UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant NATHAN AMBRIZ
United States Air Force

ACM 37674

05 December 2011

Sentence adjudged 12 January 2010 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Terry O'Brien (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 6 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford and Lieutenant Colonel Darrin K. Johns.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Deanna Daly; Major Scott C. Jansen; Major Charles G. Warren; and Gerald R. Bruce, Esquire.

Before

GREGORY, WEISS, and HECKER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HECKER, Judge:

Consistent with his pleas, a general court-martial composed of a military judge convicted the appellant of one specification of aggravated sexual assault of a child and one specification of abusive sexual contact with a second child, in violation of Article 120, UCMJ, 10 U.S.C. § 920. The adjudged sentence consists of a dishonorable discharge, confinement for 7 years, forfeiture of all pay and allowances, and reduction to E-1. Pursuant to a pretrial agreement, the convening authority reduced the confinement period to 6 years and approved the findings and the remainder of the sentence as

adjudged. He also waived the automatic forfeitures for the benefit of the appellant's wife and children.

On appeal, the appellant raises an issue related to the action taken by the convening authority, two issues related to the post-trial processing of his case and, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), a claim that his sentence is inappropriately severe.

Background

The appellant pled guilty to two specifications based on his sexual contact with two teenage girls he befriended in late 2008. For several months in the fall of 2008, the appellant socialized separately with KMA and MGD, the 15- and 14-year-old daughter and stepdaughter of two other military members. Both girls spent time at his on-base residence, which he was improperly sharing with non-military members, with MGD visiting on almost a daily basis.

On 23 November 2008, while watching football with KMA, the appellant began "French kissing" her while a teenage boy slept on the floor. He placed her hand on his genitals through his pants and then told her to accompany him upstairs. Once in his bedroom, the appellant unbuttoned her pants, put his hands inside and touched her vagina through her underwear. He also rubbed her thighs and buttocks through her clothes. KMA elected to leave the residence after they were interrupted by one of the appellant's roommates.

A few days later, the appellant invited MGD and her mother, along with others, to his residence for Thanksgiving dinner. After MGD's mother left, the appellant and MGD went into the garage to smoke cigarettes. They engaged in "French kissing," the appellant lowered both of their pants, she removed her underwear and he penetrated her vagina. He admitted knowing she was 14 years old and that he was doing something wrong, despite drinking alcohol that night.

Ten days later, the military police came to the appellant's residence after his roommates were involved in an altercation. KMA was present and one of the roommates disclosed that the appellant had engaged in sexual contact with her. Following a rights advisement, the appellant stated he took KMA to his bedroom to talk about her boyfriend problems and that she ended up on top of him moving her body in a sexual manner while he French kissed her. He denied having any sexual contact with MGD.

On 12 January 2010, the appellant pleaded guilty to two specifications of sexual misconduct with children. He entered into a pretrial agreement that capped his confinement at six years. After being advised by the military judge of the consequences,

the appellant told the military judge that he believed his sentence should include a punitive discharge, along with four years of confinement.

In clemency, the appellant requested only that the convening authority approve a waiver of the automatic forfeitures, for the benefit of his wife and children. The convening authority agreed to do so, but neglected to disapprove the adjudged total forfeitures in his action. Affidavits submitted by the government on appeal make clear that the convening authority intended for the appellant's wife to receive the benefit of waived forfeitures, and for the full impact of automatic and adjudged forfeitures to be delayed during that time period.

Although the convening authority took action within 45 days of trial, the record of trial was not forwarded to this Court until 108 days later. Affidavits submitted by the government on appeal indicate that the base military justice section became aware of certain missing paperwork from the appellant's record of trial, including one entire volume. After spending several months looking for the paperwork and accomplishing substitutes for the paperwork that was not found, the base and Numbered Air Force legal offices forwarded the record to this Court.

The Action of the Convening Authority

Both the appellant and Government counsel agree that the convening authority's action is in error, by waiving automatic forfeitures for the benefit of the appellant's spouse while fully approving the adjudged forfeiture of all pay and allowances. The appellant contends the action is ambiguous and that it be remanded so the convening authority could clarify his intention, while the Government asks this Court to effectuate the convening authority's intent by disapproving the adjudged forfeitures.

When acting on a sentence which includes forfeitures, a convening authority may reduce, suspend, or disapprove adjudged forfeitures, thereby making mandatory forfeitures available for waiver to benefit the service member's dependents under Article 58(b), UCMJ, 10 U.S.C. § 858(b). Here, the convening authority clearly intended to waive mandatory forfeitures for the benefit of the appellant's spouse, but when he also approved the adjudged forfeitures, the spouse technically received compensation to which she was not entitled. Under these circumstances, we need not return the record to the convening authority for corrective action but may correct the error by disapproving the adjudged forfeitures. *United States v. Johnson*, 62 M.J. 31, 38 (C.A.A.F. 2005).

