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

BEFORE

C.L. CARVER **C.A. PRICE** **D.A. WAGNER**

UNITED STATES

v.

Columbia R. SHILOH
Dental Technician First Class (E-6), U.S. Navy

NMCCA 200101238 Decided 22 August 2005

Sentence adjudged 21 October 1999. Military Judge: D.M. Hinkley. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, U.S. Naval Forces, Japan, Yokosuka, Japan.

Capt ROLANDO SANCHEZ, USMC, Appellate Defense Counsel
Capt WILBUR LEE, USMC, Appellate Government Counsel

WAGNER, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of unpremeditated murder, larceny, assault consummated by battery, and kidnapping, in violation of Articles 118, 121, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 918, 921, 928, and 934. The appellant was sentenced to a dishonorable discharge, confinement for 25 years, total forfeiture of pay and allowances, and reduction to pay grade E-1. The pretrial agreement had no effect on the sentence. The convening authority approved the sentence as adjudged.

The appellant claims in his first assignment of error that the military judge erred by granting the Government's motion in limine to admit into evidence the appellant's confession to Japanese authorities because the appellant's defense counsel was not apprised of the pending interrogation, in contravention of his rights to counsel under the Fifth and Sixth Amendments to the Constitution. In his second assignment of error, the appellant claims that the military judge erred by denying his motion to dismiss for a violation of his Article 10, UCMJ, right to a

speedy trial. In his third assignment of error, the appellant alleges that the post-trial delay in processing his record of trial and reviewing his court-martial was excessive and unreasonable. In his fourth and final assignment of error, the appellant contends that he has suffered cruel and unusual punishment after trial due to the conditions of his confinement.

By our order dated 16 May 2005, this court specified the following issue to the parties:

> Whether the appellant received inadequate assistance of counsel during appellate review of his court-martial where the initial appellate defense counsel filed 28 motions for enlargement of time, including the 23rd, 24th, 25th, and 26th requests wherein the appellate defense counsel stated that the appellant assented to the requests for expedited review filed by appellate defense counsel before this court, and where the appellant states in affidavit dated 25 June 2004 that he "expressly and explicitly made several requests to appellate counsels (sic) to expedite [his] appellate review."

After carefully considering the record of trial, the appellant's assignments of error, the Government's response, the reply brief, the appellant's brief and specified assignment of error, and the Government's answer, 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.

Facts

On 13 March 1997, in an off-base apartment complex in Yokosuka, Japan, the appellant brutally assaulted and murdered his pregnant neighbor, a Japanese national. The victim's husband, a Sailor, was deployed at the time. The facts adduced at trial disclosed that, in the early morning hours, Mrs. Brock fled her apartment, chased by the appellant. He grabbed her forcibly by the arm and dragged her, kicking and screaming, back into her apartment, where he strangled her. He then took her pajamas, cell phone, and apartment key and disposed of them in a dumpster.

Japanese police officials initially opened an investigation, asking for assistance from the Naval Criminal Investigative Service (NCIS), but not entering into a joint investigation. As part of this assistance, NCIS conducted an interview of the appellant where he provided a typed confession. The appellant was then placed in military pretrial confinement and NCIS began their own investigation. Further requests for assistance from Japanese authorities were referred from NCIS to Commander, Fleet Activities, Yokosuka. Japanese officials later conducted their

own interviews with the appellant and obtained oral and hand-written confessions.

At trial, the military judge suppressed the confession provided to NCIS. The Government requested a continuance in the case in order to file an appeal of the military judge's ruling suppressing the confession. The trial was recessed on 5 March 1998 and reconvened on 11 June 1999, after the Government appeal proved unsuccessful. A Government motion in limine to admit into evidence the confessions provided to Japanese investigators was granted and the appellant subsequently entered unconditional guilty pleas.

Confession

In his first assignment of error, the appellant asks this court to review the military judge's ruling granting the Government's motion in limine seeking to admit into evidence the confessions provided to Japanese authorities. We decline to do so. The appellant's unconditional guilty pleas waived appellate review of this issue. RULE FOR COURTS-MARTIAL 910 (j), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), *United States v. Corcoran*, 40 M.J. 478, 482 (C.M.A. 1994).

Trial defense counsel and the appellant both acknowledged at trial that the entry of guilty pleas waived the appellant's right to appeal the ruling of the military judge regarding the motion in limine. Trial defense counsel stated, however, his understanding that any appeal founded in denial of due process was not waived by the pleas. The appellant fails to establish a denial of due process for our consideration. The appellant attempts to have this court review an issue involving the admissibility of evidence in the face of a voluntary guilty plea and an informed waiver on the record by labeling the issue as a due process concern. The argument is not persuasive and is not supported by any citation to authority.

