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

BEFORE

C.L. CARVER **D.A. WAGNER** **J.F. FELTHAM**

UNITED STATES

v.

Scipio J. WILLIAMS
Corporal (E-4), U.S. Marine Corps Reserve

NMCCA 200101854 Decided 14 September 2005

Sentence adjudged 7 August 2000. Military Judge: J.V. Garaffa. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Marine Forces Reserve, New Orleans, LA.

LT MICHAEL J. NAVARRE, JAGC, USNR, Appellate Defense Counsel
LT JASON GROVER, JAGC, USN, Appellate Defense Counsel
LT GUILLERMO ROJAS, JAGC, USNR, Appellate Government Counsel
LT C.C. BURRIS, JAGC, USNR, Appellate Government Counsel

WAGNER, Judge:

The appellant was convicted, pursuant to his pleas, by a military judge sitting as a general court-martial, of attempted larceny, conspiracy to commit larceny, disrespect to a superior commissioned officer, striking a superior commissioned officer then in the execution of her office, dereliction of duty, five specifications of larceny, forgery, making a false official document, making and using a false armed forces identification card, stealing mail matter, and wearing unauthorized ribbons or insignia, in violation of Articles 80, 81, 89, 90, 92, 121, 123, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 881, 889, 890, 921, 923, and 934,. The appellant was sentenced to a bad-conduct discharge, confinement for 2 years, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged and, pursuant to a pretrial agreement, suspended confinement in excess of 18 months.

We previously reviewed this case and issued an unpublished opinion granting partial relief. *United States v. Williams,* No. 200101854, unpublished op. (N.M.Ct.Crim.App. 21 Oct 2003). Our

superior court set aside our decision because it contained verbatim replication of substantial portions of the Government's Answer Brief without attribution. The case was remanded to our court for a new review pursuant to Article 66(c), UCMJ, "before a panel comprised of judges who have not previously participated in this case." U.S.C.A.A.F. Order dtd September 30, 2004 (citing *United States v. Jenkins,* 60 M.J. 27 (C.A.A.F. 2004)).

The appellant submitted two supplemental assignments of error[1] in addition to the six[2] originally submitted to this court in the initial pleading. After considering the record of trial, the eight assignments of error, the Government's responses, and the appellant's replies, we conclude that, after taking action in our decretal paragraph, the remaining findings and the sentence are correct in law and fact and that no other error materially prejudicing the appellant's substantial rights was committed.[3] Arts. 59(a) and 66(c), UCMJ.

Facts

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[1] I. CONGRESS'S DELEGATION TO THE PRESIDENT UNDER ARTICLE 56, UCMJ, TO ENACT FINDINGS OF FACT THAT INCREASE THE MAXIMUM PUNISHMENT UNDER ARTICLES 92 AND 121, UCMJ, VIOLATES THE SEPARATION OF POWERS DOCTRINE IN LIGHT OF *APPRENDI v. NEW JERSEY*. (Footnote omitted.)

II. CPL WILLIAMS HAS A DUE-PROCESS RIGHT TO TIMELY APPELLATE REVIEW. CPL WILLIAMS WAS SENTENCED ON 7 AUGUST 2000 AND HIS CASE IS STILL IN APPELLATE REVIEW. DOES THIS VIOLATE CPL WILLIAMS' DUE-PROCESS RIGHT TO A TIMELY APPEAL?

[2] I. APPELLANT'S PLEA TO THE SOLE SPECIFICATION OF CHARGE V IS IMPROVIDENT BECAUSE APPELLANT CAN NOT BE DERELICT IN HIS DUTIES FOR DUTIES OF WHICH HE HAD NO ACTUAL KNOWLEDGE.

II. CHARGE V AND THE SOLE SPECIFICATION THEREUNDER FAIL TO STATE AN OFFENSE SUFFICIENT TO PUT THE APPELLANT ON NOTICE OF THE BASIS FOR THE OFFENSE BECAUSE APPELLANT CAN NOT BE DERELICT IN HIS DUTIES FOR DUTIES OF WHICH HE WAS NEVER ASSIGNED.

III. THE SPECIAL COURT-MARTIAL CONVENING AUTHORITY ADJUTANT, MAJOR BUTLER, WAS SO INVOLVED IN ALL LEVELS OF THIS CASE INCLUDING PROVIDING LEGAL ADVICE TO THE APPELLANT THAT SHE UNLAWFULLY INFLUENCED THE REFERRAL AND TRIAL PROCESS.

IV. APPELLANT'S SENTENCE OF A BAD CONDUCT DISCHARGE, TWO YEARS CONFINEMENT, AND REDUCTION TO E-1 IS INAPPROPRIATELY SEVERE IN LIGHT OF THE SENTENCE OF THREE YEARS CONFINEMENT (SUSPENDED) IN CIVILIAN COURT FOR THE SAME CHARGES.

