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

BEFORE

C.L. CARVER **D.A. WAGNER** **R.W. REDCLIFF**

UNITED STATES

v.

Abel M. BARO
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200200429 Decided 9 May 2005

Sentence adjudged 8 February 2001. Military Judge: T.L. Miller. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 3d Marine Division (-)(Rein), Okinawa, Japan.

Col KATHERINE GUNTHER, USMCR, Appellate Defense Counsel
Capt ROLANDO SANCHEZ, USMC, Appellate Defense Counsel
LT MARK HERRINGTON, JAGC, USNR, Appellate Government Counsel

WAGNER, Judge:

Pursuant to mixed pleas, the appellant was convicted by a general court-martial, composed of officer and enlisted members, of failure to obey a lawful general order by consuming alcohol while under the age of 21 years, assault consummated by a battery, and disorderly conduct, in violation of Articles 92, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 928, and 934. The appellant was sentenced to a bad-conduct discharge, forfeiture of $1,042.80 pay per month for 6 months, and reduction to pay grade E-1. There was no pretrial agreement. The convening authority approved only so much of the adjudged sentence "that included" a bad-conduct discharge, forfeitures of $695.00 pay per month for 6 months, and reduction in rate to pay grade E-1. The appellant asserts nine assignments of error.[1]

[1] The Allegations of Error filed in appellant's brief were as follows:

I. Appellant was denied the speedy trial guaranteed him by the Sixth Amendment to the Constitution and Article 10, Uniform Code of Military Justice, and his due process rights under the Fifth Amendment in that he spent 114 days in pretrial confinement.

After carefully considering the record of trial, the appellant's assignments of error[2], the Government's response, and

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II. Appellant was a victim of unlawful command influence in that the III MEF commander had ordered subordinates to "squash" those service members involved in liberty and alcohol-related incidents, a staff judge advocate was appointed as Article 32 investigating officer, and the convening order excluded all officers under pay grade of lieutenant colonel.

III. Appellant was deprived of his Sixth Amendment right to effective assistance of counsel where counsel did not permit him to testify.

IV. Appellant was denied a fair trial because the military judge abandoned his impartial, unbiased role and became a partisan for the prosecution.

V. Appellant was prejudiced by the denial of speedy post-trial and appellate review of his court-martial.

VI. The sentence in appellant's case is inappropriately severe in that the general court-martial failed to take into account the character and past performance of appellant and sentenced him to reduction to private, total forfeitures for six months, and a punitive discharge for offenses normally disposed of at nonjudicial punishment.

VII. The military judge erred in failing to grant Appellant's motion at trial for a finding of not guilty to the specification under Article 134, UCMJ, in that the evidence is legally and factually insufficient to support a finding of disorderly conduct.

VIII. The military judge erred in failing to grant Appellant's motion at trial to suppress the statement allegedly made by him to Lance Corporal (LCpl) Shellgren, who was acting as an agent for the platoon sergeant in gathering evidence in this case, and as such, as an agent for the Government.

IX. The record of trial is incomplete in Appellant's case, and therefore the sentence must be reduced in accordance with RULE FOR COURTS-MARTIAL 1103(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.).

[2] The court notes with concern the many discrepancies between the facts contained in the record of trial and the summary of facts contained in the appellant's brief, as well as in the appellant's reply to the Government's brief. We remind counsel that the art of creative advocacy must be restrained by a faithful adherence to the record. Liberal quotation from the record often is more persuasive than hyperbole.

