

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

**BEFORE**

**Charles Wm. DORMAN**

**C.A. PRICE**

**E.B. HEALEY**

**UNITED STATES**

**v.**

**Javier FELIX  
Lance Corporal (E-3), U.S. Marine Corps**

NMCCA 200200583

Decided 31 March 2005

Sentence adjudged 8 December 2000. Military Judge: C.H. Wesely. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st FSSG, MarForPac, Camp Pendleton, CA.

Capt RICHARD VICZOREK, USMC, Appellate Defense Counsel  
Maj RAYMOND BEAL II, USMC, Appellate Government Counsel  
LCDR MONTY MILLER, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HEALEY, Judge:

Contrary to his pleas, the appellant was convicted of conspiracy to commit larceny, dereliction of duty, making a false official statement, and larceny (109 specifications, merged to 10 specifications for sentencing), in violation of Articles 81, 92, 107, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, 907, and 921. A general court-martial comprised of officer and enlisted members sentenced the appellant to confinement for 18 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged but waived automatic forfeitures from 19 September 2001 until the appellant's end of active service (EAS) on 7 October 2001.

We reviewed the record of trial, submitted without specific assignment of error and the Government's motion to attach. Following our review, we specified the following assignment of error for briefing by appellate counsel:

In light of *United States v. Bell*, 60 M.J. 682 (N.M.Ct.Crim.App. 2004), and assuming the staff judge advocate (SJA) committed error by (1) failing to inform the convening authority of the members' recommendation and (2) failing to forward in a timely manner a request for deferment of automatic forfeitures, what is the appropriate remedy?

In accordance with our statutory obligations under Articles 59(a) and 66(c), UCMJ, we have carefully considered the record of trial, the appellant's brief on the specified issue, the Government's response, and the appellant's reply brief. We conclude there was post-trial delay in forwarding clemency and deferment requests to the convening authority and that the delay resulted in harm to the appellant. Under the circumstances, relief is appropriate. We will take corrective action in our decretal paragraph. Following that corrective action, we conclude that the findings and sentence are correct in law and fact and that no error remains that is materially prejudicial to the substantial rights of the appellant. Arts 59(a) and 66(c), UCMJ.

#### **Background**

During the sentencing phase the members were advised that the appellant had a wife and two pre-school children. Prior to sentencing, a member submitted the following written question concerning forfeiture of pay, "If 'no forfeiture' is stated, does he still lose all moneys & allowances? (Comments by the defense/prosecution seem to imply that we can negate the automatic forfeiture)." Record at 629 and Appellate Exhibit XLIII. The military judge responded, saying:

How that works is, you can award a separate sentence that includes forfeitures. If you were to award no forfeitures, this provision would still act to take pay away, essentially. However, the convening authority could either defer forfeitures or otherwise act to disapprove or suspend operation of Article 58b. So that is within the convening authority's discretion to do.

If the convening authority decides to disapprove or suspend - excuse me. If the convening authority decides to waive the forfeitures, for whatever reason, because you recommend it or because the accused request it, then, in that case, the pay and allowances would be given to Lance Corporal Felix's dependents.

Record at 629. On 8 December 2000, the members announced a sentence that did not include forfeitures and made the following recommendation, "The members recommend that there be no forfeitures." Record at 631. The military judge immediately asked the members, "And with that recommendation, is that - are

the members referring to the automatic forfeiture provision?" The military judge received an affirmative response from the president of the court-martial. *Id.*

Notwithstanding the members' recommendation that there be no forfeitures, automatic forfeitures were withheld from the appellant's pay for the majority of the appellant's 18 months of confinement. As a result, the appellant's dependents struggled financially and eventually went on public assistance. Nothing in the record indicates that the CA was informed of the members' clemency recommendation prior to the CA's action. When the deferment and clemency requests were presented to the CA nine months after trial, the CA took an action apparently intended to restore the appellant to full pay for the benefit of his dependents. However, due to the appellant's EAS three weeks after the CA's action, the appellant was again in a no pay status for the remainder of his confinement.<sup>1</sup> The following chronology details post-trial submissions and actions in the appellant's case:

8 Dec 00 Deferment from confinement denied.<sup>2</sup>

8 Dec 00 Sentenced.

21 May 01 Record of Trial authenticated.

24 May 01 Clemency matters submitted, including a request for deferment of forfeitures.<sup>3</sup>

28 Jun 01 SJA recommendation (SJAR) erroneously stated, "None," as to any clemency recommendation by the court.<sup>4</sup>

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<sup>1</sup> If a member is confined serving [a] court-martial sentence when the enlistment expires, pay and allowances end on the date the enlistment expires unless the sentence is completely overturned or set aside. DoD Financial Management Regulation Volume 7A, Chapter 03, 030207.E.

