UNITED STATES v. David H. **SANDS,** Lance Corporal (E-3), U. S. Marine Corps

NMCCA 200600447

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

2006 CCA LEXIS 255

October 25, 2006, Decided

NOTICE: [*1] AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRIOR HISTORY: Sentence adjudged 2 June 2004. Military Judge: D.M. Jones. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 1st Battalion, 7th Marines, MCAGCC, Twentynine Palms, CA.

COUNSEL: LT A.M. COOPER, JAGC, USNR, Appellate Defense Counsel.

LCDR LUIS LEME, JAGC, USNR, Appellate Defense Counsel.

LT JESSICA M. HUDSON, JAGC, USN, Appellate Government Counsel.

CAPT THOMAS J. DEMAY, JAGC, USNR, Appellate Government Counsel.

OPINION BY: D.O. VOLLENWEIDER

OPINION

VOLLENWEIDER, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of one specification of unauthorized absence and one specification of wrongful use of marijuana, in violation of Articles 86 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 912a. The appellant was sentenced to confinement for 50 days, reduction to pay-grade E-1, forfeiture of $ 795.00 pay per month for two months, and a bad-conduct **[*2]** discharge. The convening authority approved the findings and the sentence as adjudged.

The appellant's sole assignment of error alleges that his due process right to speedy post-trial review was violated. [1] We have carefully examined the record of trial, the appellant's assignment of error and the Government's response. While we do not find a violation of the appellant's due process guarantees, this case warrants relief pursuant to our Article 66(c), UCMJ, discretionary authority for unreasonable post-trial delay. Following our corrective action, 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.

FOOTNOTES

1 We note with extreme disapproval the fact that appellate defense counsel filed his brief and assignment of error several weeks out of time, in violation of our court's Rules of Practice. No request for enlargement of time was made. In the absence of complaint from the Government, and in light of the lengthy post-trial delay, we will waive this violation of our rules on this occasion.

[*3] Post-Trial Delay

HN1 Convicted service members have a due process right to timely appeal and review of courts-martial. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). In this case, the following dates pertain:

	DATE	TIME	TOTAL TIME
Court-martial	2 Jun 2004	0	0
Authentication	12 Nov 2004	164	164
SJAR	15 Nov 2005	369	532
SJAR served	21 Nov 2005	7	538
CA Action	7 Dec 2005	17	554
Docketed NMCCA	19 Apr 2006	134	687

HN2 We consider four factors in determining if post-trial delay violates 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 (Toohey I),* 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.* Moreover, in extreme **[*4]** cases, the delay itself may "'give rise to a strong presumption of evidentiary prejudice.'" *Id.* (quoting *Toohey I*, 60 M.J. at 102).

Length of Delay

Here there was a delay of about 687 days from the date of trial to the date the case was docketed at this court. This case was tried and docketed with this court prior to the date our superior court decided *Moreno,* so the presumptions of unreasonable delay outlined therein do not apply here. However, even for pre-*Moreno* cases, the *Moreno* time periods are instructive:

120 days from trial to convening authority's action

30 days from convening authority's action to docketing *Id.* at 136.

The record of trial in this case is only 46 pages long. The Government concedes that the

delay in this case triggers the need for a due process analysis. Government's Answer of 20 Jul 2006 at 3. We find that the length of delay in this case was facially unreasonable, triggering a due process review. We specifically find excessive three time periods in the processing of this case: the 164 days from trial to authentication, the 369 days from authentication to completion of the staff judge advocate's **[*5]** recommendation (SJAR), and the 134 days from the convening authority's action to docketing at this court.

Reasons for the Delay

HN3 Regarding the second factor, reasons for delay, we look at each stage of the post-trial period, at the Government's responsibility for any delay, and at any explanations for delay. *United States v. Toohey*, 63 M.J. 353 (C.A.A.F. 2006). No explanation is given for either the unreasonable delay in authentication of the short record of trial in this simple guilty pleas case or the unreasonable delay in forwarding the record to this court after the convening authority's action.

We note that the great bulk of the delay in this case consisted of the 12 months between authentication and the SJAR. To explain this delay, the Government provided a declaration from a review officer at the Legal Services Support Section, 1st Marine Logistics Group. This document purports to explain the delay in this case as the result of war-time operational requirements of the 1st Marine Division located in Twenty-Nine Palms, and particularly the personnel normally assigned to perform post-trial review. [2] On closer inspection, the declaration does **[*6]** no such thing, and fails to show the reasons for delay in *this* case. The declaration is more an exercise in obfuscation than explanation. However, it does show that the Government decided to expend the resources to try courts-martial, but radically reduced the resources required for timely post-trial review of those same cases.

FOOTNOTES

[2] As claimed by the staff judge advocate of the First Marine Division in his 15 November 2005 recommendation.

