UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Lieutenant Colonel STEVEN J. DIMATTEO
United States Air Force

ACM 37552 (f rev)

04 January 2013

Sentence adjudged 15 May 2009 by GCM convened at McChord Air Force Base, Washington. Military Judge: Ronald A. Gregory.

Approved sentence: Dismissal and confinement for 11 months.

Appellate Counsel for the Appellant: Frank J. Spinner (civilian counsel) (argued); Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Major Shannon A. Bennett; Major Michael S. Kerr; and Captain Zaven T. Saroyan.

Appellate Counsel for the United States: Major Daniel J. Breen (argued); Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel Jeremy S. Weber; Major Megan E. Middleton; and Gerald R. Bruce, Esquire.

Before

ROAN, HARNEY, and HECKER
Appellate Military Judges

PER CURIAM:

Prior to the issuance of our opinion in *United States v. DiMatteo*, ACM 37552 (A.F. Ct. Crim. App. 7 December 2012) (unpub. op.), the appellant raised a second supplemental assignment of error with the Court arguing that the delay in completing Article 66(c), UCMJ, 10 U.S.C. § 866(c), appellate review warranted relief under *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002). Due to an administrative oversight, the second supplemental assignment of error was not considered by the Court prior to its decision. Because Chief Judge Orr and Judge Weiss, who participated in the initial

opinion, have since retired, a new panel has been formed to consider the merits of the appellant's *Tardif* argument.[1]

Post-Trial Delay

Our initial opinion was rendered on 7 December 2012, 1129 days after the appellant's case was initially docketed with this Court on 4 November 2009. The length of the delay is facially unreasonable. *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). Because the delay 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" to determine if the appellant's right to due process has been violated. *Moreno*, 63 M.J. at 135-36. We will assume *arguendo* that an analysis of the first three factors weighs in the appellant's favor. With respect to the fourth factor, prejudice to the appellant, our evaluation considers three interests: (1) preventing oppressive incarceration pending appeal; (2) minimizing anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limiting the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired. *United States v. Toohey*, 63 M.J. 353, 361 (C.A.A.F. 2006) (citing *Moreno*, 63 M.J. at 138-39).

The appellant contends that he was prejudiced by the post-trial delay because he became retirement eligible on 15 September 2011 and "the delay of findings in this case has caused Appellant to now be well-past his retirement date and prevents Appellant from receiving the benefits due him." Based on this proffer, we find the appellant has not suffered undue prejudice. While we dismissed the appellant's conviction for obstruction of justice, we nonetheless found his reassessed sentence to a dismissal and confinement for 11 months was correct in law and fact, and we determined, on the basis of the entire record, it should be approved. Article 66(c), UCMJ. Therefore, the Court's delay in issuing its opinion did not provide the appellant with any relief that he would have received had the case been processed more expeditiously.

With respect to the first prong of the prejudice analysis, the appellant had been released from confinement well before his counsel submitted the initial assignment of error, thereby negating any argument that he suffered oppressive confinement as a result of the appellate delay. Second, while the appellant may have suffered some anxiety awaiting the result of his appeal, we find nothing in his submissions to this Court to indicate that such anxiety was any more burdensome than that suffered by all members awaiting post-trial appellate action. As for the third prong, nothing in the record suggests the appellant would not be able to present a defense if the Government elects to conduct a

[1] In conjunction with the appellant's request for relief, pursuant to *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002), we will reconsider the issue of whether his due process rights were violated as a result of post-trial delay in light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006).

rehearing with respect to the obstruction of justice charge that we dismissed for failing to state an offense. Thus, although the delay in rendering our decision violated the precepts of *Moreno*, we find as a matter of law that the appellant did not suffer any specific prejudice sufficient to constitute a constitutional due process violation. Even were we to find the appellant suffered prejudice, we hold that any error resulting in the delay in processing this case was harmless beyond a reasonable doubt.

Although we do not find the appellant suffered specific prejudice as a result of the delay, we may nonetheless find a due process violation if, in balancing the other three factors, the delay is "so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohey*, 63 M.J. at 362; *Tardif*, 57 M.J. at 224 (The court of criminal appeals has broad discretion to grant or deny relief for unreasonable or unexplained post-trial delay even in the absence of specific prejudice to the appellant.).

To be sure, the overall length of time it has taken to complete the appellant's case is facially unreasonable. However, we conclude that the delay is not so egregious that it undermines the public's perception of the fairness and integrity of the military justice system.[2] Having considered the post-trial delay in light of our superior court's guidance in *Toohey* and *Tardif*, we find the post-trial delay in this case does not impact the sentence that "should be approved." *See* Article 66(c), UCMJ. Accordingly, we decline to grant such relief in this case.

Conclusion

Having reconsidered the record in light of the appellant's second supplemental assignment of error, we again find that the 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

[2] We note that the appellant himself requested nine enlargements of time to prepare his appeal and took 427 days to file his initial Assignment of Error, constituting 38 percent of the overall delay. He subsequently filed two additional assignments of error for our consideration and requested oral argument. We further observe that the appellant specifically consented to the enlargement of time requested by his counsel in the appellant's seventh request for enlargement of time.

(C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court