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

BEFORE

W.L. RITTER **C.L. SCOVEL** **E.E. GEISER**

UNITED STATES

v.

Justin L. WOODS
Fireman (E-3), U.S. Navy

NMCCA 200401704 Decided 14 December 2005

Sentence adjudged 19 March 1999. Military Judge: M.D. Modzelewski. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Shore Intermediate Maintenance Activity, Norfolk, VA.

LT ANTHONY S. YIM, JAGC, USNR, Appellate Defense Counsel
LCDR THOMAS BELSKY, JAGC, USNR, Appellate Defense Counsel
LT MARK HERRINGTON, JAGC, USNR, Appellate Government Counsel

GEISER, Judge:

A military judge sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of two specifications of larceny of Government property of a value in excess of $100.00 and one specification of larceny of the property of another service member of a value less than $100.00 in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. The military judge sentenced the appellant to confinement for 90 days, forfeiture of $400.00 pay per month for a period of 3 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant asserts two assignments of error. He first alleges that he has been denied his right to a timely post-trial review. Secondly, the appellant alleges that an approved sentence including a bad-conduct discharge is inappropriately severe in light of the circumstances surrounding his conviction.

We have examined the record of trial, the two assignments of error, and the Government's response, and have concluded that, except as provided below, 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. We specifically find that the sentence in this case is not inappropriately severe. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Incomplete Record of Trial

Although not raised as an assignment of error, we note that significant portions of the record of trial in this case are missing. Pages 29 and 41 of the transcript, covering portions of the appellant's providence inquiry relating to Specifications 2 and 3 of the Charge, are missing from the record. Additionally, the backside of the charge sheet, reflecting blocks 12-15, and the first page of Appellate Exhibit IV, the Appellate and Post-Trial Rights form, are also missing. We ordered the Government to produce the missing documents on 13 October 2005. The Government subsequently indicated that, "after an exhaustive search", they were unable to produce any of the missing documents. Government's Response of 27 Oct 2005.

Aside from the missing pages, we also observe that the court-martial order of 9 September 1999 references a clemency letter from the appellant dated 1 April 1999. The staff judge advocate's recommendation (SJAR) references a clemency letter from the appellant dated 22 March 1999. The record of trial contains a clemency letter from the appellant dated 20 March 1999, which requests that the convening authority suspend or set aside the punitive discharge. Additionally, the SJAR inaccurately reflects the number of computers stolen by the appellant in Specification 1 of the Charge and misstates the valuation of the item stolen by appellant in Specification 2 of the Charge. We note that the trial defense counsel correctly submitted comments identifying the valuation error in the SJAR and made a clemency request expressly referencing a similar request of 22 March 1999.

Law

A complete record of the proceedings and testimony must be prepared for each special court-martial resulting in an adjudged sentence that includes a bad conduct discharge. Art. 54(c)(1)(B), UCMJ. Our superior court has consistently interpreted Article 54, UCMJ, to require such proceedings to be substantially verbatim. *United States v. Santoro*, 46 M.J. 344 (C.A.A.F. 1997); *United States v. Gray*, 7 M.J. 296, 297 (C.M.A. 1979). It is noted, however, that "[i]nsubstantial omissions from a record of trial do not affect its characterization as a verbatim transcript." *Gray*, 7 M.J. at 297.

Whether a record of trial is incomplete is a question of law, which we review *de novo*. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000). As a threshold question, a reviewing court must first determine whether an omission from the record of trial is "substantial." *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981). Whether an omission is substantial can be a question of quality as well as quantity. *United States v. Lashley,* 14 M.J. 7, 9 (C.M.A. 1982). The question of what constitutes a substantial omission is analyzed on a case-by-case basis. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999). When there is a substantial omission from the record of trial, this raises a presumption of prejudice that the Government must rebut. *McCullah*, 11 M.J. at 237.

Where there is an omission in the transcript, the concern is not with the sufficiency of the record for purpose of review, but with the statutory command regarding the type of record that must be made of courts-martial proceedings. *Gray,* 7 M.J. at 298 (citing *United States v. Sturdivant*, 1 M.J. 256, 257 (C.M.A. 1976)). Thus, the question is not whether there is sufficient information otherwise in the record to support appellate review, but rather whether the omission from the record contains substantial matters. Missing portions of transcripts can be reconstructed or summarized sufficiently to permit the Government to overcome the presumption of prejudice. *United States v. Peck*, 10 M.J. 779, 781 (A.F.C.M.R. 1981).

Discussion

In this case, the record is missing two pages of transcript reflecting portions of the appellant's providence inquiry referring to Specifications 2 and 3 of the Charge. It is also missing the reverse side of the charge sheet and the first page of Appellate Exhibit IV, the Appellate and Post-Trial Rights form.

