

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

BEFORE

C.L. CARVER

D.A. WAGNER

R.W. REDCLIFF

UNITED STATES

v.

**Eric J. PELTIER
Private (E-1), U.S. Marine Corps**

NMCCA 200400817

Decided 31 January 2005

Sentence adjudged 19 September 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.

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

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

CARVER, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of two specifications of unauthorized absence, in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886. The appellant was sentenced to a bad-conduct discharge and confinement for 120 days. Pursuant to a pretrial agreement, the convening authority approved the sentence as adjudged, but suspended all confinement over 60 days.

After carefully considering 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.

Post-Trial Delay Background

The appellant contends that he was denied speedy review because there was a delay of about 662 days from the date of trial until the record of trial was docketed with this court. We decline to grant relief.

The appellant was sentenced on 19 September 2002. Since the appellant received confinement credit greater than the confinement to be served and since there is no allegation that he suffered excessive confinement, we presume that he was released from the brig on the day he was sentenced. The trial counsel reviewed the record of trial on 7 November 2002 and the trial defense counsel reviewed the record of trial on 15 November 2002. The military judge did not authenticate the record of trial until 25 July 2003. The following note, apparently in the handwriting of the military judge, appears on the authentication page of the record: The military judge received this record of trial approximately 2-3 weeks prior to the date of authentication. Authentication delay by the military judge serves as a reasonable explanation for post-trial delay. *United States v. Khamsouk*, 58 M.J. 560, 562 (N.M.Ct.Crim.App. 2003). However, there is no other explanation in the record of trial for the delay of over 8 months from the date the TDC reviewed the record of trial until authentication.

Further, the staff judge advocate's recommendation (SJAR) was not signed until 21 May 2004, a delay of about 10 months after authentication. There is no explanation in the record for this delay. The trial defense counsel did not submit any matters in response to the SJAR which he received on 25 May 2004. The convening authority's action occurred on 21 June 2004. The record of trial was forwarded to this court and docketed on 12 July 2004. Throughout this lengthy process, neither the appellant nor his defense counsel requested expedited review.

In a post-trial affidavit, the appellant alleged that the delay of about two years prejudiced him because the delay "deprived me of a DD-214 and the opportunity for meaningful employment, and has been a huge stumbling block in my path as I try to move on with my life." Declaration of Private Eric J. Peltier, USMC, of 21 Dec 2004. He amplified his complaint as follows:

2. I do not recall anyone telling me after court-martial that I was entitled to an I.D. card and limited benefits while on appellate leave. I also did not receive any communication from the Navy-Marine Corps Appellate Leave Activity [NAMALA] during this time. As a result, even though I have needed medical attention, I have been without an I.D. card and other benefits these two years.

3. After the court-martial I tried to file for unemployment but was denied because I did not have a DD-214. Two months later the only job I could find in my irregular situation was with a roofing crew. This job only lasted four months, and again I had trouble finding regular employment. Finally I found a part-time job. . . . We struggled this way for about eight months. Eventually, we moved across country so I could take a job with my mother-in-law in a shipping department. . . .

4. All this time I never asked for my DD-214 because first, I wasn't sure where to go for help. And frankly, I thought that a two-year delay, inconvenient as it was, was somehow normal."

Id., at 1. The appellate leave documents are not included in the record of trial or referenced in the SJAR. But, in light of the appellant's comments quoted above that he was denied civilian unemployment benefits after the court-martial, it is reasonable to presume that the appellant went on appellate leave shortly after trial.

Post-Trial 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). In order to obtain relief as an error of law 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 claimed that the delay prejudiced him because: 1) he could not contact NAMALA in order to obtain a military I.D. (identification) card and receive

medical and other benefits, 2) he was denied unemployment benefits because he did not have his DD-214 (military separation document), and 3) he did not find employment to his liking until 8 months after trial because he did not have his DD-214.

We hold that the appellant did not suffer any prejudice as a result of post-trial delay because the post-trial delay did not adversely affect any of the matters he complained about. First, the appellant is entitled to an I.D. card and certain military benefits while he is on appellate leave, regardless of the length of the delay. We have no doubt that the appellate defense counsel is able to assist the appellant in contacting NAMALA to obtain medical and other benefits, since NAMALA is located in the same building with the appellate defense counsel. Post-trial delay did not result in the loss of the appellant's military benefits but instead extended his entitlement to those benefits which will be extinguished once the DD-214 is ordered executed.

Finally, as to the last two complaints, we find no prejudice to the appellant regarding the appellant's entitlement to unemployment benefits and lost employment opportunities. Even if post-trial review had proceeded smartly, we believe that it is highly unlikely that the DD-214 could have been issued before the appellant's 8-month job search ended since it can only be ordered executed after final review is completed and the supplemental court-martial order is issued. In short, the appellant has failed to show that but for the delay in the review of his case, he would have received a DD-214 in time to assist him in seeking employment.

We are aware however that we may grant sentence relief for unreasonable and unexplained delay under Article 66(c), UCMJ, 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). While we find the post-trial 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 post-trial processing delays. In fact, the appellant stated in his affidavit that he did not request his DD-214 because he thought that a 2 year delay in review of his case was the norm.

Accordingly, the findings of guilty and sentence, as approved by the convening authority, are affirmed.

Judge WAGNER and Judge REDCLIFF concur.

For the Court

R.H. TROIDL
Clerk of Court