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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **R.H. CAUTHEN**

UNITED STATES

v.

Jason A. PHILLIPS
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200300969 Decided 21 November 2005

Sentence adjudged 10 April 2002. Military Judge: F.A. Delzompo. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Air Ground Task Force Training Command, Marine Corps Air Ground Combat Center, Twentynine Palms, CA.

LT JENNIE L. GOLDSMITH, JAGC, USNR, Appellate Defense Counsel
LT MARK H. HERRINGTON, JAGC, USNR, Appellate Government Counsel

CAUTHEN, Judge:

The appellant stands convicted of various offenses by a general court-martial. Pursuant to his pleas, he was convicted of conspiracy to use marijuana, conspiracy to distribute ketamine, six specifications of wrongful use of various controlled substances, five specifications of wrongful distribution of various controlled substances, and wrongful manufacture of ketamine with the intent to distribute, in violation of Articles 81 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 912a. Contrary to his pleas, he was convicted by officer members of wrongful communication of a threat to kill, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The members sentenced the appellant to a dishonorable discharge and confinement for 12 years. The convening authority approved the sentence as adjudged. There was no pretrial agreement.

After carefully considering the record of trial, the appellant's assignments of error[1], and the Government's response, 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.

Facts

In January 2001, the appellant was convicted at special court-martial of, among other offenses, use of lysergic acid diethylamide (LSD) and marijuana. After his release from the brig in March 2001, he was assigned to the Marine Processing Platoon (MPP) at the Marine Corps Communication Electronics School at Twentynine Palms, California. Very soon thereafter, the appellant was once again involved in drug abuse.

In January of 2001, the Naval Criminal Investigative Service (NCIS) began Operation Desert Fox, an investigation into drug distribution and use at the Marine Air Ground Task Force Training Command, Twentynine Palms, California. As part of that investigation, NCIS Special Agent AF worked undercover. AF bought drugs from Private B. G. Asher, USMC. Pvt Asher soon became a cooperating witness for the investigation, introducing AF to many other Marines, including the appellant. AF witnessed the appellant using drugs, distributing drugs, manufacturing drugs, and conspiring to manufacture and distribute drugs.

On or about 9 April 2001, "posters" bearing the names and photographs of several Marines, including the appellant, were posted in various places around the command. These posters warned Marines to "BEWARE" of those pictured; that they were prohibited by instruction to be around certain barracks; and, that if seen there, they were to be reported. The posters were up for about one day until the Executive Officer was briefed about them. He ordered that the posters be taken down and disposed of immediately.

The investigation concluded on 25/26 April 2001 with the apprehension of multiple persons, including the appellant. All of those apprehended were sent for urinalysis on the morning of 26 April. While waiting in the hallway, the appellant stated, "I don't care if it's five, ten or fifteen years. When I get out,

[1] I. APPELLANT SUFFERED UNLAWFUL PRETRIAL PUNISHMENT WHEN MEMBERS OF HIS COMMAND POSTED HIS PICTURE AROUND THE COMMAND WITH LARGE BLOCK LETTERS ABOVE HIS NAME STATING "BEWARE."

II. A DISHONORABLE DISCHARGE AND SENTENCE OF TWELVE YEARS CONFINEMENT IS A HIGHLY DISPARATE AND INAPPROPRIATELY SEVERE PUNISHMENT COMPARED TO CO-OFFENDERS IN CLOSELY RELATED CASES WHO COMMITTED THE SAME OR SIMILAR ACTS YET RECEIVED A LESSER PUNISHMENT.

III. IN LIGHT OF THE UNREASONABLE AND UNEXPLAINED POST-TRIAL DELAY OF 399 DAYS FROM THE DATE OF SENTENCING, THIS COURT SHOULD PROVIDE REMEDIAL RELIEF PURSUANT TO ITS POWERS UNDER ARTICLE 66, UCMJ.

I'm going to find Asher and kill him (or words to that effect)." Charges were initially preferred against the appellant on 15 May 2001.

Article 13 Pretrial Punishment

In his first assignment of error, the appellant asserts that he suffered unlawful pretrial punishment when his picture was posted by the command with the word "BEWARE" above his name. We decline to grant relief on this basis.

During the Government's case on sentencing, the appellant's counsel questioned two witnesses about Defense Exhibit B, a composite exhibit consisting of ten "posters" showing the names and photographs of Marines assigned to the MPP, including the appellant, under the word "BEWARE" in big block letters at the top, all dated 9 April 2001. Record at 322-23; 339.

During the defense's case on sentencing, Defense Exhibit B was offered and admitted, and the appellant's counsel questioned two other witnesses about the posters. Record at 341; 350.

