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.

Erik D. BISHOP
Private First Class (E-2), U.S. Marine Corps

NMCCA 200500613 Decided 17 October 2005

Sentence adjudged 21 May 2003. Military Judge: L.K. Burnett. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Security Battalion, MCB, Quantico, VA.

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

DORMAN, Chief Judge:

The appellant was convicted by special court-martial, tried before a military judge sitting alone. Consistent with his pleas the appellant was convicted of two specifications of unauthorized absence, both of which were terminated by apprehension, in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886. On 21 May 2003, the appellant was sentenced to confinement for 120 days, reduction to pay grade E-1, and a bad-conduct discharge. On 7 April 2005, the convening authority approved the sentence, and to comply with the terms of the negotiated pretrial agreement, the convening authority suspended confinement in excess of 80 days for a period of 12 months from the date of trial.[1]

We have carefully examined the record of trial, the assignment of error regarding post-trial processing delay, and the Government's response. We conclude sentencing relief is required in this case due to unexplained and unreasonable post-

[1] As of the date of the convening authority's action, the termination date of the period of suspension had already passed.

trial delay. Following that corrective action, we conclude that the findings and sentence are correct in law and fact and that no error remains that is materially prejudicial to the substantial rights of the appellant. *See* Arts. 59(a) and 66(c), UCMJ.

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*, 61 M.J. 100, 102 (C.A.A.F. 2005)(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. *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 about 2 years from the date of trial to the date the case was docketed with this court. We find this delay alone is facially unreasonable, triggering a due process review. Although the Government provided an affidavit from the staff judge advocate attempting to explain the delay in the post-trial processing of this case, the affidavit falls far short in justifying the delay. In essence, we have unexplained delay. Since there are no justifiable explanations in the record, we look to 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.

We are also aware of our authority to grant relief under Article 66, UCMJ. *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). In *Tardif* our superior court made clear that this court could grant relief without a showing of actual prejudice in those cases where there has been excessive post-trial delay. The court said that we could grant relief "if [we] deem[ed] relief appropriate under the circumstances." *Tardif*, 57 M.J. at 224. The court also made clear that we are required to consider unexplained and unreasonable post-trial delay in determining "what findings and sentence 'should be approved.'" *Id*. What is equally clear from *Tardif* is that while we are required to consider unexplained and unreasonable post-trial delay in determining what findings and sentence should be approved, whether we grant relief and, if we do, the nature of that relief, is a matter left to the discretion of this court.

In deciding this case we are particularly troubled by the content of the affidavit provided by the staff judge advocate.

In that affidavit the Government admits that Marine Corps Base Quantico had no review officer from August 2003 until November 2004. It also admits that the enlisted review chief was not sure how to resolve problems with cases filed during a period of time in 2003. The affidavit also suggests that the case was delayed because the appellant had not submitted a particular type of appellate rights statement. We state, without reservation, that none of these "reasons" justify the delay in this case, or any other case for that matter. As we have said before, the staff judge advocate is responsible for the work generated by his or her office. *United States v. Kersh,* 34 M.J. 913, 914 n.2 (N.M.C.M.R. 1992). It was the staff judge advocate's responsibility to ensure that someone was preparing recommendations as required by Article 60(d), UCMJ, and RULE FOR COURTS-MARTIAL 1106, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). Furthermore, the submission of an appellate rights form is totally unrelated to the staff judge advocate's obligation to prepare the statutorily required recommendation in this case.

In short, we reject the staff judge advocate's reasons for the delay in this case, and note that the recommendation in this case could have easily been completed in less than 30 minutes. The record is only 40 pages-long, and it was not even necessary to read those 40 pages to prepare the recommendation. In the absence of a "review" officer there is no proscription against the staff judge advocate personally preparing the staff judge advocate's recommendation. Although we encourage the Government to provide us with case specific information explaining the reason for delays in processing a case, the Government's cause in this appeal would have been better served without the explanation it provided to this court by way of the affidavit of the staff judge advocate.

Given the content of the affidavit, and the length of delay in this case, we conclude that this is one of those extreme cases that "give[s] rise to a strong presumption of evidentiary prejudice." *Jones*, 61 M.J. at 83. Accordingly, the findings are affirmed. With respect to the sentence, only that portion of the sentence as extends to confinement for 50 days, reduction to pay grade E-1, and a bad-conduct discharge is affirmed. *Tardif*, 57 M.J. at 224. The supplemental court-martial order shall reflect the sentence approved by this court.

Senior Judge PRICE and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court