Post-Trial Processing Delay

Our superior court established a presumption of unreasonable delay for cases where the record of trial is not docketed by the service Court of Criminal Appeals within 30 days of the convening authority's action. *United States v. Moreno*, 63 M.J. 129, 142

(C.A.A.F. 2006). The convening authority took action in this case on 26 February 2010, yet the record did not reach this Court until 14 June 2010, 108 days after action and 153 days after trial. In light of this, the appellant contends that his punitive discharge should be disapproved or, in the alternative, that 78 days of his confinement should be disapproved, relying on *Moreno* and our authority to grant relief for excessive post-trial delay through our powers under Article 66(c), UCMJ, 10 U.S.C. § 866(c), and *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002). In contrast, the Government contends that our analysis should be limited to reviewing the "effective number of post-trial processing delay" days, which it defines as three days, based on its belief it has 150 days to forward a record of trial to this Court before the overall delay is unreasonable (combining the 120 days allotted for convening authority action by *Moreno* with the 30 days allotted for forwarding of the record of trial). It further argues that the appellant is not entitled to relief under either a *Moreno* or *Tardif* analysis.

We disagree with the government's argument that it can combine the *Moreno* requirements for timely convening authority action and record of trial forwarding. Such a practice would thwart the "thrust of the *Moreno* decision [which] was to encourage compliance with appellants' due process rights to speedy appellate processing . . . ." *United States v. Arriaga*, 70 M.J. 51, 57 (C.A.A.F. 2011). In *Moreno*, our superior court elected to set separate presumptions of unreasonable delay for each of the three major steps in post-trial processing, as opposed to a collective total processing time. *Moreno*, 63 M.J. at 142. Because the *Moreno* timelines do not provide a "'free period' in which no time delay is computed" following a court-martial, *Arriaga*, 70 M.J. at 57, the Government's failure to meet the timelines in one step of post-trial processing is not automatically remedied by swift processing in another step.

We review de novo claims that an appellant has been denied the due process right to a speedy appeal. *Moreno*, 63 M.J. at 135. In analyzing whether appellate delay has violated the due process rights of an accused, we first look at whether the delay in question is facially unreasonable. If so, this leads to an examination and balancing of the four factors set forth in *Barker v. Wingo,* 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *See Moreno*, 63 M.J. at 135-36.

"No single factor [is] required to find that post-trial delay constitutes a due process violation." *Id.* at 136. We look at "the totality of the circumstances in the particular case" in deciding whether relief is warranted. *United States v. Allison*, 63 M.J. 365, 371 (C.A.A.F. 2006). If we ultimately conclude that the appellant's due process right to speedy post-trial review and appeal has been violated, we will generally grant relief unless we are convinced beyond a reasonable doubt that the constitutional error is harmless. *Id.* at 370.

1. Length of the delay

Under *Moreno*, the 108 days between convening authority action and docketing of this record of trial is facially unreasonable. That presumption of unreasonable delay here satisfies the first *Barker* criteria, and triggers a due process review. It also favors the appellant in the balancing analysis.

2. Reasons for the delay

The government has the burden of showing that the delay was not unreasonable. The evidence presented by the government failed to meet that burden.

Once the convening authority took action on 26 February, the government had 30 days to forward the record of trial through the Numbered Air Force and to the military justice division in Washington, D.C. In March, a new paralegal took over responsibility for the base military justice division. She discovered that the record of trial in this case had not been assembled, was missing an entire volume, and contained neither the Article 32, UCMJ, 10 U.S.C. § 832, report nor the defense's receipts for that report. She also discovered that the case file was not collected in a single location, and ultimately found the Article 32, UCMJ, report elsewhere in the legal office. The government provided no explanation for those problems.

By 27 April 2010, the paralegal had used a copy to replicate the original of the missing volume and had forwarded the record of trial to the Numbered Air Force legal office. On 6 May 2010, that office contacted the base legal office regarding the still-missing receipt showing the accused had been served the Article 32, UCMJ, report. It took almost 30 days for a three sentence "missing document memorandum" to be forwarded back to the Numbered Air Force legal office. The record of trial was docketed with our Court less than a week later.

