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

BEFORE

Charles Wm. DORMAN **M.J. SUSZAN** **R.C. HARRIS**

UNITED STATES

v.

Bryant WASHINGTON
Gunnery Sergeant (E-7), U.S. Marine Corps

NMCCA 200101360 Decided 29 July 2005

Sentence adjudged 28 July 1999. Military Judge: A.W. Keller, Jr. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d MAW, U.S. MarForLant, Cherry Point, NC.

LCDR ERIC MCDONALD, JAGC, USN, Appellate Defense Counsel
CAPT TODD BLACKMAR, USMC, Appellate Defense Counsel
LT CHRISTOPHER HAJEC, JAGC, USNR, Appellate Government Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel
CAPT DIANE HOWARD, JAGC, USNR, Appellate Government Counsel

HARRIS, Judge:

A military judge, sitting alone as a general court-martial, convicted the appellant, contrary to his pleas, of making a false official statement, wrongful use of cocaine, wrongful possession of marijuana, and carrying a concealed weapon (loaded 9mm semi-automatic pistol). The appellant's crimes violated Articles 107, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 912a, and 934. The appellant was sentenced to confinement for 60 days, reduction to pay grade E-5, and a bad-conduct discharge. The military judge recommended that the convening authority (CA) suspend the bad-conduct discharge for 12 months from the date of the CA's action. The CA approved the adjudged sentence and, except for the bad-conduct discharge, ordered the punishment executed.

After conducting our initial review of the appellant's record of trial, the appellant's three assignments of error,[1] and the Government's response, we specified the following four issues for briefing by appellate counsel:

> I. WHETHER THE MILITARY JUDGE ERRED WHEN HE DENIED THE APPELLANT'S MOTION TO COMPEL DISCOVERY OF FILES ON BOTH ["SW"] AND ["SM"] RELATED TO CIVILIAN LAW ENFORCEMENT AUTHORITY'S BASIS FOR MAKING A MOTOR VEHICLE STOP AND SIMULTANEOUS SEARCH OF THE APPELLANT'S CAR IN ORDER TO SERVE AN ARREST WARRANT ON [SW] WHO WAS NOT PRESENT WITH THE APPELLANT IN HIS VEHICLE, AND WHO HAD NOT BEEN SEEN IN THE APPELLANT'S VEHICLE SINCE THE DAY BEFORE?
>
> II. WHETHER THE MILITARY JUDGE ERRED: (1) WHEN HE DENIED THAT PART OF THE APPELLANT'S MOTION *IN LIMINE* TO SUPPRESS (UNWARNED) STATEMENTS MADE TO HIS OFFICER-IN-CHARGE (OIC), WHO, AFTER HAVING FIRST ORDERED THE APPELLANT TO REPORT TO HIM FOR THE PURPOSE OF INFORMING THE APPELLANT OF HIS CHANGE IN PRIMARY DUTIES ORDERED BY THE COMMANDING OFFICER, AND WHO, WHILE SO INFORMING THE APPELLANT, ALSO ASKED THE APPELLANT "HOW HIS CASE WAS GOING," WITHOUT FIRST (RE-)ADVISING THE APPELLANT OF HIS RIGHTS UNDER ARTICLE 31(b), UCMJ; AND, (2) WHEN HE ALSO RULED THAT THE APPELLANT'S STATEMENTS MADE TO HIS OIC WERE "SPONTANEOUS?"
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> III. WHETHER THE EVIDENCE WAS FACTUALLY AND LEGALLY SUFFICIENT TO SUSTAIN THE APPELLANT'S CONVICTION FOR WRONGFUL POSSESSION OF A CONTROLLED SUBSTANCE, WHERE, AFTER BEING ADVISED OF HIS RIGHTS UNDER ARTICLE 31(b), UCMJ, THE APPELLANT MADE A SWORN STATEMENT UNDER OATH WHICH INCULPATED HIMSELF AS TO WRONGFULLY CARRYING A CONCEALED FIREARM, BUT EXCULPATED HIMSELF AS TO WRONGFULLY POSSESSING A CONTROLLED SUBSTANCE, AND WHERE THE APPELLANT ALSO PRESENTED UNREBUTTED EVIDENCE OF HIS CHARACTER FOR TRUTHFULNESS (INTEGRITY)[]?