During the appellant's unsworn statement, the following colloquy took place between the appellant and his civilian counsel:

> Q. . . . Now, you were assigned to MPP when you came out of the brig. Correct?
> A. Yes, sir.
>
> Q. Okay. And that's Building 1641?
> A. Yes, sir.
>
> Q. And there were other people there with you. Correct?
> A. Yes, sir.
>
> Q. And the members now have got – or will look at some posters. Can you talk about – can you tell us what those posters are about?
> A. Corporal Wolf, who was in charge of us at the time, came in one morning and said that Major King wanted our picture for our personal files. We told him, No, we don't want to give him a picture. And he promised us that these are for his personal files, that nobody is going to see these. We told him, Okay, we'll take the pictures. They took the pictures; and the following day, they were posted on base and in the morning paper to stay away from us because we were in trouble and they didn't want us to congregate with anybody. They kind of wanted to keep us together at MPP. That way, we didn't associate with nobody else.

Q. Okay. Now we don't know specifically if Major King said that. That was what –
A. That's what I was told. I don't know specifically.

Q. That was Corporal Wolf?
A. Yes.

Q. And those posters were up for a period of time in all the barracks – right? – on base.
A. As far as I know, yes.

Q. Okay. And at some point in time, a complaint was made?
A. Yes. We went to legal to see what type of legal action we could take because we didn't feel that it was right at all to keep us separated and segregated from anybody else. We were human too, we thought.

Q. And the posters being on base?
A. Yes.

Q. So the posters then were restricted to just the MCCES barracks. Is that right?
A. Yes. They were just up in the school, Headquarters Company, the duty office. They were posted.

Record at 361-62.

After the appellant's unsworn statement, the defense rested. During an Article 39(a), UCMJ, session, the following colloquy took place between the Military Judge, civilian counsel, and the appellant:

MJ: . . . I just wanted to take up one matter. I'm assuming for tactical reasons, Mr. Cave, that you did not bring an Article 13 motion alleging illegal pretrial punishment in relation to these posters. Is that right?

CC: Yes. The issue has been discussed, not just in this case, but in other cases. We feel that it's something that ultimately would go to the members based on their – on my personal legal research on the issue.

MJ: Right.

CC: And my understanding of what – their understanding was and what the facts may be.

MJ: All right. So you deliberately chose not to bring an Article 13 –-

CC: I knew I was probably waiving off an Article 13 issue, yes.

MJ: Fair enough. And you've discussed that with your client?

CC: Yes, we did.

MJ: You understand what I'm asking – what I'm talking to your counsel about here, Private Phillips?

ACC: Yes, sir.

MJ: Do you understand that this issue with these posters that were put up and are now before the members, you certainly had it within your power, if you wanted to, to seek some kind of judicial credit because of that? Do you understand that?

ACC: Yes, sir.

MJ: And you chose not to do that?

ACC: Yes, sir.

Record at 364-65.

Article 13, UCMJ, provides:

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence [at trial]. . . .

Article 13 prohibits two things: (1) the intentional imposition of punishment on an accused before his or her guilt is established at trial, i.e., illegal pretrial punishment, and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial, i.e., illegal pretrial confinement. *United States v. Fricke,* 53 M.J. 149, 154 (C.A.A.F. 2000)(citing *United States v. McCarthy,* 47 M.J. 162, 165 (C.A.A.F. 1997)). If an accused, or appellant, can demonstrate that either existed, he or she is entitled to sentence relief. *United States v. Mosby,* 56 M.J. 309, 310 (C.A.A.F. 2002); RULE FOR COURTS-MARTIAL 305(k), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.)("additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances"); *see United States v. Suzuki,* 14 M.J. 491 (C.M.A. 1983).

However, given the representations of the civilian defense counsel and the appellant to the military judge, we hold that under R.C.M. 905(e), the appellant explicitly waived the issue. We note that under the case law in effect at the time of the appellant's trial, such an issue of pretrial punishment could be waived, but only by an "affirmative, fully developed waiver on the record." *United States v. Huffman*, 40 M.J. 225, 227 (C.M.A. 1994). Subsequent to the appellant's trial, our superior court overruled *Huffman* and established a prospective rule focused on R.C.M. 905(e), forfeiture of the issue by failing to raise the issue at trial. *See United States v. Inong*, 58 M.J. 460, 464-65 (C.A.A.F. 2003). Whether the appellant's case is analyzed under *Huffman* or *Inong*, we conclude that the result is the same. In the final analysis, we see nothing in any of our superior court's decisions invalidating R.C.M. 905(e) as to this particular issue and conclude that this presidential rule controls.

