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

BEFORE

W.L. RITTER **J.F. FELTHAM** **E.S. WHITE**

UNITED STATES

v.

Joseph M. MANCILLAS
Private First Class (E-2), U. S. Marine Corps

NMCCA 200401950 Decided 18 December 2006

Sentence adjudged 6 November 2003. Military Judge: S.M. Immel. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Marine Division (Rein), Camp Pendleton, CA.

LT ANTHONY YIM, JAGC, USNR, Appellate Defense Counsel
Capt BRIAN KELLER, USMC, Appellate Government Counsel

FELTHAM, Judge:

A general court-martial, composed of a military judge alone, convicted the appellant, pursuant to his pleas, of conspiracy to distribute marijuana, two specifications of unauthorized absence, two specifications of making false official statements, and wrongful distribution and use of marijuana, in violation of Articles 81, 86, 107, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 886, 907, and 912a. The military judge sentenced the appellant to confinement for seven years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged and, in accordance with a pretrial agreement, suspended all confinement in excess of six years for a period of twelve months from the date of the convening authority's action.

We have carefully considered the record of trial, the appellant's assignments of error, and the Government's response. 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. *See* Arts. 59(a) and 66(c), UCMJ.

Facts

After the appellant was placed in pretrial confinement and charges were preferred, he twice requested that his Article 32, UCMJ, investigation be continued. During these delays, the appellant also requested a mental competency examination pursuant to RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). On 18 October 2002, a Navy psychologist stationed at the Mental Health Department, Naval Hospital, Camp Pendleton, California, determined that the appellant was mentally competent to stand trial and "accountable for his actions." Appellate Exhibit I at 54. The psychologist concluded that the appellant had a Major Depressive Disorder that was responding well to medication, but that "[t]his condition did not render him unable to appreciate the nature and quality or wrongfulness of his conduct at the time of the alleged criminal conduct." *Id*. On 18 November 2002, the appellant signed a waiver of his right to an Article 32, UCMJ, investigation.

Based upon inconsistencies in the 18 October 2002 R.C.M. 706 report, and the fact that a psychiatrist was not involved in the R.C.M. 706 board, the appellant requested and received a second R.C.M. 706 evaluation. *Id.* at 97. On 26 November 2002, the Division Psychiatrist, First Marine Division, released the results of this evaluation. The psychiatrist concluded, "with reasonable medical certainty," that: (1) the appellant did not suffer from a major mood or thought disorder at the time of the offenses; (2) that he had the capacity to "understand his actions at the time of the offenses;" (3) that his then-current state prevented an accurate determination of his competency to stand trial; and (4) that the appellant's symptoms at that time were "of questionable veracity and may represent malingered mental illness." *Id*. at 65. The Division Psychiatrist's report also contained the following recommendation: "It is my recommendation to the court that it consider placing the defendant in a facility where he can be closely observed to more accurately determine competency and whether his symptoms represent a major thought disorder, a decompensated personality disorder, or malingered mental illness to avoid trial." *Id*.

The inconclusive results of the 26 November 2002 evaluation led to a third R.C.M. 706 board. AE I at 66-67. In a report issued on 24 December 2002, this one-member board concluded that the appellant suffered from a Psychotic Disorder Not Otherwise Specified (DSM IV 298.9) and a Personality Disorder Not Otherwise Specified, with Antisocial and Paranoid Features (DSM IV 301.9). *Id*. at 70. The board concluded that the appellant did "not have sufficient mental capacity to understand the nature of the proceedings," and was "unable to conduct himself or cooperate intelligently in his defense." *Id*. The board was unable to assess the appellant's "mental state" and "mental responsibility" at the time of the alleged offenses. *Id*. Its report concluded with the following recommendation: "I strongly recommend that PFC Mancillas be admitted to an appropriate inpatient facility for further evaluation and treatment. I further recommend that projective psychological testing be performed to more fully evaluate the presence and/or extent of his psychotic symptoms. Antipsychotic medication may be helpful in restoring his mental capacity." *Id*. at 71.

During a 5 February 2003 hearing before the military judge, the parties agreed that the first R.C.M. 706 board was insufficient due to the aforementioned deficiencies in the board process. Record at 8-9. The military judge also confirmed that the appellant had unconditionally waived his right to an Article 32, UCMJ, hearing. Record at 9. At the conclusion of this Article 39(a) session, the military judge determined that a preponderance of the evidence supported the conclusion that the appellant was incompetent to stand trial because he was: "(1) unable to understand the nature of the proceedings and (2) unable to conduct himself and cooperate intelligently in his own defense." AE I at 98-99. The military judge thus ordered that his finding be relayed to the convening authority, so that the appellant could be transferred to the custody of the United States Attorney General for hospitalization and treatment in accordance with R.C.M. 909(e)(3) and (f). Record at 10; AE I at 98-99.