The missing transcript pages, 29 and 41, deal with the military judge's providence inquiry into Specifications 2 and 3 of the Charge. The first missing page appears to relate to ownership of the item stolen in Specification 2 and the second missing page appears to cover the appellant's intent to permanently deprive the Government of the property charged in Specification 3. The Government has provided no reconstruction or other summary of what was actually said at trial. We are convinced that the missing two pages of transcript constitute a substantial omission in the record of trial according to case law. This raises a rebuttable presumption of prejudice.

The content of the missing pages can be reasonably determined from the pages preceding and following the omissions, from the detailed stipulation of fact attached to the record, and from the fact that the appellant pled guilty. Further, the absence of matters inconsistent with, or raising a defense to, the appellant's pleas can be inferred from the fact that neither

the trial defense counsel nor the military judge raised or referred to such inconsistent matters elsewhere in the record. Finally, the absence of such matters can also be inferred from the fact that the appellant did not raise any such issues as assignments of error on appeal. The appellant would clearly be in the best position and have the greatest motive to identify any such issues if they existed. We, therefore, find that the Government has overcome the presumption of prejudice in this case.

With regard to the missing backside of the charge sheet reflecting blocks 12-15, the trial counsel described the relevant information on the record to include the name of the convening authority, the date and number of the special court-martial convening order, the preferral and referral processes, and the date of service on the appellant. The defense made no objection. The Appellate and Post-Trial Rights form was similarly discussed on the record. The appellant told the military judge that he read over the document, discussed it with his defense attorney, and fully understood all the rights described in the document. Because of the information contained in the record pertaining to these documents and the absence of any defense objection to the missing portions, we find that the missing portions of the charge sheet and Appellate and Post-Trial Rights Form and the lack of a clemency letter dated 22 March 1999 do not constitute substantial omissions. Finally, the appellant does not assert and we do not find prejudice resulting from the various scrivener errors noted in the record. Besides, any potential prejudice is cured by our reassessment of the appellant's sentence in the decretal paragraph.

Post-Trial Delay

The appellant contends that he did not receive a timely post-trial review of his case. He admits he cannot show prejudice from the 5-year delay between the convening authority's action and docketing at this court. Under the circumstances of this case, we do not find a due process violation but nevertheless determine the delay in this case affects the sentence that "should be approved." Art. 66(c), UCMJ.

We consider four factors in determining if post-trial delay violates an appellant’s due process rights: (1) length of the delay; (2) 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 (C.A.A.F. 2004)). If the length of the delay is not unreasonable, further inquiry is not necessary. If we conclude that the length of the delay is “facially unreasonable,” however, we must balance the length of the delay against the other three factors. *Id*.

In the instant case, the appellant and the Government agree there was a delay of more than 5 years from the date of the

convening authority's action to the date the record was forwarded to this court. We find this delay to be facially unreasonable. Such substantial delay triggers a due process review.

We balanced the length of delay in this case in the context of the three remaining *Jones* factors. The Government offers no explanation whatsoever as to why it took the convening authority over 5 years to forward this record of trial. We find no evidence that the appellant asserted his right to timely post-trial review any time prior to filing his appellate brief. While the appellant now objects to the delay, he asserts no prejudice to a substantial right based on post-trial delay in this case.

This court, however, notes that the Government at this late date cannot produce or recreate the missing pages from the record. While there is no way of knowing whether the Government would have been able to find the missing documents had they initiated a search 5 years ago, we view the chance of finding the documents today - after personnel have transferred and records have likely been shifted about - as significantly diminished. Similarly, there would have been a much more realistic opportunity for the Government to reconstruct the missing transcript pages 5 years ago than there is today. We also note that the appellate defense counsel argued in his brief that he was unable to contact the appellant. Appellant's Brief of 20 Apr 2005 at 5. While the appellant has an affirmative obligation to provide his appellate defense counsel with accurate contact information, an unexplained 5-year post-trial processing delay likely complicated the appellate defense counsel's efforts to contact the appellant.

Notwithstanding the difficulty encountered by the appellate defense counsel in contacting the appellant and the Government's inability to reconstruct the record of trial at this late date, we concur with the appellant that he suffered no specific prejudice from the 5-year delay in this case. While we find no due process violation under Article 59(a), UCMJ, we do find that the delay in this case warrants relief under our Article 66(c), UCMJ authority. *Jones*, 61 M.J. at 83; *United States v. Brown*, ___ M.J. ___, No. 200500873 (N.M.Ct.Crim.App. 30 Nov 2005). We will reassess the appellant's sentence accordingly.

Conclusion

The findings of guilty are affirmed. We affirm only so much of the approved sentence as includes confinement for 90 days, forfeiture of $400.00 pay per month for a period of 3 months, and reduction to pay grade E-1.

Senior Judge RITTER and Senior Judge SCOVEL concur.

For the Court

R.H. TROIDL
Clerk of Court