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

BEFORE

C.L. CARVER **W.L. RITTER** **D.A. WAGNER**

UNITED STATES

v.

Ingersoll U. AVELINO
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200300730 Decided 28 July 2005

Sentence adjudged 8 November 2000. Military Judge: F.A. Delzompo. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding General, 1st Marine Division (Rein), Camp Pendleton, CA.

LT JENNIE L. GOLDSMITH, JAGC, USNR, Appellate Defense Counsel
LT DEBORAH MAYER, JAGC, USNR, Appellate Government Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel

RITTER, Senior Judge:

A military judge, sitting alone as a general court-martial, convicted the appellant, contrary to his pleas, of wrongfully distributing methylenedioxy-methamphetamine (MDMA, or "ecstasy") and wrongfully possessing MDMA with the intent to distribute, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. §912a. The military judge sentenced the appellant to 10 years confinement, total forfeitures, a fine of $5,000.00 or an additional 1 year of confinement if the fine was not paid at the time the convening authority orders the fine executed, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the findings and only so much of the sentence as included confinement for 10 years, total forfeitures, reduction to pay grade E-1 and a dishonorable discharge. In an act of clemency, the convening authority disapproved the adjudged fine.

The appellant asserts three assignments of error: (1) the record of trial omits a substantial exhibit; (2) the sentence is highly disparate and inappropriately severe; and (3) the unexplained and inordinate post-trial delay warrants relief.

We have examined the record of trial, the appellant's assignment of errors, and the Government's reply. 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.

Omission from the Record of Trial

In his first assignment of error the appellant asserts that the record of trial omits a substantial exhibit, specifically, a videotape offered by the Government during its case-in-chief and admitted into evidence by the military judge. The videotape purportedly showed the appellant conducting the drug transaction that formed the basis for one of the two specifications of which he stands convicted. Due to this omission, the appellant avers that this court should disapprove his punitive discharge and reassess his adjudged confinement. We agree with the appellant that the missing videotape is a substantial omission from the record, but find the presumption of prejudice to the appellant arising from that omission has been rebutted.

Facts

During its case-in-chief, the Government offered into evidence a surveillance tape purportedly showing the appellant conducting a drug transaction in the presence of other Marines, while sitting inside a parked vehicle. The videotape was made by Special Agent (SA) Fahey of the Naval Criminal Investigative Service (NCIS), who had helped to prearrange this "controlled buy" between the appellant and a cooperating witness. After SA Fahey testified that he was responsible for filming the alleged transaction and maintaining the videotape, the tape was played in its entirety before the military judge and SA Fahey. Upon completion of the viewing, which lasted approximately 18 minutes, the military judge described for the record the recorded time segments apparent on the tape. He then stated:

And there's some conversation that takes place during the last portion from 1203 to 1209. But almost all the conversation is unintelligible. So, the record will only indicate that the videotape was played. We're not going to try to have the reporter try to transcribe that, which was something that was

inaudible, very few words that I could make out during that conversation.

Record at 237-38.

SA Fahey was then asked a series of questions by the trial counsel and cross-examined by the civilian defense counsel concerning the contents of the videotape. The military judge directed that the videotape be attached to the record as Prosecution Exhibit 9. However, the exhibit labeled Prosecution Exhibit 9 in the record of trial consists of five photographs that depict two plastic bags containing white pills. It is apparent from our review of the record that Prosecution Exhibits 7 and 9 were interchanged, and that the missing videotape corresponds to the blank page labeled as Prosecution Exhibit 7. The Government's attempts to find the videotape have been unsuccessful.

Law

A complete record of the proceedings and testimony must be prepared for each general court-martial resulting in an adjudged sentence which includes "death, a dismissal, a discharge, or (if the sentence adjudged does not include a discharge) any other punishment which exceeds that which may otherwise be adjudged by a special court-martial[.]" Art. 54(c)(1)(A), UCMJ. To be complete, the record of trial must include "[e]xhibits, or, with the permission of the military judge, copies, photographs, or descriptions of any exhibits which were received in evidence and any appellate exhibits." RULE FOR COURTS-MARTIAL 1103(b)(2)(D)(v), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.).

Whether a record of trial is incomplete is a question of law, which we review *de novo*. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000). A single missing prosecution exhibit can render the record incomplete, if it is of sufficient import to the findings in a contested case. *United States v. McCullah*, 11 M.J. 234, 237-38 (C.M.A. 1981). Technical violations of R.C.M. 1103(b)(2) do not require reversal in every case; rather, an incomplete record only raises a rebuttable presumption of prejudice. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999); *see also United States v. Santoro*, 46 M.J. 344, 346 (C.A.A.F. 1997). Therefore, as a threshold, a reviewing court must first determine whether an omission from the record of trial is "substantial." *McCullah*, 11 M.J. at 236. Whether an omission is substantial can be a question of quality as well as quantity. *United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982).

