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.

Malcolm M. MACK
Aviation Machinist's Mate Airman (E-3), U. S. Navy

NMCCA 200400133 Decided 28 August 2006

Sentence adjudged 24 August 2001. Military Judge: J.S. Brady. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Aircraft Wing, Cherry Point, NC.

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

GEISER, Judge:

Contrary to his pleas, the appellant was convicted by a general court-martial with enlisted representation, of conspiracy to obstruct justice, nine specifications of breaking restriction, and three specifications of wrongfully attempting to influence the testimony of a witness, in violation of Articles 81 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 934. The appellant was sentenced to a dishonorable discharge, confinement for six months, hard labor without confinement for three months, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

The appellant raises five assignments of error. First, he asserts that he was subjected to illegal pretrial punishment. Second, he argues that the military judge erred as a matter of law when he submitted the issue of the lawfulness of the appellant's restriction order to the members. Third, the appellant avers that the evidence is legally and factually insufficient to prove he conspired with another to obstruct justice. Fourth, he asserts that the evidence is factually insufficient to prove the three specifications alleging that he

endeavored to influence the testimony of a witness by threatening him. Fifth, the appellant claims unreasonable post-trial processing delay.[1]

We have carefully examined the record of trial, the assignments of error, and the Government's response. We find merit in the contention that this case warrants relief pursuant to our Article 66(c), UCMJ, discretionary authority for unreasonable post-trial processing delay. Following our corrective action, 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.

I. Determination of Lawfulness of Restriction Order

Background

The appellant initially challenged certain aspects of his restriction order in a pretrial motion alleging pretrial punishment in violation of Article 13, UCMJ. He asserted that some provisions of the restriction order were punitive and not reasonably necessary to a legitimate nonpunitive Government purpose. He specifically objected to requirements that he have only supervised visitation with his wife; that he not drink alcoholic beverages; that he live in an old, dilapidated open squad bay barracks when normal rooms were available; that he not operate a motor vehicle of any kind; and that he not wear civilian clothes. Appellate Exhibit VIII.

After taking evidence, the military judge agreed with part of the appellant’s assertion. Record at 112. The military judge specifically found the provisions mandating that the appellant have only supervised visitation with his wife, that his telephone calls with his counsel be monitored, and that the appellant be berthed in substandard housing were unduly onerous and were not necessary to ensure the appellant’s presence at trial or deter future misconduct. The military judge awarded the appellant day-for-day confinement credit for the entire period of his restriction. The military judge declined, however, to declare the entire restriction order illegal as a matter of law, but encouraged the defense to raise their motion again at the conclusion of the Government’s case.

Following the Government's case-in-chief, the defense moved for a finding of not guilty to Charge III (breaking restriction) and reiterated its request that the military judge rule on the legality of the restriction order. The military judge denied the motion and again declined to rule on the legality of the entire restriction order. He stated that the question of its legality

[1] We will address these assignments of error out of order for clarity.

was sufficiently intertwined with factual issues such that it was a mixed question of fact and law, which he determined to submit to the members. Record at 113, 550, 558. In order to prevail on appeal, the appellant must show that the military judge erred in submitting the question of the legality of the restriction order to the members and must show that he was prejudiced by this error. Art. 59(a), UCMJ.

Discussion

Specifications 1, 3, 4, 7, and 9 of Charge III allege that the appellant broke restriction by failing to muster at the time and place directed in the restriction order. We note that the appellant never challenged this particular provision of the restriction order.

Specifications 2 and 5 of Charge III allege that the appellant broke restriction by telephonically contacting someone other than his wife or attorney in violation of the restriction order. While the appellant did assert and the military judge did find that telephone restrictions with respect to his wife and attorney were problematic, the appellant never argued that limiting his telephonic contact with third-parties was unnecessary. Further, the appellant's commanding officer had information from investigators that the appellant may have been threatening out-of-area witnesses by telephone. In view of this, the commanding officer's decision to limit telephonic contact with persons other than the appellant's wife and attorney was reasonable to deter future misconduct.

Finally, Specifications 6 and 8 of Charge III allege that the appellant broke restriction by driving a car in violation of the restriction order. The appellant asserted in the context of his pretrial motion that this order was unnecessary. The military judge disagreed as do we. The appellant's commanding officer had reason to believe that the appellant had been dealing drugs from his car. In view of this, an order not to drive a car was reasonable to deter future misconduct and to protect the safety and security of other personnel on the base.

After a careful *de novo* review of the record, we find that the appellant's commanding officer had sufficient information to reasonably believe that the appellant committed an offense triable by court-martial and that the specific limitations reflected in Charge III, were reasonable and lawful under the circumstances. RULE FOR COURTS-MARTIAL 304(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.); *see United States v. Deisher*, 61 M.J. 313, 319 (C.A.A.F. 2005). In light of our finding, we hold that the appellant was not prejudiced by the military judge's decision to permit the members to determine the lawfulness of the restriction order. We need not reach the question of whether or not the judge erred in this regard.

II. Illegal Pretrial Punishment

At trial, the appellant moved the court to award him three for one confinement credit arguing that the terms and conditions of his pretrial restriction violated Article 13, UCMJ. As noted above, the military judge determined that certain conditions of the appellant's restriction were more onerous than necessary, but specifically determined that the command did not intend to punish the appellant. The military judge further held that the commanding officer's concerns were for legitimate nonpunitive governmental purposes. Record at 112.

We will not overturn a military judge's findings of fact, including a finding of no intent to punish, unless clearly erroneous. We review *de novo* the ultimate question of whether the appellant is entitled to additional confinement credit for a violation of the Article 13 prohibition against pretrial punishment. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002)(citing *United States v. Smith,* 53 M.J. 168, 170 (C.A.A.F. 2000)).