<sup>2</sup> The SJA sent an email to the Defense Counsel prior to the announcement of sentence, that said, "The CG will not support a deferment [sic] for Felix." According to the defense counsel the email was in response to a request for deferment of confinement. Clemency Request of 30 Jul 2001 at ¶6 and enclosure (5).

<sup>3</sup> In the clemency request the defense counsel referenced the members' recommendation and requested deferment of automatic forfeitures. The request detailed the financial plight of the appellant's wife and two young children. A 7 May 2001 letter from the appellant's wife was included in the request. She asked the general that her husband's pay be continued until October. Defense asked that the automatic forfeitures be deferred from 1 May 2001 until the appellant's EAS, which was in October.

<sup>4</sup> Although the SJAR incorrectly informed the CA that there was no clemency recommendation from the court, it did inform the CA that the defense counsel submitted a clemency request on 24 May 2001 asking for deferment of automatic forfeitures from 1 May 2001 until the appellant's EAS.

29 Jun 01 SJAR served.

30 Jul 01 Defense submits matters to the Commanding General via the SJA.<sup>5</sup>

31 Jul 01 SJA forwards clemency letter to the "Felix file."<sup>6</sup>

16 Sep 01 Addendum SJAR noted Appellant's 24 May 01 request to defer automatic forfeitures until EAS.

19 Sep 01 CA approved the sentence as adjudged and deferred<sup>7</sup> automatic forfeitures until the appellant's EAS.

7 Oct 01 Appellant's EAS. Pay stops.

15 Oct 01 Additional Addendum SJAR.<sup>8</sup>

16 Oct 01 Supplemental General Court-Martial Order waived automatic forfeitures from the date of his previous action, 19 Sep 2001, until the appellant's EAS, 7 Oct 2001.

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<sup>5</sup> The defense matters requested: (1) deferment of automatic forfeitures as previously requested; (2) an audience with the appellant's wife; and, (3) early release from confinement. The defense counsel noted he met with the SJA in May and the SJA indicated that he would favorably endorse the deferral of automatic forfeitures, however that request had not yet been acted upon. The submission included another letter from the appellant's wife to the commander. She described her support needs and her status on public assistance since her husband's pay stopped. She also stated in her letter to the CA, "You are the only person who can act on my husband [sic] case," and she requested "news." Clemency Request of 30 Jul 2001 at enclosure (1).

<sup>6</sup> The SJA's email forwarded a clemency letter from the appellant's mother to the Felix file to be considered "along with the rest of the package when the case is forwarded. . . for CA's action." The mother's letter discussed the wife's financial plight and asked that the appellant be paroled to permit him to work to support his family. Government Motion to Attach of 8 Sep 2004, enclosure (2).

<sup>7</sup> Deferment applies to a portion of the sentence that has not been ordered executed. R.C.M. 1101(c)(2). Since in his action the CA ordered the forfeitures executed, the appropriate action would have been to waive forfeitures of pay and allowances. Article 58b, UCMJ. Eventually the CA waived automatic forfeitures in his subsequent action dated 16 October 2001.

<sup>8</sup> In the Additional Addendum SJAR the SJA informs the CA that his SJAR and Addendum SJAR failed to mention the members' recommendation that there be no automatic forfeitures, but mentioned that defense counsel's clemency request of 24 May 2001 included the members' recommendation. The SJA recommended that the CA waive automatic forfeitures from the date of his previous action, 19 Sep 2001 until the appellant's EAS of 7 Oct 2001, and that the waived forfeitures be paid to the appellant's wife.

## Forwarding Clemency and Deferment Requests

First, we address whether the SJA committed error when he (1) delayed informing the CA of the members' recommendation and (2) delayed forwarding the requests for deferment of automatic forfeitures.

RULE FOR COURTS-MARTIAL 1106(d)(3)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) requires the SJA to advise the CA of a recommendation for clemency by the sentencing authority made in conjunction with the announced sentence. The purpose of the rule is to assist the CA to decide what action to take on the sentence in the exercise of command prerogative. R.C.M. 1106(d)(1).