The appellant also asserts that the failure of the military judge to *sua sponte* grant relief constitutes plain error. Appellant's Brief of 29 Oct 2004 at 8. "Plain error" requires that an error, in fact, exists; that it be plain or obvious; and that it materially prejudices the substantial rights of the appellant. *United States v. Finster,* 51 M.J. 185, 187 (C.A.A.F. 1999)(citing *United States v. Powell,* 49 M.J. 460, 463, 465 (C.A.A.F. 1998)); *see also United States v. Fuson*, 54 M.J. 523, 526 (N.M.Ct.Crim.App. 2000). The court invokes the plain error rule only in exceptional circumstances to avoid a miscarriage of justice. *United States v. Lowry*, 33 M.J. 1035, 1038 (N.M.C.M.R. 1991). Further, this Court has defined plain error as being so "particularly egregious" as to seriously affect the fairness or integrity of judicial proceedings and has indicated that plain error must be reviewed in the context of the whole record. *Id*.

The appellant contends that he suffered pretrial punishment by being humiliated and denounced as a criminal long before his trial ever took place. Appellant's Brief at 7. However, less than three months before the appellant's poster was posted, the appellant had been convicted at a special court-martial of offenses including conspiracy, orders violations, unauthorized absence, and use of LSD and marijuana, and had been adjudged a bad-conduct discharge, confinement for six months, and reduction to pay grade E-1.

Article 13 requires that the alleged punishment occur *while being held for trial.* On 9 April, when the posters were posted, the appellant was not *being held for trial.* The appellant was not apprehended until 26 April. Charges were not preferred until 15 May. Based upon a review of the entire record, we find no plain error and conclude that the issue of pretrial punishment was waived.

Sentence Disparity and Appropriateness

In his second assignment of error, the appellant asserts that his sentence is inappropriately severe and highly disparate from the sentence of his co-offenders in closely related cases who committed the same or similar acts yet received a lesser punishment. He asks that we reassess his sentence and set aside his dishonorable discharge. We decline to grant relief on this basis.

To support his position, the appellant cites the cases of Private (Pvt) Tillinghast and Pvt Ryan, who participated with the appellant in drug use and distribution, and the case of Pvt W. E. Cathey, USMC.

Pvt Cathey was convicted of nine specifications of the wrongful use of various controlled substances. He was sentenced to a bad-conduct discharge, confinement for 14 months, and reduction to pay grade E-1. The convening authority, suspended all confinement in excess of 180 days.

Pvt Ryan was convicted of conspiracy to wrongfully distribute ketamine, conspiracy to wrongfully use ketamine, three specifications of wrongful distribution of marijuana, wrongful manufacture of ketamine, wrongful use of ketamine, and assault. Pvt Ryan was sentenced to a dishonorable discharge, confinement for 112 months, total forfeiture of pay and allowances, and a fine of $5,000.00. The convening authority, suspended all confinement in excess of 48 months.

Pvt Tillinghast was convicted of conspiracy to wrongfully distribute ketamine, conspiracy to wrongfully use marijuana, conspiracy to wrongfully possess marijuana, three specifications of wrongful distribution of ketamine and marijuana, wrongful manufacture of ketamine, wrongful introduction of marijuana, and six specifications of wrongful use of ketamine and marijuana. Pvt Tillinghast was sentenced to a dishonorable discharge, confinement for 12 years, and forfeiture of all pay and allowances. The convening authority, suspended all confinement in excess of 54 months.

A court-martial is free to impose any legal sentence it deems appropriate. *United States v. Turner,* 34 C.M.R. 215, 217 (C.M.A. 1964); R.C.M. 1002. On review, a court of criminal appeals "may affirm only such findings of guilty and the sentence or such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ. Courts of criminal appeals are tasked with determining sentence appropriateness, rather than granting clemency. *United States v. Healy,* 26 M.J. 394, 395-396 (C.M.A. 1988); R.C.M. 1107(b). Clemency, which involves bestowing mercy, is the prerogative of the convening authority.

Sentence appropriateness involves the "'*individualized* consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(emphasis added)(quoting *United States v. Mamaluy,* 27 C.M.R. 176, 180-81 (C.M.A. 1959)). In raising the issue of sentence disparity, the appellant has the burden of "demonstrating that any cited cases are 'closely related' to his . . . case and that the sentences are 'highly disparate.'" *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *see also United States v. Olinger*, 12 M.J. 458, 460 (C.M.A. 1982). To be closely related, "the cases must involve offenses that are similar in both nature and seriousness or which arise from a common scheme or design." *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994).

Although they were both caught up in the same investigation, the charges in the appellant's case and the charges in Pvt Cathey's case are significantly and substantively different. Pvt Cathey was convicted only of wrongful use of controlled substances and was not convicted of the more serious offenses of conspiracy, manufacture, introduction, and distribution of controlled substances. Therefore, these cases are not closely related.

The charges in Pvt Ryan's and Pvt Tillinghast's cases are comparable to the charges in the appellant's case. They were convicted of conspiring with each other, and several other offenses that were factually interrelated. All were convicted of the serious offenses of conspiracy, manufacture, and distribution of controlled substances. We find these three cases to be "closely related" within the meaning of *Lacy* and *Kelly*.

