UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 39050

UNITED STATES
Appellee

v.

Jeffrey D. WILLIAMS,
Staff Sergeant (E-5), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 14 June 2017

Military Judge: Mark W. Milam.

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-1. Sentence adjudged 10 November 2015 by GCM convened at Sheppard Air Force Base, Texas.

For Appellant: Major Mark C. Bruegger, USAF.

For Appellee: Major G. Matt Osborn, USAF; Gerald R. Bruce, Esquire.

Before DREW, J. BROWN, and MINK, *Appellate Military Judges.*

Senior Judge J. BROWN delivered the opinion of the court, in which Chief Judge DREW and Judge MINK joined.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

J. BROWN, Senior Judge:

A general court-martial composed of a military judge sitting alone found Appellant guilty, consistent with his pleas, of divers use of lysergic acid diethylamide (LSD), violating a lawful general regulation by wrongly using over-the-counter cough medicine to alter his mood or function, and conspiring with two other military members to use LSD, in violation of Articles 81, 92,

and 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 881, 892, 912a. The military judge sentenced Appellant to a bad-conduct discharge, confinement for three months, and reduction to E-1. The convening authority waived automatic forfeitures for the benefit of Appellant's dependents, but otherwise approved the adjudged sentence.

As the period of time between sentence and final action by the convening authority exceeded 120 days, Appellant now requests "appropriate sentence relief" pursuant to *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002). We disagree and affirm.

I. BACKGROUND

On 10 November 2015, the military judge sentenced Appellant and adjourned the trial. Six days later, Appellant submitted a request to the convening authority to defer both the automatic forfeitures and reduction in rank, and to waive the automatic forfeitures. The convening authority granted the request only as to the waiver of automatic forfeitures.

On 22 January 2016 (day 73), the military judge authenticated the record of trial.

On 18 February 2016 (day 100), the staff judge advocate, in her staff judge advocate recommendation (SJAR), recommended approval of the sentence as adjudged. As all of the offenses occurred after 24 June 2014,[1] the staff judge advocate advised that the convening authority was not authorized to set aside the bad-conduct discharge.

On 4 March 2016 (day 115), Appellant submitted his petition for clemency and requested that the convening authority disapprove the bad-conduct discharge. In making this request, Appellant's defense counsel argued that Appellant provided extensive information regarding the prosecution of another military member and informed the convening authority that, upon a trial counsel recommendation that they expected would be forthcoming, he would then be authorized to set aside the punitive discharge as requested.

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[1] The convening authority's power under Article 60, UCMJ, 10 U.S.C. § 860, was restricted as part of the National Defense Authorization Act for Fiscal Year 2014 (FY 14 NDAA), Pub. L. No. 113-66, § 1702(b), 127 Stat. 672, 955–57 (2013). Pursuant to section 1702(d)(2), this amendment did not take effect until 24 June 2014, 180 days after the FY 14 NDAA was enacted. As a result, for offenses occurring on or after 24 June 2014, a convening authority's power to grant clemency is significantly reduced, absent either a pretrial agreement or a trial counsel recommendation in recognition of substantial assistance by the accused in the prosecution of another person.

On 7 March 2016, a senior trial counsel submitted a letter recommending that Appellant be recognized for his "substantial assistance" in the prosecution of another military member.

On 14 March 2016 (day 125), the staff judge advocate completed the first addendum to the SJAR. As the senior trial counsel recommended that Appellant provided substantial assistance in the prosecution of another military member, the staff judge advocate advised the convening authority that he was now authorized to grant clemency as to any portion of Appellant's sentence. Nevertheless, the staff judge advocate again recommended against clemency.

On 28 March 2016 (day 139), Appellant submitted a response to the first addendum to the SJAR and provided additional argument regarding why clemency was appropriate.

On 11 April 2016 (day 153), the staff judge advocate completed the second addendum to the SJAR. Three days later, on 14 April 2016 (day 156), the convening authority approved the sentence as adjudged.

