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

BEFORE

J.D. HARTY **K.K. THOMPSON** **R.G. KELLY**

UNITED STATES

v.

Howard W. ROSS
Private (E-1), U. S. Marine Corps

NMCCA 200400240 Decided 30 October 2006

Sentence adjudged 27 February 2002. Military Judge: E.W. Loughran. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Training Command, Quantico, VA.

Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
Maj KEVIN C. HARRIS, USMC, Appellate Government Counsel
LtCol JOHN F. KENNEDY, USMCR, Appellate Government Counsel

KELLY, Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of five specifications of failure to obey a lawful general order and regulation and eight specifications of larceny, in violation of Articles 92 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 921. The appellant was sentenced to confinement for sixty-six months, a $2,000.00 fine with an additional year of confinement if the fine was not paid, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

We have examined the record of trial, the appellant's three assignments of error,[1] and the Government's response. We find

[1] I. TRIAL DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO INFORM APPELLANT OF HIS RIGHT TO HAVE ALL RELATED CHARGES TRIED TOGETHER; BY PREVENTING APPELLANT IN ENTERING A PRETRIAL AGREEMENT; BY NOT INVESTIGATING AND PRESENTING FINANCIAL IMPACT DATA PERTAINING TO APPELLANT'S POTENTIAL LOSS OF RETIREMENT BENEFITS IF DISCHARGED; AND BY SUBMITTING EVIDENCE OF APPELLANT'S PRIOR MISCONDUCT DURING SENTENCING.

that this case warrants relief pursuant to our Article 66(c), UCMJ, discretionary authority for unreasonable post-trial processing delay. Otherwise, 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. We will take corrective action in our decretal paragraph. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was previously tried and convicted at a general court-martial on 13 April 2001, and was sentenced, in part, to a bad-conduct discharge. Upon his release from confinement, he was immediately placed in pretrial confinement for his actions as set forth below.

At the time of the offenses, the appellant was a class commander stationed at Fort Leonard Wood, Missouri. As a class commander he was responsible for junior Marines under his care, and often interacted with them in their daily administrative needs while they were students attending their Military Occupational Specialty (MOS) School. The appellant used his position as a staff noncommissioned officer to take advantage of the junior personnel entrusted to his care. He made deliberate and unwelcome verbal comments and sexual advances towards junior female Marines, wrongfully engaged in sexual intercourse with one female Marine, and sexually harassed two other female Marines in violation of Secretary of the Navy Instruction 5300.26C (17 Oct 1997) and U.S. Navy Regulations, Article 1165 (1990). In addition, the appellant stole a total of $1008.00 from eight junior Marines. The appellant told these young Marines that they had outstanding debts that had to be paid before they would be allowed to leave for their next duty station. The appellant told them he would pay off their debts if the Marines would provide him with the funds. Instead, the appellant kept the money and never paid any of the debts, thus causing these Marines to suffer financial difficulties once they reached their next duty station.

II. A DELAY OF 1460 DAYS BETWEEN SENTENCING AND CONCLUSION OF REVIEW DOES NOT COMPORT WITH DUE PROCESS.

III. SUBSTITUTE DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO RAISE THE SIGNIFICANT POST-TRIAL DELAY AS AN ERROR WHEN SERVED WITH THE [STAFF JUDGE ADVOCATE'S RECOMMENDATION] AND THE [RECORD OF TRIAL] ALMOST [14] MONTHS AFTER TRIAL AND AGAIN WHEN THE CONVENING AUTHORITY TOOK HIS ACTION [21] MONTHS AFTER THE TRIAL.

Ineffective Assistance of Counsel

In his first and third assignments of error, the appellant asserts that his individual military counsel (IMC) and substitute defense counsel were ineffective. We disagree.

1. The law

The Sixth Amendment to the United States Constitution guarantees an accused the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *United States v. Ingham*, 42 M.J. 218, 223 (C.A.A.F 1995). To prevail on a claim of ineffective assistance, the appellant must overcome the strong presumption his counsel acted within the wide range of reasonably competent professional assistance. Any judicial scrutiny of a defense counsel's performance must be highly deferential. Acts or omissions that fall within a broad range of reasonable approaches do not constitute a deficiency. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

The appellant has the burden of demonstrating: (1) his counsel was deficient; and (2) he was prejudiced by such deficient performance. *Id*. at 687. To meet the deficiency prong, the appellant must show his defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. To show prejudice, the appellant must demonstrate that any errors made by his defense counsel were so serious that they deprived him of a fair trial. *Id*.; *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). The appellant "must surmount a very high hurdle." *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998)(quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)). This is because it is strongly presumed that counsel are competent in the performance of their representational duties. *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000).

