UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class RODDEY B. DUE
United States Air Force

ACM 36424

30 May 2007

Sentence adjudged 28 September 2004 by GCM convened at Kirtland Air Force Base, New Mexico. Military Judge: Jack L. Anderson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 13 months, and total forfeiture of all pay and allowances.

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, and Captain Jamie L. Mendelson.

Before

BROWN, BECHTOLD, and BRAND
Appellate Military Judges

OPINION OF THE COURT

BECHTOLD, Judge:

The appellant was convicted, in accordance with his pleas, of one specification of conspiracy to commit unlawful entry; one specification of false official statement; one specification of larceny; one specification of unlawful entry; and one specification of obstruction of justice, in violation of Articles 81, 107, 121, and 134 UCMJ, 10 U.S.C. §§ 881, 907, 921, and 934, respectively. He was sentenced by a military judge sitting alone to a bad-conduct discharge, confinement for 15 months, total forfeitures, and reduction to

E-1. The convening authority approved the bad-conduct discharge, total forfeitures, and 13 months confinement.

The appellant does not challenge the findings of his court-martial, and we find them correct in both law and fact. *See* Article 66(c), UCM.J, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Instead, the appellant alleges that he was subjected to unreasonable post-trial delay when 9 months elapsed between trial and convening authority action. The appellant further asserts that he was prejudiced by the delay because the delay prevented him from being paroled. The appellant asks this Court to grant him relief by either setting aside the bad-conduct discharge or, in the alternative, reducing appellant's sentence to confinement to 10 months. Although we find no specific prejudice, we have reviewed the entire case, including post-trial delays, under Article 66(c), UCMJ, and have reassessed the sentence.

Background

The offenses to which the appellant pled guilty occurred in February 2003. The investigation was completed in May 2003. The appellant was charged in March 2004 and tried on 28 September of that year. The entire trial was on the record for less than 5½ hours. The court reporter completed transcribing the record and sent it to trial defense counsel for review on 15 April 2005, 199 days after trial. The military judge authenticated the 251-page record on 26 April 2005. The SJA's recommendation (SJAR) was completed on 6 May 2005, 220 days after trial. Sometime shortly thereafter, the trial defense counsel responded by submitting a request for clemency. On 19 May 2005, the staff judge advocate (SJA) prepared an addendum to the SJAR.[1] On 24 May 2005, the defense responded to the addendum. The SJA completed a second addendum on 15 June 2005. On 22 June 2005, the defense responded to this second addendum. The SJA prepared a third and final addendum on 24 June 2005 and the action was signed on 25 June 2005, 270 days after trial.

In his clemency requests, the appellant asked that his bad-conduct discharge be disapproved and that he be released from confinement because the delay in post-trial processing had interfered with his ability to have a parole hearing. In the first addendum to the SJAR, the SJA acknowledged the delay in processing and recommended that the convening authority reduce confinement to 13 months in compensation for the delay. In making this recommendation, the SJA indicated that the appellant would have received a hearing on or about 28 March 2005. The defense counsel's response to this addendum contended that it was inaccurate because the appellant would have had a hearing on or about 28 January 2005. This would have allowed sufficient processing time for the appellant to be released on his parole eligibility date at the end of March 2005. In

[1] Although not alleged as error, the addendum incorrectly stated that the appellant had been convicted of unlawful entry, making a false official statement, obstruction of justice, larceny and wrongful appropriation. We find no prejudice in that the initial SJAR correctly reported the results of trial in the attached AF Form 1359.

support of this statement, the defense counsel included a copy of the relevant Air Force Instruction (AFI). The appellant also included a copy of the AFI in his 24 May 2005 response to the addendum. He further informed the convening authority that he had already received 17 days of extra good conduct time and had a minimum release date of 11 September 2005. The appellant renewed his request for clemency and pointed out that parole was no longer an option, because he would arrive at his minimum release date before a parole board would have the opportunity to complete action in his case. In his second addendum, the SJA stated he was standing by his original recommendation.[2] In response, the trial defense counsel and the appellant asked that the convening authority only approve 12 months of confinement. The third and final addendum had no new matters and the convening authority granted the two months of clemency recommended by the SJA.

Discussion

The standard of review for determining due process on speedy post-trial processing is de novo. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004); *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003).

