UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class COURTNEY DEON LEWIS CLAYBORN
United States Air Force

ACM 36432

31 May 2007

Sentence adjudged 11 December 2004 by GCM convened at Charleston Air Force Base, South Carolina. Military Judge: Donald A. Plude.

Approved sentence: Dishonorable discharge, confinement for 4 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for 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, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Matthew S. Ward, and Major Nurit Anderson.

Before

BROWN, FRANCIS, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

BROWN, Chief Judge:

The appellant was convicted, contrary to his pleas, of four specifications of unlawful entry and two specifications of indecent assault in violation of Article 134, UCMJ, 10 U.S.C. § 934. He was found not guilty of two specifications and the charge of rape in violation of Article 120, UCMJ, 10 U.S.C. § 920; two specifications of indecent assault in violation of Article 134, UCMJ; and one specification and charge of making a false official statement, in violation of Article 107, UCMJ, 10 U.S.C. § 907. Officer and enlisted members sitting as a general court-martial, sentenced the appellant to a

dishonorable discharge, confinement for 4 years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the findings and sentence as adjudged.[1]

Pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982), the appellant now contends the military judge erred when he denied the appellant three-for-one credit for illegal pretrial punishment because of the conditions of his pretrial confinement. In addition, the appellant contends his sentence is inappropriately severe.

Additional Credit for Illegal Pretrial Punishment

At trial, the appellant brought a motion for appropriate relief asserting that the conditions of his pretrial confinement violated Article 13, UCMJ, 10 U.S.C. § 813, and requested the military judge award him three-for-one credit against his sentence for every day spent in pretrial confinement. After hearing all the evidence and testimony presented by the parties and considering the arguments of counsel, the military judge made detailed findings of fact, and denied the appellant's motion, finding the conditions of the appellant's pretrial confinement did not violate the provisions of Article 13, UCMJ.

Article 13, UCMJ, provides:

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

This Court's determination of whether the appellant suffered from unlawful pretrial punishment involves constitutional and statutory considerations. *Bell v. Wolfish*, 441 U.S. 520, 535-36 (1979); *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005).

We will defer to the findings of fact by the military judge unless they are clearly erroneous; however, our application of those facts to the constitutional and statutory considerations, as well as any determination of whether this appellant is entitled to credit for unlawful pretrial punishment, involves independent de novo review by this Court. *King*, 61 M.J. at 227 (citing *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000)). The appellant bears the burden of establishing his entitlement to additional sentence credit because of a violation of Article 13, UCMJ. *King,* 61 M.J. at 227; *See also* Rule for Courts-Martial 905(c)(2).

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[1] The appellant spent 182 days in pretrial confinement and was awarded one day of credit for each of these days pursuant to *United States v. Allen*, 17 M.J. 126, 128 (C.M.A. 1984).

We reviewed the military judge's findings of fact and they are amply supported by the evidence presented and therefore are not clearly erroneous. Based upon our review of the facts, we conclude the appellant's pretrial confinement was lawful. We find that the conditions of the appellant's confinement were neither punishment nor unnecessarily harsh or rigorous, and hold there was no violation of Article 13, UMCJ, in this case.

Sentence Appropriateness

This Court has the authority to review sentences pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866(c), and to reduce or modify sentences we find inappropriately severe. Generally, we make this determination in light of the character of the offender and the nature and seriousness of his offenses. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). We may also take into account disparities between sentences adjudged for similar offenses in closely related cases. *United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001). Our duty to assess the appropriateness of a sentence is "highly discretionary," but does not authorize us to engage in an exercise of clemency. *United States v. Lacy,* 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

We note the appellant was convicted of indecently assaulting two women and unlawfully entering the dormitory rooms of four other female airmen. All of the victims were members of the appellant's squadron except one, and she was the girlfriend of a member of the appellant's squadron. All of the indecent assaults and unlawful entries occurred at Charleston Air Force Base, South Carolina, in the dormitory where the appellant lived. In addition, the indecent assaults were particularly egregious. One airman discovered that while she was asleep the appellant had pulled down her jogging pants, fondled her buttocks and breasts and thrust his penis against her side. Another victim was twice indecently assaulted by the appellant. On the first occasion, she woke up to find the appellant grinding his penis into her buttocks. A few months later, this same woman woke up to find the appellant rubbing her vagina through her shorts. We have examined the record and taken into account all of the facts and circumstances surrounding the crimes for which the appellant was convicted. We do not find his sentence inappropriately severe. *See Snelling*, 14 M.J. at 286.

Post-Trial Delay

Although not raised by the appellant, we note that the trial in this case ended on 11 December 2004 and convening authority action did not take place until 29 August 2005. Convicted service members have a due process right to timely review and appeal of their convictions. *United States v. Toohey,* 60 M.J. 100, 101 (C.A.A.F. 2004). We conduct de novo review of claims that an appellant has been denied his due process right to a speedy post-trial review and appeal. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006).

"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." *United States v. Rodriquez-Rivera*, 63 M.J. 372, 385 (C.A.A.F. 2006) (quoting *Moreno*, 63 M.J. at 136). If it is, then we examine and balance the factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), to determine if an appellant has been denied his due process right to speedy post-trial review and appeal. *Rodriquez-Rivera*, 63 M.J. at 385; *Moreno*, 63 M.J. at 135; *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey,* 60 M.J. at 102. "[N]o single factor [is] required to find that post-trial delay constitutes a due process violation." *Moreno*, 63 M.J. at 136 (citing *Barker*, 407 U.S at 533).

After carefully considering the facts and circumstances of this case and the four *Barker* factors, we determine that the delay between the end of the trial and convening authority action (a period of over 8 months) was not as expeditious as it could have been, but was not unreasonable.[2] In addition, we find that this delay did not constitute a due process violation. We therefore decline to grant any relief on this basis.

We are cognizant of the Court's power under Article 66(c), UCMJ, to grant relief even in the absence of actual prejudice. *See United States v. Toohey,* 63 M.J. 353, 362-63 (C.A.A.F. 2006)*; United States v .Tardiff*, 57 M.J. 219, 224 (C.A.A.F. 2002); *see also United States v. Bodkins*, 60 M.J. 322, 324 (C.A.A.F. 2004). We do not find any prejudice or other harm to the appellant resulting from the delay between the conclusion of the trial and action by the convening authority. Based on all the facts and circumstances of this case, and mindful of our obligation under Article 66(c), UCMJ, as expressed in *Toohey*, *Tardiff,* and *Bodkins*, we decline to grant relief.

Conclusion

The approved 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). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

MARTHA E. COBLE-BEACH, TSgt, USAF
Court Administrator

[2] The record of trial contains 17 volumes. The transcript of the trial is 1293 pages. The prosecution presented 10 exhibits and the defense 19 exhibits to the members. There were 43 appellate exhibits.