On 27 August 2003, after several months of treatment, the Federal Medical Center, Butner, North Carolina, pronounced the appellant mentally competent to stand trial and returned him to military custody. A Certificate of Restoration of Competency to Stand Trial, signed by the Warden of the Federal Medical Center on 27 August 2003, reads, in part as follows: "This is to certify that Joseph Mancillas, Register Number 15288-045, is able to understand the nature and consequences of the proceedings against him and to assist properly in his own

defense. This certification is made and filed with the Clerk of the Court pursuant to Title 18, United States Code, Section 4241(e)." AE II at 1-2.

The Article 32, UCMJ, Investigation Waiver

In his first assignment of error, the appellant argues that he was mentally incompetent when he waived his right to an Article 32, UCMJ, investigation on 18 November 2002. In the alternative, he contends that his civilian defense counsel provided ineffective assistance when she failed to secure a second Article 32 investigation waiver from him after he was declared competent to stand trial. In both respects, the appellant's first assignment of error is without merit.

In the military justice system, a service member is presumed competent to stand trial unless the contrary is established by a preponderance of the evidence. R.C.M. 909(b), (e). In this case, where a finding of incompetence was reached pursuant to the procedures outlined in R.C.M. 706 prior to the referral of charges, the general court-martial convening authority had the option of immediately committing the appellant to the custody of the Attorney General or of taking any action appropriate under R.C.M. 407, to include referral of the charges to trial by court-martial. R.C.M. 909(c). With the allegations of misconduct properly referred to trial, and a finding of incompetence previously entered, the military judge correctly held a competency hearing pursuant to R.C.M. 909(e), and ultimately determined that the appellant was incompetent to stand trial.

After treatment in the Federal Medical Center at Butner, the appellant was found competent to stand trial and was returned to military custody, where his court-martial proceedings reconvened. The question, as framed by the appellant, is whether his waiver of the Article 32, UCMJ, investigation, which occurred after an initial inconclusive R.C.M. 706 board, but prior to the eventual finding of incompetence, remained valid. A service member's right to an Article 32, UCMJ, investigation is "a personal right, and in most instances cannot be waived without a defendant's informed consent." *United States v. Garcia*, 59 M.J. 447, 451 (C.A.A.F. 2004). The record of trial contains an unconditional waiver of the Article 32, UCMJ, investigation, signed by the appellant in his own hand. AE I at 6. Moreover, during the February 2003 competency hearing, the appellant's counsel confirmed that the

appellant had provided an unconditional waiver of the Article 32 hearing. Record at 8-9.

On 18 November 2002, when the appellant signed the Article 32, UCMJ, investigation waiver, he had not yet been declared incompetent. Admittedly, the 18 October 2002 R.C.M. 706 board, which found the appellant competent to stand trial, was later found defective. However, the second R.C.M. 706 board, which issued its report on 25 November 2002, did not conclude that the appellant was incompetent. Rather, the second R.C.M. 706 board was inconclusive. It was not until 24 December 2002, more than one month after the appellant signed his Article 32, UCMJ, waiver, that the third R.C.M. 706 board declared him incompetent to stand trial. Thus, while there are some concerns with respect to the appellant's mental health during the November 2002 timeframe, we view these concerns as too speculative to overcome the presumption that, on 18 November 2002, the appellant was competent to understand the nature of his court-martial proceedings and assist in the preparation of his defense, to include signing the waiver of the Article 32, UCMJ, investigation. R.C.M. 909(b). In short, the preponderance of the available evidence points towards competence, rather than incompetence, at the time the appellant signed the waiver.

The appellant takes the alternative position that his civilian defense counsel's failure to secure a second personal waiver of the Article 32, UCMJ, investigation, after the appellant had received psychiatric treatment and been returned to military custody, amounted to ineffective assistance of counsel. To prevail, the appellant must overcome the strong presumption that his counsel acted within the wide range of reasonably competent professional assistance. *Strickland v. Washington,* 466 U.S. 668, 689 (1984). Our superior court has developed a three-pronged test to determine whether an appellant has overcome this presumption. Under this analysis, we ask: (1) are the allegations made by appellant true, and, if so, is there a reasonable explanation for counsel's actions in the defense of the case; (2) if they are true, did the level of advocacy "fall[ ] measurably below the performance . . . [ordinarily expected] of fallible lawyers;" and (3) if ineffective assistance of counsel is found to exist, "is . . . there . . . a reasonable probability that, absent the errors," there would have been a different result? *United States v. Christian*, 63 M.J. 205, 209 (C.A.A.F. 2006)(quoting *United States v. Polk,* 32 M.J. 150, 153 (C.M.A. 1991)).

