UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman DEXTER J. PAYNE
United States Air Force

ACM S32093

14 November 2013

Sentence adjudged 30 April 2012 by SPCM convened at Nellis Air Force Base, Nevada. Military Judge: Jeffrey A. Ferguson (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Jane E. Boomer.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Rhea A. Lagano; and Gerald R. Bruce, Esquire.

Before

ORR, HARNEY, and MITCHELL
Appellate Military Judges

OPINION OF THE COURT

PER CURIAM:

At a special court-martial comprised of a military judge sitting alone, the appellant pled guilty to 10 specifications of larceny and one specification of forgery in violation of Articles 121 and 123, UCMJ, 10 U.S.C. §§ 921, 923. The adjudged and approved sentence consisted of a bad-conduct discharge, confinement for 6 months, and reduction to the grade of E-1.

On appeal, the appellant alleges two errors associated with his post-trial processing. First, the appellant argues he was deprived of his due process right to speedy

post-trial review when 128 days elapsed between the completion of his trial and the convening authority's action. Second, the appellant argues the staff judge advocate (SJA) incorrectly advised the convening authority on the post-trial processing delay raised by trial defense counsel. He asks this Court to set aside the bad-conduct discharge or grant him new post-trial processing.

Background

The appellant, a vehicle operator assigned to the 99th Logistics Readiness Squadron, Nellis Air Force Base, Nevada, stole a Military Star Card (Star Card) from Technical Sergeant (TSgt) RW, a coworker in his duty section. The Star Card, which is essentially a revolving credit card for the Base Exchange, was left unattended in the office when the appellant stole it. In December 2011 and January 2012, the appellant used the Star Card and forged TSgt RW's initials nine times to charge over $4,500 worth of merchandise to his account.

The convening authority took action on the case 128 days after trial closed. In submissions to the convening authority under Rules for Courts-Martial (R.C.M.) 1105(b) and 1106(f)(4), the appellant's counsel noted the Government took 100 days to serve the appellant with the record of trial. Trial defense counsel asserted the delay was prejudicial to the appellant and that the SJA failed to mention this delay in his recommendation to the convening authority.

In the addendum to his recommendation, the SJA addressed trial defense counsel's request for the convening authority to disapprove the bad-conduct discharge. The SJA advised the convening authority to approve the bad-conduct because the appellant "did not specify how the delay prejudiced [him]."

S*peedy Post-Trial Review*

The appellant argues he was deprived of his right to speedy post-trial review under *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). We review de novo whether an appellant's due process right to a speedy post-trial review has been violated. *Id.* at 142. In *Moreno*, our superior court established guidelines that trigger a presumption of unreasonable delay in certain circumstances, specifically, when the "action of the convening authority is not taken within 120 days of the completion of trial." *Id.*

Because the delay of 128 days in this case is facially unreasonable, we examine 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 (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to

engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006).

Although the Government acknowledges it bears the primary responsibility for speedy post-trial processing, which exceeded our superior court's guidelines for the timeliness of the convening authority's action, an explanation for the delay is offered. Specifically, the Government avers the delay was caused in part by problems with the transcription of the record which contained audio gaps and the illness of the court reporter. However, our superior court has ruled that "personnel and administrative issues, such as those raised by the Government are not legitimate reasons justifying otherwise unreasonable post-trial delay." *United States v. Arriaga*, 70 M.J. 51, 57 (C.A.A.F. 2011). Accordingly, the second factor weighs against the Government.

With regards to the third factor, we note trial defense counsel submitted the appellant's R.C.M. 1105 matters 20 days after service of the authenticated record of trial and receipt of the SJA's recommendation. Even though he submitted the matters later than the 10-day period authorized by R.C.M. 1105(c)(1), the appellant asserted his right to a timely review to the convening authority. In his submission of matters to the convening authority, however, the appellant did not identify any particular prejudice caused by the eight days the *Moreno* standard was exceeded. On appeal the appellant recounts the 100 days of post-trial processing before receiving the record of trial coupled with the 28 additional days he waited for the action in his case. Trial defense counsel argued, "It is reasonable to infer [the appellant] suffered great anxiety during this time." It is unclear whether trial defense counsel is claiming the appellant suffered anxiety for the entire 128 days or just the 8 days in excess of the presumptive date. Nonetheless, the presumption of unreasonableness alone does not equal prejudice.

To determine prejudice, our superior court adopted the following analysis in post-trial delay cases: "(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired." *Moreno*, 63 M.J. at 138-39 (citing *Rheuark v. Shaw*, 628 F.2d 297, 303 n.8 (5th Cir. 1980)).

We decline to "infer" the anxiety suggested by the appellant based solely on eight days in excess of the post-trial processing standard. In fact, it is up to the appellant to demonstrate that he suffered anxiety.

> [T]he appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision. This particularized anxiety or concern is thus related to the timeliness of the appeal, requires an appellant to demonstrate a nexus to the

> processing of his appellate review, and ultimately assists this court to "fashion relief in such a way as to compensate [an appellant] for the particular harm."

Moreno, 63 M.J. at 140 (quoting *Burkett v. Fulcomer*, 951 F.2d 1431, 1447 (3rd Cir. 1991) (second alteration in original).

We do not believe the anxiety an appellant may experience depends upon whether his substantive appeal is ultimately successful. "An appellant may suffer constitutionally cognizable anxiety regardless of the outcome of his appeal." *Moreno*, 63 M.J. at 140.

Having considered the totality of the circumstances, the entire record, and the appellant's failure to show specific anxiety beyond that normally experienced by those awaiting appellate resolution, we find the eight days of post-trial delay in this case was harmless beyond a reasonable doubt.

Staff Judge Advocate's Advice to the Convening Authority

The appellant cites R.C.M. 1107(d)(1) to remind us of the convening authority's power to disapprove or mitigate a legal sentence "for any or no reason." He argues that a convening authority uses the staff judge advocate's recommendation (SJAR) as an aid in determining what action to take on the sentence thereby making it critical for him or her to receive "proper advice" from the SJA.

He argues the SJA provided incorrect advice to the convening authority because he did not inform the convening authority there was a presumption of unreasonable delay since over 120 days had elapsed since the completion of the trial. He further argues that the unreasonable post-trial delay triggered an obligation for the SJA to include in his addendum to the SJAR the full analysis under *Barker v. Wingo*. The appellant asserts that merely advising the convening authority "the defense did not specify how the delay prejudiced [the appellant]" was "inaccurate and incomplete advice." Accordingly, he argues that it was "plausible" the convening authority would have taken more favorable action had he known the Government violated the *Moreno* post-trial processing standard.

R.C.M. 1106(d)(3), which governs the content of the SJAR, requires a report of the results of trial; the accused's service record; a copy of the pretrial agreement, if any; the nature of any pretrial restraint; any recommendation for clemency made in conjunction with the announced sentence; and the SJA's concise recommendation to be included. R.C.M. 1106(d)(4) states that the SJA does not need to examine the record for legal errors and is only required to address whether corrective action is needed if the defense makes an allegation of legal error in the matters submitted under R.C.M. 1105 or otherwise deemed appropriate by the SJA. Thus, while the SJA may have provided additional information to the convening authority, we find no legal requirement in the

Rules for Courts-Martial for the SJA to raise the *Moreno* issue to the convening authority's attention in the SJAR. In any event, the delay in the record getting to the convening authority was raised generally by the defense and addressed by the SJA in his addendum to the SJAR.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court