For decades, our judicial system has recognized the importance of timely post-trial processing. Although the presumption of prejudice at 90 days after trial that was established in *Dunlap v. Convening Authority*, 48 C.M.R. 751, 754 (C.M.A. 1974) was later removed in *United States v. Banks*, 7 M.J. 93, 94 (C.M.A. 1979), our superior court has nevertheless been steadfast in its recognition of the right to timely post-trial review. *See United States v. Tardif*, 57 M.J. 219, 222 (C.A.A.F. 2002); *United States v. Williams*, 55 M.J. 302, 305 (C.A.A.F. 2001). This includes a right to a reasonably timely convening authority's action. *United States v. Toohey*, 60 M.J. 100, 101 (C.A.A.F. 2004) (citing *Williams*, 55 M.J. at 305). As our superior court has noted, "The obligation to ensure a timely review and action by the convening authority rests upon the Government . . . ." *United States v. Moreno*, 63 M.J. 129, 138 (C.A.A.F. 2006) (citing *United States v. Bodkins*, 60 M.J. 322, 323-24 (C.A.A.F. 2004)).

A facially unreasonable delay triggers a due process analysis. In conducting this review, our superior court has adopted 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. *Moreno*, 63 M.J. at 135.

In the case sub judice, the 270 days to action is facially unreasonable. The government's explanation for the delay focuses on the fact that the court reporter finished

[2] The second addendum to the SJAR references the "original advice and recommendation", but is clearly referring to the first addendum that recommended 2 months clemency and not the advice in the original SJAR which recommended approval of the sentence as adjudged.

transcribing another case prior to this case, spent 17 days recording 5 other proceedings, and that the period in question covered the holidays. Finally, the government points out that the last 50 days before action were spent with the SJAR and addendums and providing the defense counsel the opportunity to respond.[3]

A review of the chronology and the whole record demonstrates that the 270 days to action is unreasonable. The trial was completed in one day and was on the record for less than 5½ hours. In the roughly 199 days before the record was sent to the defense counsel, the court reporter only spent (being exceedingly generous in our calculations) 42 days doing anything with the case. Of those 42 days, only 8 were not also devoted to preparing other records. During 5 of those 8 days, she only spent an average of 5 hours per day on the case. What is most significant was that the court reporter managed to complete the records of two courts-martial tried subsequent to the appellant's (one 2-day court-martial and one 3-day court-martial) one to two months before she completed this case.

While this Court has previously recognized that those responsible for the administration of military justice must be afforded the discretion to prioritize their cases, we also noted that "[i]mproving statistical processing times is not a valid reason to delay the post-trial processing of any case." *United States v. Lewis*, ACM 33502 (A.F. Ct. Crim. App. 21 Dec 2000) (unpub. op.). In this case, it is impossible to determine whether there were legitimate reasons for completing other records before the appellant's record.

The third factor in this case is readily met. Throughout the clemency process, the appellant highlighted the impact that the delay was having. It is on the issue of this impact, that the appellant fails to show specific prejudice. The appellant claims that he was denied certain parole because of the delay. Although the record presents an exceptionally compelling case that the appellant would have been successful before a parole board, there is no right of parole and no guarantee that the appellant would have received it. *United States v. Bigelow*, 55 M.J. 531, 534 (A. F. Ct. Crim. App. 2001). As this Court has previously found, "divining the outcome of such (parole) application is speculation, and therefore, provides no basis for finding specific prejudice." *Id.* In this case, although the speculation would be "informed" speculation, it is nevertheless speculation and precludes a finding of specific prejudice.

The lack of prejudice does not mean that the appellant is not entitled to relief. Our superior court has specifically addressed the issue of relief for post-trial delay in the absence of prejudice. They held that this Court's "authority to grant relief under Article 66(c) [UCMJ] does not require a predicate holding under Article 59(a) [UCMJ] 'that the error materially prejudices the substantial rights of the accused.'" *Tardif*, 57 M.J. at 220. The Court further found "that a Court of Criminal Appeals has authority under Article 66(c), UCMJ . . . to grant appropriate relief for unreasonable and unexplained post-trial

[3] However, the government fails to highlight the 22 days it took the government from the defense response to the first SJAR addendum and the government completing the second SJAR addendum.

delays . . . ." [T]his authority under Article 66(c) [UCMJ] is distinct from the court's authority under Article 59(a), UCMJ . . . to overturn a finding or sentence "on the ground of an error of law[.]" *Id.* Our superior court has also been clear that Courts of Criminal Appeals should determine whether lengthy delay warrants some form of relief. *Toohey*, 60 M.J. at 104.

