UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman JESUS R. ALANIZ
United States Air Force

ACM S32072

18 November 2013

Sentence adjudged 1 March 2012 by SPCM convened at Nellis Air Force Base, Nevada. Military Judge: Jeffrey A. Ferguson (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 100 days, forfeiture of $750.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Zaven T. Saroyan.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Daniel J. Breen; Gerald R. Bruce, Esquire.

Before

HELGET, WEBER, and PELOQUIN
Appellate Military Judges

OPINION OF THE COURT

PELOQUIN, Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of underage drinking, driving while drunk, and misbehavior of a sentinel, in violation of Articles 92, 111, and 113, UCMJ, 10 U.S.C. §§ 892, 911, 913. The adjudged sentence was a bad-conduct discharge, confinement for 100 days, forfeiture of $750.00 pay per month for 3 months, and reduction to E-1. The convening authority approved the sentence as adjudged.

On appeal the appellant raises two issues: (1) He asserts that his guilty pleas as to driving while drunk and being drunk while on sentinel duty were improvident and the military judge erred when he accepted the pleas; and (2) He asserts that the Government denied him a meaningful opportunity for clemency when it took 145 days from the close of trial for the convening authority to take action. Finding no error materially prejudicial to the substantial rights of the appellant, we affirm.

Background

At the time of the misconduct, the appellant was a 20-year-old Airman assigned to the 99th Security Forces Squadron, Nellis Air Force Base (AFB), Nevada. A general order was in effect for Airmen assigned to Nellis AFB prohibiting those under the age of 21 from consuming alcohol.

On the evening of 26 December 2011, the appellant drank 10 to 12 Corona-brand beers. He stopped drinking between 2300 and 2400 hours. At 0500 hours on 27 December 2011, the appellant reported for duty at Creech AFB, Nevada. His duty day began with guard mount. During guard mount, Security Forces members were asked whether they had been drinking alcohol within the previous eight hours, or if there were any other reasons why they should not arm up. The appellant did not tell the flight sergeant that he had been drinking or that he otherwise should not arm up. The appellant armed up with an M-4 carbine rifle and an M-9 pistol, and went to his duty post at the Creech AFB main gate, arriving there at approximately 0600 hours.

The appellant informed his Security Forces partner at the main gate that he had been drinking and did not feel well. His partner performed the gate security checks while the appellant rested in the gate shack. At 0630 hours, the appellant drove himself and three other Security Forces Airmen in a Government Humvee to the dining facility for breakfast. After breakfast, the appellant determined he should not be driving. One of the other three Security Forces Airmen drove the appellant back to his post.

One of the Airmen riding in the Humvee smelled alcohol on or around the appellant, and reported such to the chain of command. Later in the morning, Staff Sergeant IS went to the main gate, picked the appellant up from his post, and escorted him to the base defense operations center (BDOC). At the BDOC, the appellant was administered two breathalyzer tests. The breathalyzer tests recorded the appellant's blood-alcohol content (BAC) to be 0.109 and 0.116.

Guilty Plea

The appellant asserts his guilty pleas to drunk driving and being drunk on post as a sentinel were improvident. He contends that he never admitted to being impaired as a result of intoxication, but rather that he was impaired as a result of his headache. The

appellant asserts he was charged with being drunk, vice having an unlawful BAC, and that his plea did not admit to his being drunk within the definition of the *Manual for Courts-Martial, United States* (*MCM*), ¶ 35.c.(6) (2008 ed.). The appellant requests that his convictions for drunk driving and being drunk on his sentinel post be set aside and the case returned to the convening authority for sentence reassessment.

"[We] review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de novo. In doing so, we apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." *United States v. Ferguson*, 68 M.J. 431, 433-34 (C.A.A.F. 2010) (alteration in original) (quoting *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)).

