

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

**BEFORE**

**C.A. PRICE**

**R.C. HARRIS**

**J.L. FALVEY**

**UNITED STATES**

**v.**

**Dana W. CLARK II  
Private (E-1), U.S. Marine Corps**

NMCCA 200400589

Decided 14 March 2005

Sentence adjudged 30 October 2002. Military Judge: L.K. Burnett. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Security Battalion, Marine Corps Base, Quantico, VA.

Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel  
LCDR RICARDO BERRY, JAGC, USNR, Appellate Defense Counsel  
Maj RAYMOND E. BEAL, II, USMC, Appellate Government Counsel  
Maj GREGG M. LYSKO, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FALVEY, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of unauthorized absence terminated by apprehension and separate specifications of use and distribution of marijuana on divers occasions, in violation of Articles 86 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 912a. The appellant was sentenced to a bad-conduct discharge and confinement for 150 days. Pursuant to a pretrial agreement, the convening authority approved the sentence as adjudged, but suspended all confinement over 90 days.

We have carefully considered the record of trial, the appellant's assignment of error regarding post-trial delay, 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. *See* Arts. 59(a) and 66(c), UCMJ.

## Background

The appellant contends that he was denied speedy review because there was a delay of over 500 days from the date of trial until the convening authority's action. We decline to grant relief.

The appellant was sentenced on 30 October 2002. The appellant was apparently released from the brig that day because he received pretrial confinement and administrative credit greater than the confinement to be served. The trial counsel received the record of trial on 22 January 2003 and completed his review on 7 February 2003. The trial defense counsel also completed his review of the record on 7 February 2003. The military judge authenticated the record of trial on 20 February 2003.

The staff judge advocate's recommendation (SJAR) was not signed until 26 March 2004, a delay of over 13 months from authentication. There is no explanation in the record for this delay. On 6 April 2004, the trial defense counsel requested an extension to submit clemency matters and he was given an extension to 29 April 2004. On 28 April 2004, the trial defense counsel submitted a clemency request that was forwarded to the convening authority that same day. The convening authority's action occurred on 3 May 2004.

Throughout this lengthy process, neither the appellant nor his trial defense counsel requested expedited review. Moreover, the appellant has not claimed that he has been prejudiced in any way by this delay.

## Discussion

The appellant has a right to timely review of the findings and sentence. *United States v. Williams*, 55 M.J. 302, 305 (C.A.A.F. 2001); *United States v. Tucker*, 26 C.M.R. 367 (C.M.A. 1958); *United States v. Khamsouk*, 58 M.J. 560, 561 (N.M.Ct.Crim.App. 2003). In order to obtain relief as an error of law or fact under Article 59(a), UCMJ, the appellant must show material prejudice to a substantial right as a result of unreasonable and unexplained post-trial delay. *United States v. Jenkins*, 38 M.J. 287, 288 (C.M.A. 1993). As noted above, the appellant makes no claim that he has been prejudiced by the delay in his post-trial review and we can discern no such prejudice.

Our analysis does not, however, end with this conclusion. We may grant sentence relief under Article 66(c), UCMJ, for unreasonable and unexplained delay even in the absence of actual prejudice. As our superior Court said, we are "required to determine what findings and sentence 'should be approved,' based on all the facts and circumstances reflected in the record, including any unexplained and unreasonable post-trial delay." *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

The post-trial processing of the appellant's court-martial proceeded normally until authentication. The 13-month delay between authentication and the SJAR is inexplicable. Although we find this delay is unexplained and excessive, we decline to grant relief.

[C]ounsel at the trial level are particularly well-situated to protect the interests of their clients by addressing post-trial delay issues before action by the convening authority. . . . Appellate relief under Article 66(c) should be viewed as the last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review.

*Id.* at 225. In this case, there is no evidence of any complaint to the military judge, staff judge advocate, convening authority, or any other authority regarding the post-trial processing delay. In fact, the appellant submitted clemency matters on 28 April 2004 in response to the SJAR on behalf of his client in which he raised no issue of delay prior to convening authority's action.

Thus, despite the unexplained delay, we decline to grant relief where, as here, the appellant suffered no prejudice and took no action to obtain relief at an earlier and more opportune moment. Although we do not countenance dilatory post-trial processing, we do not find the delay prior to convening authority's action, standing alone, to be so extraordinary to warrant the exercise of our Article 66(c), UCMJ, powers.

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

Senior Judge PRICE and Judge HARRIS concur.

For the Court

R.H. TROIDL  
Clerk of Court