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.C. HARRIS**

UNITED STATES

v.

George D. VON WOLFF
Corporal (E-4), U.S. Marine Corps

NMCCA 200301538 Decided 25 July 2005

Sentence adjudged 27 March 1998. Military Judge: C.R. Zelnis. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 1st Battalion, 6th Marines, 2d Maine Division, Camp Lejeune, NC.

LT LUIS P. LEME, JAGC, USN, Appellate Defense Counsel
Maj KEVIN C. HARRIS, USMC, Appellate Government Counsel

DORMAN, Chief Judge:

The appellant was tried before a special court-martial composed of officer and enlisted members. In accordance with his pleas the appellant was convicted of a two-hour long unauthorized absence. Contrary to his pleas, the appellant was convicted of a one-day unauthorized absence, making a false official statement, and adultery. The appellant's crimes violated Articles 86, 107, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 907, and 934. The adjudged and approved sentence consists of a reduction to pay grade E-1 and a bad-conduct discharge.

The appellant has assigned three errors for our consideration. First, he asserts that he has been denied a speedy review of his court-martial. Second, the appellant contends that the evidence is both legally and factually insufficient to sustain his conviction for adultery. Finally, the appellant asserts that a sentence that includes a bad-conduct discharge is inappropriately severe.

We have reviewed the appellant's record of trial and his three assignments of error. We have also considered the

Government's response brief. Having done so, we find that following our corrective action there are no remaining errors that are materially prejudicial to substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant stands convicted of having engaged in adultery with R.S., the wife of Lance Corporal (LCpl) S. The evidence established that LCpl S and his wife met the appellant when they lived in an apartment complex in Jacksonville, NC. The appellant and his wife lived in an apartment downstairs from that of LCpl S and his wife. Eventually, LCpl S and RS moved from the apartments to a trailer in a rather secluded area of Hubert, NC. During this period of time, both couples were experiencing some marital discord. In fact, during the summer of 1997 the appellant's wife left him.

In November 1997 RS was working at the Super 8 Motel in Jacksonville. She worked the late shift, 2300-0700. The appellant was seen visiting RS at the motel on several occasions. On one occasion, LCpl S saw the appellant and RS sitting on a bench outside the motel. After seeing the two of them together, LCpl S apparently went to the trailer and damaged some of RS's personal belongings. By 17 November 1997, LCpl S had moved into the barracks to give his wife some "space." He apparently was still intent on remaining married to RS and sent her flowers at the motel on the 17th of November. Later that evening he called the motel to find out if she liked the flowers and he was told that she had not come to work that day. The appellant called the trailer, but no one answered the phone. Even later that evening, LCpl S drove out to the trailer.

RS testified that on the 17th of November she had called in sick, even though she was not sick. Rather, she was trying to get her car repaired, and she asked the appellant to help her. She drove into Jacksonville and picked up the appellant at around 1830-1900 and then drove back to the trailer. The appellant had been staying with a Marine sergeant, who loaned the appellant some tools that evening. RS further testified that once they got to the trailer, the appellant began to work on her car, and that he, and his clothes, got rather dirty and greasy in the process. To show her appreciation for his help, RS offered to make dinner for the appellant. Since he was so dirty, she also let him take a shower in the master bedroom of the trailer. According to RS, her husband, LCpl S, arrived at the trailer while the appellant was in the shower. LCpl S was talking with her when the appellant came out of the shower. At that time LCpl S became angry and attacked the appellant, knocking him unconscious. RS called the police, who came to the trailer and arrested LCpl S. RS specifically denied having engaged in sexual intercourse with the appellant.

LCpl S testified that when he arrived at the trailer, he noticed that there was a light on in the master bedroom. He went around to the back of the trailer and, looking through the window, saw the appellant engaging in sexual intercourse with his wife. They were both nude and were on top of the covers. The appellant was on top of RS. She "was on her back with her legs open, Corporal Vonwolff (sic) between her legs, thrusting, having sex." Record at 160. LCpl S further testified that he was able to see the appellant penetrating RS while they were engaged in sexual intercourse. *Id*. LCpl S watched them for about 30 seconds and then entered the trailer through a sliding door. When he got into the bedroom, RS was under the covers and the appellant was in a closet. They were both nude. LCpl S admits to assaulting the appellant, and Prosecution Exhibits 4 and 5, as well as Defense Exhibit A, substantiates the severity of the beating the appellant received.