The Government is responsible for timely post-trial processing of courts-martial. *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34 (C.A.A.F. 2003). Without question, an appellant has the right to timely review of the findings and sentence of his court-martial. *United States v. Tardif*, 57 M.J. 219, 222 (C.A.A.F. 2002); *United States v. Khamsouk*, 58 M.J. 560, 561 (N.M.Ct.Crim.App. 2003)(citing *United States v. Williams*, 55 M.J. 302, 305 (C.A.A.F. 2001)). Normally, before an appellant will be afforded relief stemming from a claimed denial of speedy review, the appellant "must demonstrate some real harm or legal prejudice flowing from that delay." *United States v. Bell*, 46 M.J. 351, 353 (C.A.A.F. 1997)(quoting *United States v. Jenkins*, 38 M.J. 287, 288 (C.M.A. 1993)). Where the post-trial delay has been excessive, however, the Court of Appeals for the Armed Forces has expressly held that the courts of criminal appeals may grant relief under Article 66(c), UCMJ, without a showing of "actual prejudice" within the meaning of Article 59(a), UCMJ, if we deem relief appropriate under the circumstances. *Tardif*, 57 M.J. at 224. We may "tailor an appropriate remedy, if any is warranted, to the circumstances of the case." *Id.* at 225.

"The manner in which a request for clemency has been processed is a factor we will consider when reviewing allegations of a denial of speedy review as we apply the guidance contained in *Tardif*." *United States v. Bell*, 60 M.J. 682, 686 (N.M.Ct.Crim.App. 2004). In *Bell* the court found error and granted relief when the request for clemency in the form of early release from confinement, was held by the SJA and not forwarded to the CA until after the appellant had been released from confinement.

In the instant case, the appellant sought relief, primarily, from automatic forfeitures to lessen the adverse financial impact on his dependent wife and children while he was confined.<sup>9</sup> Starting approximately 5 months after trial, and contemporaneous with the authentication of the record of trial, the appellant, the appellant's family, and the appellant's defense counsel made

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<sup>9</sup> Automatic forfeitures go into effect 14 days after the sentence to confinement starts. Art. 58b, UCMJ.

repeated clemency requests and two deferment requests for forfeiture relief. Four to five months before the CA's action there was a discussion between the defense counsel and SJA, in which the latter indicated he would favorably endorse forfeiture relief.

Significantly, all of the clemency and deferment requests were directed to the CA via the SJA. The requesters, to include the members, understood that the CA was the only authority that could provide the relief requested. Yet, it is apparent from the record that the SJA sat on the numerous requests and the members' time-sensitive recommendation for "no forfeitures" without advising the CA or forwarding the requests and the members' recommendation in a timely manner. Thus, the SJA became the decision-maker and essentially usurped the CA of his exercise of command prerogative -- a practice condemned by the *Bell* court. *Bell*, 46 M.J. at 685.

We find that the deferment requests were treated no differently than the clemency requests, as there is no correspondence attached to the record that would indicate the deferment requests were separately forwarded to the CA and acted upon.<sup>10</sup> The CA is empowered to exercise immediate action deferring portions of the sentence prior to review of the record of trial. R.C.M. 1101(c)(1) and (2) provide the CA with the opportunity to defer all or part of the sentence only up until he orders the sentence executed. With respect to forfeitures, "the convening authority may defer mandatory forfeiture until the date on which the convening authority approves the sentence under Article 60, and may rescind such deferment at any time." *United States v. Emminizer*, 56 M.J. 441, 443 (C.A.A.F. 2002).

Considering the record as a whole, we conclude that the SJA erred in failing to expeditiously forward to the CA the members' clemency recommendation and the several clemency and deferment requests made by and on behalf of the appellant. Furthermore, we find that the appellant has articulated harm. The financial hardship to the appellant's dependents that the members sought to avoid, occurred in large part due to the failure of the SJA. Under the facts of this case, the SJA's nine months of inaction was a denial of timely post-trial review.

### **Conclusion**

Finally, the appellant avers, assuming this court found error regarding denial of timely post-trial review, that this court should disapprove the bad-conduct discharge. We do not concur. However, in light of our holding we will grant appropriate sentencing relief. Accordingly, we affirm the

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<sup>10</sup> R.C.M. 1101(c)(3) says that, "The action of the authority acting on the deferment request shall be in writing and a copy shall be provided to the accused." R.C.M. 1103(b)(3)(D) requires that the deferment request and the action on it be attached to the record.

findings. Following our reassessment of the sentence, based upon our finding of error in the post-trial processing, only so much of the sentence as provides for reduction to pay grade E-1, confinement for 10 months, and a bad-conduct discharge is approved.<sup>11</sup>

Chief Judge DORMAN and Senior Judge PRICE concur.

For the Court

R.H. TROIDL  
Clerk of Court

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<sup>11</sup> Reducing the approved confinement entitles the appellant to some relief for the automatic forfeitures withheld while confined and still in a pay status.