Speedy Trial

In his second assignment of error, the appellant alleges that the military judge erred when he denied the appellant's motion to dismiss for a violation of his right to a speedy trial. The appellant asserts this allegation of error solely under Article 10, UCMJ. At trial, the appellant raised the speedy trial motion under Rule for Courts-Martial 707, Article 10, and the Sixth Amendment. The military judge denied the motion on all grounds.

Before accepting the appellant's pleas, the military judge informed the appellant that, "By a plea of guilty you also give up the right to appeal the decision I made on your motion to dismiss on speedy trial grounds..." Record at 812. The trial defense counsel agreed, stating, "Your Honor, in a technical sense, all motions that the defense has filed thus far, the

guilty plea would waive further appeal." Record at 813. The trial defense counsel also asked the appellate courts, "in the interest of justice," to consider the waived speedy trial issue in spite of the expressed waiver if an appeal then pending before the Court of Appeals for the Armed Forces (C.A.A.F.) in a similar, but unidentified, case were to produce favorable precedent. Record at 815-16.

Our superior court has determined that the appellant's Article 10 speedy trial rights are not waived by an unconditional guilty plea. *United States v. Mizgala*, 61 M.J. 122 (C.A.A.F. 2005). We, therefore, are bound by precedent to consider the issue presented by the appellant in his allegation of error.

Article 10, UCMJ, requires the Government to act with reasonable diligence in proceeding to trial following imposition of pretrial arrest or confinement. *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993). The Government's duty to employ reasonable diligence continues beyond arraignment. *United States v. Cooper*, 58 M.J. 54, 59 (C.A.A.F. 2003). In determining whether the Government used reasonable diligence to take immediate steps to try the appellant, we apply a *de novo* standard of review. *Id.* at 58.

The Supreme Court has established four factors to consider in determining whether there has been a violation of speedy trial rights under the Sixth Amendment: the length of the delay, the reasons for the delay, whether a demand was made for speedy trial, and whether the appellant was prejudiced by the delay. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). The Court emphasized that the appellant's "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id.*, at 532. In the context of analyzing a speedy trial issue under Article 10, UCMJ, we are required to apply these factors, but with the caveat that it is the Government who shoulders the burden of establishing that they acted with reasonable diligence in talking immediate steps to bring the appellant to trial. *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999).

Applying those factors to the appellant's court-martial, we note: (1) the appellant made no demand for speedy trial or for release from pretrial confinement; (2) the appellant did move to dismiss the charges based on a lack of speedy trial; (3) the appellant negotiated a pretrial agreement for a period of approximately one month before signing it on 11 August 1999, just 20 days before entering guilty pleas; (4) the appellant received credit for his pretrial confinement on his sentence; (5) there is no evidence of willful or malicious conduct on the part of the Government to create the delay; (6) the convening authority approved a delay of 45 days for translation of 700 pages of Japanese documents instead of the 60 days requested by the Government; (7) the defense requested several delays, including a request for a four-month delay of the Article 32, UCMJ,

investigation that was approved for just over one month; (8) the appellant benefited from the time and effort of appellate counsel during the Government appeal of the military judge's ruling to suppress statements given to investigators by prevailing on the issue; and (9) appellant suffered no prejudice to the preparation of his case as a result of the delay.

On the basis of our *de novo* review of the record of trial, we conclude that the Government acted with reasonable diligence under the circumstances of this case in taking immediate steps to bring the appellant to trial following imposition of pretrial confinement. We, therefore, decline to grant relief.

Speedy Review

In his third assignment of error, the appellant contends that he was denied speedy review of his court-martial both because of the delay between sentencing and the date the record of trial was received for docketing before this court and because of the delay incurred by appellate defense counsel in reviewing and briefing the issues before this court.

We consider first the appellant's due process right to speedy review. Specifically, we look to four factors in determining if the delay has violated 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. *Jones*, 61 at 83. Moreover, in extreme cases, the delay itself may "give rise to a strong presumption of evidentiary prejudice." *Id.*

Here, the 1277-page, 18-volume record of trial was prepared and authenticated 264 days after sentencing. The staff judge advocate completed review of the record and signed his recommendation 261 days after the record was authenticated. The convening authority took action on the record 79 days later, and the record was received at this court 26 days after the convening authority's action. While the processing of this extensive record was slow in both authentication of the record of trial and in preparing the staff judge advocate's recommendation, it is not so egregious when considered in light of the size of the record as to label it unreasonable on its face.

