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

BEFORE

Charles Wm. DORMAN **C.L. CARVER** **E.E. GEISER**

UNITED STATES

v.

Jill R. SMITH
Private First Class (E-2), U. S. Marine Corps

NMCCA 200300497 Decided 16 February 2006

Sentence adjudged 4 April 2001. Military Judge: J.W. Styron. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Chief of Naval Education and Training, Pensacola, FL.

Capt JAMES D. VALENTINE, USMC, Appellate Defense Counsel
CAPT BRIAN K. KELLER, USMC, Appellate Government Counsel

DORMAN, Chief Judge:

The appellant was convicted by a military judge sitting as a general court-martial, of one specification of conspiracy to distribute lysergic acid diethylamide (LSD) and ecstasy, and one specification each of the wrongful distribution of LSD and ecstasy. Additionally, the military judge found the appellant guilty of solicitation of another to assist her in distributing LSD and Ecstasy. The appellant's crimes violated Articles 81, 112a, and 134 Uniform Code of Military Justice, 10 U.S.C. §§ 881, 912a, and 934. The adjudged and approved sentence consists of confinement for 210 days, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant has presented three assignments of error for our consideration. She first argues that she was denied her right to a speedy trial under both the Sixth Amendment of the Constitution and Article 10, UCMJ. She next argues that she was sentenced for an offense that had been withdrawn from the court. Finally, she argues that she has been denied the right to a speedy review of her conviction and sentence.

We have examined the record of trial, the appellant's assignments of error, the Government's response, and the Government's motion to attach documents. We conclude that the court-martial order must be corrected. As modified, the findings and the sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Speedy Trial

In the first assignment of error, the appellant asserts that she was denied a speedy trial as provided by the Constitution and Article 10, UCMJ. Appellant's Brief of 30 Mar 2005 at 3-4. We disagree.

We apply a *de novo* standard of review concerning the question of whether an accused received a speedy trial. *United States v. Cooper*, 58 M.J. 54, 57-58 (C.A.A.F. 2003). Where a military judge has made findings of fact when ruling on a motion to dismiss for denial of a speedy trial, we review those findings for clear error. Where no clear error is found, those findings can be accorded substantial deference and adopted by this court. *Id*. at 58.

Under Article 10, UCMJ, when the Government places a service member in pretrial confinement, "immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him . . . ." The Government's duty under this provision does not terminate at arraignment, but rather extends to at least the taking of evidence. *Cooper*, 58 M.J. at 60. The yardstick against which the Government's efforts are measured is "reasonable diligence." *United States v. Birge*, 52 M.J. 209, 211 (C.A.A.F. 1999)(quoting *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993)). The Government need not show constant motion, and "[b]rief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive." *Kossman*, 38 M.J. at 262 (quoting *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965)).

We consider four factors in determining whether a Sixth Amendment or an Article 10, UCMJ, violation has occurred: (1) length of the delay; (2) reasons for the delay; (3) assertion of the right to a speedy trial; and (4) prejudice. *Birge*, 52 M.J. at 212 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). In assessing whether the Government proceeded with reasonable diligence, our superior court has recognized that the reasons for delay may include: (1) the complexity of the case; (2) logistical impediments and operational considerations unique to the military; and (3) ordinary judicial impediments such as crowded dockets, unavailability of judges, and attorney caseloads. *Kossman*, 38 M.J. at 261-62.

In this case there is no significant dispute concerning the chronology. At trial the appellant essentially accepted the

Government's chronology. Record at 83-84. We have reviewed the military judge's extensive findings of fact, and finding no clear error, adopt them as our own. Appellate Exhibit XL. In summary format we note the following dates and events. The appellant was placed into pretrial confinement on 26 Sep 2000. On 25 Oct 2000 the defense requested to continue the Article 32 investigation until 30 November 2000. The court-martial was convened on 30 January 2001 and the appellant was arraigned on that date. At that time, the appellant had been in confinement for 126 days. On 8 Feb 2001 the military judge granted the appellant's motion for appropriate relief, which resulted in the reopening of the Article 32 hearing. On 22 Feb 2001, on day 149 of pretrial confinement, the appellant moved for dismissal of charges due to denial of speedy trial. On 23 Feb 2001 the second Article 32 Investigation was conducted, resulting in the preferral and referral of additional charges. On 1 Mar 2001, day 156, the appellant's motion to dismiss for denial of speedy trial was litigated. The Government presented its case-in-chief on 3 April 2001, and the appellant was sentenced the following day.

