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.

Salvador A. FREEMAN
Storekeeper Seaman Recruit (E-1), U.S. Navy

NMCCA 200201626 Decided 16 December 2004

Sentence adjudged 2 July 1997. Military Judge: T.L. Leachman. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS ELLIOT (DD 967).

LtCol DWIGHT SULLIVAN, USMCR, Appellate Defense Counsel
LT MARCUS FULTON, JAGC, USN, Appellate Defense Counsel
LT JENNIE GOLDSMITH, JAGC, USNR, Appellate Defense Counsel
LT DEBORAH MAYER, JAGC, USNR, Appellate Government Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel
LT LARS JOHNSON, JAGC, USNR, Appellate Government Counsel

SUSZAN, Judge:

A military judge sitting as a special court-martial convicted the appellant of two specifications of conspiring to possess lysergic acid diethylamide (LSD) and two specifications of use of LSD, in violation of Articles 81 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 912a. The adjudged and approved sentence included confinement for 30 days, forfeiture of $600.00 pay per month for three months, and a bad-conduct discharge.

The appellant has raised four assignments of error. All deal with the post-trial processing of his case. First, he alleges the record contains no proof of service of the legal officer's recommendation on trial defense counsel. Second, he alleges unreasonable delay between trial and the convening authority's (CA) action. Third, he notes the CA's error in purporting to order the bad-conduct discharge executed. Fourth, in a supplemental assignment of error, he alleges error on the

part of trial defense counsel in failing to contact the appellant prior to review of, and response to the legal officer's recommendation.

We have examined the record of trial, the appellant's four assignments of error, the Government's response, and the appellant's reply. We conclude that relief is warranted for unexplained dilatory post-trial processing delay. We shall take corrective action in our decretal paragraph, and reassess the sentence. Arts. 59(a) and 66(c), UCMJ.

Legal Officer's Post-Trial Recommendation

The appellant's first and fourth assignments of error both deal with issues related to the legal officer's recommendation. Our superior court has previously dealt with the issue of improper service of a copy of the staff judge advocate's recommendation (SJAR) on trial defense counsel. *United States v. Lowe,* 58 M.J. 261 (C.A.A.F. 2003). In *Lowe* the trial defense counsel was not served a copy of the SJAR before the CA had taken action on the case. While this constituted error, the *Lowe* court did not find plain error, holding rather that the outcome of the case hinged on whether the appellant could make a colorable showing of possible prejudice as a result of the error of improper service. Citing *United States v. Chatman,* 46 M.J. 321 (C.A.A.F. 1997) and *United States v. Howard,* 47 M.J. 104 (C.A.A.F. 1997), the *Lowe* court made clear that this threshold is low and if the appellant makes *some colorable showing* of possible prejudice he will be given the benefit of the doubt without speculating on what the CA might have done if comment had been submitted. *Lowe,* 58 M.J. at 263-64. While the threshold is low, it nonetheless requires some showing of possible prejudice. Here, while having the opportunity to make such a colorable showing of possible prejudice, the appellant has failed to articulate what, if anything he would have submitted for post-trial consideration to the CA. Absent such a showing of possible prejudice, we find no merit to these assignments of error.

Post-Trial Delay

In his second assignment of error the appellant correctly notes that it took over five years from the date of his trial to the time the CA took action on his case. We find this unexplained delay to be excessive and unreasonable for a record of trial less than 100 pages in length. The appellant avers that this court should reassess the appellant's sentence and grant appropriate relief by disapproving the punitive discharge. We only agree that this court should act under Article 66(c), UCMJ, and grant some relief for the unexplained dilatory post-trial processing of the appellant's case.

An appellant's constitutional right to timely review extends to the post-trial and appellate process. *See United States v.*

Toohey, 60 M.J. 703, 706 (N.M.Ct.Crim.App. 2004)(citing *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003)). The appellant also has the right to timely post-trial review of his case pursuant to Article 66(c), UCMJ. *See United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002); *United States v. Williams*, 55 M.J. 302, 305 (C.A.A.F. 2001)("appellant has a right to a speedy post-trial review of his case"), *cert. denied*, 534 U.S. 1169 (2002). Under Article 66(c), UCMJ, this court has authority to grant relief for excessive post-trial delay without a showing of actual prejudice within the meaning of Article 59(a), UCMJ, if we deem relief appropriate under the circumstances. *See Tardif*, 57 M.J. at 224. We, however, will only grant relief under Article 66(c), UCMJ, under the most extraordinary of circumstances. *See generally* Art. 59(a), UCMJ.

We conclude that the length of unexplained post-trial delay between the date of the appellant's trial and the date of the CA's action, "reflects poorly on the administration of military justice." *See Williams*, 55 M.J. at 305. As such, we shall take appropriate action below.

Convening Authority's Action

In his third assignment of error the appellant correctly notes that the convening authority erred when he took action purporting to order the bad-conduct discharge into execution. That *ultra vires* part of his action is a nullity that does not require correction. *United States v. McGee,* 30 M.J. 1086, 1088 (N.M.C.M.R. 1989).

Conclusion

The findings are affirmed. Consistent with this opinion, and in accordance with *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998)(citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986), we reassess the sentence. We affirm only so much of the sentence as extends to confinement for 30 days and a bad-conduct discharge. As reassessed, the sentence is both appropriate and free of all prejudice from the post-trial delay.

Senior Judge PRICE and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court