Since there are no explanations for the delay in the record, we look to the third factor. We find no assertion of the right to a timely appeal. The appellant states that he expressed his concern over the delay to his assigned appellate defense counsel, but specifically states that he does not allege ineffective

assistance of counsel on their part. In response to this court's specified issue of inadequacy of appellate counsel, the original appellate defense counsel provided an affidavit wherein he states that he spoke with the appellant and received the appellant's assent to the various requests for enlargement of time. The appellant does not refute this assertion. There is nothing before the court to indicate that appellate defense counsel ever requested expedited review of this case or asked for assistance from their superiors in order to expedite the review of this case. Appellate defense counsel continued to file enlargement requests stating that they had exercised due diligence and had placed priority in completing other cases over the appellant's case.

Turning to the fourth factor, we do not find any evidence of prejudice suffered by the appellant from the delay in this case. The appellant advances no meritorious allegations of error in his briefs to this court. He is serving a 25-year sentence to confinement and has had ample contact with his appellate defense counsel, as is amplified in his affidavit to the court. Additionally, the delay in this case is not so egregious as to give rise to a presumption of prejudice. Thus, we conclude that there has been no due process violation due to the post-trial delay.

As to the appellant's third assignment of error concerning post-trial delay, we are cognizant of this court's power under Article 66(c), UCMJ, to grant sentence relief for excessive post-trial delay even in the absence of actual prejudice. *United States v. Oestmann,* 61 M.J. 103 (C.A.A.F. 2005); *United States v. Toohey*, 60 M.J. 100 (C.A.A.F. 2004); *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).

The vast bulk of delay, 1083 days, occurred between receipt of the record of trial and filing of the appellant's brief before this court. While the amount of time it took the appellate defense counsel to read and brief this record was excessive, we have not found any prejudice or other harm to the appellant resulting from it, nor have we concluded that the delay affects the "findings and sentence [that] *'should be approved,'* based on all the facts and circumstances reflected in the record." *Id*. (emphasis added). Thus, we find no merit in this assignment of error and decline to grant the requested relief.

Cruel and Unusual Punishment

In his fourth and final assignment of error, the appellant contends that his conditions of post-trial confinement amount to cruel and unusual punishment prohibited by Art. 55, UCMJ, and the Eighth Amendment. The appellant fails to establish that he has addressed his concerns to proper authority in an effort to have them addressed. He must exhaust his administrative remedies before asking this court for relief. *United State v. White*, 54

M.J. 469, 472 (C.A.A.F. 2001). This assignment of error lacks merit.

Adequacy of Appellate Counsel

The appellant bears a weighty burden to show ineffective assistance of counsel. *United States v. Moulton*, 47 M.J. 227, 229 (1997). This is because his defense counsel are "strongly presumed" to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Strickland* establishes a two-part test for the appellate courts to use in determining whether relief is required for ineffective assistance of counsel. First, the appellant must establish that the trial defense counsel's performance was somehow deficient, and then the appellant must show resulting prejudice. *Id.*

The appellant claims that his original appellate defense counsel was deficient because he failed to file any substantive pleadings in the appellant's case, but makes no showing as to what pleadings should have been timely filed. As stated previously, the appellant's allegations of error before this court bear no merit and he was, in all respects, afforded a fair and complete trial.

The appellant also claims that his original appellate defense counsel suffered a conflict of interest between the appellant's case and the other cases competing for counsel's interest. The act of prioritizing cases does not create a conflict of interest and we explicitly reject this argument on its face. While the appellant did make requests to his counsel to expedite his case, he also decided to give his assent to requests for additional time to file his pleadings.

Other than the delay itself, the appellant presents no evidence that his original appellate defense counsel was deficient in any way. In fact, the number and quality of the communications between the appellant and his counsel indicate that his original defense counsel was active in monitoring his case and keeping the appellant apprised of the progress or lack thereof in completing his appeal.

In short, the appellant has failed to overcome the presumption that his original appellate defense counsel was effective. In addition, for the reasons set forth previously in this opinion, we find no prejudice resulting from the delay in this case, and, therefore, no prejudice resulting from appellate defense counsel's performance.

Conclusion

Accordingly, the findings of guilty and sentence, as approved by the convening authority, are affirmed.

Senior Judge CARVER and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court