II. DISCUSSION—POST-TRIAL DELAY

After sentence was announced, the Government took 159 days before the convening authority took final action. Appellant seeks sentence relief due to non-prejudicial delay between the sentence and the convening authority's action. We are not persuaded that sentence relief is warranted.

The Government submitted an affidavit explaining that the delay was reasonable for several reasons: the workload of the court reporter, trial counsel unavailability through significant portions of December, the court-martial docket in January and February, and delays resulting from the submission of additional matters by Appellant.

"[C]onvicted servicemembers have a due process right to timely review and appeal of courts-martial convictions." *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). Accordingly, we review de novo Appellant's claim that he has been denied his due process right to a speedy post-trial review and appeal. *Id*. In *Moreno*, the Court of Appeals for the Armed Forces established a presumption of unreasonable post-trial delay that requires a due process review when the convening authority does not take action within 120 days of trial. *Id.* at 142.

If there is a *Moreno*-based presumption of unreasonable delay or an otherwise facially-unreasonable delay, we examine the claim under 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. *Moreno* identified three types of prejudice arising from post-trial processing delay: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of ability to present a defense at a rehearing. *Id*. at 138–39.

"We analyze each factor and make a determination as to whether that factor favors the Government or [Appellant]." *Id.* at 136. Then, we balance our analysis of the factors to determine whether a due process violation occurred. *Id*.; *see also Barker*, 407 U.S. at 533 ("Courts must still engage in a difficult and sensitive balancing process."). "No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." *Moreno*, 63 M.J. at 136. However, where 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).

The period of 159 days between sentence and action in this case is presumptively unreasonable, exceeding the standard by 39 days, and triggers a full due process review under *Moreno*. However, Appellant has not claimed any legally cognizable prejudice from the delay, and we find none. Balancing the remaining factors, and considering the Government's explanation for the delay, we do not find the delay so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system. *See Toohey*, 63 M.J. at 362. Therefore, we find no due process violation.

Although we find no due process violation in Appellant's case, we nonetheless consider whether Article 66(c), UCMJ, 10 U.S.C. § 866(c), relief pursuant to *Tardif* is appropriate. 57 M.J. at 224. In resolving Appellant's request for *Tardif* relief, 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.[2]

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[2] 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) whether there is nonetheless 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 whether relief is 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) whether, given the

(Footnote continues on next page)

We find that the Government's post-trial processing for the month of December lacked a sense of urgency. Specifically, we are not persuaded by the Government's assertion that trial counsel's purported unavailability, based upon leave, temporary duty assignments, and detailing to the base tax center, constituted a sufficient explanation for a five-week delay in reviewing a 189-page record of trial. Nevertheless, we do recognize that additional post-trial processing, to include service of the first addendum to the SJAR, Appellant submitting additional matters, and completion of a second addendum to the SJAR, were all necessary steps to ensure full consideration of information beneficial to Appellant.

Considering the entirety of the post-trial processing in light of the remaining factors, we conclude no extraordinary exercise of our Article 66(c) authority is warranted here. Considered as a whole, Appellant's case has not been subjected to excessive delay, and we discern no particular harm to Appellant. The delay has not lessened the disciplinary effect of Appellant's sentence. The delay has not adversely affected our ability to review Appellant's case or grant him relief, if warranted. While we are concerned with portions of this post-trial processing, we conclude that an otherwise appropriate sentence should not be reduced because the Government elected to take the necessary time to properly process and consider additional information that increased the likelihood of Appellant receiving meaningful relief in clemency. That the convening authority ultimately chose not to provide any relief does not otherwise change the desirability of ensuring the convening authority properly considered this additional favorable information. The circumstances of Appellant's case do not move us to reduce an otherwise appropriate sentence imposed by the military judge and approved by the convening authority.

III. 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).

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passage of time, this court can provide meaningful relief in this particular situation. *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).

Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

KURT J. BRUBAKER
Clerk of the Court