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

BEFORE

C.A. PRICE **C.L. SCOVEL** **J.J. MULROONEY**

UNITED STATES

v.

Eric V. F. LUCAS
Boatswain's Mate First Class (E-6), U.S. Navy

NMCCA 200201157 Decided 15 September 2005

Sentence adjudged 14 February 2002. Military Judge: T.K. Leak. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Chief of Naval Education and Training, Pensacola, FL.

JOHN B. WELLS, Civilian Appellate Defense Counsel
Capt ROLANDO SANCHEZ, USMC, Appellate Defense Counsel
Maj WILBUR LEE, USMC, Appellate Government Counsel

PRICE, Senior Judge:

Pursuant to mixed pleas, the appellant stands convicted of aggravated assault (three specifications), wrongful discharge of a firearm endangering human life, wrongful communication of a threat, and kidnapping (two specifications)[1]. The appellant's offenses violated Articles 128 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 828 and 934. A general court-martial composed of officer and enlisted members sentenced the appellant to confinement for one year, total forfeiture of pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

[1] The appellant pleaded guilty to aggravated assault under Charge I, Specification 2, on Seaman (SN) Makani Young by shooting him twice in the leg, and to the wrongful discharge of a firearm, under Charge II, Specification 1. All other pleas were not guilty.

We have carefully considered the record of trial, the appellant's 13 assignments of error[2], the petition for new trial, the Government's response, the appellant's reply, the appellant's supplemental brief, and the oral arguments. Of the 13 assignments of error, only two warrant relief: improvident guilty pleas and post-trial delay. However, we will also discuss the sufficiency of the evidence of Charge I, Specification 3, (aggravated assault) and the appellant's claim of ineffective assistance of counsel. As modified, 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 remains. Arts. 59(a) and 66(c), UCMJ.

Background

After their ship returned to home port, the appellant and two shipmates went to his house to drink and socialize. The two shipmates were Seaman (SN) Makani Young and SN Larry Carpenter. After consuming an undetermined amount of alcohol, the appellant called his girlfriend on his cell phone. During that telephone conversation, they argued with each other. The appellant became angry and shot his cell phone with a Davis .380 semiautomatic pistol.

I. THE CONVENING AUTHORITY AND THE MILITARY JUDGE ERRED IN ALLOWING THE COURT-MARTIAL TO PROCEED IN THE NORTHERN DISTRICT OF FLORIDA.

II. THE APPELLANT SHOULD BE GRANTED A NEW TRIAL BASED ON THE DISCOVERY OF NEW EVIDENCE.

III. THE APPELLANT SHOULD BE GRANTED A NEW TRIAL BASED ON AN INCOMPLETE RECORD.

IV. THE TRIAL COUNSEL VIOLATED R.C.M. 919.

V. THE GUILTY PLEA TO CHARGE I, SPECIFICATION 2 WAS IMPROVIDENT.

VI. THE GUILTY PLEA TO CHARGE II SPECIFICATION 1 WAS IMPROVIDENT.

VII. THE CONVICTION FOR ASSAULT ON SN YOUNG (CHARGE I SPECIFICATION 3) WAS NOT LEGALLY OR FACTUALLY CORRECT.

VIII. CHARGE I SPECIFICATION 1 IS MULTIPLICIOUS WITH CHARGE II, SPECIFICATIONS 3 AND 4.

IX. THE MILITARY JUDGE ERRED IN NOT ALLOWING THE MEMBERS TO RECALL A WITNESS PURSUANT TO M.R.E. 614.

X. THE DEFENSE COUNSEL ARGUED FOR A PUNITIVE DISCHARGE WITHOUT THE CONSENT OF THE ACCUSED.

XI. THE APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

XII. THE CONVENING AUTHORITY ERRED IN NOT GRANTING CLEMENCY OR IN THE ALTERNATIVE THE JUDGMENT OF A BAD-CONDUCT DISCHARGE WAS TOO SEVERE.

XIII. THE TIME BETWEEN TRIAL AND LODGING THE APPEAL IN THIS COURT WAS EXCESSIVE.

With the pistol in his hand, the appellant went into the living room. SN Young was sitting on the floor in the living room. SN Carpenter was also present in the room. The appellant was still angry and told SN Carpenter he would kill him. When SN Young told SN Carpenter not to worry and that the appellant would not shoot him, the appellant turned and shot SN Young in the leg. SN Carpenter jumped up and tried to run out of the house. The appellant pointed the gun at SN Carpenter and told him to sit down, which he did. SN Young then tried to raise himself up from the floor and the appellant shot him again in the leg. Both Sailors remained in place for fear that the appellant would shoot again.

