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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **R.C. HARRIS**

UNITED STATES

v.

Trent T. PRITCHETT
Quartermaster First Class (E-6), U.S. Navy

NMCCA 9601212 Decided 14 July 2005

Sentence adjudged 13 Aug 1999. Military Judge: A.W. Keller. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Submarine Group TEN, Kings Bay, GA.

LT STEPHEN C. REYES, JAGC, USNR, Appellate Defense Counsel
LT CRAIG A. POULSON, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRICE, Senior Judge:

This is a rehearing of charges first tried in 1994. In that first trial, the appellant was convicted of substantially the same charges as in this rehearing. Because the military judge committed an error that materially prejudiced a substantial right of the appellant by denying him a peremptory challenge of newly detailed members, we set aside the findings and sentence and authorized a rehearing. *United States v. Pritchett*, 48 M.J. 609 (N.M.Ct.Crim.App. 1998).

At the rehearing, contrary to his pleas, the appellant was convicted of forcible sodomy of a child under the age of 16 and indecent act with a child under the age of 16 (two specifications), in violation of Articles 125 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925 and 934. A military judge sitting as a general court-martial sentenced the appellant to confinement for four years, forfeiture of $500.00 pay per month for four years, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and credited the appellant with confinement served from 9 June 1994 until 21 July 1997.

The appellant asserts that: (1) he has been denied timely appellate review; (2) the evidence is legally and factually insufficient; (3) the military judge erred in failing to suppress the appellant's statements made to a family advocacy representative, Ms. Pettaway, and to Dr. Leigh; and (4) the military judge erred in failing to suppress the appellant's statements to the Naval Criminal Investigative Service (NCIS) and Ms. Blackmore, and real evidence seized during a search of his home.[1]

We have carefully considered the record of trial, the appellant's assignments of error, and the Government's response. As modified, 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 remains. Arts. 59(a) and 66(c), UCMJ.

Appellate Delay

To assist in our analysis of the assignment of error of appellate delay, we provide the following chronology:

13 Aug 99	Sentence adjudged
20 Mar 00	Convening authority's action promulgated
14 Apr 00	Record docketed
20 Feb 03	*May* Order issued[2]
17 Mar 03	30th Motion for Enlargement of Time denied; case placed in panel for decision
21 Jun 04	Appellate Defense Motion to File Brief granted
14 Oct 04	Appellate Government brief filed
28 Oct 04	Case again placed in panel for decision

The record of trial totals 772 pages.

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 (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,

[1] With the exception of denial of timely appellate review, all the assignments of error are submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[2] *United States v. May*, 47 M.J. 478 (C.A.A.F. 1998).

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., slip op.* at 9.

The length of appellate delay is a threshold factor that determines whether additional analysis is necessary. If the delay is not excessive, further scrutiny may be avoided. If the delay is excessive, the other factors must be applied and evaluated.

We conclude that the delay in appellate review has been excessive. This case sat in the Appellate Defense Division for nearly three years before we issued an order in accordance with *United States v. May.*[3] Over the course of 29 motions for enlargement of time, several successive appellate defense counsel asserted a variety of reasons for the requested delay. Based on the representations of counsel, it appears that most of the delay was attributable to large caseloads. While we are sympathetic to the plight of appellate defense counsel assigned to represent a multitude of clients, each lawyer who enters an appearance has a duty to read the record and file a brief or submission on the merits in a timely manner. Based on the facts and circumstances of this case, three years is not timely, nor are the explanations for the delay acceptable. *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 38-40 (C.A.A.F. 2003).

We note that, in the absence of any appellate defense brief, before this court could decide the case on its merits, a motion was filed seeking consideration of the brief now before us. To ensure that the appellant was afforded the assistance of appellate defense counsel, albeit untimely, we granted the motion and accepted the brief.

We now consider the third and fourth factors. We find no assertion of the right to a timely appeal. In fact, from our review of the motions for enlargement, it is quite clear that the appellant desired ample time for appellate defense counsel to prepare a brief.

Moreover, we do not find any claim or evidence of specific prejudice. However, we are painfully aware that the appellant was first arraigned on the substance of the current charges in October of 1993. For more than 11 years, the appellant has been deprived of a final resolution of those charges. We conclude that while the appellant has not demonstrated his right to relief

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[3] In that order, we stated that if appellate defense counsel did not file a brief by 10 March 2003, the court would review the case under Article 66(c), UCMJ. In that event, counsel would be expected to invite the court to consider any *Grostefon* issues.

for prejudicial delay under Article 59(a), UCMJ, he is entitled to relief under Article 66(c), UCMJ. *United States v. Oestmann,* 61 M.J. 103 (C.A.A.F. 2005); *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 will grant relief in our decretal paragraph.

Sufficiency of the Evidence

In a summary assignment of error, the appellant contends that, as to each charge and specification, the evidence is legally and factually insufficient. We disagree.

This court's standard of review for sufficiency of the evidence is set forth in Article 66(c), UCMJ:

> In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

Further, this standard and its application have been recognized and defined by the Court of Appeals for the Armed Forces:

> [U]nder Article 66(c) of the Uniform Code, 10 U.S.C. § 866(c), the Court of [Criminal Appeals] has the duty of determining not only the legal sufficiency of the evidence but also its factual sufficiency. The test for the former is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). For factual sufficiency, the test is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the Court of [Criminal Appeals] are themselves convinced of the accused's guilt beyond a reasonable doubt.