In response to RS's call for police assistance, two deputy sheriffs from Onslow County arrived at the trailer. Although they arrested LCpl S for his assault upon the appellant, they also provided useful testimony regarding the adultery charge. They both noted that when they arrived at the trailer RS was wearing a bathrobe, and they could not tell if she had anything on under it. Both officers heard LCpl S say that he had found the appellant and RS having sex when he got to the trailer. One officer testified that the appellant had told him he looked through the window and saw the sexual activity. The other officer testified that he did not hear LCpl S say that he had looked through the window. He also testified that the appellant had said there were no lights on when he got to the trailer. Additionally, one officer testified that the appellant's hair did not appear wet, and that his clothes were not greasy.

During the defense case-in-chief, the appellant presented the testimony of RS, one of the deputy sheriffs, and several other witnesses who testified as to the appellant's good military character. In rebuttal, the Government called the appellant's officer-in-charge (OIC) who testified that the appellant's military character was "poor." *Id*. at 272. The Government also presented the testimony of a friend of both LCpl S and RS. He testified that he spoke with RS a few days after LCpl S had been arrested for assaulting the appellant. At that time RS told him that LCpl S had watched her engaging in sexual intercourse and that he had not come into the trailer until after they had finished. *Id*. at 266.

The appellant was supposed to be at work on the morning of 18 November 1997. The appellant's OIC, First Lieutenant (1st Lt) Retz, saw the appellant at the office at 0630 that morning. He testified that at the time he saw him the appellant was beaten up pretty badly. The appellant reported to the dental clinic at Camp Lejeune around 0900 that morning and was treated for a broken front tooth. The tooth had been sheared and the fracture went below the gum line. A root canal procedure was performed.

The appellant was at dental until about 1215-1245 that day. The doctor who treated him testified that when the appellant left the dental clinic he was "not going to be able to carry out any military duties in the condition that he presented, and the same as when he left my care." Record at 243. The doctor, a Navy commander, did not give the appellant a no-duty chit because he was confident that the appellant had already received one from the emergency room.

Sufficiency of Evidence

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 (C.M.A. 1987).

The test for factual sufficiency 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. Reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). "[T]he 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). Based on that review, we are convinced beyond a reasonable doubt of the guilt of adultery, but we are not convinced of his guilt of unauthorized absence on 18 November 1997.

A. Adultery.

In order to convict the appellant of the offense of adultery the Government was required to prove that the appellant wrongfully had sexual intercourse with RS, that at the time either the appellant or RS was married to another person, and that under the circumstances the appellant's conduct was either prejudicial to good order and discipline or was of a nature to bring discredit upon the armed forces. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.), Part IV ¶ 62b. The appellant specifically alleges that the Government failed to prove that the appellant engaged in sexual intercourse with RS. We do not agree.

It is uncontroverted that late in the evening of 17 November 1997, LCpl S found the appellant and RS together in the trailer that LCpl S and RS had rented. It is also uncontroverted that

LCpl S rather severely beat the appellant upon finding him there. LCpl S told the officers who arrested him that he had found the appellant and RS engaged in sexual intercourse. While RS testified that no such intercourse had occurred that night, we give credence to the testimony of the Government's rebuttal witness who testified that RS told him that her husband had seen her engaged in sexual intercourse that night. We also find that that testimony corroborates the testimony of LCpl S concerning his eyewitness account of the adultery. Based upon the all the evidence contained in the record, we conclude that the evidence was legally sufficient. Moreover, we are convinced beyond a reasonable doubt that the appellant committed the offense of adultery as alleged in the specification under Charge II.

B. Unauthorized Absence

Although not assigned as error, we have closely examined the evidence of the appellant's unauthorized absence on 18 November 1997, and find it wanting. In order to convict the appellant of this offense the Government was required to prove that the appellant was absent from his organization, that the absence was without authority, and that the absence was for a certain period of time. MCM, Part IV ¶ 10b(3). However, when an individual is unable to report for duty through no fault of his own, the offense of unauthorized absence has not been committed. *United States v. Barnes*, 39 M.J. 230, 232 (C.M.A. 1994).

While the evidence does support a finding that the appellant was not with his organization, we are not convinced that it was without authority. Nor are we convinced that the appellant was able to perform his military duties that day. In short, we are not convinced that the appellant did not have a defense of physical inability. First, we note that although 1st Lt Retz testified that he saw the appellant at the office at 0630 on 18 November 1997, DE A states that the appellant was not released from the emergency room until 0640. It was thus after that time that the appellant went to his office and his OIC let him in. The Government also presented testimony that the appellant was supposed to be at work between 0630 and 0700 that morning. No testimony was presented that anyone actually looked for the appellant at 0700. Staff Sergeant Gruner, who worked in the same area as the appellant testified that the appellant called him at around 1030. He also testified that the appellant told him he had been beat up the night before, had gone to the emergency room and was released from there around 0600, and that he had fallen asleep. That information is obviously in error because of the evidence contained in DE A and the testimony of the appellant's OIC. Additionally, DE A indicates that the appellant was to report to dental that day. The dental officer who treated the appellant testified that the appellant showed up at dental at around 0900 and that he was not released until 1215-1245. He further testified that the appellant was in no condition to perform his duties. Examination of PEs 4 and 5, lead to that same conclusion.