The question of what constitutes a substantial omission is analyzed on a case-by-case basis. *Abrams*, 50 M.J. at 363. When there is a substantial omission from the record of trial, this raises a presumption of prejudice that the Government must rebut. *McCullah*, 11 M.J. at 237.

Discussion

We agree with the appellant that the missing videotape is a substantial omission from the record of trial. The videotape was offered in the findings stage and depicted the actual events that gave rise to Specification 1 of Charge II. SA Fahey testified concerning its contents, and the trial counsel argued in his closing argument that the videotape corroborated the key facts concerning this specification. We are convinced that the videotape's disappearance constitutes a substantial omission in the record of trial according to case law, and renders the record of trial incomplete within the meaning of Article 54, UCMJ. This omission thus raises a rebuttable presumption of prejudice.

We find, however, that the presumption of prejudice has been rebutted as to the missing videotape. First, several Government witnesses testified from first-hand knowledge concerning the incident depicted on the videotape. Second, in testifying to the contents of the videotape, SA Fahey noted that, because a night vision lens was used and it was difficult to focus, it could not be determined from the videotape how many people were involved in the transaction, nor their identities. He also agreed with the appellant's civilian defense counsel that the positions of the people in the car could not be identified, no transfer of money or drugs could be seen, and that the videotape itself provided no evidence linking the appellant to a drug transaction. Thus, we are not left to speculate as to its contents, and can confidently conclude that the videotape added nothing of value to the evidentiary record that was not already provided by the Government's witnesses.

Finally, we view the military judge's comments after viewing the tape and his instruction to the court reporter not to transcribe the audio portion into the record as consistent with our negative assessment of the videotape's quality and value. Although we deplore the mishandling of the evidence in this case, we find no prejudice resulting from the omission of the videotape, and thus grant no relief on this basis.

Inappropriately Severe and Highly Disparate Punishment

We have considered the appellant's contention that his sentence is inappropriately severe and highly disparate in comparison to the sentence in a companion case (Private Jimenez). We find that the approved sentence is not inappropriately severe, given the nature and seriousness of the offenses and the character of the appellant. *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982). We also conclude that the appellant has not met his burden to demonstrate that his case is "closely related" to Private Jimenez' case -- or any of the other companion cases listed in the convening authority's action -- for purposes of sentence comparison. *See United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999).

Significantly, the convening authority's action in this case indicates that of all the listed companion cases, only the appellant was convicted of distribution and possession with the intent to distribute illegal drugs. The other Marines were each convicted only of drug use, a lesser offense. Private Jimenez was convicted of several conspiracies in addition to multiple drug uses. Although there was testimony in this case that Private Jimenez may have arranged the drug transaction that the appellant carried out in Specification 1 of Charge II, the appellant was not actually charged with or convicted of any conspiracy involving Private Jimenez. There was also testimony that the appellant's offense of possession with intent to distribute resulted in actual distributions of ecstasy to Private Jimenez and several other Marines. But we do not know whether the appellant was involved in *any* of Private Jimenez' 11 drug use convictions or 3 conspiracies. Thus, the offenses of which the appellant was convicted may well have been mutually exclusive with those of which Private Jimenez was convicted.

Since the appellant has not met his burden to show that his case is closely related to Private Jimenez' case, we conclude that this is not one of "those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases." *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001)(quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). This assignment of error is without merit.

Post-Trial Delay

The appellant contends that we should disapprove his dishonorable discharge because of the unexplained and inordinate post-trial delay in processing his case. We disagree.

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 is not unreasonable, further inquiry is not necessary. If we conclude that the length of the delay is "facially unreasonable," however, we must balance the length of the delay against the other three factors. *Id*. Moreover, in extreme cases, the delay itself may "give rise to a strong presumption of evidentiary prejudice." *Id*.

There is no explanation contained in the record as to why it took over two years from the date of trial to receipt at the Navy-Marine Corps Appellate Review Activity. We find that the delay alone is facially unreasonable, triggering a due process review. Regarding the third factor, although the appellant submitted an affidavit providing reasons, he admits he did not assert his right to a timely appeal. As for the fourth factor, the appellant claims the delay prejudiced him because the trial counsel's case file was destroyed at some point, and the loss of the videotape may be attributable to this fact. However, it is a matter of pure speculation whether the videotape was destroyed with the trial counsel's case file, and in any case, we have found no prejudice due to its omission from the record. Thus, we conclude that there has been no due process violation resulting from the post-trial delay.

We are also aware of our authority to grant relief under Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866, but we decline to do so. *Id*.; *United States v. Oestmann*, 61 M.J. 103 (C.A.A.F. 2005); *Toohey*, 60 M.J. at 103; *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).

Conclusion

Accordingly, we affirm the findings of guilty and the sentence, as approved by the convening authority.

Senior Judge CARVER concurs.

For the Court

R.H. TROIDL
Clerk of Court

Judge WAGNER did not participate in the decision of this case.