U.S. Navy–Marine Corps Court of Criminal Appeals.
UNITED STATES
v.
Brian S. SPARKS, Airman (E–3), U.S. Navy.

NMCCA 9901575.
Sentence Adjudged 31 May 1996.
Decided 17 Oct. 2006.

Sentence adjudged 31 May 1996. Military Judge: N.H. Kelstrom. Review pursuant to Article 66(c), UCMJ, of Special Court–Martial convened by Commanding Officer, Sea Control Squadron 38, San Diego, CA.
Capt Jeffrey Stephens, USMC, Appellate Defense Counsel.

LT Mark Herrington, JAGC, USNR, Appellate Government Counsel.

Before RITTER, Senior Judge, WHITE and FELTHAM, Appellate Military Judges.

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WHITE, Judge:

***1** A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of violating a lawful general order, introducing marijuana on board a naval installation, two specifications of wrongfully using marijuana, and stealing military property of a value of about $55.00, in violation of Articles 92, 112a, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 912a, and 921. On 31 May 1996, the appellant was sentenced to confinement for two months, forfeiture of $500.00 pay per month for two months, reduction to pay grade E–1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

This case was originally docketed at this court on 25 October 1999. At that time, the appellant submitted five assignments of error, all concerning the post-trial processing of his case. By order of 7 February 2001, this court set aside the convening authority's actions of 14 June 1996 and 2 December 1996, and directed the Government to obtain and file with the court, by 20 April 2001, a new legal officer's or staff judge advocate's (SJA) recommendation, and a new convening authority's (CA) action. Following a delay of over 5 years, the case was redocketed with this court on 13 March 2006. All but one of the appellant's earlier assignments of error were mooted by the new SJA's recommendation and CA's action. The appellant now reasserts he has been denied speedy post-trial review. We agree.

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 is not unreasonable, further inquiry is unnecessary. If we conclude the length of the delay is "facially unreasonable," however, we must balance the length of the delay against the other three factors. Id. 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 3,573 days (roughly nine years, nine and one half months) from the date of sentencing to the date the case was re-docketed at this court on 13 March 2006. The Navy–Marine Corps Appellate Review Activity (NAMARA) did not receive the case the first time until nearly three years after the convening authority's (CA) action of 2 December 1996. Our superior court has called delays in forwarding a case to NAMARA following the CA's action "the least defensible of all" post-trial delays. United States v. Dunbar, 31 M.J. 70, 73 (C.M.A.1990). Then, following this court's 15 February 2001 order directing a new CA's action, roughly five years passed before a new CA's action was taken on 19 January 2006. The case was then re-docketed at this court on 13 March 2006.

This case was both tried and docketed 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. Nevertheless, we find the delay in this case was facially unreasonable, triggering a due process review. Accordingly, we must balance the delay against the other three factors.

***2** With respect to the second factor, the Government provides no explanation or justification for the excessive delay in processing this military judge alone, guilty plea record whose transcript fills a mere 76 pages. Turning to the third factor, the appellant asserted his right to speedy post-trial review in his initial assignments of error, filed 11 January 2001. Despite that assertion, the Government subsequently allowed this case to languish for roughly five years before taking a new CA's action. This factor weighs in favor of the appellant.

With respect to the fourth factor, we evaluate prejudice to the appellant in light of three interests: (1) preventing oppressive incarceration pending appeal; (2) minimizing anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limiting the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired. United States v. Toohey, —— M.J. ——, No. 05–0127, 2006 CAAF LEXIS 995, at 20–21 (C.A.A.F. Aug 9, 2006)(hereinafter *Toohey* II)(quoting *Moreno*, 63 M.J. at 138–39)(quoting *Rheuark v. Shaw*, 628 F.2d 297, 303 n. 8 (5th Cir.1980), *cert. denied*, 450 U.S. 931, 101 S.Ct. 1392, 67 L.Ed.2d 365 (1981))). The appellant must show particularized anxiety or concern distinguishable from the normal anxiety experienced by convicted persons awaiting an appellate decision, and that the anxiety or concern is related to the delay. Id. at 21.

