UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MICHAEL BAILON
United States Air Force

ACM 36912 (f rev)

29 April 2009

Sentence adjudged 15 June 2006 by GCM convened at Vance Air Force Base, Oklahoma. Military Judge: Barbara G. Brand (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 21 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Major Mark D. Hoover, Captain Michael A. Burnat, and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel George F. May, Lieutenant Colonel Matthew S. Ward, Major Jeremy S. Weber, Major Donna S. Rueppell, and Captain Michael T. Rakowski.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

UPON FURTHER REVIEW

FRANCIS, Senior Judge:

Consistent with the appellant's pleas, a military judge sitting as a general court-martial convicted him of conspiracy to commit larceny, violation of a lawful order, twice making false official statements, destruction of property, drunk driving, multiple drug use offenses, multiple larcenies, wrongful appropriation, and unlawful entry, in violation of Articles 81, 92, 107, 109, 111, 112a, 121, and 130, UCMJ, 10 U.S.C. §§ 881, 892, 907,

909, 911, 912a, 921, 930. The adjudged and approved sentence includes a bad-conduct discharge, confinement for 21 months, and reduction to the grade of E-1.[1]

By unpublished decision issued 24 January 2008, this Court set aside the convening authority's Action and returned the record for new post-trial processing under Article 60, UCMJ, 10 U.S.C. § 860. *United States v. Bailon*, ACM 36912 (A.F. Ct. Crim. App. 24 Jan 2008) (unpub. op.). That has been accomplished and the record is again before this Court for review under Article 66(c), UCMJ, 10 U.S.C. § 866(c). Upon further review, the appellant asserts a violation of his right to due process because of unreasonable post-trial delay. Finding no prejudicial error, we affirm.

Post-Trial Delay

We review post-trial due process violation claims de novo, balancing the four factors set 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. *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006).

The first factor weighs in favor of the appellant, in that the length of delay from the time the record was returned for new post-trial processing to the time the convening authority completed a new Action is facially unreasonable. *Moreno* established time standards for post-trial processing and review, the violation of which gives rise to a presumption of unreasonable delay, including a standard of 120 days for convening authority action. *Id.* at 142. Although *Moreno* specifically dealt with initial post-trial processing, and so expressed the standard for convening authority action in terms of the time between the completion of trial and action, the same rule logically applies to cases returned by this Court for new post-trial processing. Here, 244 days elapsed between our return of the record and the convening authority's completion of the new Action, considerably longer than the *Moreno* standard.

In determining the length of the delay, we have considered but find no merit in the appellant's assertion that, for post-trial due process purposes, we must add in all of the time from the end of trial until the case was docketed with the Court the second time, after the new convening authority action. Considering the holding of *Moreno* within the context of the issues then pending before the Court, we conclude that the time standards established therein do not contemplate a running appellate clock that continues to tick until all stages of appellate review are complete at whatever level. When, as here, an appellate court rules on an appeal and grants the appellant relief by returning the case for further processing, the *Moreno* clock is reset for the new processing and appeal periods

[1] The appellant pled guilty pursuant to a pretrial agreement that limited the maximum period of confinement to no more than 30 months.

that follow. To hold otherwise would subject virtually every case in which an appellant pursued a successful appeal that resulted in additional lower-level processing to the *Moreno* presumptions. We do not believe that was the intent of the *Moreno* Court.

The second factor weighs only slightly in favor of the appellant. Of the 244-day delay after the case was returned for further processing, 114 days are attributable to delays by the appellant's trial defense counsel in acknowledging receipt of the new Staff Judge Advocate's Recommendation. The remaining 130 days are only marginally more than the time standard established by *Moreno* for this portion of the post-trial processing.

With regard to the third factor, the appellant concedes, and the record so indicates, that he did not, with respect to the 244-day delay at issue, assert his right to a timely review and appeal. While failure to do so does not constitute waiver, it is nonetheless a factor for consideration in our application of the *Barker* factors. *Moreno*, 63 M.J. at 138.

Finally, the fourth factor weighs against the appellant, in that we find no discernable prejudice from the delay. The appellant has not, in either his original appeal or currently, asserted any substantive errors, nor has our review identified any such errors.

Weighing all of the above, we find no due process violation in the post-trial processing and appellate review of the appellant's court-martial. In reaching this determination, we note that the appellant's original appeal to this Court raised an unreasonable post-trial delay claim based on the convening authority's slowness in completing the original Action.[2] Our original decision found no merit to that claim and we continue to so hold. We recognize that we have the power, under Article 66, UCMJ, to grant relief even in the absence of a showing of prejudice, but find that such action is not warranted here. *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

Conclusion

The approved findings and sentence 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).

[2] 181 days elapsed from the date of trial to the completion of the convening authority's original Action.

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court