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

BEFORE

Charles Wm. DORMAN **M.J. SUSZAN** **R.C. HARRIS**

UNITED STATES

v.

Julius E. LETT
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 9901826 Decided 19 August 2004

Sentence adjudged 17 December 1998. Military Judge: T.J. Hamilton II. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 1st Battalion, 10th Marines, 2nd Marine Division, Camp Lejeune, NC.

LT REBECCA SNYDER, JAGC, USNR, Appellate Defense Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel
LCDR R.W. SARDEGNA, JAGC, USNR, Appellate Government Counsel

HARRIS, Judge:

The appellant was tried by a special court-martial composed of a military judge, sitting alone. Pursuant to his pleas, the appellant was convicted of a 12-day unauthorized absence and wrongful appropriation of another Marine's motor vehicle, in violation of Articles 86 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 921. On 17 December 1998, the appellant was sentenced to confinement for 120 days, reduction to pay grade E-1, forfeiture of $600.00 pay per month for 4 months, and a bad-conduct discharge. On 4 October 1999, the convening authority (CA) approved the adjudged sentence. A pretrial agreement had no effect on the sentence.

On the appellant's initial appeal, he raised five assignments of error.[1] On 24 July 2000, this court found merit

[1] I. A SENTENCE INCLUDING AN UNSUSPENDED BAD-CONDUCT DISCHARGE IS INAPPROPRIATELY SEVERE.

II. THE COVER SHEET FOR THE RECORD OF TRIAL FORWARDED TO THIS COURT REFLECTS AN INCORRECT SOCIAL SECURITY NUMBER.

in the appellant's fourth assignment of error and set aside the CA's premature action, thereby mooting the appellant's fifth assignment of error, which also was addressed by the court. Further, this court returned the record to the Judge Advocate General of the Navy for transmission to an appropriate CA for a new staff judge advocate's recommendation (SJAR) and a new CA's action under Article 60, UCMJ, and further directed compliance with RULE FOR COURTS-MARTIAL 1106(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). On 3 August 2000, the Judge Advocate General of the Navy transmitted the record to the CA directing compliance with this court's decision not later than 10 October 2000. On 20 February 2002, the CA again acted on the appellant's case, approving only the bad-conduct discharge. The CA disapproved that part of the sentence pertaining to confinement, forfeitures, and reduction.

We again have carefully considered the original record of trial, the post-trial record, the appellant's three remaining original assignments of error and three additional assignments of error after remand,[2] and the Government's answers. We conclude that the findings and the sentence are correct in law and fact and that no error, except as addressed below, materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Competence to Stand Trial

In the appellant's first assignment of error after remand, he asserts that he was not competent to assist in his own defense and stand trial because he took prescribed anti-psychotic medication before trial. The appellant avers that this court

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III. THE MILITARY JUDGE ERRED WHEN HE INCORRECTLY ANNOUNCED THE FINDINGS AT PAGE 38 OF THE RECORD OF TRIAL.

IV. THE CONVENING AUTHORITY ERRED WHEN HE TOOK ACTION BEFORE RECEIPT OF THE STAFF JUDGE ADVOCATE'S [RECOMMENDATION].

V. THE STAFF JUDGE ADVOCATE FAILED TO ENCLOSE PROOF OF SERVICE OF HIS RECOMMENDATION UPON THE [TRIAL] DEFENSE COUNSEL.

[2] I. THE MILITARY JUDGE'S FINDING ON REMAND THAT LCPL LETT WAS COMPETENT TO STAND TRIAL WAS CLEARLY ERRONEOUS WHERE THE BOARD OF MEDICAL EXAMINERS DID NOT DETERMINE WHETHER LCPL LETT WAS COMPETENT TO ASSIST IN HIS DEFENSE AND STAND TRIAL, AND WHERE LCPL LETT TOOK PRESCRIBED ANTI-PSYCHOTIC MEDICATION BEFORE TRIAL AND AT THE TIME OF TRIAL THAT IS KNOWN TO ADVERSELY AFFECT ONE'S CONCENTRATION, EXERCISE OF JUDGMENT AND ABILITY TO THINK CLEARLY.