We must next examine whether the appellant's sentence and that of his co-actors are "highly disparate", and whether there is a rational basis for any disparity. *See Lacy*, 50 M.J. at 288; *Kelly*, 40 M.J. at 570. We do not find the appellant's sentence to be highly disparate from that of either Pvt Ryan or Pvt Tillinghast. All three were adjudged a dishonorable discharge. Although Pvt Ryan's sentence to confinement was two years and eight months less than the appellant's confinement, he was not convicted of communicating a threat to kill Pvt Asher, the cooperating Government witness in the investigation. The sentences of the appellant and Pvt Tillinghast are identical except that Pvt Tillinghast was adjudged forfeiture of all pay and allowances. By operation of law, the appellant also loses all pay and allowances while confined. Art. 58b, UCMJ. Whether Pvts Ryan and Tillinghast received the benefit of a pretrial agreement or clemency is irrelevant to this determination. We look at the sentences *adjudged* in closely related cases. *United States v. Sothen,* 54 M.J. 294 (C.A.A.F. 2001). We note that different officers took action on the appellant's and Pvt Ryan's cases, and that fact alone is a rational basis for the differences at the post-trial stage. We will not second-guess

the convening authority's decision to treat these cases differently.

Based upon the entire record, including the case in extenuation and mitigation and the appellant's unsworn statement, we find that the appellant's sentence is not inappropriately severe for these very serious offenses. Art. 66(c), UCMJ. Given the appellant's previous court-martial conviction for drug as well as other offenses, given his voluntary and extensive involvement in drug conspiracies, drug manufacture, distribution and use, much of which occurred aboard a Marine Corps Base and involved other Marines, and mindful of the appellant's character and background, we are convinced that the sentence is appropriate in all respects for the offenses and this offender. *Healy*, 26 M.J. at 394; *Snelling*, 14 M.J. at 268.

Post-Trial Delay

In his third assignment of error, the appellant asserts that he has been denied speedy post-trial review of his court-martial in that 399 days passed before the record of trial was docketed with this court for appellate review. We disagree.

The salient dates and actions are set out below.

10 APR 02	Sentenced
10 JUL 02	Record of trial authenticated by Military Judge
23 AUG 02	Staff Judge Advocate's Recommendation (SJAR)
23 AUG 02	SJAR served on defense counsel
26 AUG 02	Defense request for 20 additional days in which to submit clemency matters
23 SEP 02	Defense clemency request submitted
26 SEP 02	Supplemental SJAR submitted
30 SEP 02	Convening Authority's Action / Court-Martial Order
14 MAY 03	Case docketed for appellate review

The appellant does not contend that the delay rises to the level of a due process violation, but rather asserts that reassessing the sentence is appropriate under this court's powers pursuant to Article 66, UCMJ. However, we will also consider whether a due process violation occurred.

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)(citing *Barker v. Wingo,* 407 U.S. 514, 530 (1972)). 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. *Jones,* 61 M.J. at 83. 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).

The only time period, which causes us any concern is the unexplained seven and one half month period between the convening authority's action and docketing with this court. We conclude that this period of delay is facially unreasonable. However, in the record, we find no assertion of the right to a timely appeal. The only claim of prejudice is that the appellant had by then already served two years of his confinement. He was sentenced to twelve years. We find no prejudice to the appellant caused by the delay. Thus, we conclude that there has been no due process violation due to the post-trial delay.

Appellate relief under Article 66(c), UCMJ, should be viewed as a last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review. *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). While we do not condone the tardy transmission of the record to this court, we decline to grant relief on this ground. *Id. at* 224; *see also United States v. Bigelow*, 57 M.J. 64, 69 (C.A.A.F. 2002); *United States v. Williams*, 55 M.J. 302, 305 (C.A.A.F. 2001); *United States v. Jenkins*, 38 M.J. 287, 288 (C.M.A. 1993).

Conclusion

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

Although not raised by the appellant, nor mentioned by the Government, both the staff judge advocate's recommendation and the general court-martial order contain errors as to the pleas and the findings. As to Specification 1 of Charge II, both incorrectly state that the appellant pled not guilty and that the specification was withdrawn. In fact, the appellant pled guilty and was found guilty of that specification. As to the sole specification of Charge III, both incorrectly state that the appellant pled guilty. Actually, the appellant pled not guilty.

The appellant does not contend, nor do we find, that he was prejudiced by these scrivener's errors. However, he is entitled to accurate records regarding his court-martial. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). We therefore direct that the supplemental court-martial order accurately reflect the pleas and findings as to Specification 1

of Charge II, and the sole specification of Charge III, as noted above.

Chief Judge DORMAN and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court