V. THE MILITARY JUDGE ERRED WHEN HE FAILED TO ENTER FINDINGS OF NOT GUILTY TO THE EXCEPTED LANGUAGE IN ADDITIONAL CHARGE II AND ITS SOLE SPECIFICATION AFTER THE GOVERNMENT DID NOT GO FORWARD ON THE "NAVY UNIT COMMENDATION" LANGUAGE AND DID NOT WITHDRAW THOSE CHARGES BEFORE THE MILITARY JUDGE ENTERED HIS FINDINGS. ALTERNATIVELY THE CONVENING AUTHORITY'S ACTION FAILS TO INDICATE THAT THE "NAVY UNIT COMMENDATION" LANGUAGE IN THE ADDITIONAL CHARGE II SPECIFICATION WAS WITHDRAWN AND DISMISSED "WITH PREJUDICE."

VI. THE CONVENING AUTHORITY ERRED WHEN IT OMITTED THE APPELLANT'S PLEAS AND THE COURT'S FINDING FOR THE SPECIFICATION OF ADDITIONAL CHARGE I (CONTAINED IN THE COURT-MARTIAL ORDER AS ADDITIONAL CHARGE II) FROM THE COURT-MARTIAL ORDER.

[3] The appellant's Motion for Oral Argument, filed on 15 November 2004, is denied.

The appellant, a drilling reservist who had returned to active duty, was assigned to work in the mailroom at his command. He had no prior experience or training in mailroom operations and relied heavily on the expertise of the other Marines working with him. He became involved in a scheme with one of them, Corporal (Cpl) Muse, to steal credit cards and automatic teller machine cards from the mailroom. Cpl Muse was also an administrative clerk at the command and thus had access to the Marine Corps Total Force Structure Manpower Information System (MCTFSMIS). Cpl Muse used that system to obtain the personal information of other Marines in order to activate the cards stolen from the mailroom. The appellant had no experience or training in the MCTFSMIS.

The appellant was arrested and incarcerated by the State of Georgia for charges arising out of the mailroom conspiracy. The appellant was eventually tried in state court and convicted of felony financial transaction card fraud. He was sentenced to serve 3 years confinement and to pay $1,815.60 in fines and restitution. All confinement in excess of time served in pretrial confinement, 127 days, was suspended for 3 years. With the approval of the Judge Advocate General (JAG) of the Navy, pursuant to the Manual of the Judge Advocate General, JAG Instruction 5800.7C § 0124 (Ch-3, 27 Jul 1998), the Commander, Marine Forces Reserve, convened the general court-martial we now review.

Providence of Guilty Plea

In his first allegation of error and in his reply brief, the appellant claims that the military judge erred in accepting his plea of guilty to the sole specification under Charge V, dereliction of duty. We agree.

The specification stated that the appellant was derelict in that he willfully failed to access the MCTFSMIS for "solely an authorized and official purpose." Charge Sheet. The appellant stated during the military judge's inquiry into the providence of his guilty pleas that he did not know initially how Cpl Muse was gaining the personal information of other service members necessary to activate the stolen cards. He went on to state that he discovered Cpl Muse was using the MCTFSMIS, but never used the system himself or gained any knowledge of the system or its operating requirements. The sole theory of criminal liability was the appellant's responsibility for crimes committed by Cpl Muse in furtherance of the criminal enterprise. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 5c(5); *see United States v. Jefferson*, 22 M.J. 315, 323 (C.M.A. 1986)(citing *Nye & Nissen v. United States*, 336 U.S. 613 (1946)).

Ultimately, whether the appellant's plea to this specification was provident relies on whether the actions of Cpl

Muse satisfied the required elements of the offense. Under the circumstances of this case, we do not believe they do so.

Cpl Muse essentially abused his authority by accessing the MCTFSMIS for an unauthorized purpose. There is no evidence in the record that Cpl Muse was under a specific duty not to use the system for unauthorized purposes and no evidence that Cpl Muse was otherwise derelict in his administrative clerk duties vis-à-vis the system by virtue of his unauthorized access. As this court has previously held, and as the appellant properly points out in his reply brief, dereliction of duty does not "encompass acts committed which go beyond the scope of one's duties." *United States v. Sojfer*, 44 M.J. 603, 610 (N.M.Ct.Crim.App. 1966), *aff'd*, 47 M.J. 425 (C.A.A.F. 1998).

Accordingly, the appellant's guilty plea to dereliction of duty under the sole specification of Charge V was not provident and the military judge erred in accepting the plea based on the facts contained in the record. We will take corrective action in our decretal paragraph. In light of our resolution of this issue in the appellant's favor, the appellant's second allegation of error, also involving this specification, is moot.

Although not assigned as error, we note that the appellant failed to state facts sufficient to support the word "strike" as used in the sole specification under Charge IV, involving assault upon a superior commissioned officer. The facts adduced during the providence inquiry did satisfy all the elements of the offense, except that the offensive touching involved the appellant "touching" the victim's neck and shoulders with his hands. Record at 38. We will take corrective action in our decretal paragraph.

Unlawful Command Influence

The appellant claims in his fourth assignment of error that the actions of Major (Maj) Butler, his Officer-in-Charge, throughout the investigation and trial, amounted to unlawful command influence and asks this court to order a hearing pursuant to *United States v. Dubay,* 37 C.M.R. 411 (C.M.A. 1967). This issue is without merit.