A review of the entire record reveals that some relief is warranted. This case is distinguishable from *Bigelow* where the delay in completion of the record was largely due to geographic constraints and efforts to ensure the record was error-free. That is not the case here. Additionally, as was previously noted, the appellant made an extremely strong showing in his clemency packages that he would have been favorably considered for parole. It is true that the convening authority, based on the recommendation of his SJA, has already granted clemency in compensation for the delay. However, the addendum to the SJAR is misleading.

In the first addendum to the SJAR, the SJA informed the convening authority that the appellant would have received a hearing in late March 2005. That statement was contested by the appellant in his response to the addendum. In the second addendum, the SJA stated that the appellant was eligible for parole at the end of March 2005. While the latter is correct, it does not adequately redress his earlier statement that the hearing would have been at the end of March 2005. The advice from the SJA never clarified that the appellant, if approved for release, would have been released on his eligibility date at the end of March 2005. The convening authority may have interpreted the addendum to mean that the hearing would have been in March with a release date sometime subsequent to that.

The governing instruction is clear that the appellant would have received a hearing after 4 months (January 2005) to be eligible to be released on his parole eligibility date at the end of March. Air Force Instruction (AFI) 31-205, *Air Force Corrections* System, Table A18.2, Rule 3B (7 April 2004). While the appellant and his counsel took pains to clarify this issue, the convening authority may have relied on the vague information provided by his SJA.

The government also counters the appellant's argument that he was denied parole by pointing out that the appellant could have applied for parole prior to action. This is correct. Although parole eligibility normally requires an approved sentence, both the Department of Defense Instruction and the AFI have a provision which allows waiver of a parole eligibility requirement.[4] This means that the appellant could have applied for a waiver and still met a parole board. Unfortunately, it does not appear that the confinement personnel were aware of the waiver provision or that the appellant was

[4] Department of Defense Instruction 1325.7, *Administration of Military Correctional Facilities and Clemency Parole Authority*, ¶ 6.17.7 (July 17, 2001, incorporating Change 1, June 10, 2003) and AFI 31-205, ¶ 10.12.7.

informed of it. Several letters were submitted in support of the appellant by confinement personnel. Those letters indicate that the appellant's parole hearing was delayed pending action. Had confinement personnel or the parole officials at the confinement facility been aware of or informed the appellant of this provision, it is likely that he would have requested such a waiver. This would have obviated any speculation on whether the appellant would have received favorable consideration. However, even if the appellant had been approved for parole, he still would not have been eligible for release until the action was taken.[5] Taking the government's argument to its logical conclusion, and assuming the appellant would have been successfully considered for parole, the appellant would have been confined from 28 March 2005 until 25 June 2005 for no other reason than the government had not completed processing of his action.

Again, reviewing the entire record, it is clear that the equities lie with the appellant. A determination of the appropriateness of the sentence under Article 66(c), UCMJ, should consider these equities. The appellant has asked for relief in the form of a set aside of the bad-conduct discharge or reduction of confinement to 10 months. Although a set aside of the discharge is not warranted, reduction of confinement is appropriate. In his June 2005 clemency request, the appellant asked for approval of only 12 months. We find 12 months to be appropriate in this case. Accordingly, under the criteria set out in *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986), we reassess the sentence as follows: bad-conduct discharge, 12 months of confinement, and total forfeiture of pay and allowances.[6] Further, we find this sentence to be appropriate for the appellant and his crimes. *United States v. Peoples*, 29 M.J. 426, 427-28 (C.M.A. 1990); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Conclusion

The findings and the sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *Reed*, 54 M.J. at 41. Accordingly, the findings and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

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

[5] Affidavit of James D. Johnston, Chair/Executive Secretary, Air Force Clemency and Parole Board.
[6] Although the adjudged sentence included reduction to E-1, reduction was not included in the sentence approved by the convening authority.