For example, on page 3 of his brief, the appellant states that the cut he suffered to his hand was "much" worse than the cuts on LCpl M's throat. The court found support in the record for the statement that the cut on the appellant's hand was worse than the cut on the victim's throat, but no characterization in the record of it being "much" worse. On page 8, the appellant states that the Government threw him in the brig "after demanding statements and evidence without any Article 31 rights warnings." This is, at the very least, a materially incomplete summary of the facts adduced on the record. Again, on page 8, the appellant claims that "some witnesses were unavailable." We find no basis for this statement in the record. On page 9, the appellant characterizes visits from command members while in pretrial confinement as follows: "Members of LCpl Baro's command even came to apologize for the unexplained delay," citing his declaration to the court. The appellant's actual words from the declaration are quite different. The appellant, in ¶ 8 of his declaration, states that when command members came to visit, "they would apologize because they didn't know what was going to happen to me." On page 10, the appellant's brief states that the trial judge found "what he considered referral irregularities" during the first session of court on 4 January 2001. In fact, the record reflects that the military judge

the appellant's reply brief, 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.

Speedy Trial

In his first assignment of error, the appellant contends, for the first time on appeal, that he was denied a speedy trial, as provided by the Sixth Amendment to the United States Constitution and Article 10, UCMJ, because four months passed between his initial date of pretrial confinement and adjournment of his court-martial. The appellant asks this court to set aside the findings and sentence. We disagree and decline to grant relief.

Once an appellant is placed in pretrial confinement, immediate measures must be taken to notify him of the charges against him and either bring him to trial or dismiss the charges. Art. 10, UCMJ. Although the Government is required to exercise reasonable diligence in bringing an accused to trial, proof of constant motion is not necessary. *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993). Furthermore, for an appellant to prevail on an assertion that he was deprived of his right to a speedy trial, he must in the first instance make a *prima facie* showing or a colorable claim that he is entitled to relief. *United States v. McLaughlin*, 50 M.J. 217, 219 (C.A.A.F. 1999).

In determining whether the appellant has been denied his right to a speedy trial under Article 10, UCMJ, and the Sixth

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simply recessed the court to allow production of successor-in-command documents at the request of the trial defense counsel. On pages 13-14, the appellant states that "Several members expressed the inability to even consider the possibility of a sentence of no punishment for an alcohol-related violation," and that members Lieutenant Colonel (LtCol) Almquist, LtCol Liddell, Captain (Capt) Coleman, Capt Collazo, Sergent Major (SgtMaj) Scharnhorst, and Gunnery Sergeant (GySgt) Foshee were *all* aware of the e-mail directive contained in AE XXVIII. (Emphasis added.) These summaries do not match the evidence in the record of trial.

This problem occurs also in the appellant's reply brief, where, on page 3, the appellant states "*All* members of the court-martial admitted during voir dire that they were aware of the *command policy* to reduce *by extreme measures* the recurrence of liberty incidents, *particularly those involving alcohol*." (Emphasis added.) First, several members denied knowledge of any command policy. Second, all members denied that there was a command policy. Third, the words "by extreme measures" do not appear in the cited portions of the record of trial. Finally, the court could not find, in the cited portion of the record, facts indicating that the liberty incident communications where particularly aimed at incidents involving alcohol. Again, on page 4, the appellant states that ". . . an article appeared in the Stars and Stripes newspaper that highlighted yet again the MEF commander's *policy on crushing liberty offenders*." (Emphasis added.) The court failed to find any portion of the article that emphasized such a policy.

Amendment, we consider the following factors: (1) the length of the delay; (2) the reasons for the delay; (3) the assertion of the right to speedy trial; and (4) the existence of prejudice. *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999)(quoting *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). We will also consider, as did the *Birge* court, the following specific factors: (1) did the appellant enter pleas of guilty, and if so, was it pursuant to a pretrial agreement; (2) was credit awarded for pretrial confinement on the sentence; (3) was the Government guilty of bad faith in creating the delay; and (4) did the appellant suffer any prejudice to the preparation of his case as a result of the delay. *Id*.

