UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MICHAEL J. RODRIGUEZ
United States Air Force

ACM 36455

26 June 2007

Sentence adjudged 28 April 2005 by GCM convened at Pope Air Force Base, North Carolina. Military Judge: Kevin P. Koehler.

Approved sentence: Bad-conduct discharge, confinement for 5 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Captain Griffin S. Dunham (argued), Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major Anniece Barber.

Appellate Counsel for the United States: Major Kimani R. Eason (argued), Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Major Matthew S. Ward, Captain Daniel J. Breen, and Captain Jamie L. Mendelson.

Before

FRANCIS, THOMPSON, and BECHTOLD
Appellate Military Judges

OPINION OF THE COURT

BECHTOLD, Judge:

The appellant was convicted, contrary to his pleas, of one specification of divers wrongful use of marijuana and one specification of divers wrongful use of Percocet, a Schedule II controlled substance, in violation of Article 112a UCMJ, 10 U.S.C. § 912a. He was sentenced by officer and enlisted members to a bad-conduct discharge, confinement for 5 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant asserts 5 errors.[1] Specifically, in order of assertion, the appellant contends: (1) the convictions for divers use of both Percocet and marijuana are legally and factually insufficient; (2) if either the evidence was insufficient to convict the appellant for divers marijuana use or the military judge erred by not providing an uncorroborated confession instruction, *United States v. Seider*, 60 M.J. 36 (C.A.A.F. 2004), and *United States v. Walters* 58 M.J. 391 (C.A.A.F. 2003), require set aside of Specification 2 of the Charge; (3) the military judge abused his discretion by instructing the members to base their deliberations strictly on the evidence presented to them and committed plain error when failing to instruct them on treatment of an uncorroborated confession[2]; (4) the 147 days from sentence to action constitutes an excessive delay in violation of the appellant's due process rights by effectively precluding an avenue for clemency; and (5) the sentence is excessively harsh.[3]

Background

At the appellant's trial, the government called five witnesses on the merits. In support of the Percocet specification, three of the witnesses testified they observed the appellant use Percocet at different times. In support of the marijuana specification, one witness testified he used marijuana with the appellant on one occasion. Three other witnesses testified regarding admissions made to them by the appellant regarding marijuana use. The admissions were vague as to time and a specific place and included pre-service use. Although it was apparent from witness testimony that other military members were present at various times during the appellant's drug use, the government did not call every possible witness.

Through cross-examination and character witnesses, the trial defense counsel attacked the credibility of the government's witnesses. On argument, the trial defense counsel also raised the specter of the "missing witnesses," alluding that the government would have called them to testify if their testimony would have supported the government's case. Apparently this argument was compelling enough to cause the members to interrupt their deliberations to ask about the missing witnesses. The military judge's response was to tell the members they had to make a "decision based on the evidence presented to you and that's all I can tell you." The trial defense counsel then added "I believe the members can also look at lack of evidence and evidence that wasn't presented here." At this point, the trial counsel asked for a session outside the members' presence under Article 39a, UCMJ, 10 U.S.C. § 839a. At the conclusion of the Article 39a, UCMJ, session, the military judge instructed the members as follows:

[1] A 6th error, raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), was withdrawn by the appellant after the government submitted its answer.
[2] Oral argument was heard on the first three assigned errors on 5 April 2007 at Maxwell Air Force Base, Alabama, as part of the Court's Outreach Program.
[3] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

> [You] have to look at the evidence that's been presented to you. You have an instruction dealing with what constitutes individuals who are granted immunity – testimonial immunity . . . With regard to an order given by the convening authority and their obligations under that. So that's all I'm going to explain to you on that. Again, you really have to look at the evidence that's been presented to you and make your decision on that.

The members returned to the deliberation room and the trial continued through sentencing.

The appellant was sentenced on 28 April 2005. The appellant's court-martial was recorded and transcribed by a court reporter brought in from a different location for just that purpose. That court reporter's chronology indicates almost continuous transcription efforts interrupted only by other courts-martial. The 433-page transcript was completed on 15 July 2005 and provided to the court reporter assigned to Pope Air Force Base for further processing. That court reporter, who was also responsible for the processing of 8 other courts-martial during the relevant time, completed processing on 8 August 2005. The appellant's record of trial was authenticated on 19 August 2005 and action was completed on 22 September 2005 – a total of 147 days after trial.

I. Legal and Factual Sufficiency.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, as the prevailing party at trial, any rational trier of fact could have found the appellant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and allowing for the fact that we did not personally see and hear the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. There is ample evidence in the record to support both the members' determination and our own independent determination that the appellant used Percocet on divers occasions.