Our reading of the entire record leads us to the conclusion that the appellant's 18 November 2002 waiver of his Article 32, UCMJ, investigation was executed at a time when he was presumed competent. Additionally, the affidavit submitted by the appellant's civilian defense counsel reveals that, after the appellant was returned to military custody, the civilian counsel and the appellant discussed the merits of continuing to waive the Article 32, UCMJ, investigation and attempting to negotiate a favorable pretrial agreement with the convening authority. Siegel Affidavit dated 9 Jun 2006 at 3. As explained by the civilian defense counsel, this litigation strategy was agreed upon in the prudent hope of discouraging further investigation by law enforcement authorities that might ultimately have uncovered additional misconduct that the appellant told his counsel he had committed. *Id*. Under these circumstances, we find that waiving the Article 32, UCMJ, investigation was a reasonable course of action, and further find that it was unnecessary for the civilian counsel to secure a second written Article 32, UCMJ, investigation waiver from the appellant after he was returned to military custody.

Assuming, *arguendo*, that we were to agree with the appellant that a second Article 32, UCMJ, investigation waiver should have been secured, we are unconvinced that such a failure reduced the civilian counsel's overall advocacy to a level measurably below that expected of other attorneys. The appellant's pleadings to this Court are devoid of any claim that, but for his civilian counsel's supposed shortcomings, he would have exercised his right to an Article 32, UCMJ, investigation, and pursued some course of action other than entering guilty pleas pursuant to a bargained-for pretrial agreement containing favorable sentence-limitation terms. Instead, the appellant merely argues that he was incompetent to waive his Article 32, UCMJ, investigation, or that he should have at least been required to provide a second waiver of the Article 32, UCMJ, investigation. We find the appellant's allegations do not overcome the strong presumption that his counsel was competent in the performance of her duty.

The Appellant's Competence to Stand Trial

In his second assignment of error, the appellant argues that the competency certification provided by the Federal Medical Center, Butner, North Carolina, did not authorize the convening authority to press forward with his court-martial. The appellant claims that a fourth R.C.M. 706 board should have

been ordered prior to the reconvening of his general court-martial. We disagree.

As previously explained, a service member is presumed competent to stand trial unless the contrary is established by a preponderance of the evidence. R.C.M. 909(b) and (e). Although the appellant did not seek a fourth R.C.M. 706 board after the Federal Medical Center declared him competent, this failure does not preclude our inquiry into his competency to stand trial. *See United States v. Massey*, 27 M.J. 371, 374 (C.M.A. 1989)(finding "practical reasons why a [service court] might choose not to limit the sanity board's inquiry to the single question of the [appellant's] capacity to participate in the appeal"). Nevertheless, the burden with respect to any claim of incompetence rests squarely on the appellant's shoulders. *Thompson v. United States*, 60 M.J. 880, 884 (N.M.Ct.Crim.App. 2005). Moreover, our inquiry is not limited to the record of trial, but rather, may include the consideration of documents and material submitted from outside of the record. *United States v. Murphy*, 50 M.J. 4, 6 (C.A.A.F. 1998); *United States v. Van Tassel*, 38 M.J. 91, 93 (C.M.A. 1993).

The appellant faults the military judge for not *sua sponte* ordering a fourth R.C.M. 706 board after the appellant was returned to military custody. He also faults the convening authority for not directing such an inquiry. The appellant specifically argues that once he was declared competent to stand trial by the Warden of the Federal Medical Center, R.C.M. 909(f) only authorized the convening authority to take custody of the appellant, not to reconvene the court-martial. The appellant contends that his court-martial proceedings could not have gone forward without either the convening authority or the military judge ordering a fourth R.C.M. 706 board.