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[1] AOEs:

> I. [THE APPELLANT] WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO PRESENT LIVE WITNESS TESTIMONY REGARDING GOOD MILITARY CHARACTER, REHABILITATIVE POTENTIAL, AND FINANCIAL IMPACT OF LOSS OF RETIRED PAY DURING SENTENCING.
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> II. THE SENTENCE INCLUDING A PUNITIVE DISCHARGE WAS INAPPROPRIATELY SEVERE GIVEN THE NATURE OF [THE] OFFENSES AND THE CHARACTER OF THE OFFENDER.
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> III. [THE] APPELLANT HAS BEEN DENIED SPEEDY POST-TRIAL REVIEW OF HIS COURT-MARTIAL IN THAT 740 DAYS PASSED BEFORE THE [529-]PAGE RECORD OF TRIAL WAS DELIVERED TO THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS FOR APPELLATE REVIEW.

IV. WHETHER THE EVIDENCE WAS FACTUALLY AND LEGALLY SUFFICIENT TO SUSTAIN THE APPELLANT'S CONVICTION FOR MAKING A FALSE OFFICIAL STATEMENT?

Navy-Marine Corps Ct. Crim. App. Order of 17 Dec 2004 (footnote omitted).

We again have reviewed the record of trial, the appellant's briefs on the three AOEs and four specified issues, and the Government's responses. Having done so, we conclude that law enforcement authorities did not have a "reasonable suspicion" to justify stopping the appellant's vehicle and that evidence resulting from that stop was not admissible at trial. We shall take corrective action in our decretal paragraph. Arts. 59(a) and 66(c), UCMJ.

Background

On 3 April 1998, a warrant was in existence for the arrest of the appellant's nephew, SW. An undercover law enforcement officer testified that on 3 April 1998 he was conducting a surveillance of the Gary, Indiana residence of the appellant's mother, which had been searched under warrant the day before. The officer was aware that the day before, SW had left that residence with the appellant in the appellant's late-model white BMW with South Carolina tags. At the time the undercover law enforcement officer was conducting the surveillance of the residence from an unmarked vehicle, he had a photograph and description of the 5'5", 155 lb, 25-year-old SW. Record at 156-57; *see* Prosecution Exhibit 32.

During the surveillance of the residence, from a half a block away, the undercover law enforcement officer observed the 5'9", 175 lb, 37-year-old appellant arrive at the residence with another male and two females in his white BMW, get out of the vehicle and then go into the residence. Later he saw the appellant leave the residence with the same three people and get back into the BMW. Record at 156, 159-60; *see* Prosecution Exhibit 9 and Defense Exhibit GG. The undercover law enforcement officer testified that he determined that the appellant was SW, record at 159, and, after the appellant pulled away from the residence in his white BMW, the undercover law enforcement officer caused uniformed law enforcement officers in marked vehicles to stop the appellant's vehicle. A pistol was found behind the driver's seat during a search of the vehicle. *Id*. at 162. The appellant admitted that he owned the pistol. At that time the uniformed law enforcement officers arrested the appellant for carrying a firearm without a permit. When the appellant's person was subsequently searched, a small amount of marijuana was found (Specification 2 of Charge II). The undercover law enforcement officer did not attempt to serve any arrest warrant at the time of the stop of the appellant's

vehicle. Nor did he file a written report of his actions on 3 April 1998. *Id*. at 165.

Denial of Discovery

In response to this court's first specified issue, the appellant asserts that the military judge erred when he denied the appellant's motion to compel discovery of files on both SW and SM.[2] Their files related to civilian law enforcement authority's basis for making the motor vehicle stop and simultaneous search of the appellant's car in order to serve an arrest warrant on SW. The appellant avers that this court should set aside the findings as to Specification 2 of Charge II and Charge III and its sole specification, dismiss (by implication) Specification 2 of Charge II and Charge III and its sole specification, and reassess the sentence. We do not agree that the military judge erred when he denied the appellant's motion to compel discovery. This, however, does not end our review.

During the Article 39(a), UCMJ, session on the defense discovery motion, during which no testimony was offered, the appellant's trial defense counsel insinuated in both his brief and during argument that there had been a Fourth Amendment violation because there was not a good faith belief on the part of the undercover law enforcement officer to justify a reasonable suspicion motor vehicle stop for the purpose of serving an arrest warrant on a specific occupant of the vehicle who was the object of the warrant. The military judge did not request clarification from the appellant concerning whether he was effectively raising a motion concerning a violation of the Fourth Amendment, which issue would have been effectively waived if not raised. Nor did the military judge discuss or rule on the appellant's insinuated Fourth Amendment violation concerns when he ruled on the appellant's discovery motion, or state that he was deferring a ruling until after he heard the Government's evidence on the merits. We, therefore, review for plain error.