In reviewing the question of whether the appellant was denied her right to a speedy trial, we have examined the entire period of time in this case, from the date of confinement to the date of sentencing. In applying a *de novo* standard of review, we do so conscious of the requirements of Article 10, UCMJ, that the Government is required to exercise reasonable diligence in bringing an accused to trial, but that constant motion is not required. *Kossman*, 38 M.J. at 262. We are also conscious of the four factors contained in *Birge*, 52 M.J. at 212, concerning the right to a speedy trial under both the Sixth Amendment and Article 10, UCMJ, specifically: the length of the delay; the reasons for the delay; the assertion of the right to a speedy trial; and the existence of prejudice. *See Cooper*, 58 M.J. at 61. *Birge* also suggests that we should also consider whether the appellant demanded a speedy trial or release from confinement; whether the appellant raised the issue at trial; whether the appellant entered pleas of guilty and, if so, was it pursuant to a pretrial agreement; whether credit was awarded for pretrial confinement on the sentence; whether the Government was guilty of bad faith in creating the delay; and whether the appellant suffered any prejudice in the preparation of his case as a result of the delay. *Birge*, 52 M.J. at 212. Applying all of the above-mentioned standards of review and factors to the case before us, we conclude that the appellant was not denied her right to a speedy trial.

Military Judge's Findings

In her second assignment of error, the appellant asserts that the military judge erred by sentencing her for an offense that had been withdrawn and dismissed by the CA. We do not agree.

Immediately before announcing findings, the military judge stated "I just discussed with [counsel], inserting into the record through Appellate Exhibit . . . the withdrawal and dismissal of the Additional Charge that is dated 28 March 2001 and that is a letter from the Chief of Naval Education and Training." Record at 378. After making this announcement the military judge then found the appellant guilty by exceptions and substitutions of soliciting another Marine to distribute LSD and ecstasy.

The letter to which the military judge referred is apparently Appellate Exhibit LXV. It is a letter from the Chief of Naval Education and Training, and it is dated 28 March 2001. Appellate Exhibit LXV states that the Additional Charge and Specifications that were preferred on 12 January 2001 and referred for trial on 19 January 2001 were withdrawn and ordered dismissed without prejudice. On its face, that Appellate Exhibit does not apply to the Additional Charge that was before the court on 3 April 2001. The Additional Charge and Specifications that were before the court on that date were preferred and referred on 28 March 2001. In its brief, the Government argues that the appellant has wrongly interpreted the comments of the military judge and that he was merely describing the contents of Appellate Exhibit LXV. Government Brief of 28 Sep 2005 at 10.

While we agree with the Government's contention that the appellant has misinterpreted the comments of the military judge, so too did the force judge advocate (FJA) and the convening authority. Both the FJA's recommendation (FJAR) and the court-martial order contain the following statement. "Although the Military Judge entered a finding of Guilty by exceptions and substitutions . . . the Charge and its Specification was dismissed and withdrawn by the convening authority on 28 March 2001 per Appellate Exhibit LXV and page 378 of the ROT." General Court-Martial Order No. 12-02 dated 8 Oct 2002. While we do not find that the military judge sentenced the appellant for an offense that had been withdrawn and dismissed, the court-martial order is ambiguous. Rather than returning this matter to the convening authority to correct what is an obvious error to us by both the FJA and the convening authority and further delay this case, we will resolve the issue in the appellant's favor, by ordering corrective action on both the findings and sentence. *See* Art. 66(c), UCMJ.