The appellant's contention ignores the fact that R.C.M. 706(a) states that a capacity inquiry is necessary only when it appears to the convening authority, the military judge, or other concerned party, that there is reason to question a service member's mental responsibility or capacity to stand trial. In light of the 27 August 2003 certification from the Warden of the Federal Medical Center that the appellant had responded to treatment and was competent to stand trial, the circumstances discussed in R.C.M. 706(a) did not exist, and there was no reason for either the convening authority or the military judge to order a fourth inquiry into the appellant's

capacity to stand trial. The warden's certificate, which specifically states that the appellant was then able to understand the nature and consequences of the proceedings against him and to assist properly in his own defense, obviates any concern that the then-existing circumstances warranted an additional examination of the appellant under R.C.M. 706(c)(4). Finally, the warden's certificate can be viewed as a proper substitute for a fourth R.C.M. 706 board, as it was generated pursuant to the provisions of 18 U.S.C. §§ 4241 and 4247, which, taken together, mirror R.C.M. 706 in several crucial respects. *See United States v. Jancarek*, 22 M.J. 600, 603 (A.C.M.R. 1986) ("in a proper case, there can be a substitute for a sanity board"); *see also United States v. English*, 47 M.J. 215, 218 (C.A.A.F. 1997)(discussing *Jancarek*).

The Federal Medical Center's evaluation of the appellant, conducted three months prior to the reconvening of the court-martial, determined that he was competent to stand trial. To date, the appellant has offered nothing in the way of actual evidence, from either inside or outside the record, to contradict the Federal Medical Center's determinations. His bald assertions that he would have been found incompetent by a fourth R.C.M. 706 board do not qualify as evidence that he was, at the time of trial, unable to appreciate the significance of his court-martial proceedings or otherwise unable to assist in his defense. Therefore, we reject the appellant's second assignment of error.

Speedy Post-Trial Review

In his third assignment of error, the appellant claims he was denied due process because of excessive and inordinate Government delay in the post-trial review of his court-martial. He argues that this court should reassess the sentence and disapprove the dishonorable discharge. We disagree.

Regardless of the nature of the offense committed, speedy post-trial review is a right afforded all service members punished during court-martial proceedings. *United States v. Williams*, 55 M.J. 302, 305 (C.A.A.F. 2001). As a court, we have consistently decried post-trial delays and striven to hold convening authorities accountable for foot-dragging. *United States v. Williams*, 42 M.J. 791, 794 (N.M.Ct.Crim.App. 1995); *United States v. Henry*, 40 M.J. 722, 725 (N.M.C.M.R. 1994)

(noting that this court cannot condone such dilatory and slipshod practices). Our efforts in this regard stem from the broad power and responsibility we possess to protect an accused. *United States v. Parker*, 36 M.J. 269, 271 (C.M.A. 1993).

We consider four factors in determining whether post-trial delay violates an appellant's constitutional right to due process: (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).

The following is a chronology of the appellant's post-trial processing:[1]

6 Nov 03	Day	0	Sentence Announced
4 Oct 04	Day	333	SJAR prepared
14 Dec 04	Day	404	CA takes action
28 Jan 05	Day	449	Record received at Navy and Marine Corps Appellate Review Activity (NAMARA)
3 Feb 05	Day	455	Record docketed at Navy-Marine Corps Court of Criminal Appeals (NMCCA)
26 Apr 06	Day	901	Appellant's brief filed with NMCCA
14 Jun 06	Day	950	Government answer filed with NMCCA

[1] Omitted from this chronology are several *pro se* extraordinary writs filed by the appellant. All of these requests for extraordinary relief have been denied by this court.

28 Jun 06 Day 964 Appellant's Reply Filed with NMCCA[2]

In the case at bar, 455 days passed between the date of trial and the date on which the case was docketed at this Court. This court-martial involved a guilty plea, with a little over 170 pages of transcribed proceedings. Since then, another 509 days elapsed while the case was briefed by both the appellant and the Government. This case was tried and docketed at this Court prior to our superior court's decision in *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), so the presumptions of unreasonable delay set forth in that opinion do not apply to this appeal. Nevertheless, we find the delay in this case facially unreasonable, triggering a due process review.

With respect to the second *Jones* factor, the staff judge advocate's 4 October 2004 recommendation contains an explanation for the delay. Specifically, the staff judge advocate states that the processing of the appellant's case was delayed, in part, because of the operational requirements of Operations Enduring Freedom and Iraqi Freedom. The explanation notes that further delay resulted from an increase in the volume of records pending promulgation and review by Marine Corps Base, Camp Pendleton, California.