The appellant was placed in pretrial confinement on 16 October 2000 (Day 1). Charges were preferred against the appellant on 23 October 2000 (Day 8). An Article 32, UCMJ, investigating officer was appointed by two separate appointing letters dated 4 and 14 November 2000 (Days 20 and 30). The investigating officer provided a report of investigation on 30 November 2000 (Day 46), recommending that the charges be referred for trial by general court-martial. On 18 December 2000 (Day 64), the appointing authority forwarded the charges with a recommendation for trial by general court-martial. On 22 December 2000 (Day 68), the staff judge advocate provided an Article 34, UCMJ, advice letter regarding the charges. The charges were referred for trial by general court-martial that same day.

An Article 39(a), UCMJ, session was called to order on 4 January 2001 (Day 81) to arraign the appellant. The defense objected to the propriety of the referral and requested production of a successor in command document. The military judge recessed the session in order to allow for production of this document.

The accused was then arraigned on 12 January 2001 (Day 88). As agreed between trial and defense counsel, the military judge set the trial date for 4 February 2001. An Article 39(a), UCMJ, session to hear motions was set for 29 January 2001. The trial defense counsel did not object to the trial dates and made no demand for speedy trial. The appellant failed to raise the issue of speedy trial before the military judge.

The appellant would ask this court to hold the Government accountable for the number of days that elapsed between the initial date of pretrial confinement and the date of sentencing in this case, 114 days. We are unwilling to do so. The appellant was brought to trial 88 days after he was placed in pretrial confinement. Once the appellant was arraigned, he had the military judge's attention to the scheduling of his court-martial. Any concerns regarding the trial schedule or demand for speedy trial could easily have been made a matter of record. Having not availed himself of that opportunity at trial, the

appellant cannot now complain that the Government is responsible for the delay between arraignment and sentencing in this case.

Even assuming that the total delay in this case was 114 days, such a delay is not, in and of itself, egregious under the circumstances of this case. The Government advances cogent reasons for the delay, citing the many steps toward trial alluded to above. There is no evidence of bad faith or foot-dragging on the part of the Government in bringing this case to trial. Also, the only evidence of prejudice offered by the appellant is the claim that witnesses had difficulty remembering events. A thorough reading of the record of trial, however, does not disclose significant facts clouded by the passage of time.

Based on the foregoing, we conclude that the appellant has not met his threshold burden of presenting a *prima facie* showing or a colorable claim that he is entitled to relief. *McLaughlin*, 50 M.J. at 219. We decline to grant the requested relief.

Unlawful Command Influence

The appellant claims that he was the subject of unlawful command influence at his court-martial because the commanding general had ordered subordinates to "squash" those service members involved in liberty incidents, because a staff judge advocate was appointed as the Article 32, UCMJ, investigating officer, and because the convening order excluded all officers under the rank of lieutenant colonel. We disagree and decline to grant relief.

Unlawful command influence is prohibited under Article 37(a), UCMJ, which states in pertinent part that:

> No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case . . . .

United States v. Biagase, 50 M.J. 143 (C.A.A.F. 1999), sets forth the analytical framework for deciding issues involving unlawful command influence. The defense has the burden to raise the issue of unlawful command influence by presenting "some evidence" to show that command influence did exist and that it had a "potential to cause unfairness in the proceedings." *Id.* at 150. The burden of proof then shifts to the Government to show either that there was no unlawful command influence or that it did not have any effect on the findings or sentence of the court-martial. *Id.* On appeal, in order for the Government to prevail, this court must be persuaded beyond a reasonable doubt either that the unlawful command influence did not exist or that it had no prejudicial impact on the court-martial. *Id.* at 151.

The appellant argues that the convening authority excluded junior officer members in his case by referring the charges against him to a court martial panel that contained only colonels and lieutenant colonels. The facts elicited at trial establish that the panel had been selected for a trial involving a major, necessitating selection of higher-ranking officers. The panel was still in existence at the time the charges were ready for referral against the appellant. The convening authority referred the charges to the pre-existing panel. We find nothing in the record to suggest that the convening authority purposely excluded junior officers from the appellant's court-martial panel. In fact, the convening authority, prior to trial, modified the original convening order, relieving all but one of the original members (a lieutenant colonel) and detailing a lieutenant colonel, two captains, and a first lieutenant in their place. In response to the appellant's request for enlisted members, the convening authority also detailed five enlisted members to the panel. The military judge properly denied the appellant's motion for appropriate relief regarding this issue at trial, and we find this argument to be wholly without merit.

