UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman BRANDAN M. LORENZANA
United States Air Force

ACM 38938

6 December 2016

Sentence adjudged 9 September 2015 by GCM convened at Kadena Air Base, Japan. Military Judge: Charles E. Wiedie, Jr. (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for 9 years, and reduction to E-1.

Appellate Counsel for Appellant: Major Lauren A. Shure; Major Thomas A. Smith; Major Jonathan D. Legg; and Brian L. Mizer, Esquire.

Appellate Counsel for the United States: Major Mary Ellen Payne; Captain Matthew L. Tusing; and Gerald R. Bruce, Esquire.

Before

MAYBERRY, SPERANZA, and JOHNSON
Appellate Military Judges

OPINION OF THE COURT

JOHNSON, Judge:

A general court-martial composed of a military judge sitting alone found Appellant guilty in accordance with his pleas of two specifications of sexual assault on a child under the age of 16 years on divers occasions, one specification of rape of a child under the age of 16 years, and one specification of extortion by communicating a threat to post nude photographs of the same victim in order to engage in sexual acts with the victim, in

violation of Articles 120b and 127, UCMJ, 10 U.S.C. §§ 920b, 927.[1] The court-martial sentenced Appellant to a dishonorable discharge, confinement for nine years, and reduction to E-1. The convening authority approved the sentence as adjudged, but waived the mandatory forfeitures for the benefit of Appellant's spouse and child.

This case was submitted to the court on the merits with no specific assignment of error. Although not raised by the parties, we address a facially unreasonable delay in the post-trial processing of Appellant's case.[2] Finding no sentence relief is warranted, we affirm the findings and sentence as approved by the convening authority.

Background

In the summer of 2014, Appellant, who was then 24 years old, met SF, a 14-year-old[3] dependent family member living on Kadena Air Base, Japan, at the base post office where Appellant worked. They exchanged contact information, and in the following weeks their electronic discourse turned from casual conversation to sexual matters. Appellant began a clandestine sexual relationship with SF in late July 2014, which continued until late October 2014, when SF attempted to end the relationship. Appellant engaged in oral and vaginal intercourse with SF on approximately 30 occasions. During the sexual relationship, at Appellant's request, SF sent Appellant several digital nude images of herself. After SF attempted to end the relationship, Appellant persisted in trying to convince SF to continue it. In late November of 2014, Appellant threatened to publicly post the nude images of SF. As a result, SF agreed to meet Appellant again if he would delete the images. Appellant agreed, and SF submitted to another sexual encounter including oral and vaginal intercourse. Appellant later informed SF that he had lied and

[1] Pursuant to his pretrial agreement with the convening authority, Appellant pleaded not guilty to one charge and specification of possessing child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934. This charge and specification were withdrawn and dismissed after arraignment.

[2] This court specified the following issue for the parties to brief:

> DOES THE PRESUMPTIVELY UNREASONABLE DELAY BETWEEN THE CONVENING AUTHORITY'S ACTION AND THE DOCKETING OF APPELLANT'S RECORD OF TRIAL WITH THIS COURT CONSTITUTE A VIOLATION OF APPELLANT'S DUE PROCESS RIGHT TO SPEEDY POST-TRIAL AND APPELLATE REVIEW OR OTHERWISE WARRANT RELIEF FROM THIS COURT? *UNITED STATES V. MORENO*, 63 M.J. 129, 142 (C.A.A.F. 2006) (PRESUMPTION OF UNREASONABLE DELAY TRIGGERING FOUR-FACTOR ANALYSIS WHERE RECORD OF TRIAL IS NOT DOCKETED WITH THE SERVICE COURT WITHIN THIRTY DAYS OF THE CONVENING AUTHORITY'S ACTION); *UNITED STATES V. TARDIF*, 57 M.J. 219, 224 (C.A.A.F. 2002) (COURTS OF CRIMINAL APPEALS HAVE AUTHORITY UNDER ARTICLE 66(C), UCMJ, TO GRANT RELIEF FOR EXCESSIVE POST-TRIAL DELAY WITHOUT FINDING A DUE PROCESS VIOLATION OR ACTUAL PREJUDICE TO THE APPELLANT).

[3] SF turned 15 years old in September 2014.

had not deleted the images, and he stated he would delete them if SF had sex with him again. SF reported Appellant's activities to Appellant's co-worker, who informed a supervisor, who informed the chain of command and criminal investigators on 30 November 2014.

Appellant's court-martial concluded on 9 September 2015 at Kadena Air Base, Japan. The convening authority, located at Yokota Air Base, Japan, took action on the findings and sentence 70 days later, on 18 November 2015. However, the convening authority's staff judge advocate did not provide the record of trial (ROT) to the Fifth Air Force mail processor for pick up by the Yokota Air Base post office until 1 December 2015. The tracking receipt provided by the Yokota Air Base post office to the staff judge advocate's office was dated 9 December 2015. The ROT arrived at the Military Justice Division (JAJM) of the Air Force Legal Operations Agency, located at Joint Base Andrews, Maryland, on 21 December 2015. The case was docketed with this court the same day.

Additional facts are included as necessary in the discussion below.

