UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman LOGAN B. CARR
United States Air Force

ACM 38025 (f rev)

15 August 2013

Sentence adjudged 4 May 2011 by GCM convened at Andersen Air Force Base, Guam. Military Judge: Vance H. Spath (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 180 days, forfeiture of $700.00 pay per month for 10 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Matthew T. King and Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Jason S. Osborne; and Gerald R. Bruce, Esquire.

Before

HARNEY, SOYBEL, and MITCHELL
Appellate Military Judges

UPON FURTHER REVIEW

PER CURIUM:

A general court-martial composed of a military judge sitting alone convicted the appellant of one specification of larceny of non-military property of a value of less than $500.00; one specification of wrongful appropriation; and two specifications of housebreaking, in violation of Articles 121 and 130, UCMJ, 10 U.S.C. §§ 921, 930.[1] The

[1] The appellant pled guilty by exceptions and substitutions to the larceny and wrongful appropriation specifications. The military judge found the appellant guilty to those specifications by exceptions and substitutions. The appellant pled not guilty to the two specifications of housebreaking.

military judge sentenced the appellant to a bad-conduct discharge, confinement for 270 days, forfeiture of $700.00 pay per month for 10 months, and reduction to the grade of E-1. On 22 August 2011, the convening authority approved "only so much of the sentence as provides for reduction to the grade of E-1, forfeiture of $700.00 pay per month for 10 months, and confinement for 180 days is approved and, except for the Bad-conduct discharge, will be executed."

The case was docketed with this court on 7 November 2011. On 22 May 2012, the Government filed a Motion to Remand the case back to the convening authority to clarify the Action, which we granted on 25 June 2012. We reissued the Order 10 months later, on 24 April 2013. On 23 May 2013, the original convening authority signed an affidavit stating that he intended to approve the bad-conduct discharge. On 29 May 2013, the successor convening authority withdrew the 22 August 2011 Action and approved the same sentence as in the original Action, to include the bad-conduct discharge. The case was again docketed with this Court on 6 June 2013.

Post-Trial Delay

The appellant argues that he was deprived of his right to speedy post-trial review under *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). He also argues that he is entitled to relief under *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002). We affirm the findings, but modify the sentence.

In *Moreno*, our superior court established guidelines that trigger a presumption of unreasonable delay in certain circumstances: (1) when the action of the convening authority is not taken within 120 days of the completion of trial; (2) when the record of trial is not docketed by the service Court of Criminal Appeals within 30 days of action; and (3) when appellate review is not completed with a decision rendered within 18 months of docketing the case before the Court of Criminal Appeals. *Moreno*, 63 M.J. at 142. In this case, the time from action to docketing with this Court exceeded 30 days; and the total period from the date the case initially was docketed with this Court and completion of review has exceeded 18 months.

Because the delay in this case 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." *Moreno*, 63 M.J. at 135-36 (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)). 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 factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006).

In this case, the post-trial record contains no evidence that the delay has harmed the appellant. In *Moreno*, our superior court recognized three types of prejudice arising from post-trial processing delay that could give rise to a due process violation: (1) preventing oppressive confinement awaiting appeal; (2) minimization of anxiety and concern beyond that normally experienced by any prisoner while awaiting an appellate decision; and (3) impairment of the ability to present a defense at a retrial or rehearing, if one is ordered. *Moreno*, 63 M.J. at 138-39 (citing *Rheuark v. Shaw*, 628 F.2d 297, 303 n.8 (5th Cir. 1980)).

We find no prejudice to the appellant in this case. The appellant was incarcerated on 4 May 2011. His approved sentence was 180 days. Appellate defense counsel filed the assignment of errors on behalf of the appellant on 4 May 2012. On 25 June 2012, when we remanded this case, the appellant had already been released from confinement. Thus, his incarceration was not lengthened by the delay. Likewise, because the appellant completed his sentence long before his case ever reached this court, we find that his concern and anxiety while awaiting our decision was already minimized. Finally, the appellant has not shown how he would be denied the opportunity to present a defense at any subsequent rehearing. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

The appellant also argues, pursuant to *Tardif*, that the post-trial processing time in his case is sufficiently long to require relief absent a showing of prejudice. In *Tardif*, our superior court determined that Article 66(c), UCMJ, 10 U.S.C. § 866(c), empowered the service courts to grant sentence relief for excessive post-trial delay without showing actual prejudice as is required by Article 59(a), UCMJ, 10 U.S.C. § 859(a). *Tardif*, 57 M.J. at 225. Having reviewed the legislative and judicial history of both Articles, the Court concluded that the power and duty to determine "sentence appropriateness" under Article 66(c) is distinct from and broader than that of determining "sentence legality" under Article 59(a):

> Article 59(a) constrains the authority to reverse "on the ground of an error of law." Article 66(c) is a broader, three-pronged constraint on the court's authority to affirm. Before it may affirm, the court must be satisfied that the findings and sentence are (1) "correct in law," and (2) "correct in fact." Even if these first two prongs are satisfied, the court may affirm only so much of the findings and sentence as it "determines, on the basis of the entire record, should be approved."

Id. at 224 (citing *United States v. Powell*, 49 M.J. 460, 464-65 (CAAF 1998)). The Court remanded the case to the lower court to determine whether relief was warranted for excessive post-trial delay notwithstanding the absence of prejudice: "[A]ppellate courts are not limited to either tolerating the intolerable or giving an appellant a windfall. The

Courts of Criminal Appeals have authority under Article 66(c)…to tailor an appropriate remedy [for post-trial delay], if any is warranted, to the circumstances of the case." *Id.* at 225; *see also United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955) (holding the service courts have the power to, "in the interests of justice, substantially lessen the rigors of a legal sentence.").

In *United States v. Brown*, 62 M.J. 602 (N.M. Ct. Crim. App. 2005), our Navy and Marine Court colleagues identified a "non-exhaustive" list of factors to consider in evaluating whether Article 66(c) relief should be granted for post-trial delay. Among the non-prejudicial factors are the length and reasons for the delay; the length and complexity of the record; the offenses involved; and the evidence of bad faith or gross indifference in the post-trial process. *Id.* at 607. Finding gross negligence in a delay of almost 30 months from adjournment of trial until receipt of the record for review, the court disapproved the adjudged bad-conduct discharge.

Here, the appellant does not articulate any specific prejudice, but argues that the Court should set aside the findings, or reassess the sentence to set aside the bad-conduct discharge because of "presumptive unreasonable delay." We agree that reassessment is justified. The post-trial processing in this case hit an initial speed bump with the 47 day delay from action to docketing with this Court. Once docketed, it appears the case moved smartly through the appellant process until 25 June 2012, when we remanded the case back to the convening authority for a corrected action. Nothing happened on the case again until 24 April 2013, when we issued a second order remanding the case for a corrected action. We find this puzzling, and are unable to find anything in the record to adequately explain the 10 month gap between our first and second remand orders. Without an adequate explanation for this lengthy delay, we are concerned that the processing of the appellant's case broke down at some point along the way.

Therefore, the unique facts of this case are sufficient for us to tailor appropriate sentence relief for the appellant. Although the appellant's sentence is within legal limits and no error prejudicial to the appellant's substantial rights occurred during the sentencing proceedings, we nonetheless find that a lesser sentence of a bad-conduct discharge, confinement for 180 days, forfeiture of $700.00 pay per month for 8 months, and reduction to E-1 should be affirmed.

Conclusion

The findings and the sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c). However, we affirm only so much of the sentence as includes a bad-conduct discharge, confinement for 180 days, forfeiture of $700.00 pay per month for 8 months, and reduction to E-1.

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

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court