UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic MATTHEW P. CLAYTON
United States Air Force

ACM S31297

28 July 2008

Sentence adjudged 18 December 2006 by SPCM convened at Altus Air Force Base, Oklahoma. Military Judge: William M. Burd (sitting alone).

Approved sentence: Bad-conduct discharge, forfeiture of $849.00 pay per month for 4 months and a reprimand.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Imelda L. Paredes, and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Roberto Ramirez.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

A military judge sitting as a special court-martial convicted the appellant, in accordance with the appellant's pleas, of one specification of being absent without leave and one specification of wrongful use of marijuana on divers occasions, in violation of Articles 86 and 112a, UCMJ, 10 U.S.C. §§ 886 and 912. The military judge sentenced the appellant to a bad-conduct discharge, four months confinement, forfeitures of $849 pay per month for four months, and a reprimand. The convening authority approved the findings and, pursuant to a pretrial agreement, approved the bad-conduct discharge, the forfeitures, and the reprimand.

On appeal the appellant asks the court to set aside his bad-conduct discharge because of the following assertions of error: (1) there is no addendum to the Staff Judge Advocate's Recommendation (SJAR) and there is no way to know if the convening authority received or considered all of the appellant's clemency; and (2) the appellant was subjected to an unreasonable post-trial delay when the record of trial was not docketed by this court within 30 days of the convening authority's action. Finding no error, we affirm.

Background

On 18 December 2006, a military judge sitting as a special court-martial convicted and sentenced the appellant. On 21 February 2007, the appellant, through his defense counsel, submitted his clemency request to the convening authority. On 22 February 2007, the convening authority took action on the appellant's case. The record of trial does not contain an addendum to the SJAR. The appellant's record of trial was docketed by this court on 8 May 2007—75 days after the convening authority took action on this case.

Discussion

Missing Staff Judge Advocate Recommendation Addendum

We review post-trial processing issues de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000)). This is yet another case, in a long line of cases dating back to 1990, that requires us to discuss the application of *United States v. Craig*, 28 M.J. 321 (C.M.A. 1989). Prior to taking final action, the convening authority must consider clemency matters submitted by the accused. *Id.* at 324-25 and Rule for Courts-Martial (R.C.M.) 1107(b)(3)(A)(iii).

The preferred method of documenting a convening authority's review of clemency submissions is completion of an addendum to the SJAR. *United States v. Godreau,* 31 M.J. 809, 811 (A.F.C.M.R. 1990). The addendum should: (1) inform the convening authority that the accused has submitted matters and they are attached to the addendum; (2) inform the convening authority that he must consider the matters submitted by the accused before taking action on the case; and (3) list as attachments matters submitted by the accused. *Id.* (citing *United States v. Foy*, 30 M.J. 664, 665 (A.F.C.M.R. 1990)). While such an addendum is not required, in its absence the court "must have some reliable means of verifying that the convening authority actually considered the appellant's submissions." *Id.* (citing *Craig*, 28 M.J. at 325).

In response to appellate defense counsel's brief on this issue, appellate government counsel submitted an affidavit which has as its attachment a memorandum from the convening authority. The convening authority's memorandum specifically highlights he considered the appellant's clemency submissions and the matters required to be

considered under R.C.M. 1107(b) (3) (A). This affidavit and its accompanying memorandum is an approved method to demonstrate compliance with R.C.M. 1107 and we find that the convening authority received and considered the appellant's clemency submissions prior to taking action on the appellant's case.* *Godreau*, 31 M.J. at 812.

Post-Trial Delay

We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citing *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) and *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003)). In conducting this review we follow our superior court's guidance in using 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 (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)) and *United States v. Toohey*, 60 M.J. 100, 102 (C.A.A.F. 2004).

In determining prejudice, this court looks to three interests for prompt appeals: (1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired. *Moreno*, 63 M.J. at 138-39 (internal citations omitted).

The first sub-factor (oppressive incarceration pending appeal) is related to the success or failure of an appellant's substantive appeal. If the substantive grounds for the appeal are not meritorious, an appellant is in no worse position due to the delay, even though it may have been excessive. Conversely, if an appellant's substantive appeal is meritorious and the appellant has been incarcerated during the appeal period, the incarceration may have been oppressive. *Moreno*, 63 M.J. at 139 (internal citations omitted).

