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

BEFORE

D.A. WAGNER **R.E. VINCENT** **E.B. STONE**

UNITED STATES

v.

Cory L. SANFORD
Builder Third Class (E-4), U. S. Navy

NMCCA 200301583 Decided 10 July 2006

Sentence adjudged 28 February 2003. Military Judge: J.A. Maksym. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Commander Navy Region Southeast, Jacksonville, FL.

Capt ROLANDO SANCHEZ, USMC, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel

WAGNER, Senior Judge:

The appellant was tried by officer and enlisted members sitting as a general court-martial. Contrary to his pleas, the appellant was convicted of conspiracy to commit assault, wrongful use of provoking words, and assault with a means or force likely to produce death or grievous bodily harm, in violation of Articles 81, 117, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 917, and 928. The adjudged and approved sentence consisted of confinement for 4 months, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant asserts three assignments of error: that the evidence adduced at trial was legally and factually insufficient to sustain his conviction on the conspiracy charge; that the military judge erred by not redacting language on the victim's shirt depicted in photographs admitted into evidence; and that the appellant has been denied speedy review of his court-martial. After careful review of the record, 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. Arts. 59(a) and 66(c), UCMJ.

Legal and Factual Sufficiency

Considering the evidence adduced at trial in the light most favorable to the Government, we find that a 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. In addition, 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).

Post Trial Delay

The appellant asserts that he was denied speedy post-trial review because of excessive and inordinate delay between the docketing of his case before our court and the filing of initial pleadings on the appellant's behalf. The appellant avers that this court should reassess the sentence, disapproving the bad-conduct discharge. We disagree.

This case involves a contested members trial resulting in an 825-page record of trial. The appellant's Brief and Assignments of Error was filed with the court on 29 April 2005 -- 20 months after the case was docketed.[1] The appellant claims that he suffered undue post-trial delay because his appellate defense counsel, due to his heavy caseload commitment, could not review the record of trial and file initial pleadings in a timely fashion.

We initially conduct a due process analysis in all claims of excessive post-trial delay. *United States v. Moreno,* 63 M.J. 129 (C.A.A.F. 2006). If no constitutional violation is established, we then analyze the delay under our broad Article 66(c), UCMJ, mandate. *United States v. Brown,* 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc).

We consider four factors in determining if post-trial delay violates the 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.

[1] The appellant's brief claims that the time period, 12 August 2003 to 29 April 2005, is 30 months.

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).

In this case, the aggregate delay of almost three years between the date of the appellant's trial and final briefing to this court is facially unreasonable, as is the delay of 20 months from docketing with this court until the appellant's initial pleadings were filed. We find no demonstrated prejudice, nor do we find the delay so egregious as to give rise to a presumption of prejudice. Therefore, there was no due process violation.

The appellant, through appellate counsel, argues that the appellate defense counsel's large caseload prevented him from reading and briefing the case in a timely manner. In doing so, reference is made to the general workload for the Appellate Defense Division, but, other than providing the case names for several cases requiring counsel's more immediate attention, there is no reference to the number of cases carried by appellant's counsel or any case-specific reason for the undue delay. Recently, our superior court has stated that 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 129, slip op. at 32.

This court has a statutory duty to conduct appellate review of the cases forwarded by the Judge Advocate General. Arts. 59(a) and 66(c), UCMJ. Our superior court has stated that we also have the responsibility to oversee the timely management and disposition of cases docketed at our court. *Moreno*, 63 M.J 129, slip op. at 32. Our superior court has also stated, however, that administrative control of appellate attorneys and their workloads are the responsibility of the attorneys and their supervisors under Article 70, UCMJ. *United States v. Brunson*, 59 M.J. 41, 43 (C.A.A.F. 2003). The court went on to state that:

> Counsel have a responsibility to aggressively represent clients before military trial and appellate courts. If counsel fail to comply with the basic rules of this Court, they risk compromising their client's rights and protections. The attorneys of the Navy-Marine Corps Appellate Defense Division must adequately protect the appellate rights of their clients, comply with the Rules of Practice and Procedure of this Court, and provide competent and timely appellate representation.
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> In that regard, we also note that this Court has adopted the *American Bar Association's Model Rules of Professional Conduct* (2003 ed.) "as the rules of conduct for members of the Bar of this Court." C.A.A.F.

> R.15(a). Those Model Rules require that counsel "shall act with reasonable diligence and promptness in representing a client." *Model Rules of Prof'l Conduct* R.1.3. The comment to Rule 1.3 provides that "[a] lawyer's work load must be controlled so that each matter can be handled competently." *Id*. at cmt. 2.

Brunson, 59 M.J. at 43.

There is no evidence before us that the appellate defense counsel informed his supervisory attorneys that his caseload would preclude him from providing adequate and timely representation in this case. Had he done so, and had his supervisory attorneys agreed with his work priorities and time allocation, then the supervisory attorneys would have been required to find a substitute counsel or notify the Judge Advocate General that the appellant was unable to be represented by any attorney under their cognizance.

Management of attorney workload involves discussion of appellate defense counsel workloads in terms of the quality of issues being raised, the competing time commitments of writing briefs, preparing for oral argument, and assisting other counsel with their cases. These are issues ideally suited to discussions between appellate counsel and their supervisory attorneys, and, if necessary, between the Director, Appellate Defense, the Assistant Judge Advocate General for Military Justice, and the Judge Advocate General.

Before accepting responsibility to represent an appellant, an appellate defense counsel must determine whether counsel can provide timely assistance to the newly assigned client and case based on their current workload. Formal notification to their supervisory attorneys and, as necessary, from their supervisory attorneys to the Judge Advocate General, that there are no counsel available to represent the appellant, is required to fulfill the ethical obligation owed to each appellant. It is important to note that, while many entities have statutory obligations toward the appellant, it is the defense counsel, both at trial and on appeal, who owes his or her client the ethical obligation of effective and timely representation.

We comment on this issue to express our frustration with the continuing practice of appellate counsel, from both sides of the aisle, in making bald assertions regarding workload commitments without providing detailed information regarding case numbers and complexity, work hours, and what efforts have been made to obtain assistance. In the end, however, it is the delay and the reasons for the delay that must be considered in our determination of what findings and sentence should be approved in this case.

This is not a simple, straightforward special court-martial case. The appellant pled not guilty to the offenses before officer and enlisted members. The resulting record of trial is

825 pages in length. While the delay in this case was far longer than it needed to be, some delay in reviewing a large record of trial such as this is to be expected. In determining what findings and sentence should be approved in this case based on our authority under Article 66(c), UCMJ, we also consider the offenses of which the appellant stands convicted and the sentence he received. *Brown* 62 M.J. at 607. In this case, the appellant stood convicted of conspiring to assault a fellow Sailor, use of provoking words toward his shipmate, and an aggravated assault where the appellant savagely beat the victim. These are very serious offenses for which the appellant received a bad-conduct discharge, 4 months confinement, and reduction to pay grade E-1. On the whole, in light of all the circumstances of this case, we do not find that the delay affects the findings and sentence that should be approved in this case.

Conclusion

The remaining assignment of error is without merit. Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Judge VINCENT and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court