We first note that the declaration is not dated, making it invalid under 28 U.S.C. § 1746. *See Bonds v. Cox*, 20 F.3d 697, 702 (6th Cir. 1994). Looking beyond this defect in form, we also find the substance of the declaration lacking. According to the declaration by Major Emerich (bracketed matter added), the following occurred:

Dec 2003 to	Review Section, Legal Services
Jan 2004	Support Section, First Force
	Support Group, Camp Pendleton,
	manpower reduced by 70%
Prior to	The Commanding General of Marine
February 2004	Corps Base Camp Pendleton agreed
	to act on all First Marine
	Division courts-martial.
February 2004	The Commanding General of the

	First Marine Division deployed
	Iraq.
[June 2004	Trial in this case.]
10 August 2004	New agreement: Commanding General,
	Marine Air Ground Task Force
	Training Command, Twenty-Nine
	Palms, given authority to act on
	courts-martial for First Marine
	Division units permanently
	stationed at Twenty-Nine Palms;
	Commanding General, Marine Corps
	Base Camp Pendletone retained
	authority to act on courts-martial
	for First Marine Division units
	permanently stationed at Camp
	Pendleton.
[12 November 2004	Record of trial authenticated by
	the military judge.]
30 April 2005	The Commanding General of the
	First Marine Division returned and
	rescinded the above agreements.
15 June 2005	Legal Services Support Section,
	First Force Support Group, Camp
	Pendleton, received 31 cases from
	the Twenty-Nine Palms Staff Judge
	Advocate's office, review section.
	Cases had trial dates ranging from
	23 March 2004 to 22 December 2004.
August 2005	Declarant, Major Emerich, assigned
	as Review Officer, Legal Services
	Support Section, First Force
	Support Group, Camp Pendleton.
[15 November 2005	SJAR signed by Staff Judge
	Advocate, First Marine Division
	(REIN).]
[7 December 2005	Special Court-Martial Order and
	Convening Authority's Action
	signed by the Commanding Officer,

	First Battalion, Seventh Marines,
	First Marine Division (REIN),
	Marine Corps Air Ground Combat
	Center, Twenty-Nine Palms.]
[19 April 2006	Case docketed NMCCA.]

[*7] A number of observations can be made from the foregoing facts. First, the declarant had no personal knowledge of the facts prior to August 2005, and the declaration does not state who did have personal knowledge or how the declarant obtained his "facts". No judge advocates responsible for the processing of this case were identified, and none provided a declaration that is in this record.

None of the agreements relating to actions on courts-martial are appended to the declaration or the record of trial. None of the general officers referred to in the declaration was the commanding officer who convened this special court-martial and took action in this case. The declaration provides no explanation for the delay of five months from trial to authentication by the military judge. It does not state whether this case was one of the 31 cases received by his office from Twenty-Nine Palms on 15 June 2005. It does not state this case was affected by any confusion between the legal offices on the two bases. The declaration does not say why it took one year after authentication of the record to draft a SJAR. It does not attempt to explain the delay of five months in executing the simple ministerial **[*8]** task of sending the record to this court after the convening authority's action was completed.

While this declaration is notable for what it does not say, what it does say is important. It states that the Marine Corps reduced by 70% the staffing available for post-trial review mandated by law, yet continued unabated the number of courts-martial tried. The war may explain why certain individuals were actually overwhelmed at certain periods (although there is insufficient evidence in this record to prove such a claim, and none are identified). However, it does not explain why the Government did not provide the appropriate resources to ensure the timely and efficient operation of this phase of the military justice system during periods of military operations. This Marine Corps command appears able to prosecute criminal cases through courts-martial during the current war, [3] yet seeks to avoid the negative consequences when it is less diligent in implementing those post-trial procedures which are designed to protect the rights of convicted service members, and which are required by law. In none of the post-trial delay cases this court has seen has the Government even attempted to explain **[*9]** the disparity between assets made available for trial of courts-martial and the assets made available for their post-trial review. It has not done so here.

FOOTNOTES

[3] We are not here questioning the discretion of military commanders on which cases to refer to court-martial, either generally or under the specific facts of this case. However, we emphasize that if commanders exercise their discretion to refer a case to court-martial, they assume, by requirement of law, the duty to provide appropriate and timely

post-trial processing.

Assertion of Right to a Timely Appeal

Turning to the third factor, we find no assertion of the right to a timely appeal prior to the filing of the appellant's brief and assignments of error with this court in July 2006.

Prejudice

Concerning the fourth factor, the appellant has made no claim of specific prejudice. The appellant raised no allegation of error that was upheld by this court, or which could be found meritorious by our superior court. Therefore, we find no evidence **[*10]** of specific prejudice. Given the fact that the appellant at trial asked for a bad-conduct discharge and presented witness statements that indicated that the appellant wanted out of the Marine Corps, it would be difficult to find prejudice where the sentence approved included only fifty days confinement, two months forfeitures, reduction to pay grade E-1, and a bad-conduct discharge. We also find no "extreme circumstances" that give rise to a strong presumption of evidentiary prejudice. Thus, we conclude that there has been no due process violation resulting from the post-trial delay. *Jones,* 61 M.J. at 83.

We are aware of our authority to grant relief under Article 66, UCMJ, and in this case choose to exercise it in our decretal paragraph. *Toohey I,* 60 M.J. at 102; *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).

Conclusion

Accordingly, we affirm the findings of guilty and only so much of the sentence approved by the convening authority as includes forfeiture of $ 795.00 pay for one month, confinement for fifty days, reduction in **[*11]** rank to pay grade E-1, and a bad-conduct discharge.

Chief Judge ROLPH and Senior Judge CARVER concur.