This is a post-trial affidavit-based claim of ineffective assistance of counsel. The Government submitted affidavits from the IMC and the substitute defense counsel in response to the appellant's affidavit. We will resolve the appellant's claim of ineffective assistance of counsel based on the record before us and the principles announced in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

In *Ginn*, our senior court announced six principles to be applied by courts of criminal appeals in disposing of post-trial, collateral, affidavit-based claims, such as ineffective assistance of counsel, stating, in part:

> In most instances in which an appellant files an affidavit in the Court of Criminal Appeals making a claim such as ineffective assistance of counsel at trial, the authority of the Court to decide that legal issue without further proceedings should be clear. The following principles apply:
>
> > First, if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor, the claim may be rejected on that basis.
> >
> > ....
> >
> > Fourth, if the affidavit is factually adequate on its face but the appellate filings and the record as a whole "compellingly demonstrate" the improbability of those facts, the Court may discount those factual assertions and decide the legal issue.

Id.; *see United States v. Singleton*, 60 M.J. 409, 410-11 (C.A.A.F. 2005). We believe the appellant's allegations can be resolved under *Ginn's* first and fourth principles. We will address each allegation in accordance with those principles.

2. IMC never explained potential trial postponement

The appellant contends that his IMC never told him about the trial counsel's offer to consider postponing the first trial until the investigation was complete, thereby allowing all charges to be tried before one court-martial. Appellant's Brief and Assignment of Errors of 28 Feb 2006 at 5. Under the fourth *Ginn* principle, we find that the record compellingly demonstrates the improbability of the appellant's claim. At his second general court-martial, the appellant moved to dismiss the charges based upon prosecutorial misconduct. The military judge ruled that the appellant had made a tactical decision not to delay the first trial in hopes of never facing the additional charges that were ultimately referred to his second court-martial. The appellant now claims not to have known about trying all the charges together, even though he previously avoided a trial of all the charges together, in hopes of gaining a tactical advantage. The appellant has failed to overcome the strong presumption that his defense team provided effective legal services.

3. IMC prevented a pretrial agreement for the appellant

The appellant contends that his IMC prevented him from entering into a beneficial pretrial agreement. Under the fourth *Ginn* principle, we find that the record compellingly demonstrates the improbability of the appellant's claim. In his first court-martial, the appellant had the benefit of a pretrial agreement, negotiated with the assistance of the same trial defense counsel. AE XIV, enclosure (5) at 2. His claim that he was not aware of his rights and responsibilities as they pertain to pretrial agreement negotiations in this case, simply is not supported by a record that demonstrates his prior full involvement in the pretrial agreement negotiations in a general court-martial.[2] We find the appellant was well aware of the nature of a pretrial agreement and his right to accept or reject any offer or counteroffer. The appellant has failed to overcome the strong presumption that his defense team provided effective legal services.

4. IMC did not call an expert on financial impact

The appellant contends that his IMC did not present any financial impact data, and should have called an expert witness who could testify concerning the loss of retirement benefits. We disagree, and resolve this issue using *Ginn's* first principle. Although the IMC did not provide an expert witness to provide financial impact data, that fact would not result in relief for three reasons.

First, there is no requirement in a trial before a military judge alone, that an expert witness be presented regarding the potential loss of retirement benefits due to the imposition of a punitive discharge. Second, the information is not relevant. Our superior court has held that it is not necessary for a military judge to instruct the members of the potential loss of military retirement benefits where an appellant was three years from retirement and would have been required to reenlist in order to retire. *United States v. Henderson*, 29 M.J. 221, 222-23 (C.M.A. 1989). Here, the appellant was not retirement eligible.[3] *See also United States v. Boyd*, 55 M.J. 217, 221 (C.A.A.F. 2001)(holding that a military judge may deny a request for a sentencing instruction on the impact of a punitive discharge on retirement benefits where there is no evidentiary predicate for

[2] In his prior general court-martial, the appellant acknowledged that the "offer to plead guilty originated with me and my defense counsel; that no person or persons have made any attempts to force or coerce me into making this offer to plead guilty.") AE XIV, enclosure (5) at ¶ 2.

