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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **A. DIAZ**

UNITED STATES

v.

Terry L. BOYD
Mess Management Specialist First Class (E-6), U.S. Navy

NMCCA 200301589 Decided 26 July 2005

Sentence adjudged 20 June 2002. Military Judge: R.B. Wities. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southwest, San Diego, CA.

Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
CAPT MARK W. PEDERSEN, JAGC, USNR, Appellate Defense Counsel
LT DEBORAH S. MAYER, JAGC, USNR, Appellate Government Counsel
LT GUILLERMO J. ROJAS, JAGC, USNR, Appellate Government Counsel

DIAZ, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of false official statement and larceny, in violation of Articles 107 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 921. The military judge sentenced the appellant to confinement for 91 months, a fine of $91,608.00, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence but suspended all confinement in excess of 36 months for 36 months from the date of his action[1], suspended the fine for six months from the date of his action, and waived automatic forfeitures for six months from the date of his action.

We have carefully considered the record of trial, the appellant's three original assignments of error, the appellant's

[1] Although not raised as an assignment of error, the convening authority failed to comply with the terms of the pretrial agreement as to the suspended confinement, in that the parties agreed that the suspension period was to run from the date of the adjudged sentence, and not the date of the convening authority's action. We will correct this error in our decretal paragraph.

affidavit dated 30 October 2003 (with attachments), which sets out an additional assignment of error, the supplemental assignment of error filed by the appellant's counsel, and the Government's responses. Except as noted below, we conclude that the findings and the 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.

Denial of Speedy Post-Trial Review

The appellant first asserts that he has been denied speedy post-trial review of his court-martial because thirteen months elapsed between the date of trial and the time the record of trial was delivered to this court for review. We note that most of the post-trial delay is attributable to the appellant's trial defense counsel, who received the record on 19 August 2002, and then misplaced it for over nine months before returning it to the command for authentication. Record at 110.

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 (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. *Jones*, 61 M.J. at 83. Moreover, in extreme cases, the delay itself may "give rise to a strong presumption of evidentiary prejudice." *Id.*

In this case, the appellant does not assert a denial of due process, asking instead that this Court grant relief based on its authority under Article 66, UCMJ. *See United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002). While we recognize that the Government is ultimately responsible for the timely processing of the appellant's case, we cannot overlook that the record of trial was in the possession of the appellant's trial defense counsel for over nine months before it was forwarded to the command for authentication. Moreover, in his post-trial submissions to the convening authority, the appellant never complained about the processing of his case. Finally, the appellant does not assert to us that he has been prejudiced by his lawyer's negligence and we discern no prejudice or other harm based on this record. Accordingly, we see no basis for granting relief under Article 66, UCMJ, or any other authority and decline to do so.

Substitute Authentication by the Trial Counsel

Next, the appellant complains that the record was authenticated by the trial counsel, with no explanation as to why

substitute authentication was necessary. We agree that this was error, but decline to grant relief.

RULE FOR COURTS-MARTIAL 1104(a)(2)(A), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) provides that the record of trial in a general court-martial shall be authenticated by the military judge. The trial counsel may authenticate the record when the military judge is unable to do so, "because of the military judge's death, disability, or absence[.]" R.C.M. 1104(a)(2)(B).

In this case, the appellant correctly notes that there is no explanation for the substitute authentication. Absent some claim that the record is not accurate, however, we will not order the record returned for a useless act. *See e.g., United States v. Merz,* 50 M.J. 850, 854 (N.M.Ct.Crim.App. 1999)(declining to return the case for proper authentication where the appellant identified no errors in the record). Because the appellant has failed to show prejudice from the authentication error, he is not entitled to relief. *See United States v. Ayers*, 54 M.J. 85, 92 (C.A.A.F. 2000).

Disparate Sentence

The appellant also contends that his sentence is inappropriately severe and disparate compared to sentences meted out to servicemembers in six other cases. He requests that we approve only a bad-conduct discharge and disapprove the balance of his sentence to confinement. We decline to grant relief.

