UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic JAKE R. BRIGGS
United States Air Force

ACM S32110

14 November 2013

Sentence adjudged 12 September 2012 by SPCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Lynn Schmidt (sitting alone).

Approved Sentence: Bad-conduct discharge and confinement for 90 days.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni and Captain Isaac C. Kennen.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Captain Thomas J. Alford; and Gerald R. Bruce, Esquire.

Before

HELGET, WEBER, and PELOQUIN
Appellate Military Judges

PER CURIAM:

The appellant was tried by a special court-martial composed of a military judge sitting alone. Pursuant to his plea, he was convicted of the wrongful use of heroin on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. On 12 September 2012, the appellant was sentenced to a bad-conduct discharge and confinement for 90 days. On 22 October 2012, the convening authority took action by approving the adjudged sentence. On 29 November 2012, this case was docketed with this Court.

On appeal, the appellant asserts that the 38-day delay between the action and docketing denied his due process right to a speedy post-trial review. He avers that this Court's admonishment for such delays in prior cases as well as the standards set out in *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), and *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002), warrant "modest relief." We disagree.

We review de novo an appellant's claim that he has been denied the due process right to a speedy post-trial review and appeal. *Moreno*, 63 M.J. at 135 (citations omitted). Because the 38-day delay in this case is facially unreasonable, *id.* at 142,[1] 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 (citation omitted). When we assume error but are able to directly conclude it was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006).

The appellant does not articulate any specific prejudice, but argues that this Court "should decline to affirm a portion of the sentence to send a clear message . . . that [we] will not be patient with . . . unreasonable post-trial delay." Indeed, the record contains no evidence that the delay has harmed the appellant. The appellant was incarcerated on 12 September 2012 and submitted his clemency request to the convening authority on 15 October 2012. The convening authority took action 7 days later. Thus, this case was processed months earlier than the 120-day trial-to-action *Moreno* standard.[2] Under these circumstances, we find no prejudice to the appellant. *See Moreno*, 63 M.J. at 138–39 (citations omitted) (recognizing 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). We agree with the appellant that *Moreno* violations are unacceptable. But as the appellant essentially concedes, it is obvious that the minor delay in docketing this case with the Court is harmless beyond a reasonable doubt.

We also find insufficient reason to grant the appellant relief under *Tardif*. Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we may grant sentence relief even when we find no prejudice in unreasonable post-trial delays. *Tardif*, 57 M.J. at 220, 224; *see also United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006) (finding delays were "such that tolerating them would adversely affect the public's perception of the fairness and integrity of the military justice system"). However, "[a]ppellate relief under Article 66(c)

[1] Under *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006), the record should have been docketed with this Court within 30 days of the convening authority's action.

[2] In addition to the 30-day action-to-docketing time standard, *Moreno* also established that delays are presumptively unreasonable where "action of the convening authority is not taken within 120 days of the completion of trial." *Id.* at 142.

should be viewed as the last recourse to vindicate, where appropriate, an appellant's right to timely . . . review." *Tardif*, 57 M.J. at 225.

The Government has not provided, and our review of the record does not reveal, a reason why it took 38 days to docket the appellant's case in this Court. While cognizant of our obligation to factor unreasonable and unexplained post-trial delay into our determination of what findings and sentence "should be approved," *Tardif*, 57 M.J. at 224 (quoting Article 66(c), UCMJ), the record here does not reveal any bad faith or gross indifference in the post-trial processing of this case to prompt sentence relief. We find, therefore, that this is an inappropriate case for this Court to exercise its broad powers to grant additional relief under Article 66(c), UCMJ.

Having considered the totality of the circumstances and the entire record of trial, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt and that no relief is warranted.

Conclusion

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

AFFIRMED.

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court