The Government charged the appellant with "physically control[ling] a vehicle…while drunk," in violation of Article 111, UCMJ, and with "being . . . found drunk upon his post" as a sentinel, in violation of Article 113, UCMJ. "Drunk" is defined as "any intoxication which is sufficient to impair the rational and full exercise of the mental or physical faculties. The term drunk is used in relation to intoxication by alcohol." *MCM*, ¶ 35.c.(6).

There is nothing to suggest the appellant's pleas were improvident. The military judge fully explained the elements of the offenses. The appellant acknowledged he understood the elements. The record of trial is replete with the appellant's statements acknowledging he was drunk, that he was impaired as a result of consuming alcohol, and that he knew he was drunk on post and drunk when he drove the Humvee. Those statements include, in part:

> MJ: Now, you said that day at work you were hung over; was that from consuming the alcohol that we just talked about in Charge I?
>
> ACC: Yes, sir.
>
> . . . .
>
> MJ: Okay, so on 27 December 2011, Airman Alaniz, do you think that you were drunk?
>
> ACC: Yes, sir.
>
> MJ: And why do you think that?
>
> ACC: Because I had a hangover and because I saw the breath results.

MJ: Do you think that your mental or physical faculties were impaired in any way on the morning of 27 December 2011?

ACC: Yes, sir.

MJ: What makes you think that?

ACC: I was still feeling the effects from the night before because of my headache.

. . . .

MJ: Did anyone authorize you to be on your post that morning while drunk?

ACC: No, sir.

MJ: Did anything or anyone force you to be on your post as a sentinel while drunk on the morning of 27 December 2011?

ACC: No, sir.

. . . .

MJ: Did you drive the Humvee back to the main gate after breakfast?

ACC: No, sir.

MJ: Why not?

ACC: I felt that I shouldn't be driving.

MJ: Why did you feel that?

ACC: Because I knew I had drank the night before.

. . . .

MJ: Airman Alaniz, do you think that you were drunk or intoxicated when you operated the Humvee?

ACC: Yes, sir.

MJ: Why do you think that?

ACC: Because of my breath-alcohol content.

. . . .

MJ: Did anyone authorize you to operate the Humvee while drunk?

ACC: No, sir

. . . .

MJ: Was there anyone or anything that forced you to operate the Humvee while drunk?

ACC: No, sir.

MJ: Could you have avoided operating the Humvee while drunk if you'd wanted to?

ACC: Yes, sir.

The appellant reads the record of trial selectively, pointing us to two of his responses where he says he did not feel drunk, but had a headache and where he indicates he did not feel his ability to operate the Humvee was impaired, suggesting his admitted impairment was due to his headache and not his intoxication. These statements were prefaced and followed by a thorough inquiry by the military judge in which the appellant clearly admitted that he was drunk, that he was under the influence of alcohol on the morning of 27 December 2011, that his headache was due to his intoxication, that his drunkenness was wrongful, and that he was impaired.

The military judge did not abuse his discretion in accepting the appellant's guilty pleas.

Post-Trial Processing Delays

The appellant's second assignment of error alleges that the unreasonable delay between completion of the trial and the convening authority's action – more specifically, the delay from authentication of the record of trial to his receipt – deprived him of an opportunity for meaningful clemency. The appellant requests that this Court set aside his bad-conduct discharge or, in the alternative, set aside his confinement and forfeitures due to this delay in post-trial processing.

The appellant's court-martial was held on 1 March 2012. The transcript was provided to trial counsel and trial defense counsel on 21 March 2012 for review. After they submitted edits to the court reporter, the record of trial was authenticated by the military judge on 8 May 2012. On 10 May 2012, it appears that trial defense counsel discovered that several corrections she had submitted prior to authentication had in fact not been incorporated into the record of trial. Those changes were subsequently made to the record of trial and reviewed by trial counsel on 11 May 2012. Trial defense counsel was provided a copy of the revised transcript on 6 June 2012, and authenticated it that same day. On 29 June 2012, the military judge authenticated a certificate of correction in accordance with Rule for Courts-Martial 1104(d). That same day, the record of trial, the certificate of correction, and the staff judge advocate's recommendation were served on the appellant. On 16 July 2012, the appellant submitted a clemency request asking the convening authority to set aside the bad-conduct discharge. The convening authority took action, approving the sentence as adjudged on 24 July 2012 – 145 days after the completion of trial.

