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.

Roger S. ROCHA
Sergeant (E-5), U.S. Marine Corps

NMCCA 200500780 Decided 17 November 2005

Sentence adjudged 5 February 2004. Military Judge: P.J. Ware. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 3d Low Altitude Air Defense Battalion, MACG-38, 3d MAW, Camp Pendleton, CA.

LT ANTHONY YIM, JAGC, USNR, Appellate Defense Counsel
CAPT MARTIN GROVER, JAGC, USNR, Appellate Defense Counsel
Capt ROGER MATTIOLI, USMC, Appellate Government Counsel

RITTER, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of attempting to violate a lawful general order, wrongful use of ecstasy, methamphetamine, and marijuana, and wrongful introduction of ecstasy, ketamine, and methamphetamine onto a military installation, in violation of Articles 92 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 912a. The appellant was sentenced to confinement for 9 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence, but in an act of clemency, suspended confinement in excess of 200 days for a period of 12 months from the date of his action.

We have carefully examined the record of trial, the appellant's sole assignment of error regarding excessive post-trial delay, and the Government’s response. We agree with the appellant that he was prejudiced by the excessive delay in the post-trial processing of his case. After our corrective action, we conclude that the findings and sentence are correct in law and

fact and that no other error materially prejudicial to the substantial rights of the appellant was committed. *See* Arts. 59(a) and 66(c), UCMJ.

Post-Trial Delay

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 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*. 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 a delay of about 473 days from the date of trial to the date the case was docketed in this court. We find that the delay alone is facially unreasonable, triggering a due process review. Regarding the delay, the Government moved with reasonable diligence, with one glaring exception -- the approximately 344 days from the military judge's authentication of the record until the staff judge advocate's recommendation was completed. The reasons for that delay are outlined in the staff judge advocate's recommendation.

We find that the multiple deployments by the staff judge advocate and support judge advocates in support of combat operations in Iraq and the aftermath of the war are compelling reasons for the delay. Indeed, we can think of no better reason for administrative delay in military matters than supporting combat operations conducted in furtherance of our national security. However, that factor must be balanced with the appellant's constitutional right of due process.

Regarding the third factor, we find no assertion of the appellant's right to timely review. Contrary to the defense argument on appeal, the appellant did not in any way complain of delay in his clemency petition, or argue for a speedier resolution of his appeal.

As for the fourth factor, prejudice, we find the appellant suffered actual prejudice as a result of the delay in this case. The appellant was tried on 5 February 2004. His adjudged confinement of 9 months was less than the 300 days he bargained for in the pretrial agreement. While serving his adjudged confinement, the appellant requested clemency, specifically suggesting a reduction of "less than seventy days" in confinement. This request, dated 7 June 2004, was granted by the convening authority, who suspended all confinement in excess of

200 days. But the convening authority did not take this action until 28 April 2005, long after the appellant's adjudged confinement had run. There is nothing in the record of trial to suggest that the appellant received the benefit of the convening authority's act of clemency, and on appeal he implies through counsel that he was not released after 200 days.[1]

"Basic fair play does not envision sitting on a request for clemency for over a year before forwarding it to the convening authority." *United States v. Bell*, 60 M.J. 682, 685 (N.M.Ct.Crim.App. 2004). While we understand the difficulties inherent in supporting multiple deployments in support of combat operations, it is incumbent on staff judge advocates to ensure that the convening authority can give a **meaningful** response to a request for clemency. To do otherwise is to render ineffective the appellant's rights to request clemency and to timely post-trial review. This may require some prioritization in determining which records of trial to review first, or the use of a system for handling clemency requests such as the one we suggested in *Bell*.

Here, the appellant was granted clemency, but was still forced to serve the entire period of adjudged confinement because the staff judge advocate did not prepare the recommendation until almost a year after the record was authenticated. We conclude that the appellant's right to due process was violated as a result of the post-trial delay. *Jones*, 61 M.J. at 83.

This court can neither reduce the amount of confinement actually served nor grant monetary compensation for illegal confinement. But we can disapprove further confinement, and thereby increase any entitlement to compensation. The appellant may seek relief on this basis, if he chooses, from the Defense Finance and Accounting Service, the Board for Correction of Naval Records under 10 U.S.C. § 1552, and, if he deems necessary, from the United States Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491, or a United States District Court under the Little Tucker Act, 28 U.S.C. § 1346(a)(2).

[1] "Assuming the staff judge advocate received the record of trial shortly after it was authenticated on 1 April 2004, had he prepared his recommendation within 120 days, *there would have been* more than enough time for Sgt. Rocha to benefit from the convening authority's grant of clemency." Appellant's Brief of 23 Sep 2005 at 8. (Emphasis added)

Accordingly, we affirm the findings of guilty and only so much of the sentence as provides for a bad-conduct discharge, confinement for 100 days, and reduction to pay grade E-1.

Judge SCOVEL and Judge GEISER concur.

For the Court

R.H. TROIDL
Clerk of Court