The second sub-factor (anxiety and concerns) involves constitutionally cognizable anxiety that arises from excessive delay. To meet this sub-factor an appellant will be required to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision. *Moreno*, 63 M.J. at 139-140 (internal citations omitted). The last sub-factor (impairment of ability to present a defense at a rehearing) is related to whether an appellant has been successful on a substantive issue of the appeal and whether a rehearing has been authorized. *Moreno*, 63 M.J. at 140-41 (internal citations omitted). If an appellant does not have a meritorious

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* To avoid these errors in the future, staff judge advocates are strongly advised to follow the guidance in *United States v. Godreau*, 31 M.J. 809 (A.F.C.M.R. 1990) and *United States v. Foy*, 30 M.J. 664 (A.F.C.M.R. 1990).

appeal, there will be no prejudice arising from a rehearing; conversely, if an appellant has a meritorious appeal and a rehearing is authorized, the appellate delay encountered by the appellant may have a negative impact on his ability to prepare and present his defense at the rehearing. *Id.*

For courts-martial completed after 11 June 2006, we apply a presumption of unreasonable delay where the record of trial is not docketed to this court within 30 days of the convening authority's action. *Moreno*, 63 M.J. at 142. Once this due process analysis is triggered by a facially unreasonable delay, we analyze each factor and make a determination as to whether that factor favors the government or the appellant. *Id.* at 136 (citing *Rheuark v. Shaw*, 628 F.2d 297, 303 (5th Cir. 1980)).

We then balance our analysis of the factors to determine whether there has been a due process violation. *Moreno*, 63 M.J. at 136 (citing *Barker*, 407 U.S. at 533). No one single factor is required to find that a post-trial delay constitutes a due process violation; nor will the absence of a given factor prevent such a finding. *Id.* Having enunciated the "post-trial delay" test, we now apply the test to the case *sub judice*. The first three *Barker* factors cause little pause.

The appellant's record of trial was docketed with this court 75 days after the convening authority took action and thus there is a presumption that the delay was unreasonable. *Moreno*, 63 M.J. at 142. The government offers no evidence to rebut this presumption nor any explanation for the delay. Accordingly, *Barker* factors one and two favor the appellant. With respect to *Barker* factor three, we note the appellant did not object to any delay or assert his right to a timely review and appeal prior to his case arriving at this court. However, an appellant's failure to object or assert his rights does not waive his right to a speedy trial. *Moreno*, 63 M.J. at 138 (citing *Barker*, 407 U.S. at 528). Moreover, the onus is on the government, not the appellant, to ensure the appellant's record of trial is transmitted to this court within 30 days after the convening authority's action. The government, without explanation, failed to ensure a timely transmission of the record of trial to this court. Given the appellant waited until this appeal to object or assert his right to a speedy trial, *Barker's* third factor weighs *slightly* in favor of the government.

With respect to prejudice we make the following observations: (1) there has not been nor will there be any oppressive incarceration pending appeal because the appellant's approved sentence did not include confinement; (2) the appellant has failed to meet his burden of showing particularized anxiety or concern; and (3) there is little possibility that the appellant's ability to present a defense at a rehearing will be impaired because the appellant has not been successful on a substantive issue on this appeal and is not entitled to a rehearing. Simply stated, we find no prejudice and find that the last *Barker* factor favors the government.

Having determined that factors one and two favor the appellant and factors three and four favor the government, we now balance the factors to determine whether the appellant was denied due process. In reaching our decision today, it is important to note that we engaged in a qualitative rather than a quantitative analysis. While there was a sufficient delay to create a rebuttable presumption of an unreasonable delay, the delay was not lengthy or extraordinary. In fact, on balance, we find the delay meets the bare minimum needed to trigger judicial examination of this claim. *See Barker*, 407 U.S. at 533-34.

The appellant experienced no prejudice from the delay. In the final analysis, there was a short, unexplained delay in the post-trial processing of the appellant's case. This delay caused no prejudice to the appellant and hardly crosses into the threshold of a due process violation.

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); *United States v. Reed,* 54 M.J. at 41. Accordingly, the findings and the sentence are

AFFIRMED.

OFFICIAL

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