Plain error exists where there is plain or obvious error that materially prejudices the substantial rights of the appellant. *United States v. Reist*, 50 M.J. 108, 110 (C.A.A.F. 1999); *United States v. Fuson*, 54 M.J. 523, 527 (N.M.Ct.Crim.App. 2000). Since a military judge is presumed to know the law and apply it correctly, plain error by a military judge sitting alone is rare. *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000). Therefore, for us to find that the military judge committed plain error, we have to conclude that he erred by admitting at trial evidence seized during an unlawful stop of the appellant's vehicle and that the appellant was prejudiced by the admission of that evidence.

[2] SM was an associate of SW who was also being sought by civilian law enforcement authority.

When a law enforcement officer causes a motor vehicle to be stopped by the side of the road only for the purpose of serving an arrest warrant on a specific occupant of the vehicle and all of its occupants are detained, such a stop constitutes a search and seizure under the Fourth and Fourteenth Amendments, even though the purpose of the stop is sufficiently limited and the resulting detention of all of the occupants is normally quite brief. *United States v. Wheat*, 278 F. 3d 722, 726 (8th Cir. 2001)(citing *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *accord Whren v. United States*, 517 U.S. 806, 809-10 (1996); *see also Thomas v. Dickel*, 213 F.3d 1023, 1024 (8th Cir. 2000)). We review issues involving a law enforcement officer's good faith reasonable suspicion to conduct a motor vehicle stop only for the purpose of serving an arrest warrant on a specific individual *de novo*. *Cf. United States v. Robinson*, 58 M.J. 429, 432 (C.A.A.F. 2003)(citing *Ornelas v. United States*, 517 U.S. 690, 699 (1996)).

In the appellant's case, we evaluate the undercover law enforcement officer's conduct by considering whether a "reasonably well-trained officer" would have acted similarly under the circumstances. *United States v. Leon*, 468 U.S. 897, 923 (1984); *see also Malley v. Briggs*, 475 U.S. 335, 345 (1986)(identifying "reasonably well-trained officer" as the standard for assessing whether an officer is entitled to qualified immunity for applying for a warrant that is subsequently held invalid for lack of probable cause). For, if the law enforcement officer's "subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, house, papers, and effects' only in the discretion of the police." *Leon*, 468 U.S. at 915 n.13 (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964)).

A law enforcement officer's stop of a motor vehicle to serve an arrest warrant is constitutionally permissible provided he has a good faith reasonable suspicion that the occupant or one of the occupants of the motor vehicle is the object of the arrest warrant. *Cf*. *Robinson*, 58 M.J. at 432 (citing *United States v. Cortez*, 449 U.S. 411, 418 (1981)). We review the law enforcement officer's conduct "[b]ased on the totality of the circumstances." *Id*. In the present case, a reasonably well-trained undercover law enforcement officer with eight years experience who wanted to stop a motor vehicle only for the purpose of serving an arrest warrant on a specific individual, should have a good faith basis sufficient to support a reasonable suspicion that the subject of the arrest warrant is an occupant of the vehicle being stopped based on significantly developed physical identification skills. Further, "[t]he factual basis for [the law enforcement officer's] reasonable suspicion must be more than a mere 'hunch.'" *Id*. at 433 (citing *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). Nonetheless, "it need not rise to the level of probable cause, and it falls considerably short of a preponderance of the evidence." *Id*. (citing *United States v. Sokolow*, 490 U.S. 1, 7 (1989)).

After conducting our *de novo* review of the evidence concerning the appellant's apprehension on 3 April 1998, based on the totality of the circumstances and the expected significantly developed physical identification skills of a reasonably well-trained undercover law enforcement officer with eight years law enforcement experience, we conclude that the undercover law enforcement officer who caused the appellant's vehicle to be stopped only for the purpose of serving an arrest warrant on a specific individual, did so without having a good faith reasonable suspicion that the object of the arrest warrant was an occupant of the appellant's vehicle at the time he caused the vehicle to be stopped.