II. LCPL LETT'S TRIAL DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO REQUEST A MENTAL COMPETENCY HEARING TO DETERMINE WHETHER LCPL LETT WAS COMPETENT TO ASSIST IN HIS DEFENSE AND STAND TRIAL.

III. THE GOVERNMENT HAS DENIED APPELLANT SPEEDY POST-TRIAL REVIEW OF HIS COURT-MARTIAL AS NEARLY FIVE YEARS HAVE PASSED SINCE HIS COURT-MARTIAL WITHOUT FINAL ACTION BY THIS COURT.

should again remand his case to the CA for a mental competency evaluation to determine whether he was competent to assist in his defense and to stand trial. We disagree.

On 6 November 2001, the military judge, at the direction of the CA, conducted an R.C.M. 1102 post-trial session. The military judge found that the limited purpose of the post-trial proceeding was to inquire into the appellant's mental capacity and/or responsibility at the time of the offenses and as to his ability to assist in his own defense both at trial and at the ordered post-trial proceeding. Post-Trial Record at 5, 25. Whereupon, the military judge, at the request of the trial counsel, without objection by the trial defense counsel, ordered an inquiry be conducted, in accordance with R.C.M. 706, into the appellant's mental capacity and/or responsibility at the time of the offenses and as to his ability to assist in his own defense both at trial and at the ordered post-trial proceeding. *Id*. at 12.

On 19 December 2001, the report of the inquiry conducted in accordance with R.C.M. 706 was presented to the military judge for inclusion in the post-trial record. Post-Trial Record at 25; Post-Trial Appellate Exhibit I at 12. The military judge adopted the findings of the R.C.M. 706 inquiry officer: (1) that at the time of the appellant's criminal conduct for which he was convicted, the appellant did not have a mental disease or defect; (2) that at the time of the appellant's criminal conduct the appellant was able to appreciate the nature and quality or the wrongfulness of his conduct; and, (3) that at the present time, the appellant does have sufficient mental capacity to understand the nature of the proceedings and to conduct or cooperate intelligently in his own defense. Post-Trial Record at 25. The military judge further concluded that he was required to determine whether or not the appellant had the requisite mental capacity to assist in his own defense at the time of his original trial. *Id*. at 27. After having the opportunity to observe and question the appellant, the military judge then found that there was no evidence in front of the military judge to indicate that the appellant suffered from any mental disease or defect that prohibited him from understanding or appreciating the nature and quality of the proceedings at his original court-martial, nor did he suffer from any mental disease or defect that precluded him from possessing the mental capacity necessary to understand the nature of the present proceedings. *Id*. at 28-29. The military judge finally found that there was no factual basis for him to order or recommend to the CA that the findings and the sentence be set aside or that a rehearing on the findings and the sentence was necessary. *Id*. at 29.

The trial counsel subsequently brought to the military judge's attention that the R.C.M. 706 report in the appellant's case did not specifically address whether at the time of the appellant's trial, the appellant was suffering from a mental defect. *Id*.; Post-Trial Appellate Exhibit I at 12. The trial

counsel then informed the military judge that he spoke with the R.C.M. 706 inquiry officer and the officer told the trial counsel that the R.C.M. 706 board did make conclusions that the appellant was able to participate and that he did not have a mental disease or defect at the time of the appellant's trial. Post-Trial Record at 29-30. The trial counsel then told the military judge that he intended to have the R.C.M. 706 inquiry officer draft a supplemental attachment to be filed with Post-Trial Appellate Exhibit I to clarify the issue. *Id*. at 30. The military judge agreed and determined that another post-trial session was not required. *Id*. The trial defense counsel then stated that another post-trial session "is not necessary and that a supplemental report will be adequate for the [CA]." Id. at 30-31. Whereupon, the military judge told the trial defense counsel, "if that supplemental report doesn't answer the mail for the defense, then that's certainly something that can be addressed in [R.C.M.] 1106 matters prior to the ultimate approval by the [CA]." *Id*. at 31. To which the trial defense counsel replied, "[y]es, sir." *Id*.