The evidence regarding marijuana use is not as compelling. Senior Airman (SrA) D, a government informant, was the first of the witnesses called in support of the marijuana allegation. She testified that sometime in the summer of 2002[4], the appellant talked about using marijuana while he was at home in Florida. SrA D also testified that, earlier, the appellant "would brag about using it [marijuana] while he was home in Florida." Finally, she testified that the appellant told her he had family in Florida. No evidence was introduced as to whether or when the appellant went to Florida during the

[4] The appellant was charged with using marijuana beginning on or about 1 August 2002.

summer of 2002. Another government witness, Airman First Class (A1C) D, only testified that the appellant told him that he used marijuana in Florida before entering the service. SrA L testified that the appellant told him his father bought him marijuana for his birthday party in November 2002. There was no other evidence regarding the appellant's birthday party or where the appellant's father lived. Airman Basic (AB) M testified that he smoked marijuana with the appellant at a gathering in November or December of 2002.

This testimony was the only evidence of marijuana use based on something other than the appellant's own admissions. The corroboration of these admissions is so ephemeral as to be almost nonexistent, although appellate defense counsel specifically agrees that there was sufficient corroboration for the military judge to admit the evidence at trial. Admission of evidence is one thing; the weight to be accorded the evidence is another. Given the extremely vague admissions made by the appellant, this Court is unable to state that we are convinced beyond a reasonable doubt the appellant used marijuana during the time frame alleged on any occasion other than the time in which he smoked it with AB M in late November or December 2002. Accordingly, Specification 1 of the Charge must be amended to strike the words "on divers occasions."

We are mindful of the possible spillover effect that the divers marijuana use charge may have had on the members with respect to the remaining marijuana use and the divers Percocet use. However, there is more than sufficient evidence to support the single marijuana use and the divers Percocet uses beyond a reasonable doubt and those convictions are affirmed.

Although the remaining convictions are affirmed, the sentence must be reassessed in light of our modification of Specification 1 of the Charge, supra. If we can determine that, "absent the error, the sentence would have been at least of a certain magnitude," then we "may cure the error by reassessing the sentence instead of ordering a sentence rehearing." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). We can make such a determination here. After carefully reviewing the record of trial, we are convinced beyond a reasonable doubt the members would have imposed at least a bad-conduct discharge, confinement for 4 months, and reduction to the grade of E-1. *See Doss*, 57 M.J. at 185.

II. Affect of Seider and Walters.

In the second error alleged, the appellant claims that, if the conviction for divers uses fails, the entire specification must be set aside under *United States v. Seider*, 60 M.J. 36 (C.A.A.F. 2004), and *United States v. Walters* 58 M.J. 391 (C.A.A.F. 2003). We disagree. This Court can approve a finding of a single use. Both the *Seider* and *Walters* cases involve situations where the members did *not* find divers use. In both those cases, the members found the appellants guilty of single uses and our superior court held that

the specifications must be set aside because this Court could not determine upon which use the members acquitted the appellants. Those holdings are based on the premise that, once a member is acquitted of an offense, this Court cannot substitute a finding of guilty. In the case *sub judice*, the members convicted the appellant of divers uses. While this Court cannot find an appellant guilty contrary to approved findings, we can set aside any part of an approved conviction.

III. Instructions.

The appellant's third assignment of error alleges two separate errors in instructions. The first is that the military judge abused his discretion by instructing the members to limit their deliberations to the evidence before them. The second is that the military judge failed to instruct the members on how to treat uncorroborated admissions. Since we have set aside the findings based on the appellant's admissions, the second of these alleged errors need not be addressed. With respect to the instruction limiting the members to the evidence presented, we find no error. The military judge's instructions were consistent with Rule for Courts-Martial 920(e)(4), which requires that the military judge provide "[a] direction that only matters properly before the court-martial may be considered." Trial and appellate defense counsel appear to argue that the military judge should instruct that the absence of evidence is, itself, evidence. That is incorrect. It remains an absence of evidence. Members should not be placed in a position of speculating about what is missing. They must make their determinations based on the evidence presented in court; however, that same absence of evidence may be considered in determining whether the government has met its burden of proof beyond a reasonable doubt.

In this case, the members received ample instruction on the issue. The members were informed that a reasonable doubt is "an honest conscientious doubt suggested by material evidence *or lack of it in a case*." (Emphasis added.). They were also instructed to consider "the extent to which each witness is either *supported or contradicted by other evidence*; the relationship each witness may have with either side; or how each witness might be affected by the verdict." (Emphasis added.). "In the absence of evidence" to the contrary, court members are "presumed" to have followed the military judge's instructions. *United States v. Pollard*, 38 M.J. 41, 52 (C.M.A. 1993) (quoting *United States v. Ricketts*, 1 M.J. 78, 82 (C.M.A. 1975)).

