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.

Jimmie L. GETER, Jr.
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 9901433 Decided 8 November 2005

Sentence adjudged 10 July 1998. Military Judge: R.J. Kreichelt. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Marine Forces Reserve, New Orleans, LA.

Capt E.V. TIPON, USMC, Appellate Defense Counsel
Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
LCDR RICARDO BERRY, JAGC, USNR, Appellate Defense Counsel
Maj WILBUR LEE, USMC, Appellate Government Counsel
Maj PATRICIO A. TAFOYA, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRICE, Senior Judge:

This is our second review of this case. In our first review, another panel of this court affirmed the findings and sentence as approved by the convening authority. *United States v. Geter*, No. 9901433, unpublished op. (N.M.Ct.Crim.App. 30 May 2003). The appellant petitioned our superior court for review, citing three issues. One of the issues referenced: "The lower court's verbatim replication of substantial portions of the Government's answer brief . . ." Appellant's Supplement to Petition for Grant of Reviw [sic] of 6 Oct 2003. In response, citing *United States v. Jenkins,* 60 M.J. 27 (C.A.A.F. 2004), the Court of Appeals for the Armed Forces (CAAF) set aside the decision of this court and remanded the case to this court for a new review pursuant to Article 66(c), Uniform Code of Military Justice, 10 U.S.C. § 866(c), before a panel comprised of judges who did not previously participate in this case. *United States v. Geter*, 60 M.J. 344 (C.A.A.F. 2004)(summary disposition). We now comply with the terms of that remand.

At trial, a military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of conspiracy (three specifications), wrongful distribution of marijuana (two specifications), and wrongful use of marijuana, in violation of Articles 81 and 112a, UCMJ. The adjudged and approved sentence consists of confinement for three years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. The pretrial agreement had no impact on the sentence.

Before entry of pleas, the appellant moved to suppress several e-mails he had sent using his Government computer and the Government's e-mail software. After the military judge denied the motion, the appellant entered conditional guilty pleas to Charge II, Specifications 3 and 5. Both specifications stated the offense of conspiracy with Lance Corporal (LCpl) Stanley H. O. Lacey. The appellant also entered a conditional guilty plea to Charge III, Specification 2, wrongful distribution of about one pound of marijuana. Under RULE FOR COURTS-MARTIAL 910(a)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), these conditional pleas preserved the search and seizure issue inherent in the motion to suppress. The remainder of the appellant's guilty pleas were unconditional.[1]

The appellant's original assignments of error now require our decision: (1) the military judge erred in denying the motion to suppress the e-mails; and (2) Charge II, Specification 1 fails to state an offense under Wharton's Rule. In addition, this court previously specified a third issue of post-trial delay.

We have carefully considered the record of trial and all appellate pleadings. We conclude that following our corrective action the findings and the sentence are correct in law and fact, and that no error remains that is materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

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[1] We note with disapproval that the Government consented, and the military judge approved of conditional guilty pleas where the matter at issue was not case-dispositive. An accused has no right to enter a conditional guilty plea, and the approval of such pleas in this case controverted the policy underlying R.C.M. 910(a)(2). MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), App.21, at A56-57. Because the Government and military judge did not have the benefit of any guidance in the exercise of their discretion, we recommend that the Judge Advocate General follow the pattern of our sister service and promulgate guidance to ensure that conditional guilty pleas are accepted only when doing so would conserve resources and enhance the best interests of justice. *See United States v. Monroe*, 50 M.J. 550, 553 (A.F.Ct.Crim.App. 1999)(citing Air Force Instruction 51-201); *see also United States v. Maio*, 34 M.J. 215, 219 n.3 (C.M.A. 1992).

Search and Seizure of E-Mail

The appellant worked in the Base Operations Section of the Marine Forces Reserve command. In his cubicle, he had a desktop computer to assist him in performing his duties. There was no door to the cubicle, allowing others to come in and see what was on the computer monitor. The appellant was assigned a Government e-mail account that he could access through his desktop computer. The information systems coordinator for his section was responsible to know the two passwords necessary to access the appellant's e-mail account. The two passwords existed to protect the integrity of the command information systems, not the personal interests of the appellant.

There was no evidence that the appellant had permission to use his Government computer and e-mail account for personal use. Moreover, there was no direct evidence that the appellant thought he could use those Government means for personal use. We note that the appellant did not testify for the limited purpose of the motion. The Department of Defense Joint Ethics Regulation 5500.7-R, § 2-301 (Ch-2, Apr. 3, 1996), and Marine Corps Order (MCO) 5271.4A, ¶ 6b (2 Nov 1993), both limited use of Government e-mail accounts to official purposes.

The military judge received extensive testimony and documentary evidence on the motion to suppress the e-mails, although he pointedly refused to examine the e-mails in ruling on the motion. After deliberation, the military judge released a lengthy ruling including 42 findings of fact, legal analysis and conclusions of law. Appellate Exhibit XIII.

We review a military judge's ruling on a motion to suppress evidence for an abuse of discretion. *United States v. Ayala,* 43 M.J. 296, 298 (C.A.A.F. 1995). In doing so, we must determine whether the military judge's findings of fact are clearly erroneous or the conclusions of law are incorrect. *Id*. We review *de novo* the question of whether the military judge "correctly applied the law." *Id*. We are required to consider the evidence "in the light most favorable" to the "prevailing party." *United States v. Reister,* 44 M.J. 409, 413 (C.A.A.F. 1996). The appellant may challenge the validity of the search for evidence only if he can assert: (1) "a subjective expectation of privacy," and, (2) that the expectation of privacy is also "objectively reasonable." *United States v. Monroe,* 52 M.J. 326, 330 (C.A.A.F. 2000)(citing *Minnesota v. Olson,* 495 U.S. 91, 95, (1990)).

Based on our review of the record, we conclude that the findings of fact are not clearly erroneous and are supported by the record. Accordingly, we adopt them as our own. The key finding of fact was that the appellant did not have a subjective expectation of privacy in the e-mails. Because he did not have

such an expectation of privacy in his Government-provided e-mail account, we need not discuss whether a possible expectation of privacy was reasonable. Without a subjective and reasonable expectation of privacy, he did not enjoy the protections of the Fourth Amendment or MILITARY RULES OF EVIDENCE 311-317, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). *See Monroe*, 52 M.J. at 330. This assignment of error has no merit.

Post-Trial Delay

The appellant contends that he has been denied speedy post-trial review and that we should exercise our discretion under Article 66(c), UCMJ, to disapprove the dishonorable discharge. We do not condone the post-trial delay in this case, and find that sentencing relief is appropriate.

The following chronology outlines the unacceptable post-trial delay in processing this 383-page record:

10 Jul 98	Sentencing
11 Feb 99	Authentication of record
14 Jul 99	Staff Judge Advocate's Recommendation signed
11 Aug 99	Clemency matters submitted to convening authority (CA), including complaint of delay
14 Sep 99	CA takes action
16 Nov 99	Record docketed at Navy-Marine Corps Court of Criminal Appeals (NMCCA)
13 Jan 03	After 21 defense enlargements of time, and five Government enlargements of time, case is briefed and record is placed in panel for decision
27 Jan 03	NMCCA specified issue of post-trial delay and ordered responsive briefs
31 Mar 03	Responsive briefs filed
30 May 03	First NMCCA decision
06 Oct 03	Appellant files Supplement to Petition for Review with CAAF
29 Sep 04	CAAF sets aside NMCCA decision and remands record for new review
12 Nov 04	Appellant advises NMCCA that he does not desire to submit additional briefs.

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) and *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 16 months from the date of sentencing until the record was docketed with this court, including seven months to authenticate the record. After the case was docketed, over three years passed before appellate counsel filed their briefs. Most of that delay was attributable to appellate defense counsel.[2] We find that the cumulative delay of 54 months to place this record in panel for decision is facially unreasonable, triggering a due process review.

There is no explanation for the delay in this case. Since there is no explanation in the record, we look to the third and fourth factors. In his submission of clemency matters, the trial defense counsel (TDC) complained that the appellant had been denied speedy review of his conviction. At that point, over one year had passed since sentencing. The TDC asserted that prejudice accrued because: (1) timely appellate review of a legitimate appellate issue relating to the e-mail seizure had been frustrated; (2) the appellant could not find steady employment because potential employers were concerned the appellant may be recalled to active duty; and (3) he had been denied timely parole consideration. In his addendum to the staff judge advocate's (SJA) recommendation, the SJA disagreed with the assertion of prejudice, concluding that the allegations were speculative.

We note that the TDC's factual assertions were unsupported by affidavits from the appellant, potential employers, and corrections officials. In the absence of such supporting evidence, we cannot conclude that the appellant has suffered prejudice in the context of constitutional due process. *See United States v. Starling*, 58 M.J. 620, 623 (N.M.Ct.Crim.App. 2003).

We are also aware of our authority to grant relief under Article 66, UCMJ. *See United States v. Oestmann,* 61 M.J. 103

[2] We hasten to note that the appellate defense counsel who ultimately filed the brief only moved for two enlargements of time.

(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." *Id.* 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.

Although we conclude that the appellant has not borne his burden to show prejudice in the context of due process analysis, we still consider the fact that he complained of post-trial delay and the basis for that complaint in deciding whether to provide relief under Article 66(c), UCMJ. We also consider that it has taken more than six years since his complaint to obtain his right to appellate review under Article 66(c), UCMJ, in the form of this decision. Thus, we conclude that the appellant is entitled to relief under that same statute. *See Tardif*, 57 M.J. at 224.

We must next decide the appropriate nature of that relief. The approved sentence consists of confinement for three years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. The appellant has long since served the confinement. We presume that he is now in an appellate leave status, particularly given his assertions relative to civilian employment. Thus, he is no longer in a pay status, and is not subject to forfeiture of pay and allowances. The appellant argues that we should not affirm the punitive discharge. Given the gravity of the appellant’s offenses, we are not persuaded by that argument. We conclude that the only appropriate relief would be monetary in nature. We will affirm only part of the approved confinement and forfeitures to ensure that the appellant receives such monetary relief.

Conclusion

We have considered the remaining assignment of error regarding “Wharton’s Rule” and find it lacking in merit. The findings are affirmed.

Based on unreasonable post-trial delay, we affirm only so much of the sentence extending to confinement for 30 months,

reduction to pay grade E-1, forfeiture of all pay and allowances for 30 months, and a bad-conduct discharge.

Chief Judge DORMAN and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court