On 28 December 2001, the SJA issued a second addendum to his 1 September 2000 SJAR. On 17 January 2002, the appellant responded to this second addendum. In his response, the appellant addresses, in extensive detail, post-trial processing delay. This assignment of error we address below. Nowhere in his response, however, does the appellant address the supplemental attachment to be filed with his R.C.M. 706 inquiry report, or the fact that a supplement has not been attached to the post-trial record. Nor did the appellant request that the CA order an additional post-trial session to refute the trial counsel's assertions that the R.C.M. 706 inquiry officer had told the trial counsel that the appellant had the ability to assist in his own defense at the time of trial.

The mental capacity of an accused is an interlocutory question of fact. R.C.M. 909(c)(1). Accordingly, the military judge's factual determination will be overturned only if it is clearly erroneous. *United States v. Proctor*, 37 M.J. 330, 336 (C.M.A. 1993), *cert. denied*, 510 U.S. 1091 (1994). Applying that standard of review, we find no error.

Since the appellant was presumed to have the capacity to stand trial, he had the burden of presenting evidence to the contrary. R.C.M. 909(b). The following standard of proof applied to the issue.

> Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case.

R.C.M. 909(e)(2).

It is clear that the military judge carefully considered the appellant's examination under R.C.M. 706 as well as his own observations of the appellant in determining that there was no issue as to whether the appellant was able to participate and that the appellant did not have a mental disease or defect at the time of his trial. Following our careful review of both the original record and the post-trial record, we find that the military judge's findings of fact on this issue, and his determination that the appellant was able to participate and that he did not have a mental disease or defect at the time of the appellant's trial, are not clearly erroneous. Rather, we fully concur with the findings of the military judge on this issue and adopt them as our own.

We find that the appellant has not met his burden by a preponderance of the evidence that he did not have the capacity to adequately assist in his own defense at the time of trial. Accordingly, we decline to grant relief.

Ineffective Assistance of Counsel

In the appellant's second assignment of error after remand, he asserts that his trial defense counsel provided ineffective assistance of counsel (IAC) by failing to request a mental competency hearing under R.C.M. 706 to determine whether he was competent to assist in his defense and stand trial. The appellant avers that this court should again remand his case to the CA for a mental competency evaluation to determine whether he was competent to assist in his defense and to stand trial. We disagree.

In light of our decision above on the appellant's first assignment of error after remand, we conclude that the appellant's assertion has failed to rebut the strong presumption of competency attached to his trial defense counsel's representation. As such, we decline to grant relief.

Post-Trial Delay

In the appellant's third assignment of error after remand, he asserts that he has been denied speedy post-trial review of his court-martial as more than 5 years have passed since his court-martial without final action by this court. The appellant avers that this court should set aside the only approved punishment, that being a bad-conduct discharge. We disagree.

An appellant has a right to a timely review of his or her findings and sentence. *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34 (C.A.A.F. 2003); *United States v. Williams*, 55 M.J. 302, 305 (C.A.A.F. 2001). In reviewing a case where there is an alleged excessive delay in its post-trial processing, this court must determine whether the excessive delay materially

prejudiced the appellant, thus requiring a remedy under Article 59(a), UCMJ. *United States v. Tardif*, 57 M.J. 219, 223-24 (C.A.A.F. 2002). If there is no material prejudice to the appellant, then 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." *Id*. at 224; *see* Art. 66(c), UCMJ. However, "[a]ppellate relief under Article 66(c) should be viewed as the last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review." *Tardif*, 57 M.J. at 225.