The appellant also contends that the detailing of a staff judge advocate as the Article 32, UCMJ, investigating officer in his case constituted unlawful command influence. There is no evidence that the investigating officer was in any way involved in the appellant's case before being appointed to conduct the investigation. The record establishes that he did not work for the convening authority. The appellant fails to show that the investigating officer was partial or biased and fails to present any basis in law for the proposition that a staff judge advocate cannot serve as an Article 32 investigating officer. Additionally, the appellant raised no objection at trial concerning defects in the Article 32 pre-trial investigation. Accordingly, we find this argument to be wholly without merit, as well.

The appellant also claims that the members were unlawfully influenced by an email originating from the commanding general regarding liberty incidents, as well as newspaper articles on the subject of liberty incidents. The rampant inaccuracies in the appellant's recitation of the facts in this regard cloud the issue but momentarily, as the record of trial makes clear the pertinent facts.

On 23 January 2001, the ranking commanding general sent an email to his subordinates regarding his views on liberty incidents. Appellate Exhibit XXVIII. The thrust of the message was aimed at those in leadership positions and urged them to do more to prevent liberty incidents. He summarizes his position by urging his subordinate leaders to "Get tough on these guys BEFORE they act." *Id*. at 6. He also follows with the statement "Squash them after they violate the laws and rules." *Id*. The Commanding General's Chief of Staff forwarded the email to commanders and executive officers with his own spin on the position, emphasizing

the role of leadership in preventing liberty incidents and urging commanders to be "tough" when they take offenders to nonjudicial punishment. *Id*. at 5.

The two senior members of the panel had seen the emails. Both were challenged on other grounds and were excused from participation in the case. One of the remaining three officer members recalled seeing emails reflecting the commanding general's views on liberty incidents, but did not take them as a policy and recalled that they emphasized prevention of incidents. Another of the officer members saw emails directing him, as a leader, to make everyone more aware of the issue of liberty incidents, but recalls no command policy. The third officer member had not seen the emails. Having reviewed the emails, the voir dire of the members, and the entire record of trial, we find no evidence of undue command influence.

The appellant also claims that newspaper articles regarding liberty incidents and a particular *Stars and Stripes* article seen by some of the members during trial unlawfully influenced the members. The military judge, *sua sponte*, voir dired the members during trial after seeing the most recent issue of the *Stars and Stripes* newspaper in the hands of one or more members. That issue contained an article on the strained relationship between Marine leadership and local civilian leaders over their respective roles in preventing and handling liberty incidents. Appellate Exhibit XXVII. Some members had read the article and some had not. The military judge questioned them regarding their ability to continue as members and satisfied himself that the members remained impartial and able to perform their duties. The trial defense counsel moved unsuccessfully for a change of venue. The appellant presents no basis in fact to support a conclusion that he was subject to undue command influence as a result of any of these matters. We are also satisfied that the military judge's actions avoided "even the appearance of evil in his courtroom. . . ." *United States v. Stoneman*, 57 M.J. 35, 42 (C.A.A.F. 2002). In summary, we find that the appellant has failed to meet his burden under *Biagase* of presenting “some evidence” of unlawful command influence. Thus, we find not merit in this assignment of error.

Post-Trial Delay

The appellant asserts that he was denied speedy post-trial review of his court-martial and asks this court to set aside the adjudged sentence, particularly the bad-conduct discharge. We disagree and decline to grant relief.