After carefully reviewing the record of trial, the appellant's brief and the Government's response, we find that the military judge's findings of fact, including his finding that the appellant's command had no intent to punish him, were not clearly erroneous and we adopt them as our own. In the context of the record of trial, evidence that the appellant's restriction order included elements that were more onerous than necessary to ensure his presence for trial or to prevent additional misconduct does not, standing alone, establish that he was subjected to illegal pretrial punishment absent evidence of intent to punish. There is ample evidence that the commanding officer's focus was on legitimate concerns both for the safety and security of his command and for the safety of potential Government witnesses. We, therefore, decline to grant the appellant additional relief beyond the day-for-day credit already awarded by the military judge.

III. Legal and Factual Sufficiency

The appellant asserts that the evidence adduced at trial was legally and factually insufficient to prove he conspired to obstruct justice. Similarly, the appellant asserts that the evidence is factually insufficient to prove he endeavored to influence the testimony of John Dubose by threatening him on the dates alleged in Specifications 10-12 of Charge III.

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 two elements to the offense of conspiracy: (1) that the appellant entered into an agreement with one or more persons to commit an offense under the code; and (2) that, while the agreement continued to exist, and while the appellant remained a party to the agreement, the appellant or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 5b.

The object of the conspiracy was obstruction of justice. There are five elements to this offense: (1) the appellant wrongfully did a certain act; (2) that the appellant did so in the case of a certain person against whom the appellant had reason to believe there were or would be criminal proceedings pending; (3) that the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice; (4) 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; and (5) that the appellant had reason to believe that the person alleged would be called upon to provide evidence as a witness. MCM, Part IV, ¶ 96b.

There is no requirement that the identity of the co-conspirators or their particular connection with the criminal purpose be known. MCM, Part IV, ¶ 5c(1). The agreement need not be in any particular form or manifested in any formal words. It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy, and this may be shown by the conduct of the parties. MCM, Part IV, ¶ 5c(2).

The gravamen of the appellant's argument involves whether or not the Government proved he made the threatening phone calls and whether he facilitated the mailing of the threatening package to Mrs. Dubose. He does not contest the other elements of the offense. The record reflects evidence that Mr. Dubose received a package at his mother's house containing two 9mm cartridges with his name on one of them. Record at 390, 466. It also reflects that Mrs. Dubose's address was unlisted (Record at 464-465), that the appellant knew Mrs. Dubose's address from prior conversations with Mr. Dubose (Record at 360), that the return address on the package included the name "Robert Williams" (Record at 463), that the appellant identified himself as "Robert" in previous threatening phone calls (Record at 463), that the note with the cartridges referred to other individuals who were after Mr. Dubose (Record at 399) and that the note referred to "my partner" (Record at 399). There is also evidence that the return address

on the package was in Atlanta about 20 miles from Mrs. Dubose's home (Record at 392, 395), and that after receiving the package, Mrs. Dubose received a phone message on her answering machine from a man asking if she'd got the mail (Record at 469). Mr. Dubose later listened to the tape and was able to identify the caller as the appellant. Record at 410, 453.

With specific respect to the specifications relating to threatening phone calls, the evidence also shows that Mrs. Dubose received a phone call on 17 January 2001 that included statements that a $10,000 hit had been put out on her son, that they knew where Mr. Dubose's parents lived, and that there would be bloodshed. (Record at 463-465). There is also evidence that Mrs. Dubose received a second phone call on 23 January 2001 in which the caller inquired if her son was "coming to... my court-martial" and stating that if he did show up, he was "a dead man." Record at 456, 514. Phone records demonstrated that both calls originated at the appellant's residence. Record at 542.

The members could reasonably have found that Robert Williams or one of the other individuals named in the letter (David, Allen, Bookie, Jerry, Jap, or "Wild Child") were given Mrs. Dubose's address by the appellant and mailed the package in an attempt to keep Mr. Dubose from testifying at the appellant's court-martial. The members could also have found that the appellant made the two phone calls reflected in Charge III, Specifications 10 and 11, and that the appellant facilitated the mailing of the threatening package reflected in Charge III, Specification 12, by providing Mrs. Dubose's address to a co-conspirator. Taken together with the rest of the record, this evidence provides proof both of the conspiracy to impede an investigation and of the charge and specifications alleging that the appellant endeavored to influence Mr. Dubose's testimony. This court is convinced that a rational fact finder could have found the appellant guilty of these offenses. We, too, are convinced beyond a reasonable doubt of the appellant's factual guilt to the specification under Charge I and to Specifications 10-12 under Charge III.

IV. Post-Trial Delay

In a summary assignment of error, the appellant also asserts that a delay of 717 days from the date sentence was announced to the date of the convening authority's action, and a further delay of 175 days between the convening authority's action and docketing 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 892 days from the date of sentencing to the date the case was docketed with this court. We find this unexplained delay of almost two and one-half years to be facially unreasonable. *See United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). This substantial unexplained delay triggers 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. With respect to the third factor, we find no evidence that the appellant asserted his right to timely post-trial review any time prior to filing his appellate brief. 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. Considering all four factors, we conclude that there has been no due process violation.

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 *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc), we hold that the delay in this case impacts the sentence that "should be approved." *See* Art. 66(c), UCMJ. Accordingly, we find a sentence extending to a dishonorable discharge is inappropriate in this case.

V. Conclusion

Accordingly, we affirm the approved findings of guilty and only that portion of the approved sentence that extends to a bad-conduct discharge, confinement for six months, hard labor without confinement for three months, and reduction to pay grade E-1.

Senior Judge CARVER and Judge VOLLENWEIDER concur.

For the Court

R.H. TROIDL
Clerk of Court