UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JONATHAN F. HOLMES
United States Air Force

ACM 36387

11 December 2006

Sentence adjudged 20 December 2004 by GCM convened at Eglin Air Force Base, Florida. Military Judge: Dawn R. Eflein (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 11 months, a fine of $29,000.00, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major John N. Page III.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, Captain Daniel J. Breen, Captain Jefferson E. McBride, and Captain Jamie L. Mendelson.

Before

BROWN, JACOBSON, and SCHOLZ
Appellate Military Judges

OPINION OF THE COURT

BROWN, Chief Judge:

The appellant was convicted, in accordance with his pleas, of filing 11 fraudulent travel vouchers and stealing a total of $29,693.76 from the Air Force, in violation of Articles 132 and 121, UCMJ, 10 U.S.C. §§ 932, 921. A military judge sitting as a general court-martial sentenced the appellant to a bad-conduct discharge, confinement for 11 months, a fine of $29,000.00, and reduction to the grade of E-1. The convening authority approved the findings and sentence as

adjudged; however, the execution of the part of the sentence adjudging confinement for 11 months was suspended until 1 November 2005, at which time, the suspended part of the sentence was remitted without further action.

Pursuant to *United States v. Grostefon*,[1] the appellant asserts that: (1) he was denied effective assistance of counsel; (2) the post-trial delay of 5 months between convening authority action and receipt of the record of trial by this Court is unreasonable and warrants disapproval of his bad-conduct discharge; (3) his approved sentence is inappropriately severe because it includes a bad-conduct discharge and a fine of $29,000.00; and (4) the government's failure to place him in an appellate leave status and provide medical care following his conviction unlawfully modified and increased the severity of his sentence.

We examined the record of trial, the assignments of error (including the declaration filed by the appellant and the appendices attached thereto) and the government's response (including declarations and attachments). We address each of the assignments of error below.[2]

Ineffective Assistance of Counsel

We review claims of ineffective assistance of counsel de novo. *United States v. Osheskie*, 63 M.J. 432, 434 (C.A.A.F. 2006) (citing *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997)). In order to successfully raise a claim of ineffective assistance of counsel, an appellant must show deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel is presumed to be competent. *United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004); *United States v. Lee*, 52 M.J. 51, 52 (C.A.A.F. 1999). Applying the factors set forth in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), we conclude that we can resolve this assignment of error based on the record and the appellate filings. After examining the record and the appellate filings, we find trial defense counsels' performance was not deficient. We find the appellant failed to meet his burden of proving ineffective assistance of counsel. *See Strickland, 466 U.S. at 687.*

Post-Trial Delay

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.*

[1] 12 M.J. 431 (C.M.A. 1982).

[2] On 8 November 2006, the Court granted the appellant's motion for expedited review of his assignments of error.

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. *Moreno*, 63 M.J. at 135; *Rodriguez-Rivera*, *63 M.J. at 385*; *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. After carefully considering the facts and circumstances of this case and the four *Barker* factors, we determine that the delay between convening authority action and receipt of the record of trial by this Court was not as expeditious as it could have been but it was not unreasonable. In addition, we find that this delay did not constitute a due process violation. We therefore decline to grant any relief on this basis.

In addition, we are cognizant of this Court's power under Article 66(c), UCMJ, 10 U.S.C. § 866(c), to grant relief even in the absence of actual prejudice. *See United States v. Tardif*, 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 convening authority action and receipt of the record of trial by this Court. Based on all the facts and circumstances of this case, and mindful of our obligation under Article 66(c), UCMJ, as expressed in *Tardif* and *Bodkins*, we decline to grant relief on this ground.

Sentence Appropriateness

This Court has the authority to review sentences pursuant to Article 66(c), UCMJ, 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 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 268.

Remaining Issue

Finally, we considered the appellant's remaining assignment of error and find it to be without merit. *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

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

LAQUITTA J. SMITH
Documents Examiner