No one can doubt that the Navy and Marine Corps will continue to face rigorous deployment schedules to combat operations conducted in furtherance of national security. While the explanations offered by the staff judge advocate are compelling on their face, our superior court has stated that the reasons justifying delay in post-trial processing must be "case-specific delays supported by the circumstances of that case and not delays based upon administrative matters, manpower constraints or the press of other cases." *Moreno*, 63 M.J. at 143. The *Moreno* court was silent as to whether sudden deployments and threats to national defense that create manpower shortages are to be lumped in with the typical "manpower constraints" occasioned by normal force rotations.

[2] The appellant's Reply to the Government's Answer includes a request for an evidentiary hearing pursuant to *United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967) and *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997). Because we have determined that the pleadings, affidavits, and records of this case "'*conclusively* show that [the appellant] is entitled to no relief'" with respect to matters on which he seeks further proceedings before the military judge, see *Ginn*, 47 M.J. at 244 (quoting *United States v. Giardino,* 797 F.2d. 30, 32 (1st Cir. 1986)(emphasis added)), we deny the appellant's request for a *Dubay* hearing.

We are hard pressed to believe that our superior court, with its considerable knowledge of military matters and appreciation for recent threats to national security, would not recognize the wisdom of accepting, as reasonable, delays resulting from combat deployments of our fighting forces. There must be recognition in the post-trial arena of the concept of "excludable delay" for good cause shown, just as there is recognition for excludable delay in the pretrial phase. *See*, R.C.M. 707(c); *see also United States v. Longhofer*, 29 M.J. 22 (C.M.A. 1989).

At the same time, even a combat-ready unit must remain aware of, and continue to meet, its administrative and military justice obligations. Convening authorities must make every effort to maintain a rear echelon capable of continuing with military justice functions. The boilerplate language employed by the staff judge advocate in this case offers nothing in the way of case-specific reasons for the post-trial delay. As we move forward under the strictures imposed by the *Moreno* decision, excuses such as those offered by the staff judge advocate in this case may very well prove insufficient before our court.

Turning to the third factor, the appellant did not assert his right to speedy post-trial review until approximately 780 days after sentencing. The appellant's failure to lodge his request at an earlier time undermines any concern that the delay in this case impinged upon his constitutional rights.

As to the fourth *Jones* factor, the appellant argues that he suffered prejudice because: (1) the delay inhibited his ability to submit proper clemency matters; (2) the delay in post-trial review aggravated his medical condition; and (3) assuming a rehearing is granted, the passage of time has degraded his ability to mount a defense. In light of the fact that the appellant's brief to this Court does not raise any issue with respect to whether the procedures for serving copies of the record of trial and staff judge advocate's recommendation were properly followed, we do not see how delay alone caused the appellant prejudice with respect to his ability to submit clemency matters. Further, the appellant fails to specify what clemency matters he would have raised before the convening authority, but for the aforementioned delay.

As to whether the post-trial delay exacerbated the appellant's medical condition, his assertions, unsupported by any evidence, are insufficient. Absent evidence offered by competent medical authority, we cannot determine what, if

anything, caused the appellant to experience the medical problems from which he claims to suffer. We will not join the appellant in speculating that delay in the post-trial processing of his case is at the root of his health issues.[3]

Finally, because we see no reason to return this matter for a rehearing, we reject the appellant's claim that post-trial processing delays have prejudiced his ability to mount a defense during any possible rehearing. Therefore, after carefully considering all four of the *Jones* factors listed above, we conclude that there has been no violation of the appellant's constitutional due process rights.

Even where there is no constitutional violation, our statutory responsibilities require us to analyze post-trial delay under our broad Article 66(c), UCMJ, authority. *United States* v. *Tardif*, 57 M.J. 219 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(*en banc*). Having considered the factors articulated in *Brown*, we find the delay does not affect the sentence that should be approved.

Sentence Severity

With regard to the appellant's claim that the dishonorable discharge is inappropriately severe because the crimes of which he was convicted did not "cause massive loss of life or any permanent damage," after reviewing the entire record, we find that the sentence is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Conclusion

Accordingly, we affirm the findings of guilty and the sentence, as approved by the convening authority. The appellant's 13 August 2006 *pro se* request for extraordinary relief is denied. The appellant's 11 October 2006 *pro se*

[3] It is somewhat ironic that, in the appellant's case, post-trial delay may have actually worked to his benefit, as he will remain eligible for medical treatment in military treatment facilities until he receives his DD-214.

request for relief in the form of expedited review under Article 66, UCMJ, in which he requested this court to decide his appeal by 1 November 2006, is also denied.

Senior Judge RITTER and Judge WHITE concur.

For the Court

R.H. TROIDL
Clerk of Court