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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **J.F. FELTHAM**

UNITED STATES

v.

Erick D. FARMER
Seaman (E-3), U.S. Navy

NMCCA 200401736 Decided 27 September 2005

Sentence adjudged 13 June 2002. Military Judge: D.P. Price. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS NASHVILLE (LPD 13).

LT ANTHONY YIM, JAGC, USNR, Appellate Defense Counsel
CAPT STEVEN COHN, JAGC, USNR, Appellate Defense Counsel
LT KATHLEEN HELMANN, JAGC, USNR, Appellate Government Counsel
LT JESSICA HUDSON, JAGC, USNR, Appellate Government Counsel

PRICE, Senior Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of unauthorized absence (two specifications), disobedience of a superior officer's command (two specifications), and sleeping on post at sea, in violation of Articles 86, 90, and 113, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 890, and 913. Contrary to his pleas, the appellant was also convicted of assault upon a master-at-arms, in violation of Article 128, UCMJ. The adjudged and approved sentence consists of confinement for 150 days, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence and failed to enforce the pretrial agreement requiring suspension of confinement in excess of 90 days for six months from the date of sentencing.

The appellant contends that: (1) the CA's intent with reference to the suspension provision is ambiguous; and (2) post-trial delay is prejudicial. We conclude that the appellant is entitled to relief for post-trial delay.

Having carefully considered the record of trial, the assignments of error, and the Government's response, we conclude that the findings and, as modified, the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Failure to Enforce Pretrial Agreement

While the appellant suggests that the CA's action as to confinement and the pretrial agreement is ambiguous, we conclude that there is no ambiguity whatsoever. The CA simply failed to do what he promised to do.

However, the appellant does not claim that he was required to serve confinement in excess of 90 days, and we do not find anything in the record indicating such excess punishment. The confinement having run, we conclude that the appellant is not entitled to relief. *United States v. Caver*, 41 M.J. 556, 565 (N.M.Ct.Crim.App. 1994).

Post-Trial Delay

The following chronology sets the scene for our analysis:

13 Jun 02	Sentencing
30 Jul 02	Authentication
16 Dec 02	CA's action
14 Oct 04	Record mailed to Navy-Marine Corps Appellate Review Activity (NAMARA)
20 Dec 04	Record received at NAMARA
11 Mar 05	Record docketed at Navy-Marine Corps Court of Criminal Appeals

We have also considered the affidavit of the staff judge advocate who served the convening authority. The affidavit describes the ship's workups and deployment from December 2002 through October 2003.

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, 83 (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.

Id. Moreover, in extreme cases, the delay itself may "give rise to a strong presumption of evidentiary prejudice." *Id.* (quoting *Toohey*, 60 M.J. at 102).

Here, there was delay of more than two years from the date of the CA's action until the record was docketed at this court. We find that the more than two-year delay is facially unreasonable, triggering a due process review. The Government concedes as much, and notes that the delay is apparently due to an administrative oversight. The Government does not contend that the delay is adequately explained by the ship's workups and deployment, nor do we conclude that such operations excuse the performance of the "routine, nondiscretionary, ministerial" task of mailing the record to NAMARA. *United States v. Oestmann,* 61 M.J. 103, 104 (C.A.A.F. 2005).

In *Toohey*, we stated that we were "particularly troubled" by the 146 days that elapsed between the CA's action and receipt of the record at this court. *Toohey*, 60 M.J. at 710. Excessive delay in that particular segment of the post-trial process is "the least defensible of all." *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990). Here, we have *816* days that elapsed.

In considering the third and fourth factors, we find no assertion of the right to a timely appeal, nor do we find any claim or evidence of prejudice. Thus, we conclude that there has been no due process violation due to the post-trial delay.

However, we are also aware of our authority to grant relief under Article 66, UCMJ. *Id.; Oestmann,* 61 M.J. at 103; *Toohey*, 60 M.J. at 100; *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). In our determination of whether such relief is appropriate, we note that the CA not only failed to transmit the record in a timely manner, he also failed to transmit the original record. Thus, we are forced to review a copy of the record. While the copy appears to be true and substantially complete, it is missing one page from the arraignment.[1] We are left with the clear impression that because of a careless attitude on the part of the CA and his staff, the appellant was deprived of his right to timely review of his conviction. While we do not regard this as rising to the level of a constitutional error under the Fifth Amendment, it does affect "the sentence or such part or amount of the sentence, as [we] find[] correct in law and fact . . . that should be approved." Art. 66(c), UCMJ; *see Tardif*, 57 M.J. at 224.

[1] Based on our review of the record, we conclude that the missing page is not a substantial omission. *See United States v. McCullah*, 11 M.J. 234 (C.M.A. 1981)

Conclusion

Accordingly, the findings are affirmed. Only so much of the sentence extending to confinement for 60 days, reduction to pay grade E-1, and a bad-conduct discharge is affirmed.

Chief Judge DORMAN and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court