Post-Trial Processing Delay

In *United States v. Moreno*, our superior court established a presumption of unreasonable post-trial delay when the convening authority does not take action within 120 days of trial, when a record of trial is not docketed with the service court within 30 days of the convening authority's action, and when this court does not render a decision within 18 months of the case being docketed. 63 M.J. 129, 142 (C.A.A.F. 2006). Appellant now asserts we should approve only so much of the sentence as provides for 100 months of confinement, reduction to E-1, and a dishonorable discharge because the 33 days that elapsed between the convening authority's action and docketing with this court exceeded the *Moreno* standard by three days. *See id.*

There are two steps to our analysis of whether Appellant is entitled to relief. First, we determine whether the delay in this case amounts to a denial of Appellant's due process right to speedy post-trial review and appeal. *Id.* at 135. Next, even if we find no due process violation, we also consider whether this court should exercise its power under Article 66(c), UCMJ, 10 U.S.C. § 866(c), to grant relief for excessive post-trial delay. *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

Our superior court has identified four factors to consider in determining whether post-trial delay amounts to a violation of due process rights: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of his right to a timely review; and (4) prejudice to the appellant. *Moreno*, 63 M.J. at 135 (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005), *United States v. Toohey*, 60 M.J. 100, 102 (C.A.A.F. 2004)). "No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." *Id.* at 135 (citing *Barker v. Wingo*, 407

U.S. 514, 533 (1972)). However, when an appellant has not shown prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006).

As described above, the lapse of time between Appellant's court-martial and the docketing of his case with this court exceeded the *Moreno* standard by three days, establishing a facially unreasonable delay. Therefore, the next question we consider is whether Appellant has been prejudiced by the delay. *See Toohey*, 63 M.J. at 362. Appellant does not identify any specific "particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision," and we find none. *Moreno*, 63 M.J. at 142. Balancing the remaining factors, although the Government's explanation for the delay is less than compelling, the relatively limited period in excess of the *Moreno* standard coupled with the speed with which the trial-to-action phase was completed, in combination with Appellant's non-assertion of his right to timely review,[4] convinces us the delay was not so egregious as to undermine the appearance of fairness and integrity within the military justice system. Therefore, we find no due process violation.

Next we consider whether Article 66(c), UCMJ, relief pursuant to *Tardif* is appropriate. 57 M.J. at 224. We are guided by factors enumerated in *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016), with no single factor being dispositive.[5] We are mindful of our superior court's admonition that "delay in the administrative handling and forwarding of the record of trial and related documents to an appellate court is the least defensible of all [post-trial delays] and worthy of the least patience." *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990) (internal hyphens omitted).

In this case, the 33 days that elapsed between action by the convening authority and docketing with this court exceeded the *Moreno* standard by three days. However, only 70 days elapsed between the conclusion of Appellant's trial and the convening authority's action, compared to *Moreno*'s standard of 120 days for a presumptively unreasonable delay. Although we recognize *Moreno* specifically established distinct standards for trial-

[4] We note Appellant did not raise the issue of post-trial delay as an assignment of error.

[5] These factors include: (1) How long the delay exceeded the standards set forth in *Moreno*; (2) What reasons, if any, the Government set forth for the delay, and whether there is any evidence of bad faith or gross indifference to the overall post-trial processing of this case; (3) Keeping in mind that our goal under *Tardif* is not to analyze for prejudice, whether there is nonetheless some evidence of harm (either to the appellant or institutionally) caused by the delay; (4) Whether the delay has lessened the disciplinary effect of any particular aspect of the sentence, and is relief consistent with the dual goals of justice and good order and discipline; (5) Whether there is any evidence of institutional neglect concerning timely post-trial processing, either across the service or at a particular installation; and (6) Given the passage of time, whether this court can provide meaningful relief in this particular situation.

to-action and action-to-docketing, and although efficiency in one phase of the process does not necessarily excuse neglect in another phase, on the whole the processing of Appellant's case has not been subjected to severe post-trial delay.

However, we are troubled by the Government's explanation for the delay. The Government points to low manning at the staff judge advocate's office, the Thanksgiving holiday, and long mail transit times from Japan to the United States as impacting its ability to timely forward the ROT to JAJM. Yet the delay hardly appears unavoidable. The low manning described seems to have been temporary and the result of routine leave and duty-related travel that could have been anticipated, rather than unforeseen events or crises. The Thanksgiving holiday accounts for only two additional non-duty days beyond the typical work week. As for the mail transit time, in point of fact the implication of the Government's evidence is that only 12 days elapsed from the time the post office placed the ROT into the mail until it reached JAJM, and the Government must bear responsibility for any inefficiencies erected between the staff judge advocate's office and the base post office. Moreover, the Government has not explained what was occurring during the six duty days between action on 18 November 2015 and preparing the ROT for mailing on 1 December 2015. Nor has it explained the delay from 1 December 2015 to 9 December 2015 other than to state that the ROT was out of the staff judge advocate's hands—although still at the convening authority's headquarters—during that time. In conclusion, the Government has not explained why the ROT could not have been forwarded to JAJM substantially sooner, and this leaves us to infer the personnel involved simply elected to give precedence to other unspecified priorities.

Nevertheless, considering the remaining *Gay* factors, we conclude no extraordinary exercise of our Article 66(c) authority is warranted here. We discern no particular harm to Appellant from the delay. The delay has not lessened the disciplinary effect of Appellant's sentence. The delay has not adversely affected this court's ability to review Appellant's case or grant him relief, if warranted. Taken as a whole, the circumstances do not move us to reduce an otherwise appropriate sentence adjudged by the military judge and approved by the convening authority.

Promulgating Order

Finally, although not raised by the parties, we note an error in the promulgating order. The order indicates Appellant was convicted of violating Article 120, UCMJ, 10 U.S.C. § 920, *Rape and sexual assault generally*, rather than Article 120b, UCMJ, 10 U.S.C. § 920b, *Rape and sexual assault of a child*. We direct the publication of a corrected court-martial order to remedy this discrepancy.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and the sentence are **AFFIRMED**.

FOR THE COURT

KURT J. BRUBAKER
Clerk of Court