UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ALEJANDRO V. ARRIAGA
United States Air Force

ACM 37439 (rem)

16 February 2012

Sentence adjudged 28 August 2008 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: W. Thomas Cumbie.

Approved sentence: Dishonorable discharge, confinement for 4 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel James B. Roan; Major Michael S. Kerr; Major Shannon A. Bennett; and Captain Andrew J. Unsicker.

Appellate Counsel for the United States: Colonel Don M. Christensen; Colonel Douglas P. Cordova; Lieutenant Colonel Jeremy S. Weber; and Gerald R. Bruce, Esquire.

Before

ORR, HARNEY, and HECKER
Appellate Military Judges

OPINION OF THE COURT
UPON REMAND

ORR, Chief Judge:

This case is before this Court on remand from our superior court. A panel of officer and enlisted members found the appellant guilty, contrary to his pleas, of one specification of housebreaking and one specification of indecent assault, in violation of

Articles 130 and 134, UCMJ, 10 U.S.C. §§ 930, 934.[1] The approved sentence consisted of a dishonorable discharge, confinement for 4 years, forfeiture of all pay and allowances, and reduction to E-1.[2] In an unpublished decision, this Court affirmed the findings, but found that the appellant's sentence was inappropriately severe. *United States v. Arriaga*, ACM 37439 (A.F. Ct. Crim. App. 7 May 2010) (unpub. op.), *rev'd*, 70 M.J. 51 (C.A.A.F. 2011). As a result, we determined that the appropriate sentence was a bad-conduct discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E–1. *Arriaga*, unpub. op. at 11.

The Court of Appeals for the Armed Forces (CAAF) granted review of the following issues: (1) whether the appellant's conviction for housebreaking must be set aside because housebreaking is not a lesser included offense of burglary under *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010); and (2) whether the appellant should be granted additional confinement credit as relief for being deprived of his right to timely appellate review. *United States v. Arriaga*, 69 M.J. 433 (C.A.A.F. 2010) (order granting petition for review). By its decision issued 29 April 2011, the CAAF ruled that housebreaking was a lesser included offense of burglary, but held that the appellant was denied his due process right to speedy appellate review. *Arriaga*, 70 M.J. at 54-55. As a result, our superior court set aside our decision and returned the case to this Court for further action consistent with their opinion. Having considered the issue of the appellant's right to timely appellate review in light of the CAAF's opinion, and again having reviewed the entire record, we affirm the approved findings and grant the appellant an additional 51 days of confinement credit.

The appellant claims that his due process right to timely post-trial processing was violated when it took 243 days from the date of sentencing to the convening authority's Action in this case. "We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citing *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)). In conducting this review, we follow our superior court's guidance by using 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

[1] Consistent with his pleas, the appellant was found not guilty of one specification of aggravated sexual assault, one specification of indecent assault, and one specification of assault consummated by a battery, in violation of Articles 120, 134, and 128, UCMJ, 10 U.S.C. §§ 920, 934, 928. The finding of guilty to housebreaking was a lesser included offense to the charged offense of burglary under Article 129, UCMJ, 10 U.S.C. § 929, for which the appellant was found not guilty. The appellant was also credited with 156 days of pretrial confinement.

[2] Pursuant to Articles 57(a)(2) and 58b(a)(1), UCMJ, 10 U.S.C. §§ 857(a)(2), 858b(a)(1), the convening authority deferred all of the adjudged and mandatory forfeitures commencing retroactively as of 14 days from the date of the adjudged sentence. Pursuant to Article 58b(b), UCMJ, the convening authority waived all of the mandatory forfeitures for the benefit of the appellant's dependent for a period of six months, release from confinement, or expiration of term of service, whichever is sooner, with the waiver commencing retroactively as of 14 days from the date of the adjudged sentence.

(4) prejudice." *Moreno*, 63 M.J. at 135 (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). We apply a presumption of unreasonable delay when the convening authority's Action is not completed within 120 days of announcement of the sentence, thereby triggering the *Barker* four-factor analysis. *Id*. at 142.