United States v. Turner, 25 M.J. 324, 324-25 (C.M.A. 1987).

We conclude that a reasonable factfinder could properly have found, beyond a reasonable doubt, that the appellant committed each of the offenses of which he stands convicted. Moreover,

after careful consideration, we are convinced beyond a reasonable doubt that the appellant committed each of those same offenses.

NCIS Statement

In a summary assignment of error, the appellant asserts that the military judge erred when he did not suppress his NCIS statement. We disagree.

Because the assignment of error is presented in a summary format without discussion, we will address the arguments of the trial defense counsel (TDC) on the issue. First, the TDC argued that, in general, the statement made to NCIS was not voluntary. Next, he argued that the appellant was not advised of the nature of the allegations against him until after the interrogation commenced. He also contended that NCIS promised the appellant that if he cooperated by making a statement, that the Chief of Staff of the convening authority would help him out, apparently suggesting some leniency in disposing of any charges. Finally, he contended that the timing and length of the interrogation, coupled with his desire to have his children returned to his custody, combined to overcome his will, leading to a false and involuntary admission.

In our decision in *United States v. Ellis*, 54 M.J. 958 (N.M.Ct.Crim.App. 2001), we summarized the law applicable to the appellant's arguments:

> The Fifth Amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property without due process of law. . . ." Accordingly, a confession must be voluntary before it can be admitted into evidence. *Dickerson v. United States*, 530 U.S. 428, 433, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). Congress expressly incorporated these rights into the UCMJ, which states that "no person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him," Art. 31(a), UCMJ, and that "no statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial." Art. 31(d), UCMJ. The President, in turn, implemented these constitutional and statutory mandates in MIL. R. EVID. 304(a), which states, in pertinent part, that "an involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule," and MIL. R. EVID. 304(c)(3), which defines an involuntary statement

as one "obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement."

In *United States v. Bubonics*, 40 M.J. 734, 739 (N.M.C.M.R. 1994), *aff'd* 45 M.J. 93 (1996), this court stated that "the principles for determining whether a pretrial statement was the product of coercion, unlawful influence, or unlawful inducement are essentially the same whether the challenge is based on the Constitution, Article 31(d), or MIL. R. EVID. 304." A confession is voluntary if it is "the product of an essentially free and unconstrained choice of its maker." *United States v. Ford*, 51 M.J. 445, 451 (1999)(quoting *Bubonics*, 45 M.J. at 95). "If his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *Ford*, 51 M.J. at 451 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602, 6 L. Ed. 2d 1037, 81 S. Ct. 1860 (1961)).

When an accused objects at trial to the admission of his confession, the Government must prove by a preponderance of the evidence that the confession was voluntary. *Bubonics*, 45 M.J. at 95; MIL. R. EVID. 304(e). This determination is made by examining "the totality of all the surrounding circumstances" of the confession, including "both the characteristics of the accused and the details of the interrogation." *Ford*, 51 M.J. at 451 (quoting *Schneckloth v. Bustamonte,* 412 U.S. 218, 226, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973)); *United States v. Martinez*, 38 M.J. 82, 86 (C.M.A. 1993); *United States v. Jones*, 34 M.J. 899, 906 (N.M.C.M.R. 1992). Factors to be considered include the following: the provision of rights warnings; the length of the interrogation; the characteristics of the individual, including age and education; and the nature of the police conduct, including the use of threats, physical abuse, and incommunicado detention. *United States v. Sojfer*, 47 M.J. 425, 429-30 (1998). However, the "'totality of the circumstances' does not connote a cold and sterile list of isolated facts; rather, it anticipates a holistic assessment of human interaction." *Martinez*, 38 M.J. at 87.

On appeal, the voluntariness of a confession is a question of law that we review *de novo*. *Arizona v. Fulminante*, 499 U.S. 279, 287, 113 L. Ed. 2d 302, 111 S. Ct. 1246, (1991); *Ford*, 51 M.J. at 451. Although the military judge made essential findings of fact in ruling on the appellant's suppression motion, we are not bound by his findings under our Article 66(c),

> UCMJ, review authority. *United States v. Cole,* 31 M.J. 270, 272, (C.M.A. 1990). However, we are generally inclined to give such findings deference, so long as they are adequately supported by the evidence of record. *Jones*, 34 M.J. at 905; *United States v. Ruhling*, 28 M.J. 586, 592 (N.M.C.M.R. 1988).

Id. at 963-64.

At trial, the motion to suppress was thoroughly litigated. The military judge made detailed findings of fact, which we find to be adequately supported by the evidence of record. We conclude that the appellant knowingly and voluntarily waived his rights and signed a voluntary admission of his misconduct. The assignment of error is without merit.

Conclusion

We have considered the remaining assignments of error and find them lacking in merit. The findings are affirmed. We affirm only so much of the sentence extending to confinement for 42 months, reduction to pay grade E-1, and a bad-conduct discharge.

Chief Judge DORMAN and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court