A few minutes later, a car pulled up outside the house. Ms. Jaime Chong got out and went into the house to visit the appellant. Seeing an opportunity to escape, SN Young and SN Carpenter left the house and went outside. The appellant fired a fourth shot in the direction of SN Young but did not hit him. The two Sailors then drove away.

Ms. Chong asked the appellant if he wanted to go to a nearby casino. The appellant said yes, and followed Ms. Chong home so that she could drop off her baby. Realizing that he had forgotten his money, the appellant drove back to his house. Ms. Chong met him there, they decided not to go to the casino, and she stayed at the appellant's house that night. Despite his earlier consumption of alcohol, there was no indication in the record that the appellant had any difficulty driving his truck that evening.

Ineffective Assistance of Counsel

The appellant contends that his trial defense team was ineffective at trial. Specifically, he asserts that his attorneys failed to: (1) properly explain his right to civilian counsel; (2) investigate the characteristics of the pistol; (3) obtain a polygraph examination of the appellant; (4) prepare defense witnesses for cross-examination; (5) adequately litigate the defense of accident; (6) object to improper rebuttal argument; and (7) pressured the appellant to enter improvident guilty pleas. Having considered this assignment of error, we conclude that the appellant suffered no material prejudice to any substantial right.

In its recent decision of *United States v. Davis*, 60 M.J. 469 (C.A.A.F. 2005), our superior court set forth a comprehensive explanation of the legal concept of ineffective assistance of counsel under the Sixth Amendment. To obtain relief for a complaint that he was deprived of the effective assistance of counsel, the appellant has the burden to show that his lawyer's performance fell below an objective standard of reasonableness. Counsel's performance is presumed to be competent and adequate; thus, the appellant's burden is especially heavy on this point. He must establish a factual foundation for his complaint of

deficient performance. Second-guessing, sweeping generalizations, and hindsight will not suffice. *Davis*, 60 M.J. at 473.

To determine whether the presumption of competence is overcome, we follow a three-part test:

1. Are the appellant's allegations true and, if so, is there a reasonable explanation for the lawyer's actions?

2. If the allegations are true, did the level of advocacy fall measurably below the performance standards ordinarily expected of fallible lawyers?

3. If so, we test for prejudice by asking whether there is a reasonable probability that, but for the lawyer's error, there would have been a different result.

Id. at 474.

In his post-trial clemency submission and on appeal, the appellant complains that his trial defense team did not research and present important facts regarding the pistol that supported a defense of accident. Although not clearly explained by appellate defense counsel, we understand the complaint to refer to each of the shots except the first shot into the cell phone. He also asserts that the defense team pressured him to enter guilty pleas to aggravated assault under Charge I, Specification 2 when a defense of accident existed to that charge.

As to the latter assertion, the only evidence of the appellant's complaint is his affidavit belatedly filed on the eve of oral argument. Rebutting this complaint is the colloquy among the military judge, the appellant, and the defense team that supports a conclusion that the appellant, entered voluntary guilty pleas of his own choice. The record clearly shows that the appellant and his counsel agreed upon a trial strategy of pleading guilty to some of the charged misconduct and then arguing that the rest of the Government's charges were baseless. We will not question this common and generally accepted trial defense strategy, nor will we credit the appellant's unsupported complaint of pressured guilty pleas.[3]

We now address the appellant's contention that the defense team failed to properly investigate and litigate the defense of accident. As part of a post-trial clemency submission, a report from a private investigator stated that this particular type of pistol has a safety mechanism that can be easily and unintentionally disengaged. Even if that is true, we find

[3] Although related to this assertion of ineffective assistance, we will address the appellant's meritorious contention of improvident guilty pleas in a later section of this opinion.

nothing in the record of trial that persuades us that the safety mechanism in the pistol in question was a factor in the appellant's misconduct.

We note that the appellant stated during the providence inquiry and testified on the merits that he did not intentionally fire the pistol. That does not necessarily mean that the safety mechanism failed. Indeed, during the providence inquiry, the appellant stated the safety *was in the off position* and that the gun just went off, as though he bumped the gun against his leg.

We also note that a defense expert witness, Chief Utilitiesman (UTC) Robert C. Barr, USN, testified that to fire this semiautomatic pistol, one has to pull the trigger distinctly for each shot. The appellant has presented no persuasive information to rebut that testimony from his own witness.

