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.

Omatayo D. RICHMOND
Airman Apprentice (E-2), U.S. Navy

NMCCA 200400693 Decided 21 June 2005

Sentence adjudged 26 February 2001. Military Judge: J.W. Styron. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Helicopter Antisubmarine Squadron 7, Naval Air Station, Jacksonville, FL.

CAPT MICHAEL HOOD, JAGC, USNR, Appellate Defense Counsel
Maj J.ED. CHRISTIANSEN, USMC, Appellate Defense Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel

HARRIS, Judge:

A military judge, sitting alone as a special court-martial, convicted the appellant, pursuant to his pleas, of fraudulent enlistment, four short unauthorized absences, disobeying the lawful order of a first class petty officer to report for duty, two derelictions of duty by using a Government credit card for unofficial purchases, wrongful use of marijuana, larceny of Navy Exchange property, assaulting by holding and biting a female Sailor, and unlawful entry of a barracks room with intent to commit an assault on a female Sailor, in violation of Articles 83, 86, 91, 92, 112a, 121, 128, and 130, Uniform Code of Military Justice, 10 U.S.C. §§ 883, 886, 891, 892, 912a, 921, 928, and 930. On 26 February 2001, the military judge sentenced the appellant to confinement for 150 days, forfeiture of $600.00 pay per month for 6 months, reduction to pay grade E-1, and a bad-conduct discharge.

On 7 May 2004, the convening authority (CA) approved the sentence as adjudged and, except for the bad-conduct discharge,

ordered the punishment executed. A pretrial agreement had no effect on the sentence.

We have carefully considered the record of trial, the appellant's single assignment of error asserting that he has been denied speedy post-trial and appellate review of his court-martial, and the Government's response. We conclude that the appellant was denied speedy post-trial review of his court-martial. Art. 59(a), UCMJ. We shall take corrective action in our decretal paragraph. Subject to our corrective action below, we find no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was sentenced on 26 February 2001 and was released from confinement on 17 March 2001. On 21 March 2001, trial defense counsel submitted to the CA a Clemency Request and a separate Request for Deferment of Adjudged and Automatic Forfeitures. It is not clear from the record whether these requests were actually considered by the CA prior to his receipt of the staff judge advocate's recommendation (SJAR).[1]

On 11 March 2004, the CA requested judge advocate review pursuant to RULE FOR COURTS-MARTIAL 1106, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), be conducted on all courts-martial cases convened by his command. On 17 March 2004, an SJAR was issued in the appellant's case, attached to which were trial defense counsel's two requests of 21 March 2001. The SJAR contained this explanation for the lengthy delay since sentencing: "The delay in post-trial review is due to loss of the original record of trial."

The trial defense counsel received a copy of the SJAR on 26 March 2004. On 12 April 2004, trial defense counsel informed the SJA, by e-mail, that he had no further comment in response to the SJAR. The CA took his action on 7 May 2004 and the Navy-Marine Corps Appellate Review Activity received the case on 2 June 2004. The case was docketed on 25 June 2004 and was fully briefed on 30 September 2004.

Speedy Post-Trial Review

Under the appellant's assignment of error, he avers that because of the post-trial delay, this court should exercise its powers under Article 66(c), UCMJ, and set aside the adjudged and approved bad-conduct discharge. We only agree that the appellant was denied speedy post-trial review and that relief other than setting aside the bad-conduct discharge should be granted under Article 59(a), UCMJ.

[1] While each document attached to the record is dated 21 March 2001, both are unsigned facsimile copies bearing a transmission date of 22 December 2003 and are stamped "received MAR 16 2004."

Regardless of the nature of the offenses committed, speedy post-trial review is a right afforded all service members punished during court-martial proceedings. *United States v. Williams*, 55 M.J. 302, 305 (C.A.A.F. 2001). This court has consistently decried post-trial delays and strived to hold convening authorities accountable for foot-dragging. *United States v. Williams*, 42 M.J. 791, 794 (N.M.Ct.Crim.App. 1995); *United States v. Henry*, 40 M.J. 722, 725 (N.M.Ct.Crim.App. 1994) (noting that this court cannot condone "such dilatory and slipshod practices"). Our efforts in this regard stem from the broad power and responsibility we possess to protect an accused. *United States v. Parker*, 36 M.J. 269, 271 (C.M.A. 1993).

First, we are required to determine whether the post-trial delay complained of renders the findings and/or sentence incorrect as a matter of law. *United States v. Tardif*, 57 M.J. 219, 219 (C.A.A.F. 2002). This particular prong of the analysis is bracketed by the statutory constraint that relief is only appropriate where a legal error "materially prejudices the substantial rights of the accused." Art. 59(a), UCMJ; *Tardif*, 57 M.J. at 219.

Second, we will consider whether the delay renders the findings and/or sentence incorrect from a factual standpoint. *Tardif*, 57 M.J. at 219; *see* Art. 66(c), UCMJ. Third, even if the first two prongs of the analysis do not support the appellant's requested relief, we must nevertheless review the allegation of unreasonable post-trial delay in light of the entire record to determine whether the findings or sentence should be approved. *Tardif*, 57 M.J. at 219; *see* Art. 66(c), UCMJ. Unlike the first prong of the test, the second and third parts of the analysis do not require a showing of prejudice by the appellant. *Tardif*, 57 M.J. at 219. Finally, we review the case for any violation of the appellant's due process rights. *See United States v. Jones*, 61 M.J. 80 (C.A.A.F. 2005).

When viewed from sentencing until the CA's action in this 120-page, single-volume record of trial with minimal trial exhibits and post-trial documents, despite the SJA's declaration that the appellant's original record was lost, we find that the unexplained post-trial delay in the appellant's case is excessive. Further, we also find actual prejudice or other harm to the appellant resulting from the unexplained delay. The record is silent as to whether the appellant ever complained to the military judge, staff judge advocate, or convening authority about any delay.

With regard to the appellant's release from confinement, we conclude that his release mooted his waiver request as to automatic forfeitures, but did not moot the request for "waiver" (sic) of adjudged forfeitures, despite the SJA also informing the CA that the appellant is "now" on appellate leave. *Tardif*, 57 M.J. at 224. As such, we find the unexplained delay between the appellant's trial and the CA's action to be both excessive and

prejudicial. The record is simply devoid of any indication that the CA previously considered the appellant's waiver (sic) of adjudged forfeitures request during the period remaining after the appellant's request where the Government would have withheld adjudged forfeitures. Art. 59(a), UCMJ; *see United States v. Bell*, 60 M.J. 682, 686 (N.M.Ct.Crim.App. 2004)(concluding that "it was error for the SJA to fail to forward the clemency request to the CA in a timely manner when the appellant was seeking an early release from confinement.").

Having found an error materially prejudicial to the appellant's substantial rights, we will take corrective action in our decretal paragraph. As a result of our corrective action, we find no due process violation and no other basis for affording relief.

Conclusion

Accordingly, we affirm the findings and only so much of the sentence as provides for a bad-conduct discharge.

Chief Judge DORMAN and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court