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

BEFORE

C.A. PRICE **E.B. HEALEY** **R.C. HARRIS**

UNITED STATES

v.

John P. MICHAEL
Fireman (E-3), U.S. Navy

NMCCA 200300102 Decided 18 November 2004

Sentence adjudged 12 June 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).

Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
CDR BREE A. ERMENTROUT, JAGC, USNR, Appellate Defense Counsel
Maj KEVIN C. HARRIS, USMC, Appellate Government Counsel

HARRIS, Judge:

A special court-martial composed of a military judge, sitting alone, convicted the appellant, pursuant to his pleas, of conspiracy to possess Lysergic Acid Diethylamide (LSD) with intent to distribute, using LSD, distributing LSD, and introducing LSD onto a vessel used by the armed forces or under control of the armed forces, in violation of Articles 81 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 912a. On 12 June 1997, the appellant was sentenced to confinement for 100 days, reduction to pay grade E-1, forfeiture of $400.00 pay per month for 4 months, and a bad-conduct discharge. On 6 April 2002, the convening authority (CA) approved only so much of the adjudged sentence as provides for confinement for 90 days, reduction to pay grade E-1, forfeiture of $400.00 pay per month for 4 months, and a bad-conduct discharge.

We have examined the record of trial, the appellant's four assignments of error, and the Government's response. We conclude that relief is warranted for excessive unexplained post-trial processing delay, and that the court-martial order (CMO) requires

correction. We shall take corrective action in our decretal paragraph, and reassess the sentence. Arts. 59(a) and 66(c), UCMJ.

Post-Trial Processing Delay

In the appellant's first assignment of error, he summarily asserts that, notwithstanding the absence of demonstrated prejudice, the dilatory post-trial processing of his case warrants relief, given that it took almost 6 years to go from trial to this court for appellate review in a 49-page guilty plea case; and, in particular, it took almost 5 years to proceed from trial to the CA's action. The appellant avers that this court should reassess the appellant's sentence and grant appropriate relief by disapproving the punitive discharge since there is no other meaningful relief available at this late date. We only agree that this court should act under Article 66(c), UCMJ, and grant some relief for the excessive unexplained 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), *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," even discounting the unexplained delay between the date of the CA's action and the date the appellant's case was docketed with this court for appellate review. *See Williams*, 55 M.J. at 305. As such, we shall take appropriate action.

Convening Authority's Action

In the appellant's second assignment of error, he summarily asserts that the CA erred by failing to cite the companion cases to the appellant's court-martial in his action. The appellant avers that this court should set aside the CA's action and remand his case for a new action. We only agree the CA erred.

Review of the record reflects that the appellant made a number of references to certain co-accused in connection with the circumstances involving their conspiracy to procure, introduce, and use LSD onboard a vessel of the United States. The appellant is correct in that the CA is required to reference companion cases in his action. *See* Manual of the Judge Advocate General of the Navy, Judge Advocate General's Instruction 5800.7C, § 0151 (Ch-3, 7 Jul 1998). The purpose of this requirement is to ensure the CA makes an informed decision when taking action on an appellant's court-martial. *See United States v. Ortiz*, 52 M.J. 739, 741 (N.M.Ct.Crim.App. 2000). However, when dealing with the issue of the CA's failing to list companion cases in his action, an appellant's argument will fail in the absence of any claim of prejudice. *See United States v. Swan*, 43 M.J. 788, 792 (N.M.Ct.Crim.App. 1995).

The appellant has neither alleged a "*colorable claim of prejudice*" nor demonstrated any prejudice by the CA failing to list the companion cases in his action. *Id*. (emphasis added). In his action, the CA stated that he considered the appellant's record of trial. Further, in the appellant's post-trial matters submitted to the CA requesting clemency, he makes no mention of the sentences or actions taken in any companion cases. Finally, the court-martial promulgating orders (CMOs) of the appellant's companion cases reflect comparable sentences and actions by the CA. *See* Government Motion to Attach Documents of 7 Oct 2004. We have considered these companion case documents to evaluate whether the appellant suffered any prejudice. Recognizing that the appellant has neither alleged prejudice nor do we find that he suffered any prejudice, he is not entitled to any relief. *See United States v. Watkins*, 35 M.J. 709, 715-16 (N.M.C.M.R. 1992).

Court-Martial Order

In the appellant's third assignment of error, he summarily asserts that the CA erred in his CMO when he failed to reference Specification 4 of Charge II and mislabeled Charge II as a second Charge I. The appellant avers that this court should order that the supplemental CMO accurately reflect the outcome on the Charges in his case. We agree.

Among other items, a CMO is required to list the charges and specifications, the pleas, and the findings of a court-martial. RULE FOR COURTS-MARTIAL 1114(c)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). The purpose of the CMO is to publish the results of the court-martial and the CA's action. R.C.M. 1114(a)(2). The Government concurs with the appellant that the CA failed to reference Specification 4 under Charge II, and failed to reference the pleas and findings for Specification 4 under Charge II, and that Charge II has been incorrectly reported as a second Charge I in his CMO. The appellant has not alleged any prejudice as a result of this omission and scrivener's error on the CA's part. We conclude that there was no prejudice.

However, the appellant is entitled to have his official records correctly reflect the results of his court-martial. *See United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). Therefore, we shall order corrective action. *Id*.

Post-Trial Matters

In the appellant's fourth assignment of error, he summarily asserts that the Government denied him appropriate appellate review where the record of trial does not contain his clemency request. The appellant avers that this court should set aside the CA's action and remand his case for a new CA's action. We disagree.

The appellant is correct in that a complete record of the proceedings and the testimony shall be prepared in each court-martial case in which the sentence adjudged includes a punitive discharge. Art. 54(c)(1), UCMJ. The record of trial should also include, or have attached, any matter submitted by the accused under R.C.M. 1105. R.C.M. 1103(b)(3)(C). This court also recognizes that when there is a substantial omission from the record of trial, a presumption of prejudice results. *See United States v. Boxdale*, 47 C.M.R. 351, 352 (C.M.A. 1973). Nonetheless, our superior court has held that any insubstantial omission from the record does not raise a presumption of prejudice. *See United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000). Further, where an insubstantial omission from the record occurs, that omission does not effect the record's characterization as complete. *Id*.

The appellant correctly noted that the legal officer specifically referenced the appellant's post-trial request for clemency in his recommendation (LOR). *See* LOR of 26 Oct 2001 at 2. The appellant also correctly observed that the CA did consider his post-trial request for clemency before acting on the appellant's case. See CA's Action of 6 Apr 2002 at 2. However, the appellant has not addressed how he was prejudiced by the omission of his request for clemency from the record. He has also failed to provide a copy of said request for this court's consideration, and failed to state what the content of his request for clemency covered. As such, we find that the appellant has suffered no material prejudice from the omission of his request for clemency from the record. We further find that the appellant's record of trial is complete. *See* Art. 54, UCMJ. We, therefore, decline to grant relief.

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 75 days,

reduction to pay grade E-1, and a bad-conduct discharge. As reassessed, the sentence is both appropriate and free of any possible prejudice from the post-trial delay. We direct that the supplemental CMO accurately report our decision and correctly report the charges, the findings, and the sentence.

Senior Judge PRICE and Judge HEALEY concur.

For the Court

R.H. TROIDL
Clerk of Court