IV. Post-trial Processing.

The fourth issue raised by the appellant involves post-trial processing. 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). The appellant's emphasis is on this Court's authority under Article 66(c), UCMJ, 10 U.S.C. § 866(c), to grant appropriate relief for

unreasonable and unexplained post-trial delays even in the absence of prejudice. *United States v. Tardif*, 57 M.J. 219, 220 (C.A.A.F. 2002). However, we first examine the delay for prejudice.

A facially unreasonable delay triggers a due process analysis. In conducting this review, our superior court has adopted the four factor test 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. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). In the case *sub judice*, the government has assumed that the 147 day delay is sufficient to trigger a due process analysis. We will do likewise.

The length of the delay is substantial, although not extreme. Although the presumption of prejudice at 90 days after trial was established in *Dunlap v. Convening Authority*, 48 C.M.R. 751, 754 (C.M.A. 1974), that presumption was later removed in *United States v. Banks*, 7 M.J. 93, 94 (C.M.A. 1979). In *Moreno*, our superior court established a presumption of prejudice if action was not taken within 120 days of trial. *Moreno*, 63 M.J. at 142. Although that presumption was not in effect for this case, it does provide guidance in assessing the reasonableness of the delay. In the case *sub judice*, the delay is not unreasonable. This is not an example of the government allowing a record to languish while the court reporter is occupied with collateral duties. It is also not a case where the record disappeared into some cosmic black hole in a trial counsel's or staff judge advocate's office. Although the convening authority did not act immediately, he nevertheless concluded the action in a relatively timely fashion. Although it would have been possible to shave days throughout the post-trial process, it is clear the government exercised due diligence at each step along the way.

Although the appellant did not assert his right to timely action or otherwise appeal to the government for swifter action, he is "not required to complain in order to receive timely convening authority action." *Moreno*, 63 M.J. at 138. However, to prevail under due process, the appellant must demonstrate some prejudice. The issue of prejudice is analyzed by reference to whether there has been (1) oppressive incarceration, (2) anxiety and concern, and (3) any impairment of the appellant's ability to present a defense at a rehearing. *Id*. at 138-39.

Incarceration may be oppressive if an appellant is confined during the appellate process and ultimately prevails on appeal. *Id.* at 139 (quoting *Coe v. Thurman*, 922 F.2d 528, 532 (9th Cir. 1990)). In this case, the appellant received a sentence including confinement for 5 months. Given the length of the record and the issues presented, it is inconceivable that the appellant could have received appellate relief within that 5-month period, even if action had been taken in half the time. The appellant appears to argue that the length of confinement should determine the speed in which the convening authority acts. For instance, if the sentence to confinement is 30 days, action should occur even

sooner to prevent completion of the sentence prior to action. In some cases, that would defy reasonable expectations. The appellant argues the government has the obligation to either work extra hours or expend appropriate funding for additional personnel. In this case, the government did expend funds to obtain court reporter support from another installation; however, there are only so many hours in the day. Following the appellant's logic, any delays, including those from trial defense counsel, should be denied because everyone should just work longer. That is not always feasible. What is required is that the government act diligently. If that is still insufficient, this Court can exercise its authority under Article 66, UCMJ, to provide relief.

The appellant has also failed to show prejudice caused by anxiety. He has not articulated any "particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Moreno*, 63 M.J. at 140. The appellant has likewise failed to demonstrate prejudice caused by the delay through an impact on any subsequent rehearing.

Having failed to demonstrate prejudice caused by governmental delay, we turn to our authority under Article 66, UCMJ. 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." *United States v. Tardif*, 57 M.J. 219, 220 (C.A.A.F. 2002) (internal quotes omitted.). The Court further found "that a Court of Criminal Appeals has authority under Article 66(c), UCMJ, 10 USC § 866(c), to grant appropriate relief for unreasonable and unexplained post-trial delays . . . this authority under Article 66(c) [UCMJ] is distinct from the court's authority under Article 59(a), UCMJ, 10 USC § 859(a), to overturn a finding or sentence on the ground of an error of law." *Id.* at 220 (internal quotes omitted). Our superior court has also been clear that Courts of Criminal Appeals should determine whether lengthy delay warrants some form of relief. *United States v. Toohey*, 60 M.J. 100, 104 (C.A.A.F. 2004). We have reviewed the entire record and have determined no such relief is warranted.

V. Severity of the Sentence.

In his final assignment of error, the appellant alleges his sentence is excessively harsh. Since we have reassessed the sentence as a result of striking the language "divers occasions", we need not address this issue. The sentence as reassessed is 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

Specification 1 of the Charge is amended by striking the language "on divers occasions". Only so much of the sentence as includes a bad-conduct discharge, confinement for 4 months, and reduction to the grade of E-1 is approved.

The approved findings, as modified, 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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings, as modified, and the sentence, as reassessed, are

AFFIRMED

OFFICIAL

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