UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JAMES A. DEMOREST
United States Air Force

ACM S31060

5 October 2007

Sentence adjudged 9 January 2006 by SPCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: James B. Roan (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Major Kimani R. Eason.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

OPINION OF THE COURT

HEIMANN, Judge:

Consistent with his plea, the appellant was convicted in a special court-martial of a single specification of divers use of cocaine in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The military judge sentenced him to a bad-conduct discharge, confinement for 4 months, and reduction to E-1. The convening authority approved the sentence as adjudged.

On appeal the appellant asserts two errors. Both allege post-trial processing error. In the first the appellant requests this Court to order new post-trial processing, because the record does not establish that the convening authority received or considered all of the

appellant's clemency matters submitted pursuant to Rule for Courts-Martial (R.C.M.) 1105. *See* R.C.M. 1107(b)(3)(A)(iii). The second is that the appellant was denied due process of law because of delays, by this Court, in the processing of his case. We have reviewed the record of trial, the assignment of errors alleged, and the government's response.

Convening Authority's Review of Clemency Submission

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, 65 (C.A.A.F. 2000)). Prior to taking final action, the convening authority must consider matters submitted by the accused under R.C.M. 1105. R.C.M. 1107(b)(3)(A)(iii); *United States v. Craig*, 28 M.J. 321, 324-25 (C.M.A. 1989).

In this case the staff judge advocate (SJA) did not prepare an addendum to his recommendation advising the convening authority that he must consider all matters submitted by the appellant. *See United States v. Foy*, 30 M.J. 664 (A.F.C.M.R. 1990). The lack of an addendum could have been alleviated if the convening authority had initialed each page of the defense's submission; in this case, however, he only initialed the cover page. Subsequent to the appellant's allegations of error, the government obtained an affidavit from the SJA to the convening authority indicating that he had verbally briefed the convening authority in person regarding the convening authority's obligation to consider all the defense's clemency matters. The SJA's affidavit also provided examples of specific facts regarding the accused's submission that he discussed with the convening authority. Considering the specificity of the affidavit, coupled with the convening authority's initials on the cover page of the defense's submission, we find as a matter of fact that the convening authority properly considered all the defense's submissions. *See United States v. Crawford*, 34 M.J. 758 (A.F.C.M.R. 1992).

Denial of Post-Trial Due Process

In the second assignment of error the appellant alleges he was denied due process in the post-trial processing of his case. Specifically, the appellant alleges that his counsel's failure to submit a brief before this Court, in over 11 months, due to his appellate defense counsel's workload and inadequate manning of the appellate defense division "must be held against the government, not [a]ppellant."

The standard of review for determining due process on speedy post-trial processing is de novo. *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003). In conducting post-trial processing review, our superior court has adopted the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), which include: "(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

(C.A.A.F. 2006). The Court of Appeals for the Armed Forces has also indicated that "[w]here we can determine that any violation of the due process right to speedy post-trial review and appeal is harmless beyond a reasonable doubt, we need not undertake the four-factor *Barker* analysis prior to disposing of that post-trial or appellate delay issue." *United States v. Osheskie*, 63 M.J. 432, 437 (C.A.A.F. 2006); *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006).

In the case, sub judice, the government demonstrated exceptional skill in having this case docketed before this Court a mere 44 days after the court-martial. The court-martial occurred on 9 January 2006. The convening authority took action on 3 February 2006. The case was docketed with this Court on 22 February 2006. After this Court granted the appellant eight enlargements of time, this Court denied the ninth request by an order dated 31 January 2007. The appellant submitted his assignment of errors with this Court on 5 February 2007. After requesting and receiving three enlargements of time,[1] the government submitted its answer to the assignment of errors on 4 June 2007.

While it has taken over eighteen months for this Court to act on the appellant's case,[2] initial appellate review was still completed more than four months shy of two years. In addition, we find it significant that the issues before this Court were joined for four months. Clearly when the processing times are considered as a whole the "government" has met its constitutional due process obligations in this case. We believe this is particularly true when well-over half of the post-trial processing time alleged by the appellant to be a violation of his due process rights is directly attributable to appellate defense counsel's requests for delay.[3] We acknowledge there is a point at which continued defense delays are contrary to the statutory mandate of Article 66, UCMJ, 10 U.S.C. § 866 and the Due Process Clause of the Fifth Amendment to the Constitution. This point was reached when this Court denied any further delays on 31 January 2007.

In addition, to the processing factors, we also looked at the appellant's claims of prejudice to determine if any error would be harmless beyond a reasonable doubt. In this case the appellant argues the length of the delay prevented him from applying for unemployment and caused "great anxiety" he may have to return to confinement if he gets into further trouble. These claims simply do not amount to a showing of a "particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Moreno*, 63 M.J. at 140. His "great anxiety" over potentially getting in trouble and thus having to return to

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[1] None of which were opposed by the appellant.

[2] While under the *Moreno* standard, any delay at this Court beyond eighteen months would be "facially unreasonable," this case arises before the imposition of that standard and thus our analysis is limited to a constitutional due process review. *See Moreno*, 63 M.J. at 142.

[3] The appellate defense counsel had control of the appellant's case from 22 February 2006 until 5 February 2007, nearly eleven and a half months. Appellate government had control over this case from 5 February 2007 until 4 June 2007, nearly four months. This Court had control of the appellant's case from 4 June 2007 until the date of this opinion.

confinement, when he has served his entire four-month sentence, is simply unreasonable anxiety. Further, a complaint that the delay has prevented him from paying bills because of a lack of unemployment benefits, regardless of eligibility, simply is not the type of distinguishable prejudice warranting relief. Thus we conclude that even if we assumed error, it is harmless beyond a reasonable doubt and no relief is warranted.

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). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court