We review de novo claims that an appellant was denied his due process right to a speedy post-trial review and appeal. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). In conducting this review, we assess the four factors laid out 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. *Id*. 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)). There is a presumption of unreasonable appellate delay when the "action of the convening authority is not taken within 120 days of the completion of trial." *Id*. at 142.

In this case, the delay was facially unreasonable, and we therefore proceed to an analysis under the *Barker/Moreno* factors. The reasons for the delay appear to be, primarily, inattention to detail in the transcription and review of the record of trial. Post-authentication, it took 52 days to process a certificate of correction for transcription errors which were identified prior to authentication. Our superior court has held "that personnel and administrative issues . . . are not legitimate reasons justifying otherwise unreasonable post-trial delay." *United States v. Arriaga*, 70 M.J. 51, 57 (C.A.A.F. 2011) (citing *Moreno*, 63 M.J. at 137).

The appellant made no assertions or complaints regarding post-trial processing delays prior to this appeal. While this weighs against the appellant in his current argument, our superior court reminds us that "[t]he obligation to ensure a timely review and action by the convening authority rests upon the Government." *Moreno*, 63 M.J. at 56 (citing *United States v. Bodkins*, 60 M.J. 322, 323-24 (C.A.A.F. 2004)).

Lastly, we turn to prejudice. The appellant fails to demonstrate any prejudice in this case. The appellant argues that had the case been processed more quickly, he could

have submitted clemency matters to the convening authority at an earlier date, and thereby had an opportunity to receive clemency in the form of a reduction in confinement or forfeitures prior to his completing his term of confinement. He argues that the delays denied him this opportunity because he had completed his term of confinement prior to having an opportunity to submit matters in clemency. We find the appellant's argument meritless.

Post-trial delays did not restrict or hinder the appellant from requesting any form of clemency, whether he chose to request a set aside of the conviction, dismissal of the charges, or a reduction of any part, or all, of the sentence. The convening authority considered all of the clemency matters submitted by the appellant before he took action. And when he took action, the convening authority had his full Article 60, UCMJ, 10 U.S.C. § 860, authority to exercise. The appellant's argument suggests that whether or not an appellant is prejudiced by post-trial delay may be dependent on the length of the confinement term adjudged. To follow the appellant's logic, an accused sentenced to 10 days of confinement would be prejudiced if he did not receive the authenticated record within 10 days of trial. Such a standard does not exist in regulations, statutes, or in our superior court's rulings. Having considered the totality of the circumstances and the entire record, we find the post-trial delay in this case harmless beyond a reasonable doubt. *Id.* at 135-36.

While we find the post-trial delay was harmless, it does cause us to be concerned.

We presume that when our superior court established a presumption of unreasonable post-trial delay in those cases where the convening authority failed to take action within 120 days of completion of trial, *see Moreno*, 63 M.J. at 142, it did so with a reasonable mind fully apprised of the procedural requirements of the UCMJ, the resources available to perform post-trial processing, an informed sense of the varying scope and complexities of courts-martial, and an appreciation for what duly diligent military justice practitioners may be expected to accomplish in a duty day.

To be clear, in that we find no prejudice in the instant case, our *Moreno* analysis is complete. But we do find the *Moreno* guidelines instructive in assessing the egregiousness of post-trial delays outside of *Moreno*.

We note that Article 66(c), UCMJ, 10 U.S.C. § 866(c), empowers appellate courts with the authority to grant sentence relief for excessive post-trial delay without the showing of actual prejudice required by Article 59(a), UCMJ, 10 U.S.C. § 859(a). *United States v. Tardif*, 57 M.J. 219, 220 (C.A.A.F. 2002).