Based on the totality of the circumstances and the expected developed physical identification skills of a well-trained undercover law enforcement officer with eight years law enforcement experience, we conclude that the undercover law enforcement officer did not have a sufficient basis for causing the appellant's motor vehicle to be stopped. As such, we find that the admission of evidence seized as a result of that stop was not admissible over objection, that the military judge erred in admitting that evidence, and that the appellant was prejudiced by this error. We will, therefore, take corrective action below.

Suppression of Admissions

In response to this court's second specified issue, the appellant asserts that the military judge erred: (1) when he denied that part of the appellant's motion *in limine* to suppress (unwarned) statements made to his officer-in-charge (OIC), who, after having first ordered the appellant to report to him for the purpose of informing the appellant of his change in primary duties ordered by the commanding officer, and who, while so informing the appellant, also asked the appellant "how his case was going," without first (re-) advising the appellant of his rights under Article 31(b), UCMJ; and, (2) when he also ruled that the appellant's statements made to his OIC were "spontaneous." The appellant avers that this court should set aside and dismiss (by implication) the findings as to Specification 1 of Charge II, and reassess the sentence. We disagree.

Even if the military judge's rulings were erroneous, the appellant neither asserts nor establishes prejudice. The appellant's OIC did not testify at trial. Further, the appellant elicited testimony from a defense witness during trial establishing the same information the appellant reportedly told his OIC. As such, we find no prejudice and need not reach the issue of possible error. *See* Art. 59(a), UCMJ. We, therefore, decline to grant relief.

Sufficiency of Evidence of Making a False Official Statement

In response to this court's fourth specified issue, the appellant asserts that the evidence was not factually and legally sufficient to sustain his conviction for making a false official statement. The appellant avers that this court should set aside the findings as to Charge I and its sole specification, dismiss (by implication) Charge I and its sole specification, and reassess the sentence. We disagree.

A military court of criminal appeals has an independent statutory obligation to review each case *de novo* for legal and factual sufficiency, and may substitute its own judgment for that of the trial court. Art. 66(c), UCMJ; *see United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). In doing so, this court's assessment of both legal and factual sufficiency is limited to the evidence presented at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

The test for legal sufficiency is whether, considering the evidence admitted at trial in the light most favorable to the prosecution, a reasonable fact-finder could have found that all the essential elements were proven beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000)(citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *United States v. Spann*, 48 M.J. 586, 588 (N.M.Ct.Crim.App. 1998), *aff'd*, 51 M.J. 89 (C.A.A.F. 1999). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41; *Turner*, 25 M.J. at 325; *see* Art. 66(c), UCMJ. Reasonable doubt does not mean that the evidence contained in the record must be free from any and all conflict. *United States v. Reed*, 51 M.J. 559, 562 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). In exercising the duty imposed by this "awesome, plenary, *de novo* power," *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990), this court may judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the military judge or court-martial members. Art. 66(c), UCMJ. Further, we may believe one part of a particular witness' testimony yet disbelieve another part. *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979); *see* Art. 66(c), UCMJ.

We have carefully examined all of the evidence admitted on the merits at the appellant's court-martial as it pertains to his making of a false official statement. We conclude that the Government's evidence on the merits was sufficient. We, therefore, conclude that the evidence was both legally and factually sufficient as to the offense of making a false official statement. Thus, we are convinced beyond a reasonable doubt as to the appellant's guilt of the offense, as found by the military judge. As such, we decline to grant relief.

Post-Trial Delay

In the appellant's third AOE, he asserts that he is being denied speedy post-trial processing of his court-martial in that 740 days passed before this court received his 529-page record of trial for appellate review. The appellant avers that we should exercise our authority under Article 66(c), UCMJ, and only affirm a sentence that does not include a bad-conduct discharge. We disagree.

