

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

BEFORE

Charles Wm. DORMAN

D.A. WAGNER

J.F. FELTHAM

UNITED STATES

v.

**Christopher L. MCELHANON
Lance Corporal (E-3), U.S. Marine Corps**

NMCCA 200500537

Decided 19 December 2005

Sentence adjudged 17 July 2003. Military Judge: D.S. Oliver. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Marine Air Support Squadron 3, Marine Air Control Group 38, 3d Marine Aircraft Wing, Camp Pendleton, CA.

CAPT PATRICIA LEONARD, JAGC, USNR, Appellate Defense Counsel
LT ANTHONY S. YIM, JAGC, USNR, Appellate Defense Counsel
Capt ROGER MATTIOLI, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of wrongful use of marijuana and breaking restriction, in violation of Article 112a and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 912a and 934. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for 57 days, and reduction to pay grade E-1. We have examined the record of trial, the appellant's sole assignment of error that he was denied the right to speedy review of his court-martial, 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. Arts. 59 (a) and 66 (c), UCMJ.

Post-Trial Delay as a Due Process Violation

We look to four factors in determining if post-trial processing delay has violated 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).

The record of trial was docketed at this court over 21 months after trial. Such a delay for this 42-page record is facially unreasonable, triggering a due process review. The Government advances manpower shortages driven by obligations to overseas combat operations as the reason for the delay. There is no evidence in the record that the appellant asserted his right to a timely appeal prior to the filing of his brief and assignment of error. Finally, we do not find any specific evidence of prejudice suffered by the appellant from the delay in this case. Additionally, the delay in this case is not so egregious as to give rise to a presumption of prejudice. Thus, we conclude that there has been no due process violation due to the post-trial delay.

Post-Trial Delay Under Article 66(c), UCMJ

We are cognizant of this court's power under Article 66(c), UCMJ, to grant sentence relief for excessive post-trial delay even in the absence of actual prejudice. *United States v. Oestmann*, 61 M.J. 103, 104 (C.A.A.F. 2005); *Toohey*, 60 M.J. at 102; *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). We are challenged under Article 66, UCMJ, to affirm only the findings and the sentence or part of the sentence that we find "correct in law and fact" and that we "determine[], on the basis of the entire record, should be approved."

We apply the factors recently enumerated by this court in *United States v. Brown*, ___ M.J. ___, No. 200500873 (N.M.Ct.Crim.App. 30 Nov 2005)(en banc). As we stated above,

the delay of just over 21 months from the date of trial to the docketing with this court is, on its face, unreasonable, for this 42-page record of trial. The Government advances cogent reasons based on operational commitments for the delay. On the other hand, the record of trial is neither lengthy nor complex. The appellant advances no evidence of bad faith or gross negligence on the part of the Government. The appellant did not assert his right to a speedy review until the filing of his brief and assignment of error with this court. The appellant presents no harm suffered as a result of the delay.

Finally, the appellant was convicted of the wrongful use of marijuana and breaking restriction. He was previously awarded nonjudicial punishment on 24 April 2003 for the wrongful use of marijuana. Under the circumstances, the appellant received a lenient sentence at trial.

Conclusion

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

Chief Judge DORMAN and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court