As to the complaint that the defense team failed to adequately litigate the defense of accident, we find no merit. To persuade the members that the appellant's shootings were accidental, defense counsel skillfully examined prosecution and defense witnesses, including UTC Barr, then cogently argued that defense. This theory was competently litigated, and apparently discounted by the members at the court-martial. The appellant's complaint amounts to nothing more than post-trial second-guessing.

The remaining specific assertions of deficient performance do not warrant discussion. This assignment of error is without merit.

Petition for New Trial

The appellant petitions for a new trial under Article 73, UCMJ, based on a post-trial polygraph examination and the discovery of information regarding the characteristics of the pistol. We have already discussed the gist of the latter contention. To the extent that additional information about the pistol was developed after trial, we conclude that such information could have been discovered before trial. Moreover, we conclude that the information now proffered by the defense would probably not have produced a more favorable result. RULE FOR COURTS-MARTIAL 1210(f)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.).

As to the polygraph examination, such evidence is inadmissible in trials by court-martial. MILITARY RULE OF EVIDENCE 707, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.); *see United States v. Scheffer,* 523 U.S. 303 (1998). Accordingly, even if a purportedly favorable polygraph result was offered at trial, it would not be admitted and published to the members, and thus, not produce a more favorable result. We specifically decline the appellant's invitation to ignore a black-letter rule and

distinguish a plainly worded holding from the United States Supreme Court.

Providence of Guilty Pleas

The appellant contends that his guilty pleas to Charge I, Specification 2, aggravated assault upon SN Young (two gunshots) and Charge II, Specification 1, wrongful shooting of his cell phone, are improvident. We agree in part.

We will address the latter offense first. The elements of the offense of willful and wrongful discharge of a firearm under Article 134, UCMJ, are as follows:

> (1) That the accused discharged a firearm;
>
> (2) That such discharge was willful and wrongful;
>
> (3) That this discharge was under circumstances such as to endanger human life; and
>
> (4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 81b. "'Under circumstances such as to endanger human life' refers to a reasonable potentiality for harm to human beings in general. The test is not whether the life was in fact endangered but whether, considering the circumstances surrounding the wrongful discharge of the weapon, the act was unsafe to human life in general." MCM, Part IV, ¶ 81c.

The appellant fired his pistol into his cell phone while he was standing in the kitchen of his home. At the time, SN Young was in the adjacent living room. As the appellant admitted during the providence inquiry, the shot could have ricocheted into the living room and hit SN Young. Under these facts, we conclude that there is no substantial basis to question the providence of this guilty plea. *United States v. Prater*, 32 M.J. 433 (C.M.A. 1991).

Turning to the appellant's guilty pleas of aggravated assault, we reach a different conclusion. The military judge began the providence inquiry by reciting the elements of the offense, then asked the appellant if he understood. The appellant responded, "Yes sir. Unintentionally." Record at 79. As immediately noted by the trial counsel, the appellant thereby put the military judge on notice that he would probably have to resolve the defense of accident. After much discussion among the military judge and counsel about the theory of assault, i.e., attempt, offer, or culpable negligence, the military judge took a recess, held an R.C.M. 802 conference, then started over in his

colloquy with the appellant. When asked to describe his actions, the appellant said he unintentionally shot SN Young. The gun was in his hand and it "went off twice." *Id.* at 85. After the military judge explained the concept of culpable negligence, he asked the appellant if he admitted that the shootings were culpably negligent. The appellant responded, "No, sir." *Id.* at 88. At that point, the military judge told the appellant he could not accept his guilty plea to this offense and put the court in recess.

After the recess, the military judge told the appellant that his defense counsel indicated that he thought the plea might be provident. Apparently having reconsidered his decision to reject the plea, the military judge commenced the colloquy anew. The appellant explained that he was swinging the pistol as he walked through the house, but didn't know it was loaded until it went off, apparently referring to the first shot into SN Young's leg. Although once again insisting that the shots were unintentional, the appellant admitted that he was culpably negligent.

At this point, the trial counsel requested that the military judge ask the appellant whether his finger was on the trigger as he was swinging the pistol because "he may think there was some sort of accident." *Id.* at 95. When asked, the appellant said he didn't know, that the safety was off and "it just went off." *Id.* at 96. The appellant elaborated by saying automatic weapons go off, perhaps by bumping it against his leg while he was walking. In response, the trial counsel voiced concern that the facts did not support a theory of culpable negligence. However, the military judge chose to shift his attention to the other specification. After concluding that portion of the providence inquiry, the military judge cited the case of *United States v. Redding* and accepted the appellant's guilty pleas to aggravated assault under Charge I, Specification 2.