[3] The record indicates the appellant was a recruit in 1984 and his most recent enlistment was in 1997 for 4 years.

it, or the possibility of retirement is so remote as to make it irrelevant to determining an appropriate sentence). We note that the appellant received a bad-conduct discharge at his prior court-martial, thus reducing the probability of him reaching retirement. Third, even if it was deficient performance not to present expert testimony, which we do not find, there was no prejudice to the appellant. The IMC provided the military judge with defense exhibits to show the appellant's long military service. We are completely confident that the military judge, a lieutenant colonel in the United States Marine Corps, and an experienced military judge, knew the value of the retirement benefits. The military judge is not required to leave this knowledge at the courthouse door when deliberating on sentence. The appellant has failed to overcome the strong presumption his counsel acted within the wide range of reasonably competent professional assistance, and even if the performance was deficient, the appellant has failed to show prejudice.

5. The IMC introduced adverse material during sentencing

The appellant contends that his IMC was deficient for introducing into evidence 128 pages from his service record book (SRB) and his official military personnel file (OMPF) during the sentencing phase of the trial. We disagree, and resolve this issue using the first *Ginn* principle.

The appellant asserts, and we agree, that the IMC submitted extenuation and mitigation evidence that contained a counseling entry from 1988 for misuse of a Government vehicle and another from 1998 for fraternization with student personnel. Defense Exhibit J at 9 and 11. The IMC's submission of this material, however, was not deficient representation and, therefore, does not entitle the appellant to relief.

Submitting this information as part of a complete package has a sound tactical base. Rather than leave the military judge with virtually no evidence of the appellant's 17 years of service, it makes tactical sense to provide the military judge with a complete view of the appellant's career. The court will not second-guess strategic or tactical decisions made at trial by defense counsel. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993)(quoting *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977)). The IMC's tactical decision to give the military judge a complete record, which included among other notable entries, two Navy Achievement Medals, four Good Conduct Medals, and five positive fitness reports, took the sting out of the adverse material and gave a more complete history of service. There is no showing by the appellant that the IMC's actions were so serious as to deprive the appellant of a fair trial, a trial

whose result is reliable. The appellant has failed to overcome the presumption of effective counsel.

6. Substitute defense counsel's clemency was deficient

The appellant claims his substitute defense counsel was ineffective in that he did not raise the issue of post-trial delay to the convening authority in his clemency request of 20 June 2003. We disagree.

Although we agree with the appellant that his substitute defense counsel did not highlight in his clemency request the lengthy delay in the post-trial process, this issue can be settled under the first *Ginn* principle. The dates of the actions were clearly contained within the documentation provided to the convening authority (the results of trial, the record of trial, and the recommendation of the staff judge advocate), and the lengthy delays were obvious on their face. Not pointing them out does not overcome the strong presumption that the substitute defense counsel was competent. The appellant also fails to carry his burden of establishing a reasonable probability that the result would have been any different should the dates have been highlighted. This claim is without merit.

In our view, none of the defects here alleged, either individually or in combination, are sufficient to overcome the presumption of effective assistance. The IMC was an experienced trial lawyer and defended the appellant in his first court-martial. In the appellant's second court-martial, he again zealously represented his client throughout all stages of the trial, was successful on many motions, including the release of the appellant from lengthy pretrial confinement, conducted vigorous cross-examination of the Government's witnesses, and obtained a finding of not guilty on five of the specifications that the appellant faced at trial. The IMC's and the substitute defense counsel's performance exceeded the minimum level required. *Strickland*, 466 U.S. at 687. These assignments of error are without merit.

Post-Trial Delay

The appellant asserts that a delay of 616 days from the date sentence was announced to the date of the convening authority's action, and a further delay of 302 days between the convening authority's action and docketing with this court is unreasonable. We agree in part.

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 916 days from the date of sentencing to the date the case was docketed with this court. We find this unexplained delay of almost three years to be facially unreasonable. We also note that this case has languished for almost two years post-docketing. This substantial and unexplained delay triggers a due process review.

We must balance 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 an assertion of material prejudice in that he has "languished in confinement deprived of any possibility of relief from confinement due to post trial delay." Appellant's Brief at 10. We balance these factors, "with no single factor being required to find that post-trial delay constitutes a due process violation." *United States v. Toohey*, 63 M.J. 353, 361 (C.A.A.F. 2006)(quoting *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F 2006)). On balance, 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. The appellant is entitled to sentence relief for excessive post-trial delay, and we will take corrective action in our decretal paragraph.

Conclusion

Accordingly, we affirm the approved findings of guilty and only that portion of the approved sentence that extends to a dishonorable discharge, confinement for fifty-four months, and a $2,000.00 fine with an additional year of confinement if the fine is not paid.

Senior Judge HARTY and Judge THOMPSON concur.

For the Court

R.H. TROIDL
Clerk of Court