

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman EDUARDO CASTILLEJA
United States Air Force**

ACM 36975

21 November 2007

Sentence adjudged 18 January 1997 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Dennis E. Kansala.

Approved sentence: Bad-conduct discharge, confinement for 3 months, forfeiture of \$600.00 pay per month (until the bad-conduct discharge is ordered executed), and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Ryan N. Hoback.

Before

**FRANCIS, SOYBEL, and BRAND
Appellate Military Judges**

This opinion is subject to editorial correction before final release.

PER CURIAM:

Over ten years ago, at Lackland Air Force Base Texas, the appellant was court-martialed. According to the general court-martial order published after the trial, the appellant was charged with one charge and one specification of rape, one charge and one specification of dereliction of duty by failing to refrain from drinking alcohol while under the age of 21, and one charge and one specification of desertion under Articles 120, 92, and 85, UCMJ; 10 U.S.C §§ 920, 892, 885. The order indicates he was acquitted of the rape allegation but found guilty of the lesser included offense of assault consummated by a battery under Article 128, UCMJ; 10 U.S.C. § 928; found guilty of the dereliction of duty allegation and found guilty of AWOL under Article 86, UCMJ; 10 U.S.C. 886, as

the lesser-included offense of the desertion allegation. The court-martial order also states the appellant was sentenced to confinement for 3 months, forfeiture of all pay and allowances, reduction to the grade of E-1, and a bad-conduct discharge. The convening authority approved “only so much of the sentence as provides for a bad conduct discharge, confinement for three months, forfeiture of \$600.00 per month (until the bad conduct discharge is ordered executed), and reduction to airman basic (E-1).” The case was first docketed with this Court on 3 April 2007.

Background

An affidavit establishes that in April of 1997 the original and copies of the record of trial (ROT) for this four-day court-martial were sent to AFLSA/JAJM (now AFLOA/JAJM). Unfortunately, they were lost in transit; never to be seen again. Further, all other copies of the ROT in the possession of the government were destroyed. In the attempt to reconstruct the record, base personnel discovered only the back-up tape for the first day of the trial and the last page of the transcript of the third day of the trial. Thus, except for a single page of transcript, all records of days two, three, and four of the trial were destroyed. Efforts to contact the appellant to obtain his copy of the ROT proved unsuccessful. The government recreated the ROT as best they could, which consisted of a verbatim record of day one. The charge sheet, post-trial staff judge advocate recommendation and addendum if any, the convening authority’s action, clemency material, exhibits, and almost everything else required to be in the ROT, are missing.

Analysis

In a motion for summary disposition, the appellant sought to set aside the findings of guilty and the sentence because of the incomplete state of the record of trial, and its noncompliance with Article 54, UCMJ, 10 U.S.C. § 854, and Rules for Courts-Martial 1103, 1104, and 1111. The appellant argued that it is impossible for appellate counsel and this Court to satisfy our respective duties to provide post-trial review. Citing *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), the appellant also contended the length of time it took to docket this case “is the very definition of excessive delay.” The appellant urged us to set aside the findings and sentence and dismiss the charges and specifications.

We denied the appellant’s motion and permitted the government sufficient time to respond to the appellant’s allegations. In their Answer to Substantive Issues, the government conceded, given the extent of the missing portions of the record, that it was unable to “rebut the presumption of prejudice.” It also conceded the findings of guilty and the sentence should be set aside. In light of this concession to the first issue the government did not address the timeliness issue.

Conclusion

We hold the incomplete record of trial and length of delay have combined to render it impossible for the appellant to receive any meaningful appellate review. *See* Article 66(c), UCMJ; 10 U.S.C. § 866(c); *Moreno*, 63 M.J. 129. Accordingly, the findings and sentence are set aside. The charges and specifications are dismissed.

OFFICIAL



STEVEN LUCAS, GS-11, DAF
Clerk of the Court