The Government acknowledges the legal office "could have done a better job of maintaining the [record of trial] and case related documents," but argues that both legal offices should be commended for endeavoring to ensure the record was complete before it was forwarded. Unfortunately, the legal offices took several months to accomplish that "routine, nondiscretionary, ministerial task." *United States v. Oestmann*, 61 M.J. 103, 104 (C.A.A.F. 2005). Delays in forwarding the record of trial are the "least defensible of all" post-trial delays. *Moreno*, 63 M.J. at 137 (quoting *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990)). The circumstances presented here do not justify such a delay.

3. Assertion of the right to a timely review and appeal

The third factor is a neutral factor in this case. It is not clear how the appellant would know that his record of trial had not been forwarded in a timely manner or who he

would complain to if he was aware. *See Oestmann*, 61 M.J. at 105-06 (C.A.A.F. 2005) (Erdmann, J., concurring in part and dissenting in part) ("[A]fter action . . . and before a case is docketed . . ., a convicted servicemember has virtually no forum in which to complain about delay in forwarding the record."). Also, the Government bears the primary responsibility for speedy processing. *United States v. Bodkins*, 60 M.J. 322, 323-24 (C.A.A.F. 2004).

4. Prejudice

In assessing prejudice, one must look at the interests of servicemembers in having their convictions appealed "unencumbered by excessive delay." *Moreno*, 63 M.J. at 138 (quoting *Rheuark v. Shaw*, 628 F.2d 297, 303 (5th Cir. 1980)). Having a prompt appeal implicates three specific interests: "(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired." *Id.* at 138-39.

The appellant argues he has been prejudiced by the unnecessary delay because of the "stress and anxiety associated with his continued incarceration while unable to have a qualified appellate defense counsel review his case to determine if any meritorious issues exist to appeal in his case." However, appellants in this situation must demonstrate a "particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Moreno*, 63 M.J. at 140. The appellant has failed to articulate such a concern.

Furthermore, although this Court has agreed with the appellant regarding the automatic forfeitures issue, he has presented no evidence that his grounds for that appeal were impaired by the delay in the record of trial being forwarded. The appellant has not suffered prejudice because of the delay and, thus, the last *Barker* factor favors the Government.

5. Balancing the *Moreno* factors

Having determined that factors one and two favor the appellant and that factor four favors the government, we now qualitatively balance the factors to determine whether the appellant was denied due process. Upon doing so, we conclude that the appellant was not denied his due process right to speedy review and appeal. In the final analysis, the appellant suffered no due process violation.

Furthermore, in addition to discerning no particular *Barker* prejudice in this case, we also fail to find a due process violation resulting from our balancing of the other three factors, which would be required if the delay in this case "is so egregious that tolerating it

would adversely affect the public's perception of the fairness and integrity of the military justice system." *See United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). The delay in this case does not rise to that level.

Lastly, even if a constitutional due process error occurred in the post-trial processing of this case, we are fully confident that such error would be harmless beyond a reasonable doubt, and that no relief would be warranted. *Id.* at 363.

The Appellant's Sentence

As an alternative to his argument that he has suffered unreasonable post-trial delay under *Moreno*, the appellant asks this Court to grant sentence relief for the post-trial delay under our Article 66, UCMJ, authority to ensure an appropriate sentence. This Court is empowered to grant relief, when warranted, for excessive post-trial delay in processing an appellant's case. *Tardif*, 57 M.J. at 224-25. In exercising this power, this Court may fashion a remedy we believe appropriate to address "the harm suffered." *Id.* at 225. To address his post-trial delay, the appellant asks this Court to "grant meaningful relief," which he defines as disapproval of the punitive discharge or day-for-day confinement credit for the 78 days of unreasonable post-trial delay. We decline to do so. While there was a delay in the post-trial processing of the appellant's case, the requested relief would result in a windfall for the appellant—a windfall we are unwilling to provide.

Pursuant to *Grostefon*, the appellant contends his sentence to 6 years of confinement and a dishonorable discharge is inappropriately severe, and suggests that a sentence of 4 years of confinement and a bad-conduct discharge would be more appropriate. In making this argument, he relies heavily on the short time frame in which he engaged in this misconduct and his service during several tours in combat zones.

We review sentence appropriateness by conducting an individualized consideration of the appellant in light of his character, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999). After carefully examining the submissions of counsel, the appellant's military record, and all the facts and circumstances surrounding the offenses of which he was found guilty, we find appropriate the appellant's approved sentence to 6 years of confinement and a dishonorable discharge.

Conclusion

We conclude the findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). However, to ensure the convening authority's intent is satisfied in regard to financial support for the appellant's spouse, we affirm only so much of the sentence as includes a dishonorable discharge, confinement for six years, and reduction to the grade of E-1. Accordingly, the findings and the sentence, as modified, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court