In this case, the appellant was sentenced to only two months confinement, and his incarceration was completed long before his case could ever have completed appellate review, even if processed in expeditious fashion. Consequently, he has not suffered oppressive incarceration pending appeal. The appellant has not asserted he suffers any particularized anxiety or concern related to the delay distinct from the normal anxiety and concern normal for persons awaiting appellate decisions. Finally, since the appellant asserts no error that would require rehearing at which he could be prejudiced by the delay in appellate review, neither is the third interest implicated in this case. In light of the foregoing, we find no prejudice to the appellant.

In balancing the four *Jones* factors, we are cognizant that our superior court has recently held that, even where there is no finding of prejudice, an appellant's due process rights are violated where, in balancing the remaining three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system. *Toohey* II, 2006 CAAF LEXIS 995, at 24.

In *Toohey* II, the appellant had "repeatedly asserted his right to timely review and appeal," beginning approximately two years after sentencing. Id. at 19. In the case *sub judice*, the appellant only asserted his right to speedy post-trial review once, in his initial assignments of error, roughly four years and seven months after trial. On the other hand, *Toohey* II involved a complex contested case, whereas this case was a simple, military judge alone, guilty plea. As well, the total delay in *Toohey* II was slightly over six years from sentencing to decision by this court (with roughly two-thirds of the delay occurring between docketing and decision at this court), whereas in this case, we are already well over ten years from sentencing. Likewise, in *Toohey II* it took roughly four years from his first assertion of his rights to decision by this court. In this case, it took nearly five years just for the convening authority to take a new action following this court's order of 15 February 2001, despite the appellant's prior assertion of his rights and this court's explicit direction that the new CA's action was to be taken within less than three months from the date of the order. It will have been over five and a half years from the appellant's initial assertion of his right to speed post-trial review until the decision of this court is finally issued.

***3** We conclude that the excessive and unreasonably lengthy delay in this case, the lack of any explanation for that delay, and the appellant's assertion of his right to speedy post-trial review weigh heavily in favor of the appellant. In balancing these three factors, we conclude the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system, and therefore hold the appellant was denied his due process right to speedy review and appeal.

Having found a violation of the appellant's due process rights, we must next address whether the error was harmless beyond a reasonable doubt. *Chapman v.* California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967);

Toohey II, 2006 CAAF LEXIS 995, at 28; *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F.2005). The government bears the burden of demonstrating that a constitutional error is harmless beyond a reasonable doubt. *Toohey* II, 2006 CAAF LEXIS 995, at 28–29; *United States v. Cendejas*, 62 M.J. 334 (C.A.A.F.2006)(citing United States v. Simmons, 59 M.J. 485, 489 (C.A.A.F.2004)); *United States v. Grooters*, 39 M.J. 269, 273 (C.M.A.1994)(quoting *Arizona v. Fulminante*, 499 U.S. 279, 296, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)).

In this case, considering the totality of the circumstances, including the fact that the appellant has been represented on remand by substitute defense counsel, and on appeal by appellate defense counsel, who have been unable to contact him to form an attorney-client relationship, we cannot be confident beyond a reasonable doubt that the delay in this case has been harmless. [FN1] Where we cannot say beyond a reasonable doubt that the error was harmless, we must consider what relief, if any, to afford. Moreno, 63 M.J. at 143. In Moreno, our superior court provided a non-exclusive range of options as relief for due process, speedy post-trial review violations. Id. Considering the totality of the circumstances, we find that the appropriate remedy in this case is to set aside the approved confinement and forfeitures.

> FN1. We do not hold that the failure of the substitute defense counsel and/or the appellate defense counsel to form an attorney-client relationship with the appellant is affirmative harm to the appellant. Rather, we simply decide that we cannot conclude beyond a reasonable doubt, in light of all the facts in this case, that there is no harm to the appellant.

***4** We are also aware of our authority to grant relief under Article 66(c), UCMJ, but we decline to grant any relief beyond that already described. *Toohey*, 60 M.J. at 102; United States v. Tardiff, 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).

After carefully considering the record of trial, the appellant's assignment of error, and the Government's response, we conclude that the findings, and the sentence as modified in our decretal paragraph, are correct in law and fact. We find that, following our corrective action on the sentence, no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Conclusion

Accordingly, we affirm the findings of guilty and so much of the sentence as provides for reduction to pay grade E–1 and a bad-conduct discharge.

Senior Judge RITTER and Judge FELTHAM concur.

N.M.Ct.Crim.App.,2006.
U.S. v. Sparks
Not Reported in M.J., 2006 WL 4572918 (N.M.Ct.Crim.App.)