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 *Barker* factor. *United States v. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006). This approach is the one we took in our original decision. Having considered the totality of the circumstances and the entire record, we previously concluded that any denial of the appellant's right to speedy post-trial review and appeal due to the delay was harmless beyond a reasonable doubt and determined that no relief was warranted. *Arriaga*, unpub. op. at 4. Subsequently, our superior court held that the appellant was subjected to 51 days of oppressive incarceration; thus, we took a fresh look at the four *Barker* factors and now conclude the appellant is entitled to some relief.

The appellant's court-martial concluded on 28 August 2008, and his sentence included 4 years of confinement with credit for 156 days of pretrial confinement. The convening authority took action 243 days later on 27 April 2009. Due to personnel and administrative issues, the 820-page record of trial was not completed until 17 November 2008, 82 days after the court-martial concluded. Because the trial counsel was on maternity leave, the review of the transcript was not completed until 5 February 2009, 162 days after trial. The military judge authenticated the record of trial on 2 March 2009, and the convening authority took action on 27 April 2009, 187 days and 243 days after trial, respectively. On 7 May 2010, this Court completed our Article 66(c), UCMJ, 10 U.S.C. § 866(c), review and, after finding his sentence to be inappropriately severe, granted the appellant substantive relief with a reduction in the confinement period by 2 years. As a result of the revised sentence, his maximum release date was shortened to 25 March 2010. The appellant was released from confinement on 14 May 2010, having served 625 days of confinement in addition to the 156 days in pretrial confinement.

Upon remand, the appellant asserts that the Government's unreasonable post-trial delay subjected him to 169 days[3] of oppressive confinement; 51 days of which he served past his maximum release date and an additional 108 days for good conduct time credit. He asks this Court to set aside his bad-conduct discharge or, in the alternative, to grant him 169 days of confinement credit. The Government argues that, given the enormous windfall the appellant has already received, there is no reason to further reduce the appellant's sentence. We disagree with the Government's argument.

[3] It appears the appellant's prayer for 169 days results from a mathematical error; we note that the requested 51 days served plus the 108 days for good conduct time credit add up to 159 days.

As previously stated, the Government exceeded the timeline delineated in *Moreno* for processing a case between the completion of the trial and the convening authority's Action. Based on the assumption that the other two *Moreno* time periods would have remained relatively constant, the 243-day delay caused the appellant to spend 51 extra days in confinement. Because personnel and administrative issues, such as those raised by the Government in this case, are not legitimate reasons justifying otherwise unreasonable post-trial delay, we are convinced that the appellant is entitled to appropriate relief due to his oppressive incarceration. *See, e.g.*, *Moreno*, 63 M.J. at 137. In *Moreno*, our superior court provided a nonexclusive list of relief available to this Court upon a finding of unreasonable post-trial delay depending on the circumstances of individual cases:

> (a) day-for-day reduction in confinement or confinement credit; (b) reduction of forfeitures; (c) set aside of portions of an approved sentence including punitive discharges; (d) set aside of the entire sentence, leaving a sentence of no punishment; (e) a limitation upon the sentence that may be approved by a convening authority following a rehearing; and (f) dismissal of the charges and specifications with or without prejudice.

Id. at 143.

At this point, this Court can only speculate as to whether the appellant would have been entitled to his requested 169 days of credit on his confinement had the Government processed his case in a timely manner. We decline to do so. However, we know the actual processing of his case resulted in him serving 51 days of incarceration past his recalculated maximum release date. Because we had previously granted the appellant substantial relief, we find that he has provided sufficient evidence to support his claim of specific prejudice in the form of oppressive incarceration caused by unreasonable post-trial delay.

Accordingly, based on the authority granted above, we approve only so much of the sentence as includes a bad-conduct discharge, confinement for 2 years**,** forfeiture of all pay and allowances, and reduction to E-1.[4] The appellant is awarded 51 additional days of confinement credit.

Conclusion

The approved findings and sentence, as modified, 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).

[4] We do not disturb either the appellant's award of 156 days of pretrial confinement credit or the convening authority's deferral and waiver of the mandatory forfeitures.

Accordingly, the approved findings and sentence, as modified, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court