UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman THOMAS D. GARNER JR.
United States Air Force

ACM 36675

7 May 2007

Sentence adjudged 24 August 2005 by GCM convened at Robins Air Force Base, Georgia. Military Judge: Donald A. Plude.

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Major Anniece Barber, Captain Christopher L. Ferretti, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, and Major Kimani R. Eason.

Before

BROWN, FRANCIS, and BECHTOLD
Appellate Military Judges

PER CURIAM:

The appellant was convicted, contrary to his pleas, of two specifications of simple assault with an unloaded firearm, one specification of unlawful entry, and one specification of disorderly conduct, in violation of Articles 128 and 134, UCMJ, 10 U.S.C. §§ 928, 934. He was sentenced by officer members to a bad-conduct discharge, confinement for 3 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved that portion of the adjudged sentence consisting of a bad-conduct discharge, confinement for 3 months, and reduction to the grade of E-1.

The appellant does not challenge the findings of his court-martial, and we find them correct in both law and fact. *See* Article 66(c), UCM.J, 10 U.S.C. § 866(c); *United*

States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000). Instead, the appellant asserts he was denied his due process right to timely appellate review. We disagree.

Background

The appellant was tried on 22-24 August 2005. The convening authority did not take action until 17 March 2006 -- 205 days after trial. The majority of this time was attributable to completion and correction of the record of trial. The transcription was completed[*] and sent to trial counsel for review on 19 October 2005, 56 days after trial. The trial counsel's review took 62 days. The defense counsel was also allowed 30 days to review the record. The military judge authenticated the record in 15 days. Including time for incorporating counsel edits and assembly of the record, 181 days had elapsed before authentication on 21 February 2006. The staff judge advocate's recommendation (SJAR) was completed on 28 February 2006. The trial defense counsel submitted the appellant's clemency request on 12 March 2006. The staff judge advocate (SJA) completed the addendum to the SJAR on the same day. The action was signed five days later.

In his clemency request, the appellant stated that he had been waiting nearly seven months and had, therefore, been subjected to "waiting and experiencing uncertainty for much longer than normal." In the defense counsel's letter in support of clemency, she also mentions the delay in post-trial processing. She notes that the delay may "create appellate issues in the future." She then points out that disapproval of the bad-conduct discharge would result in no review by criminal appellate courts. Accordingly, the requested clemency would "ensure that there is essentially no potential for future appellate proceedings." In his addendum, the SJA's response to the issue of post-trial delay was to recommend that the convening authority not approve the adjudged forfeitures. The convening authority granted the clemency recommended by the SJA.

On appeal, the appellant now contends that the 205 days to action, the 20 days from action to docketing, and the additional 220 days for appellate defense to file a brief have denied him due process. Specifically, the appellant contends that he is prejudiced because he has "suffered particularized anxiety related to the timeliness of his appeal."

Discussion

The standard of review for determining due process on speedy post-trial processing is de novo. *United States v. Rodriguez,* 60 M.J. 239, 246 (C.A.A.F. 2004), *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003). A facially unreasonable delay in post-trial processing triggers a due process analysis. In conducting this review, our superior court has adopted the four factors set forth in *Barker v. Wingo*, 407 U.S. 514,

[*] The court reporter was assisted in the transcription of the tapes by another court reporter.

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 (C.A.A.F. 2006).

In the case *sub judice*, the passage of 205 days to action is facially unreasonable. Accordingly, the delays must be explained. A review of the chronology and the 455-page, three-inch thick record of trial demonstrate that the 205 days to action is explainable; however, we are concerned that it took the trial counsel two months to review the record. While recognizing the importance of the trial counsel's duty to ensure accuracy under Rule for Court-Martial (R.C.M.) 1103(i)(1)(A), that duty should normally not take 60 days. Likewise, the 30 days taken by the trial defense counsel to review the record appears unusually long. We are not, however, prepared to find that it constitutes an unreasonable delay as contemplated by R.C.M. 1103(i)(1)(B), nor was the government derelict in its post-trial processing responsibilities by providing trial defense counsel this extended opportunity to thoroughly review the record. There do not appear to be any inordinate delays in the rest of the processing prior to action. Although we are not convinced the delays in post-trial processing prior to action are unreasonable, we will assume *arguendo* that the appellant has satisfied this prong of the *Barker* test.

The third prong of the *Barker* test is readily met in this case. During the clemency process, both the appellant and his counsel highlighted the delay. The remaining issue is whether the appellant has been prejudiced.

The appellant has not provided anything that demonstrates he has suffered any particularized anxiety or concern that "is distinguish[able] from the normal anxiety experienced by prisoners awaiting an appellate decision." *Moreno,* 63 M.J. at 139-40. Additionally, although the time to action exceeded the 120 days envisioned by *Moreno*, the time to docketing and the time to final review is well shy of the 30 days and 18 months, respectively, also envisioned by *Moreno*. While this case predates *Moreno* and is, therefore, not subject to the presumptions established therein, those standards provide useful guideposts in reviewing pre-*Moreno* cases. *Moreno* ultimately contemplates final review in less than two years. This appellant will have final disposition well within that time frame. Given that this case has not been unduly delayed throughout the entire post-trial and appellate process and that the appellant has provided nothing to indicate a particularized anxiety, we find no merit to the allegation of error.

We have also considered the entire record, including post-trial delay, in determining the appropriateness of the appellant's sentence. Keeping in mind our authority to grant relief under Article 66(c), UCMJ, as outlined in *United States v. Toohey,* 63 M.J. 353, 362-63 (C.A.A.F. 2006) and *United States v. Tardif*, 57 M.J. 219, 220 (C.A.A.F. 2002), we do not find that relief is warranted. We find the appellant's sentence to be appropriate for the appellant and his crimes. *United States v. Peoples,* 29

M.J. 426, 427-28 (C.M.A. 1990); *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982).

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

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator