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

BEFORE

C.A. PRICE **M.J. SUSZAN** **R.C. HARRIS**

UNITED STATES

v.

Nicholas O. SWIFT
Hospitalman (E-3), U.S. Navy

NMCCA 200101260 Decided 23 January 2004

Sentence adjudged 16 February 2000. Military Judge: T.L. Miller. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Camp Smedley D. Butler, Okinawa, Japan.

Maj C.R. ZELNIS, USMC, Appellate Defense Counsel
CDR ROBERT P. TAISHOFF, JAGC, USN, Appellate Government Counsel

HARRIS, Judge:

A military judge, presiding at a general court-martial consisting of officer and enlisted members, convicted the appellant, pursuant to his pleas, of involuntary manslaughter, in violation of Article 119, Uniform Code of Military Justice, 10 U.S.C. § 919. On 16 February 2000, the appellant was sentenced by the members to confinement for 10 years, reduction to pay grade E-1, total forfeiture of pay and allowances, and a dishonorable discharge. On 18 September 2000, the military judge recommended clemency in the form of suspending confinement in excess of 5 years. On 19 June 2001, the convening authority approved the adjudged sentence and, in accordance with the terms of a pretrial agreement, suspended all confinement in excess of 7 years for the period of the confinement served plus 6 months.

After carefully considering the record of trial, submitted without assignment of error, we conclude that the findings are correct in law and fact and that no error materially prejudiced the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ. We, however, find that the adjudged sentence is

inappropriately severe. We shall take corrective action below in our decretal paragraph.

Post-Trial Delay

Although not assigned as error, we note that the appellant, in ¶3 of trial defense counsel's 24 April 2001 response to the staff judge advocate's recommendation (SJAR), averred that unreasonable post-trial delay had resulted in prejudice to the appellant. We disagree.

A military appellant has a right to timely review of the findings and sentence. *United States v. Williams*, 55 M.J. 302, 305 (C.A.A.F. 2001); *United States v. Tucker*, 9 C.M.A. 587, 589, 26 C.M.R. 367, 369 (1958). In order to obtain relief as an error of law under Article 59(a), UCMJ, however, the appellant must show actual prejudice in addition to unreasonable and unexplained delay. *United States v. Jenkins*, 38 M.J. 287, 288 (C.M.A. 1993). The delay is clearly unexplained. Addendum to SJAR of 19 Jun 2001. However, the appellant has not shown that the delay was unreasonable. Accordingly, we find that the appellant failed to meet his burden; and, even assuming *arguendo* that there has been unreasonable and unexplained delay, the appellant still has failed to show any evidence of actual prejudice.

Our superior court recently concluded that this court may grant sentence relief for unreasonable and unexplained delay under Article 66(c), UCMJ, even in the absence of actual prejudice. This court is "required to determine what findings and sentence 'should be approved,' based on all the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay." *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

In light of our authority and responsibility under Articles 59(a) and 66(c), UCMJ, we find no harm of any kind related to the delay, nor do we see any other basis for affording the appellant relief for any post-trial processing delays that occurred in his case. We therefore decline to grant relief on this ground. *United States v. Bigelow*, 57 M.J. 64, 69 (C.A.A.F. 2002).

Sentence Appropriateness

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 10 C.M.A. 102, 106-07, 27 C.M.R. 176, 180-81 (1959)).

The offense committed by the appellant was serious and deserving of serious punishment--he shook his 3-month-old son who was crying, which resulted in the infant's brain death. However, in addition to the aggravating factors presented at trial, we have also carefully considered the mitigating factors raised by the appellant during trial and during post-trial review. We believe the sentence, the maximum allowable by law, as adjudged and approved below, was inappropriately severe in the appellant's case. This court is not granting clemency, which is a prerogative reserved for the convening authority, *Healy*, 26 M.J. at 395-96. Instead, this court is fulfilling its mandated duties as required under Article 66(c), UCMJ.

Conclusion

Accordingly, we affirm the findings and only so much of the sentence as provides for 7 years confinement, reduction to pay grade E-1, total forfeiture of pay and allowances, and a dishonorable discharge.

Senior Judge PRICE and Judge SUSZAN concur.

For the Court

R.H. TROIDL
Clerk of Court