnson. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Sea Control Squad FOUR ONE, San Diego, CA.

LCDR JASON S. GROVER, JAGC, USN, Appellate Defense Counsel
LT CRAIG POULSON, JAGC, USNR, Appellate Government Counsel
LT JUSTIN DUNLAP, JAGC, USNR, Appellate Government Counsel

GEISER, Judge:

A military judge, sitting as a special court-martial, tried the appellant. Consistent with his pleas, the appellant was found guilty of making a false official statement in violation of Article 107, Uniform Code of Military Justice, 10 U.S.C. § 907. Contrary to his pleas, the appellant was found guilty of three specifications of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928. The appellant was sentenced to confinement for 140 days, forfeiture of $737.00 pay per month for a period of four months, reduction to pay grade E-1, and a bad conduct discharge. The convening authority approved the sentence, as adjudged.

The appellant raises three assignments of error. First, he asserts that he was denied a speedy trial under Article 10, UCMJ, when it took 97 days to arraign him. Second, he avers a denial of speedy post-trial appellate review. Finally, he asserted that the legal officer's recommendation was improperly prepared by an officer who testified three different times during the appellant's court-martial.

We have examined the record of trial, the appellant's brief and the Government's response. We find merit in the appellant's contention that this case warrants relief pursuant to our Article 66(c), UCMJ, discretionary authority. Following our corrective action, we conclude that the findings and the remaining sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *See* Arts. 59(a) and 66 (c), UCMJ.

Procedural History

The appellant was tried on 11 March 2002. The military judge authenticated the record 60 days later on 10 May 2002. The original convening authority's action was promulgated 38 days later on 17 June 2002. Command affidavits indicate that the record of trial was mailed to this court "within 30 days" for review.[1] Almost two years later, on 6 May 2004, the appellant filed a Petition for a Writ of Mandamus, asking this court to order the Government to docket the record of trial in this case. On 1 June 2004, the command forwarded a copy of the original record of trial by certified mail. The record was received on 12 June 2004 and routed for appellate briefing. The appellant's brief dated 3 February 2005 raised, *inter alia*, that the legal officer's recommendation was signed by an officer disqualified under RULE FOR COURTS-MARTIAL 1106(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), from providing such advice.[2] The Government concurred and on 26 August 2005, moved that this court remand the record for a new recommendation and convening authority's action (CAA). This court set aside the CAA and remanded the record for a new recommendation and CAA on 6 September 2005. A new CAA was promulgated on 9 November 2005. On 12 January 2006, the appellant submitted a memorandum to this court reaffirming those issues identified in his 3 February 2005 brief but noting the additional time needed to remand the record in the context of their assignment of error regarding untimely post-trial review. The Government responded to the appellant's memorandum on 15 March 2006.

Post-Trial Review

The appellant initially asserted that a delay of approximately two years (17 Jun 2002 - 12 Jun 2004) from the date of the convening authority's action to docketing with this court is unreasonable. Subsequently, the appellant modified his assignment of error to add reference to the almost one year delay (3 Feb 2005 - 12 Jan 2006) between the appellant's initial

[1] Affidavits of LT C.A. MONREAL (legal officer) and Ms. J.M. Acevedo (legal clerk), dated 23 Aug 2005.

[2] The author of the recommendation, LT C.A. MONREAL, previously investigated the charges and testified in connection with a speedy trial motion.

brief which identified the recommendation error and his 12 January 2006 appellate memorandum following issuance of a new recommendation and CAA. We have examined the record of trial, the assignment of error regarding post-trial processing delay, the Government's answer, the appellant's memorandum, and the Government's response. 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 almost three years directly attributable to the Government's failure to properly keep track of and account for the record of trial and the Government's failure to exercise minimal quality control during the post-trial process. We find this delay 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 offers no explanation whatsoever for the systemic failures leading to this delay. With respect to the third factor, we note that the appellant consistently requested speedy resolution of his case, both pre and post-trial.[3] Finally, regarding the fourth factor, the appellant argues that he has already completed his confinement in spite of having a "likelihood of success" on appeal. We find the appellant's claim of prejudice unpersuasive. Even with the most diligent and proactive post-trial processing, it is extremely unlikely that this court could have finally resolved the appellant's appeal during his 140 days of confinement. 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 66c, 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.

[3] The appellant made his first speedy trial request on 28 January 2002. Appellate Exhibit II, Attachment E. A second request was made on 11 February 2002. Appellate Exhibit II, Attachment F. A third demand for speedy trial was made on 27 February 2002. Appellate Exhibit II, Attachment H. The appellant also filed a Petition for a Writ of Mandamus with this court on 6 May 2002.

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 agree with the appellant that the delay in this case impacts the sentence that "should be approved." *See* Art. 66c, UCMJ.

Conclusion

The appellant's assignment of error regarding an improper legal officer's recommendation is now moot. His sole remaining assignment of error is without merit. The approved findings are affirmed. We affirm only so much of the sentence as provides for a bad-conduct discharge, confinement for a period of 140 days, and reduction to pay grade E-1.

Senior Judge CARVER and Judge VOLLENWEIDER concur.

For the Court

R.H. TROIDL
Clerk of Court