Although the military judge did not specify which *Redding* case he relied on, based on our research, we are convinced he referred to *United States v. Redding*, 34 C.M.R. 22 (C.M.A. 1963). In that decision, our superior court held that aggravated assault may be grounded upon culpably negligent conduct "even though the assailant did not intend the ultimate consequences of his action." *Id.* at 24. The court also held that accident is a defense to aggravated assault by culpable negligence. Accident is defined as the "unintentional and unexpected result of doing a lawful act in a lawful manner." R.C.M. 916(f). Moreover, this defense is not available when the act which caused the injury was a negligent act. R.C.M. 916(f), Discussion.

When a defense is raised by the appellant's statements during a providence inquiry, the military judge should explain the elements of the defense to the appellant and resolve the issue, before accepting the guilty plea. R.C.M. 910(e), Discussion; *see United States v. Lee,* 16 M.J. 278, 281 (C.M.A. 1983); *United States v. Jemmings*, 1 M.J. 414, 418 (C.M.A. 1976).

In this case, the defense of accident was raised by the appellant's statements and frequently expressed concerns of the trial counsel.[4] However, the military judge failed to squarely address the issue by advising the appellant of the elements of the defense and engaging in an appropriate colloquy with the appellant to resolve the issue. The military judge's reliance on the *Redding* case is not helpful because that was a *contested case*. Moreover, that misguided reliance is troubling because it suggests that the military judge did not understand his responsibility to resolve potential defenses *in guilty plea cases*.

In addition, the military judge failed to reopen the providence inquiry after testimony on the merits raised the defense of accident anew. As stated previously, the appellant testified that he did not intentionally fire the pistol. At this point, the military judge was duty-bound to excuse the members, call an Article 39a, UCMJ, session and reopen the providence inquiry. Art. 45(a), UCMJ; *United States v. Palus*, 13 M.J. 179, 180 (C.M.A. 1982); *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980). We conclude that there is a substantial basis to question this guilty plea and therefore must set aside the finding of guilty.

Sufficiency of Evidence

The appellant asserts that the evidence is legally and factually insufficient to support the finding of guilty of Charge I, Specification 3. Specifically, he contends that the testimony of Ms. Chong establishes that the appellant never fired the fourth shot toward SN Young. In the alternative, the appellant argues that, assuming a fourth shot was fired, the military judge failed to instruct the members on the defense of accident. We decline to grant relief.

The test for legal sufficiency is well-known. It requires this court to review the evidence in the light most favorable to the Government. In doing so, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987).

The test for factual sufficiency, however, is more favorable to the appellant. It requires this court to be convinced of the appellant's guilt beyond a reasonable doubt, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses. *Turner*, 25 M.J. at 325. Proof beyond a reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22

[4] In addition, the appellant's testimony on the merits repeated his claim that the shots were unintended and/or accidental.

M.J. 679, 684 (A.F.C.M.R. 1986)(citing *United States v. Steward*, 18 M.J. 506 (A.F.C.M.R. 1984)). "The factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). So too may we. In resolving the question of factual sufficiency, we have carefully reviewed the record of trial, but have given no deference to the factual determinations made at the trial level. *See United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

We have carefully considered the relevant evidence. On the one hand, we have the testimony of SN Young and SN Carpenter that a shot was fired in the direction of SN Young as the two ran from the appellant's house. In fact, SN Young testified that he heard the bullet go past his head. Corroborating evidence includes a shell casing found near the location the appellant was standing when the shot was fired. On the other hand, we have the testimony of the appellant and Ms. Chong that no shot was fired. We have also examined other evidence bearing on the relative credibility of these four witnesses. We find that the appellant did fire a shot in the direction of SN Young.

However, there are two other issues that warrant further discussion. First, as noted previously, the appellant argues that even if a shot was fired, it was merely an accident. Second, we note that the only theory of assault presented to the members was that of attempt. Theories of offer or culpable negligence were not presented to the members. We will examine whether the necessary specific intent to harm SN Young existed in the context of an assault by attempt.

We conclude that the appellant was able to, and actually formed, the specific intent to harm SN Young by firing his pistol in the direction of the victim. Despite the evidence of the appellant’s intoxicated and erratic behavior that evening, we note that he drove his truck after the shooting without apparent difficulty. If he was able to drive a motor vehicle some distance to Ms. Chong’s house and then drive back to his house without accident, we are confident that he was able to point his pistol toward SN Young with the requisite specific intent to harm SN Young and pull the trigger.