The power to award clemency is reserved for the convening authority; we are charged to affirm only those sentences that we deem fair and just. *United States v. Cavallaro,* 14 C.M.R. 71, 74 (C.M.A. 1954). While we have discretion to consider and compare other court-martial sentences when fulfilling our statutory duty to determine sentence appropriateness and relative uniformity, *see United States v. Wacha,* 55 M.J. 266, 267-68 (C.A.A.F. 2001), in the normal course of events, we determine sentence appropriateness without regard to sentences in other cases. *United States v. Olinger,* 12 M.J. 458, 460 (C.M.A. 1982). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

In closely related cases, however, we may afford relief where the sentences are "highly disparate." *United States v. Kelly,* 40 M.J. 558, 570 (N.M.C.M.R. 1994). Generally, cases are closely related if they involve co-actors in a common crime or parallel scheme, or if there is some other direct nexus between the cases sought to be compared. *United States v. Lacy,* 50 M.J. 286, 288 (C.A.A.F. 1999). In this case, the appellant seeks relief for a perceived disparity between his sentence and the sentences awarded six other servicemembers in completely

unrelated cases. We are not obligated to engage in sentence comparison on these facts, however, and we decline to do so.

The appellant, a first class petty officer with over 14 years of service, pled guilty to stealing over $91,000 in cash from his command over the course of a year, and attempting to cover up his crime by falsifying official records. These offenses could have netted him up to fifteen years of confinement.[2]

Although he presented evidence that his crimes were mitigated by his diagnosis as a pathological gambler[3], by the date of trial the appellant had not repaid any portion of the stolen cash. After reviewing the entire record, we find that the sentence here is appropriate for this offender and his offenses. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *Snelling*, 14 M.J. at 268.

CA's Failure to Comply with PTA

As we have noted earlier, the CA failed to suspend the adjudged confinement in accordance with the terms of the agreement. We will correct that error shortly. The appellant asserts, however, that the convening authority's action contains two additional errors that contravene the terms of this pretrial agreement.

First, in his separately filed affidavit, the appellant claims that the CA was obligated to waive all automatic forfeitures for six months at which time, unless sooner vacated, they would be remitted without further action. We disagree. The pretrial agreement is clear that the CA agreed to suspend any adjudged forfeitures and/or fines for six months from his action and then remit the same. With respect to automatic forfeitures, however, the convening authority's sole obligation was to defer and then waive such forfeitures for six months, provided the appellant set up an allotment to his family. The CA's action honors that commitment. Accordingly, we decline to grant relief as to this claim.

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[2] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶¶ 31e and 46e(1)(c).

[3] During sentencing, an expert qualified to make such a diagnosis testified that the appellant was a compulsive gambler. Record at 84. The appellant presented no evidence that this condition amounted to a mental disease or defect or otherwise excused his offenses, and he makes no such claim on appeal. *See generally United States v. Baasel*, 22 M.J. 505, 507 n.2 (A.F.C.M.R. 1986)(stating that compulsive gambling is identified in the Diagnostic and Statistical Manual of Mental Disorders (Third Edition) (DSM III) as a disorder of impulse control and not as a mental disease or defect). Thus, although the military judge did not directly address this issue with the appellant, we are convinced that no defense was raised.

In a supplemental assignment of error, the appellant correctly notes that the CA failed to order remission of the suspended fine. The Government properly concedes the error. We note that the CA also failed to order remission of the suspended sentence to confinement. We will take corrective action in our decretal paragraph.

Conclusion

We affirm the findings as approved by the convening authority. With respect to the approved sentence, we modify the convening authority's action as follows: "Confinement in excess of (36) thirty-six months will be suspended for a period of (36) thirty-six months from the date of the adjudged sentence. Unless sooner vacated, the suspended sentence to confinement, as well as the suspended fine, will be remitted without further action upon termination of the suspension period." We otherwise affirm the approved sentence and direct that the supplemental court-martial order reflect our modification to the convening authority's action.

Chief Judge DORMAN and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court