Every military appellant has a statutory and due process right to timely appellate review. *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37-38 (C.A.A.F. 2003)(concluding that an "[appellant's] right to a full and fair review of his findings and sentence under Article 66[(c), UCMJ,] embodies a concomitant right to have that review conducted in a timely fashion. Additionally, [an appellant] has a constitutional right to a timely review guaranteed him under the Due Process Clause." (citation omitted)). We are also 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. *See United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). Where post-trial delay is determined to be excessive and unexplained, we must decide whether the unexplained delay is "facially unreasonable." *See United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005). If we find unexplained delay to be facially unreasonable, this triggers a due process review under *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *See id.* (applying the following factors to determine whether the appellant's due process rights have been violated: (1) length of the delay; (2) reasons for the delay; (3) the appellant's assertion of the right to timely appellate review; and (4) the resulting prejudice to the appellant from the delay). In *Jones*, the Court of Appeals for the Armed Forces, after applying the four *Barker v. Wingo* due process review factors to the timeliness of the post-trial and appellate processing of that appellant's case, found that the unreasonably lengthy and unexplained delay prejudiced Jones as a matter of law. *Id*. at 85. Key to our superior court's finding of prejudice to that appellant was their determination that he demonstrated "on-going prejudice." *Id*. at 84.

The *Jones* court concluded that where the length of delay is so short that it is determined to be facially reasonable, the rest of the analysis under *Barker v. Wingo* is unnecessary. *Id*. at 83 (quoting *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). If 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*. Nonetheless, where the length of delay is determined to be facially unreasonable, the reasons for the delay, or the absence of demand for speedy review, or the absence of prejudice to an appellant can mitigate the unreasonableness of the delay under the particular circumstances of that appellant's case. Only where the delay is still determined to be unreasonable would there be a presumption of

prejudice, even in the absence of actual prejudice. Review of the appellant's case leads us to conclude that the delay in the appellant's case is facially unreasonable such that a presumption of prejudice is warranted.

The delay between the appellant's 28 July 1999 sentencing and the CA taking his action on 11 June 2001 was 684 days. The appellant's case was then docketed with this court for appellate review 56 days later on 6 Aug 2001. After the parties filed their final pleadings, the appellant's case became ready for this court's review on 8 October 2003.

On 4 October 2004, this court denied the appellant's 24 September 2004 motion for expedited review because the court had already begun to review the case. On 17 December 2004, having completed our initial review of the appellant's case, we ordered briefs on the specified issues. After the parties filed their final pleadings on the four specified issues on 21 April 2005, the case again became ripe for decision.

Assuming the unexplained post-trial delay in this case is excessive, we do not find any prejudice or other harm to the appellant resulting from the delay, nor do we conclude that it affects the "findings and sentence [that] '*should be approved*,' based on all the facts and circumstances reflected in the record. . . ." *Tardif*, 57 M.J. at 224 (emphasis added). The CA fully considered the appellant's request for clemency. Moreover, the appellant never complained to the military judge, staff judge advocate, or CA about the delay. As such, we conclude that the facial presumption of prejudice has been dissipated. We therefore do not find the 684-day unexplained delay between the appellant's trial and the CA's action to be excessive. We also do not find the 56 days after the CA's action that it took to docket the appellant's case with this court for appellate review to be excessive. Nor do we find the time from docketing to this court's opinion to be excessive. Despite the appellant's complaint that the length of time is sufficient to warrant relief, we do not find a lack of diligence in the post-trial processing of this case. The appellant has not alleged, nor do we find, any indication of deliberate or malicious intent as a reason for the delay in this case. *See United States v. Toohey*, 60 M.J. 703, 708 (N.M.Ct.Crim.App. 2004).

While we do not condone lengthy delay in any case, we conclude that there is nothing so extraordinary about the appellant's case that merits the exercise of our powers under Article 66(c), UCMJ. *Toohey*, 60 M.J. at 708. We also conclude that there has been no due process violation due to the post-trial delay. *See Jones*, 61 M.J. at 85; *Toohey*, 60 M.J. at 103; *Diaz*, 59 M.J. at 37; *Tardif*, 57 M.J. at 224; *see also United States v. Diaz*, ___ M.J. ___, No. 200200374 (N.M.Ct.Crim.App. 23 Mar 2005). Nonetheless, we are considering the delay in arriving at an appropriate re-assessed sentence.

Conclusion

The findings as to Specification 2 of Charge II and Charge III and its sole specification are set aside and dismissed. We affirm the remaining findings. Our action on the findings moots specified issue III. As a result of our action on the findings, we must reassess the sentence in accordance with the principles set forth in *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998), *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990), and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). Having done so, we affirm only that portion of the sentence extending to confinement for 60 days and reduction to pay grade E-5. This reassessed sentence moots AOE I and AOE II.

Chief Judge DORMAN and Judge SUSZAN concur.

For the Court

R.H. TROIDL
Clerk of Court

Judge HARRIS took final action on this case prior to his departure from the Court.