The potential defense of accident is more problematic. Based on the testimony of the UTC Barr and the appellant, we have no doubt that the defense of accident was raised by the evidence. For some reason, neither side requested an instruction on the issue. In fact, the defense was never mentioned during the discussion of instructions. Nevertheless, once raised, the military judge had a duty to instruct *sua sponte. United States v. McDonald,* 57 M.J. 18, 20 (C.A.A.F. 2002). We must now decide whether it appears “'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'” *Id.* (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967).

Had the military judge given the standard accident instruction, he would have charged the members that "if the accused was doing a lawful act in a lawful manner free of any negligence on his part, and unexpected bodily harm occurs, the accused is not criminally liable." Military Judge's Benchbook, Dept. of the Army Pamphlet 27-9 at 5-4 (Ch-1, 30 Jan 1998). In this case, we conclude that the members found beyond a reasonable doubt that the appellant fired his pistol toward SN Young. The fact that he did so completely vitiates the potential defense, for under the facts and circumstances, such an act was not lawful and not free of negligence. Thus, we are confident beyond a reasonable doubt that the error did not contribute to the verdict.

Post-Trial Delay

The appellant complains that he has been prejudiced because of post-trial delay in the review and processing of the record of trial. He asks that we set aside the reduction in rate, adjudged forfeitures of pay and allowances, and the bad-conduct discharge. We find merit in this assignment of error.

To assist in our analysis of this assignment of error, we provide the following chronology of the review of the appellant's 603-page record of trial:

14 Feb 2002	Sentence adjudged
16 Jul 2002	Trial Counsel examines record
19 Sep 2002	Record authenticated by trial counsel
15 Oct 2002	Staff Judge Advocate's Recommendation signed
10 Nov 2002	Clemency petition submitted
27 Nov 2002	Convening Authority's Action signed
17 Jun 2003	Record docketed

We consider four factors in determining if post-trial delay violates 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.,* 61 M.J. at 83 (quoting *Toohey*, 60 M.J. at 102).

Here, there was delay of about six months from the date of the convening authority's (CA's) action until the record was docketed. The Government does not dispute the appellant's allegation that the record was received at the Navy-Marine Corps Appellate Reiew Activity as early as December 2002, but was not docketed until June 2003. Based on our review of the record and the parties' briefs, we will assume *arguendo* that the appellant's allegation is correct. We find that the cumulative delay alone, particularly the segment from convening authority's action until docketing, is facially unreasonable, triggering a due process review. *See United States v. Oestmann*, 61 M.J. 103, 104 (C.A.A.F. 2005)(decision of Court of Criminal Appeals (CCA) as to sentence reversed for review of the 511-day delay in shipping record of trial from convening authority to CCA); *United States v. Dunbar,* 31 M.J. 70, 73 (C.M.A. 1990)(delay in forwarding a record of trial to the Court of Criminal Appeals is "the least defensible of all" post-trial delays). Since there are no explanations in the record, we look to the third and fourth factors.

We find no formal written assertion of the right to a timely appeal in the record. However, once the CA took his action in late November, the appellant repeatedly inquired concerning the whereabouts and status of the record. This is of particular importance given the length of time taken to move this record from the CA's office to this court.

We also have a claim of prejudice, although the appellant has not provided supporting evidence for the claim in his affidavit that he has been hindered in finding permanent employment because he has not obtained a DD 214 documenting his separation from the service. However, we are aware that many employers are understandably reluctant to hire service members who have not been discharged from active duty. We also note that, in his request for clemency, the appellant describes his difficulty supporting his family pending final action in this case.

Thus, we conclude that there has been a due process violation due to the post-trial delay. Under the facts of this case, we hold that the appellant is entitled to relief. We will consider appropriate relief in our reassessment of the sentence.

Conclusion

We have considered the remaining assignments of error and find them without merit. The findings of guilty of Charge I, Specification 2 are set aside. In the interest of judicial economy, that Specification is dismissed. The remaining findings are affirmed.

We have reassessed the sentence in accordance with *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998). Upon reassessment, we affirm only so much of the sentence extending to confinement for eight months and reduction to pay grade E-1.

Judge SCOVEL and Judge MULROONEY concur.

For the Court

R.H. TROIDL
Clerk of Court