The appellant bears the burden of proving that the post-trial delay was unreasonable. However, should this court find there was unreasonable post-trial delay in the appellant's case, that unreasonable delay alone does not necessarily entitle the appellant to relief under Articles 59(a) or 66(c), UCMJ. The appellant raised and substantiated some post-trial processing delay in his post-trial matters to the CA. Appellant's R.C.M. 1106 Response of 17 Jan 2002. There, the CA granted significant relief at the recommendation of his SJA. CA's Action of 20 Feb 2002; Third SJAR Addendum of 7 Feb 2002. We find the appellant is not entitled to any additional relief under Article 59(a), UCMJ. Even cognizant of our obligation under Article 66(c), UCMJ, to factor unreasonable and unexplained post-trial delay into our determination of what findings and sentence "should be approved," *Tardif*, 57 M.J. at 224, the record here does not justify additional relief.

While the post-trial processing of the appellant's case prior to docketing with this court for appellate review after remand may not have been a model of complete efficiency, it likewise does not cry out for additional relief. Further, the record does not establish any other facts or circumstances that serve as a basis for additional relief. We find, therefore, that this is an inappropriate case for this court to exercise its broad powers to grant additional relief under Article 66(c), UCMJ.

Sentence Appropriateness

In the appellant's original first assignment of error, he summarily asserts that a sentence including an unsuspended bad-conduct discharge is inappropriately severe in his case. The appellant avers that this court should disapprove the bad-conduct discharge. We disagree.

In determining the appropriateness of a sentence we are to afford the appellant individualized consideration under the law. Specifically, we must review the appropriateness of the sentence based upon the "nature and seriousness of the offense and the character of the offender." *United v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). Without question, this requires a

balancing of the offenses against the character of the offender. We have conducted that balancing in the appellant's case and conclude that, in our collective experience, the adjudged and approved sentence is appropriate for this offender and these offenses. As such, no sentencing relief is warranted.

Record of Trial

In the appellant's original second assignment of error, he summarily asserts that the cover sheet for his record of trial incorrectly reflects the first number of his social security number. The appellant implicitly avers that this court should order the correction of his record. We agree.

Rule 4-4c(3) of this court's rules of practice and procedure requires that every assignment of error include pertinent authorities and demonstrate with particularity why the assigned error is materially prejudicial to the substantial rights of a particular appellant, or why relief is otherwise warranted. NMCCA Rules of Practice & Procedure, Rule 4-4c(3). This, the appellant explicitly failed to provide for the court. We, nonetheless, shall take corrective action in our decretal paragraph.

Findings

In the appellant's original third assignment of error, he summarily asserts that the military judge incorrectly announced the findings. The appellant implicitly avers that this court should take whatever action it deems appropriate. We agree that the military judge incorrectly announced findings.

The military judge did mistakenly state during findings that Charge II was a violation of Article 86, UCMJ. However, it is also clear from the military judge's recitation of the excepted and substituted language that he intended to find the appellant guilty, in accordance with his pleas, of Article 121, UCMJ. Record at 38. The appellant entered pleas of guilty pursuant to a pretrial agreement by exceptions and substitutions. *Id*. at 8; Charge Sheet; Appellate Exhibit I at 2. Further, the SJAR correctly recited the findings, which drew no comment from the appellant. SJAR of 25 Oct 1999; Appellant's R.C.M. 1106 Response of 29 Oct 1999.

We find that the appellant has failed to allege, much less demonstrate, any resulting prejudice from this error. Accordingly, we decline to grant relief.

Promulgating Order

Although not assigned as error, we note that the court-martial promulgating order (CMO) fails to adequately summarize

the charges and specifications. We, however, find that the appellant was not prejudiced by the poorly crafted CMO that failed to adequately summarize the charges and specifications. *United States v. Glover*, 57 M.J. 696 (N.M.Ct.Crim.App. 2002). Although the appellant was not prejudiced, he is nonetheless entitled to accurate official records concerning his court-martial. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). We shall direct below that the CMO comply with R.C.M. 1114(c)(1).

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority. We direct that the supplemental CMO accurately summarize the offenses of which the appellant stands convicted. We further direct that the cover sheet to the original record correctly state the appellant's social security number.

Chief Judge DORMAN and Judge SUSZAN concur.

For the Court

R.H. TROIDL
Clerk of Court