What amount of delay rises to excessive post-trial delay under *Tardif* is not defined with any specific calculus. Cases involving post-trial review under *Tardif* are

analyzed on a case-by-case basis with relief, if any, granted in light of the totality of the circumstances of each case.

In the case at hand, the Government took 145 days to process the case through to the convening authority's action, and provided minimal explanation for the delay. While we ultimately do not find the delay in this case to warrant relief under *Tardif*, we urge those charged with the administration of the military justice system to be mindful of actual and perceived fairness of the military justice process. Processing delays, harmful or not, may project an attitude of indifference onto the Government which in turn may harm the perceived fairness of the process. The Government would be well served were it to ensure it can present a full and complete accounting of its post-trial timeline to those reviewing and assessing its actions, to include this Court, if it seeks to avoid a granting of relief moving forward.

Conclusion

The approved findings and sentence are correct in law and fact, and no error 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 findings and the sentence are

AFFIRMED.

WEBER, Judge (concurring):

I concur that under the facts of this case, the appellant's sentence remains appropriate despite the Government's delay in obtaining action from the convening authority. I write separately based on my observations that the Courts of Criminal Appeals approach sentence appropriateness relief for post-trial delay in significantly different ways, and that all the service courts have seemed to struggle with transplanting sentence appropriateness notions onto the concept of post-trial delay. The Courts of Criminal Appeals would benefit from increased efforts to lay out a coherent framework for analyzing when post-trial delay affects a sentence's appropriateness.

In *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002), our superior court held that Article 66(c), UCMJ, 10 U.S.C. § 866(c), provides the Courts of Criminal Appeals a separate basis to grant relief than Article 59(a), UCMJ, 10 U.S.C. § 859(a), which requires a showing of prejudice before an appellate court can grant relief. Therefore, even where an appellant has not demonstrated prejudice from post-trial delay, service courts must "determine what findings and sentence 'should be approved,' based on all the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay." *Id.* at 224. In *United States v. Toohey*, 63 M.J.

353 (C.A.A.F. 2006), our superior court further defined this responsibility of the service courts, holding that a service court may grant relief even when the delay was not "most extraordinary." *Id.* at 362. The Court held: "The essential inquiry remains appropriateness in light of all circumstances, and no single predicate criteria of 'most extraordinary' should be erected to foreclose application of Article 66(c), UCMJ, consideration of relief." *Id.*

In light of our superior court's guidance, and keeping in mind that our overriding standard under Article 66(c), UCMJ, is what portion of the sentence "should be approved," I consider the following non-exhaustive list of factors relevant in considering whether a sentence remains appropriate despite delays in post-trial processing:

> (1) How lengthy was the delay compared to the standards set forth in *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006)?
>
> (2) What reasons, if any, has the Government set forth for the delay? Is there any evidence of bad faith, gross indifference or institutional neglect to the overall post-trial processing of this case, either across the service or at a particular installation?
>
> (3) Keeping in mind that our goal under *Tardif* is not to analyze for prejudice, is there nonetheless some evidence of harm (either to the appellant or institutionally) caused by the delay?
>
> (4) Has the delay 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) Given the passage of time, is there any meaningful relief the Court can provide in this particular situation?

I consider no single factor dispositive, and a given case may reveal other appropriate considerations in deciding whether post-trial delay has rendered an appellant's sentence inappropriate.

Applying these considerations to the instant case, I concur that the adjudged and approved sentence remains appropriate. The delay was only slightly past the *Moreno* standard. The court reporter's chronology does articulate some explanation for the Government's inability to meet the *Moreno* standard, although this explanation comes short of satisfactorily accounting for the delay in this straight-forward case. However, the appellant does not satisfactorily articulate any specific harm caused by the slight delay in this case, and the appellant's adjudged and approved sentence remains consistent with the goals of justice and good order and discipline despite the passage of time.

Accordingly, I concur that relief is not warranted.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court