The appellant was sentenced on 8 February 2001. The record of trial was authenticated on 11 July 2001 and the trial defense counsel acknowledged his review of the record and submitted a 13-page clemency petition on 17 July 2001. The staff judge advocate's recommendation (SJAR) was completed on 25 October 2001 and served on trial defense counsel on 7 November 2001. The

trial defense counsel submitted a response to the SJAR on 18 November 2001 and an addendum to the original SJAR was completed on 27 December 2001. The convening authority's action was completed on 27 December 2001. The three volume, 377-page record of trial was docketed before this court on 21 June 2002. The appellant, after filing 18 enlargements of time with this court, filed a 42-page brief containing nine allegations of error on 16 June 2004[3]. The Government filed its answer on 15 December 2004 and the appellant filed a reply on 29 December 2004.

As to the 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. *See United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). We do not find the delay in the post-trial processing of this case to be excessive, in light of the size and complexity of the record of trial, all the matters provided by the appellant in clemency for consideration by the convening authority, and all the allegations of error developed by the appellant in his 42-page brief. Additionally, we have not found any prejudice or other harm to the appellant resulting from the delay, 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.

Sentence Appropriateness

The appellant contends that his sentence is inappropriately severe and disproportionate to sentences in closely related cases. We disagree and decline to grant relief.

During the course of an argument between the appellant and another Marine, a third Marine, LCpl "M," stepped in and told them to calm down to prevent a liberty incident. As the "would-be peacemaker" turned to walk away, the appellant grabbed him from behind, holding an open pocketknife to his throat. LCpl M unsuccessfully tried to push the knife away. After being told twice by another member of the group to put the knife down, the

[3] The appellant claims, in brief, at page 25, that the brief was filed during the 18th enlargement of time, "as appellate defense counsel waits for missing documents." In fact, the appellant had not filed a motion to compel production of documents until 17 March 2004, after having already filed 16 enlargements with the court. The motion requested that transcripts of the witness testimony taken at the Article 32, UCMJ, Investigation hearing be provided, as only the report of investigation had been appended to the record of trial. The motion was granted by this court on 23 March 2004, but the transcripts are no longer in existence and were unable to be produced. The appellant also alleges in his ninth allegation of error that the missing transcripts create a substantial omission from the record of trial such that the record is not complete. This argument has no merit. R.C.M. 1103(f) requires that the report of an Article 32 Investigation be appended to the record of trial, not made part of the record of trial. In this case, the subject report has been appended.

appellant returned the knife to his pocket. LCpl M suffered only minor lacerations to his neck that bled slightly, but required no first aid and did not leave permanent scars. While the appellant was convicted of underage drinking, disorderly conduct, and assault consummated by a battery, LCpl M and the Marine the appellant argued with were both given nonjudicial punishment for underage drinking.

We do not consider the dispositions regarding the appellant's two fellow-Marines and the appellant's court-martial as closely related cases. Only the appellant was charged with and convicted of assault and battery. Additionally, we disagree with the appellant's characterization that assault by holding a knife to the victim's throat is a minor offense or an offense normally handled by nonjudicial punishment. We view the offenses as serious breaches of conduct, specifically the assault consummated by a battery. 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).

Legal and Factual Sufficiency

The appellant avers that the evidence is factually and legally insufficient to support the finding of guilty of disorderly conduct. We disagree and decline to grant relief.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

The argument involving the appellant and the other marines that led to the assault consummated by battery occurred in the public entrance to a nightclub and on the adjacent public street. There were people in the street, although there is no evidence that the argument attracted the attention of any passers-by. The appellant and another Marine were speaking loudly and cursing, with some of the witnesses describing it as shouting. Under the circumstances, a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Furthermore, based on the evidence contained in the record of trial, we are convinced of the appellant's guilt beyond a reasonable doubt.

Conclusion

The remaining assignments of error were considered and found to be without basis in the record or merit in the law. Accordingly, the findings of guilty and sentence, as approved by the convening authority, are affirmed.

Senior Judge CARVER and Judge REDCLIFF concur.

For the Court

R.H. TROIDL
Clerk of Court