No motion for unlawful command influence was raised at trial. Nonetheless, this issue is not waived. *United States v. Johnson,* 39 M.J. 242, 244 (C.M.A. 1994). The appellant is required on appeal to meet the threshold burden of providing some evidence that would raise unlawful command influence. *United States v. Dugan*, 58 M.J. 253, 258 (C.A.A.F. 2003)(citing *United States v. Ayala*, 43 M.J. 296, 299 (C.A.A.F. 1995). The appellant has failed to meet this low burden.

Maj Butler certainly had many roles in this case: officer-in-charge; legal officer to the special court-martial convening authority; victim; Government witness; and escort for

the appellant to and from interviews with law enforcement. However, the charges were referred to trial by a general court-martial convening authority, and there is no evidence that Maj Butler or her actions had any impact on that convening authority. The appellant requests a *Dubay* hearing in order to question Maj Butler to discover if her actions had any impact on the proceedings. There is no evidence that Maj Butler is unavailable for questioning by the appellant's counsel in order to answer these questions and ascertain whether any basis for unlawful command influence lies in this case. The appellant's request for a *Dubay* hearing is simply a fishing expedition.

Sentence Appropriateness

In his fourth assignment of error, the appellant alleges that his sentence of confinement for 2 years, reduction to pay grade E-1, and a bad-conduct discharge is inappropriately severe in light of the sentence he received in civilian court for many of the same offenses. He was sentenced to three years suspended confinement and $1,815.60 in fines. We disagree and decline to grant relief.

We note that the appellant pled guilty to many more offenses at his court-martial than he did at his civilian court was sentenced for by the civilian court. The charges of which the appellant was convicted accurately and fairly reflect his criminal conduct and were deserving of the sentence adjudged at his court-martial, even considering the punishment he received in civilian court. After reviewing the entire record, we find that the sentence is appropriate for this offender and his offenses. *United States v. Healy,* 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling,* 14, M.J. 267, 268 (C.M.A. 1982).

Findings and Court-Martial Promulgating Order

We agree with the appellant's fifth and sixth assignments of error, alleging that the military judge erred when he failed to enter findings of not guilty to the excepted language "Navy Unit Commendation" in the sole specification under Additional Charge II and that the convening authority erred when he omitted the pleas and findings for the sole specification under Additional Charge I. We will take corrective action in our decretal paragraph.

Application of *Apprendi v. New Jersey* to the UCMJ

In his first supplemental assignment of error, the appellant asks this court to apply *Apprendi v. New Jersey,* 530 U.S. 466 (2000), a case involving the practice of increasing the statutory maximum punishments for an offense by the use of sentence enhancement provisions not apparent in the indictment stage and not subject to scrutiny by the jury, to the President's authority to prescribe maximum punishments lower than those authorized by Congress. This argument is without substance. Congress has

authorized as a maximum for UCMJ offenses tried before a general court-martial "any punishment that a court-martial may direct," except for death. Article 18, UCMJ. The President has the authority only to further limit the maximum punishments for the various UCMJ offenses. *Id*. Nothing in the UCMJ increases a statutorily-imposed maximum sentence, thereby triggering an *Apprendi* analysis.

Speedy Review

In his second supplemental assignment of error, the appellant contends that he was denied speedy review of his court-martial. We disagree and decline to grant relief.

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. *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, the appellant was sentenced on 7 August 2000. The convening authority took action on the record on 5 October 2001. The case was docketed with this court on 15 October 2001, but was not finally briefed by appellate counsel until 13 August 2003. The first opinion in this case was issued on 21 October 2003. Our superior court remanded the case for a new review on 30 September 2004. While the processing of this record was slow in moving toward the convening authority's action and subject of lengthy appellate processing, it is not, on its face, egregious in light of the extensive appellate practice surrounding the issues in the case.

Assuming, arguendo, that the delay was 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 prior to the filing of the appellants' brief and supplemental assignments of error on 15 November 2004.

Turning to the fourth factor, we do not find any evidence of prejudice suffered by the appellant from the delay in this case. 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.

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); *Toohey,* 60 M.J. at 100; *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). We have not concluded that the delay affects the "findings and sentence [that] 'should be approved' based on all the facts and circumstances reflected in the record." *Tardiff*, 57 M.J. at 224 (emphasis added). Thus, we find no merit in this assignment of error and decline to grant the requested relief.

Conclusion

Charge V and its sole supporting specification are set aside and dismissed. In the sole specification under Charge IV, the word "strike" is dismissed and the word "touch" is substituted therefor. In the sole specification under Additional charge II, the words "Navy Unit Commendation" are dismissed. We reassess the sentence and conclude that even if no error had occurred at trial the appellant would have received the same sentence. The findings, as modified, and the sentence, as approved by the convening authority, are affirmed. We order the supplemental promulgating order accurately reflect the approved guilty findings.

Senior Judge CARVER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court