Post-Trial Delay

In her third assignment of error, citing *Unites States v. Tardif*, 57 M.J. 219, 222 (C.A.A.F. 2002), the appellant seeks the disapproval of the adjudged and approved bad-conduct discharge. The appellant makes this request based upon the post-trial delay of the 715 days between the date of sentencing and the date the record of trial was docketed with this court. The appellant claims that the delay was unreasonable, unexplained, and that the

appellant suffered prejudice in seeking employment due to the 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. *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.*

The following chronology outlines the post-trial delay in processing this 400-page record:

Date	Action	Days Elapsed
04 April 2001	Appellant sentenced and released from confinement	0
15 February 2002	Trial Counsel authenticated record of trial	317
31 May 2002	Record served on Trial Defense Counsel (TDC)	422
15 August 2002	FJAR issued	498
28 August 2002	FJAR served on TDC	511
17 September 2002	TDC submitted clemency package, raising post-trial delay	531
8 October 2002	FJAR addendum issued and CA's action taken	552
19 March 2003	Record docketed at Navy-Marine Corps Court of Criminal Appeals	715

In this case, the periods of delay complained of by the appellant totaled 715 days. We do not condone the delay in getting the record docketed with this court, and given the numerous lengthy delays in the post-trial processing as the case wound its way to this court, we find the cumulative delay to be facially unreasonable. A due process review is required under *Jones*.

The record of trial was docketed at this court less than 2 years after the date of the trial. The Government explains a portion of this delay through the affidavit of the trial counsel, who was required to authenticate the record. She attributes the delay between the date of trial and authentication on her caseload, inexperienced support personnel, and the fact that she, rather than the military judges who presided over the case, had to authenticate the record. Additionally, it is noted that the record was not received for authentication by the trial counsel until 8 months after the trial. We also note that although the transcript of the record is 400 pages long, the exhibits and allied papers have expanded the "record" into a document over 6 inches thick.

We next look to the third and fourth factors. The appellant did complain to the CA about the post-trial delay in her clemency package, but that was not submitted until shortly before the convening authority took action in the case and more than 500 days after her trial.

The appellant also asserts prejudice because the uncertainty of her military status hindered her efforts to find employment and obtain financial assistance for school. While we are aware that "interference with post-military employment opportunities is a form of prejudice that warrants relief for unreasonable post-trial delay," *Jones*, 61 M.J. at 84, the appellant has not presented us with the same sort of compelling evidence as was presented in *Jones.* The appellant has not claimed that she was denied employment or financial assistance because of her status. Appellant's Letter of 17 Sep 2002. Accordingly, following our due process review, we conclude that there has been no due process violation due to the post-trial delay.

We are also aware of our authority to grant relief under Article 66, UCMJ, even in the absence of specific prejudice. *United States v. Oestmann,* 61 M.J. 103 (C.A.A.F. 2005); *Toohey*, 60 M.J. at 103-04; *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown,* __ M.J. __, 2000500873, 2005 CCA LEXIS 372, (N.M.Ct.Crim.App. 30 Nov 2005)(*en banc*). This court is "required to determine what findings and sentence 'should be approved' based on the facts and circumstances reflected in the record, including the unreasonable and unexplained delay." *Tardif*, 57 M.J. at 224. We conclude that no relief is warranted in this case based upon the length of time it has taken to review the appellant's claims.

Conclusion

The findings of guilty of Specification 2 of the Additional Charge and of the Additional Charge are set aside. The

Additional Charge and its specifications are ordered dismissed. The remaining findings of guilty are affirmed.

Based upon our action of findings, we have reassessed the sentence in accordance with the principles of *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998). Upon reassessment, we affirm only so much of the sentence as provides for confinement for 150 days, reduction to pay grade E-1, and a bad-conduct discharge.

Senior Judge CARVER and Judge GEISER concur.

For the Court

R.H. TROIDL
Clerk of Court