An absence from one's organization is excused when an individual "is unable to return . . . through no fault of his own." *Barnes*, 39 M.J. at 232 (quoting *United States v. Williams*, 21 M.J. 360, 362 (C.M.A. 1986)). Furthermore, "[t]he defense is available in situations where third parties intervened, but not where 'intervention by third parties was caused by the accused's fault.'" *Id*. (quoting United *States v. Calpito*, 40 C.M.R. 162 (C.M.A. 1969) and *United States v. Myhre*, 25 C.M.R. 294 (C.M.A. 1958)). While the evidence presented established that the appellant's injuries resulted from a beating he took at the hands and feet of the husband of the woman with whom the appellant was found in bed, the adultery itself was not the reason the appellant was unable to perform his duties on 18 November 1997. Rather it was the result of a criminal assault perpetrated by LCpl S upon the appellant that prevented the appellant from performing his duties.

Upon review of the evidence, the Government clearly did not establish that the appellant's absence began at 0700 on 18 November 1997. Given the fact that the appellant did report to work, that he later reported to dental as DE A indicated he should, and that at the time he departed dental in the early afternoon of 18 November he was in a condition in which he was unable to carry out his duties, we are not convinced that the appellant's absence on that date was unauthorized, or that he did not have a defense of physical inability. Accordingly, we will take corrective action in our decretal paragraph.

Speedy Review

In his first assignment of error the appellant contends that he has been denied a speedy review of his conviction. Appellant's Brief of 30 Sep 2004 at 7-8. To assist in our analysis of this assignment of error, we provide the following chronology of the review of the appellant's two volume, 353-page record of trial:

27 Mar 98	Sentence adjudged.
19 Aug 98	Record of Trial authenticated.
20 Oct 98	Staff Judge Advocate's Recommendation (SJAR) completed.[1]
28 Oct 98	Appellant submits clemency matters to the Convening Authority, noting evidence of his good military character, his previous proficiency and conduct markings of 4.7 /

[1] The Record contains no evidence that the SJAR was ever served on the accused or his trial defense counsel. We also note error in both the SJAR and the Court-Martial Order in that they both state that Charge I was withdrawn and dismissed.

	4.7, and requesting the suspension of his adjudged bad-conduct discharge.
05 Nov 98	Convening Authority's Action.
6 Mar 03	Record of Trial found at Camp Lejeune.
9 Aug 03	Record of Trial arrives at Navy Marine Corps Appellate Review Activity.
13 Aug 03	Record of Trial docketed with this court.
30 Sep 04	Defense Brief filed.
29 Mar 05	Government Brief filed.

We consider four factors in determining whether 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*. (quoting *Toohey*, 60 M.J. at 102). We find that the delay in this case falls into that latter category.

In this case it took almost 5½ years to forward a rather uncomplicated court-martial to this court for review. And it was 6 years from the date of trial before the case was submitted to the court for decision. Of the delay between the date of trial and the date the case was docketed with this court almost 5 years is attributable to the record simply being lost at Camp Lejeune. Unlike many cases we review, this case received relatively prompt attention between the date of trial and the date the convening authority took action. Then the case was lost until discovered in March 2003 in the Review Office of the Legal Service Support Section of the 2d Force Service Support Group at Camp Lejeune, NC. The only explanation offered is lack of administrative oversight. As our superior court has noted, the delay in forwarding a case for appellate review is the "'least defensible of all' post-trial delays." *United States v. Oestmann*, 61 M.J. 103, 105 (C.A.A.F. 2005)(quoting *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990)). Then after the record was found, it took another 5 months to simply mail it to this court for review. Under these facts the appellant is entitled to relief.

Sentence Appropriateness

In his final assignment of error, the appellant argues that a sentence that includes a bad-conduct discharge is inappropriately severe under the facts of this case. Our action below in reassessing the sentence, in conjunction with our determination that the appellant is entitled to relief due to the Government's delay in forwarding the record of trial to this court for review, moots this assignment of error. In our reassessment we will consider the delay in determining what sentence should be approved. *See generally United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002).

Conclusion

Accordingly, we set aside the appellant's conviction of Charge I and its supporting specification. That Charge and specification are ordered dismissed. The remaining findings are affirmed. In light of our action on findings we are required to conduct a reassessment of the sentence. Upon reassessment of the sentence in accordance with the principles of *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998), *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990), and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986), we affirm only that portion of the sentence as extends to a reduction to pay grade E-1.

Senior Judge PRICE and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court