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

BEFORE

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

UNITED STATES

v.

Rodney N. SIMMONS
Private First Class (E-2), U. S. Marine Corps

NMCCA 200300874 Decided 8 November 2006

Sentence adjudged 20 April 2001. Military Judge: R.H. Kohlman. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Division, II MEF, Camp Lejeune, NC.

LT STEPHEN REYES, JAGC, USNR, Appellate Defense Counsel
LT MARK HERRINGTON, JAGC, USNR, Appellate Government Counsel

FELTHAM, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of conspiracy to possess methylenedioxymethamphetamine (ecstasy) with the intent to distribute, and single specifications of the divers distribution of ecstasy, the use of cocaine, and the use of marijuana, in violation of Articles 81 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 912a. The adjudged and approved sentence consisted of a dishonorable discharge, confinement for 6 years, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority suspended confinement in excess of 60 months for 60 months.

We have carefully considered the record of trial; our superior court's order of 17 February 2006, remanding this case to us; the appellant's brief on remand; and the Government's answer to the appellant's brief on remand. 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.

Appellate History

We originally approved the findings and the sentence, as approved by the convening authority, in an unpublished decision on 16 November 2004. *United States v. Simmons*, No. 200300874, unpublished op. (N.M.Ct.Crim.App. 16 Nov 2004). On 17 February 2006, on consideration of the appellant's petition for grant of review of that decision, our superior court granted his petition on the issue of whether this court erred by failing to award any sentence relief in his case based on excessive and unreasonable delay.[1] It affirmed our decision as to findings, set it aside as to sentence, and remanded it to us for consideration of the granted issue in light of its decision in *United States v. Jones*, 61 M.J. 80 (C.A.A.F. 2005).

When his case was before us for the first time, the appellant asked us to reduce his sentence to confinement from six years to six months, and to mitigate the adjudged dishonorable discharge to a bad-conduct discharge. He sought this relief based solely upon the length of time it took the convening authority to act on the case, combined with the convening authority's delay in forwarding the case to us for review. He again seeks the same relief, based upon "the 1105 days of excessive and unreasonable delay in docketing [his] record of trial for review." Appellant's Brief on Remand of 18 Apr 2006 at 2.

Post-Trial Delay

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. *Jones*, 61 M.J. at 83 (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*. 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.).

Here, there was a delay of more than two years from the date of trial, 20 April 2001, to the date the case was initially docketed at this court. Although the record of trial contains only 112 pages of transcript, and was authenticated approximately 140 days after the court-martial adjourned, it took approximately 538 days from the date the sentence was announced to complete the second addendum to the staff judge advocate's recommendation. The convening authority acted on the sentence on 16 December 2002,

[1] Although not stated in our superior court's order, it is apparent that the delay referred to therein is post-trial delay.

some 605 days after the trial. The case was docketed at this court on 2 May 2003.

This case was tried and docketed at this court prior to the date our superior court decided *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), so the presumptions of unreasonable delay set forth in that case do not apply here. Nonetheless, we find the delay in this case facially unreasonable, triggering a due process review.

Regarding the second factor, reasons for the delay, the record contains no explanation, although the Government now contends that "the reasons for the length of the delay are explained by the numerous clemency submissions and addendums to the SJAR." Government's Answer to Appellant's Brief on Remand of 22 Jun 2006 at 4. We reject this argument, as there is no indication from the record that the appellant's clemency requests substantially delayed the post-trial processing of this case.

Turning to the third factor, as we noted in our initial decision, "[w]e have been presented with no evidence that the appellant requested the convening authority to take a speedier action or made any inquiries of why the case had not been forwarded to this court. We also note that once it was docketed with the court, it took almost a year for the appellant to claim that he had been denied a speedy review." *Simmons*, unpub. op. at 3. The appellant has not presented any evidence on remand that would undermine our earlier conclusion in this regard.

With regard to the fourth factor, the "[a]ppellant argues that because of the unreasonable delay in forwarding his record of trial he was ultimately denied his full right of review under Article 66, UCMJ." Appellant's Brief on Remand at 4. However, he does not explain, much less demonstrate, how the delay has denied him his right to appellate review. Having been ordered to reconsider our initial decision not to award sentence relief in this case in light of *United States v. Jones*, 61 M.J. 80 (C.A.A.F. 2005), we note that the appellant in *Jones* not only asserted specific prejudice, but provided proof in support of his assertion. Specifically, he submitted his own declaration and declarations from three officials of a potential employer stating that, despite his bad-conduct discharge, he would have been considered for employment as a truck driver, and likely hired, if he had possessed a DD-214. Our superior court held that these unrebutted declarations were sufficient to demonstrate that unreasonable post-trial delay prejudiced Jones by interfering with his opportunity to be considered for employment. *Jones*, 61 M.J. at 84-85.

Unlike Jones, the appellant in the instant case did not assert specific prejudice, much less establish that he was prejudiced by the delay. He cites no specific occasions on which lack of a DD-214 caused him to be denied employment, interfered with his ability to pursue educational opportunities, or

prevented him from receiving any benefit that might otherwise have accrued to him by virtue of his military service. Moreover, he does not assert that he has suffered from oppressive incarceration pending appeal, particularized anxiety or concern distinguishable from the normal anxiety or concern of a prisoner awaiting the outcome of appellate review, or impairment of his ability to present a defense at a rehearing. *See Moreno*, 63 M.J. at 138-41. Therefore, we find no evidence of specific prejudice. 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 also aware of our authority to grant relief under Article 66, UCMJ, but we decline to do so. *Toohey*, 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*). Having considered the factors we announced in *Brown* as they relate to this case, and having complied with our superior court's order to reconsider our initial decision in light of *Jones*, we find the delay does not affect the sentence that should be approved.

Conclusion

Our superior court having affirmed our previous decision as to findings, on remand, we affirm the sentence, as approved by the convening authority.

Senior Judge RITTER and Judge WHITE concur.

For the Court

R.H. TROIDL
Clerk of Court