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

BEFORE

Charles Wm. DORMAN **C.L. CARVER** **D.A. WAGNER**

UNITED STATES

v.

William J. PATERNOSTER II
Private (E-1), U.S. Marine Corps

NMCCA 200500173 Decided 27 July 2005

Sentence adjudged 27 March 2003. Military Judge: E.W. Loughran. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Security Battalion, Marine Corps Base, Quantico, VA.

CDR MICHAEL WENTWORTH, JAGC, USNR, Appellate Defense Counsel
LT ANTHONY S. YIM, JAGC, USNR, Appellate Defense Counsel
LT KATHLEEN HELMANN, JAGC, USNR, Appellate Government Counsel

CARVER, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, 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, confinement for 30 days, and forfeiture of $725.00 pay per month for 1 month. Execution of the adjudged confinement was deferred to the date of the convening authority's action. Pursuant to a pretrial agreement, the convening authority approved the sentence as adjudged, but suspended all confinement over 7 days. The appellant was credited with having served 10 days of pretrial confinement.

After carefully considering the record of trial, the appellant’s assignment of error that the sentence was inappropriately severe and the additional complaint regarding post-trial delay, the Government’s response, and reply briefs, 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. Arts. 59(a) and 66(c), UCMJ.

Sentence Severity

In his sole assignment of error, the appellant asserts that an unsuspended bad-conduct discharge is inappropriately severe primarily due to the refusal of his command to grant him emergency leave. We decline to grant relief.

The appellant pled guilty to an unauthorized absence (UA) of over 11 months in length. During the providence inquiry, the appellant said that during May of 2001, while assigned to the School of Infantry at Camp Lejeune, North Carolina, he received nonjudicial punishment for wrongful use of a controlled substance.[1]

The appellant waived an administrative discharge board for drug abuse. In September of that year, while waiting for his discharge to be processed, he received an American Red Cross message that his wife who was back home in New York had been raped. He asked for emergency leave, but it was denied because he was being processed for separation. He was told that he would be home in a week or two. But, his discharge was not yet completed two months later when he went on a 96-hour liberty weekend to New York. His UA began when he failed to return from liberty. At trial the appellant acknowledged that the rape, some two months earlier, was not a legal justification or excuse for his UA. He said that, if he wanted to do so, he could have returned to duty after the 96-hour liberty to await further processing of his discharge. Record at 18-19.

While it is certainly regrettable that his command refused an apparently legitimate request for emergency leave in September of 2001,[2] this refusal was not a legal defense to his 11-month unauthorized absence. After reviewing the entire record, we find that the sentence is appropriate for this offender and his offenses. *United States v. Baier,* 60 M.J. 382 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394, 395

[1] At trial, the Government did not present evidence of nonjudicial punishment. As a result, the military judge stated on the record that he would not consider the appellant's admission of drug abuse in adjudging the sentence. Record at 29. Likewise, we have not considered it in reviewing the sentence for appropriateness.

[2] The appellant's assertions were not rebutted by the Government.

(C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Post-Trial Delay

Although not raised as an assignment of error, the appellant briefed the issue of post-trial delay in his reply brief. As a remedy for lack of speedy processing, the appellant requests that we affirm no sentence that includes an unsuspended bad-conduct discharge. Appellant's Reply Brief of 25 May 2002. We decline to grant relief.

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) citing *Barker v. Wingo,* 407 U.S. 514, 530 (1972)). 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. *Jones,* 61 M.J. at 83. Moreover, in extreme cases, the delay itself may "give rise to a strong presumption of evidentiary prejudice." *Id.*

Here, there was delay of about 2 years from the date the sentence was announced until the record was docketed at our court. We find that the post-trial delay is facially unreasonable, triggering a due process review.

As to the second factor, we find that no adequate explanation for the delay. We granted the request of the Government to attach an affidavit from the Staff Judge Advocate (SJA). But the affidavit only explains part of the delay. There was a delay of about four months from trial to receipt of the 35-page authenticated record by the trial defense counsel (TDC). As to this period of time, the SJA stated that her review chief was indecisive or confused and did not seek assistance in resolving issues regarding missing documents in the record prior to its authentication, thus delaying authentication.

At the other end of the process, there was a two-month delay from the date the SJAR was signed until the TDC acknowledged receipt of the SJAR. As to this delay, the SJA stated that the transfer of the TDC after trial contributed to the delay in service. Unfortunately, however, the SJA's affidavit offers no explanation for the 490-day delay from the date that the TDC receipted for the authenticated copy of the record until the SJAR was signed. Thus, we find no adequate explanation for the bulk of the delay.

As to the third factor, the appellant concedes that there was no assertion of his right to a timely appeal. And finally, as to the fourth factor, we find no evidence of actual prejudice. However, the appellant claims that the delay itself gives rise to a presumption of prejudice. We do not find, however, that this delay is the extreme case that would result in a presumption of prejudice.

Thus, we conclude that there has been no due process violation due to the post-trial delay. We are also aware of our authority to grant relief under Article 66, Uniform Code of Military Justice, 10 U.S.C. §§ 866, but we decline to do so. *Jones*, 61 M.J. at 83*; United States v. Oestmann,* 61 M.J. 103 (C.A.A.F. 2005); *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).

Conclusion

Accordingly, the findings of guilty and the sentence, as approved below, are affirmed.

Chief Judge DORMAN concurs.

For the Court

R.H. TROIDL
Clerk of Court

Judge WAGNER did not participate in the decision of this case.