UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant LAWRENCE E. JOSEY
United States Air Force

ACM 33745 (f rev)

23 March 2004

Sentence adjudged 5 November 1998 by GCM convened at Los Angeles Air Force Base, California. Military Judge: Howard P. Sweeney.

Approved sentence: Forfeiture of $600.00 pay per month for 4 months and reduction to E-6.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, Lieutenant Colonel Lance B. Sigmon, Major Shannon J. Kennedy, and Major Thomas Taylor.

Before

STONE, MOODY, and JOHNSON-WRIGHT
Appellate Military Judges

OPINION OF THE COURT

STONE, Senior Judge:

This case is before this Court for the third time.[1] In our first review, we set aside two specifications involving use of cocaine, but otherwise affirmed the findings. As a result, we returned the case to the convening authority for a determination of whether it was practicable to retry the appellant on these drug offenses. If not practicable, the convening authority was authorized to reassess the sentence, which then consisted of confinement for 6 years, forfeitures of all pay and allowances, and reduction to the grade of E-1. The convening authority elected to reassess the sentence and reduced it to forfeiture of $600.00 pay per month for 4 months and reduction to the grade of E-6.

[1] See *United States v. Josey*, 58 M.J. 105 (C.A.A.F. 2003) for the full procedural history of this case.

Unfortunately, in doing so, the convening authority's action created an ambiguity as to how he wished to apply credit for the 30 months and 25 days the appellant had spent in confinement. Our superior court stated, "In the context of this case, the action of the convening authority is ambiguous. It is not clear whether the convening authority intended for the credit to be applied as a matter of law against the forfeitures, or whether he also intended to provide credit against the reduction as a matter of command prerogative." *United States v. Josey*, 58 M.J. 105, 108-09 (C.A.A.F. 2003).

As a result of this ambiguity, on 19 February 2003, our superior court set aside the action of the convening authority and remanded the case for a new post-trial action.[2] On 25 November 2003, the same convening authority took action and once again approved forfeitures of $600.00 pay per month for 4 months and reduction to the grade of E-6. He applied confinement credit only to the forfeitures. On 29 January 2004, the record of trial was returned to this Court. On 3 February 2004, the appellant filed a brief assigning a single error as follows:

> WHETHER APPELLANT IS ENTITLED TO CREDIT AGAINST HIS REDUCTION IN RANK DUE TO AN UNEXPLAINED AND UNREASONABLE 344-DAY DELAY IN HIS POST-TRIAL PROCESSING.

We have carefully examined the circumstances surrounding this latest post-trial review, and despite the dilatory post-trial processing in this case, do not grant relief.

Discussion

The following chronology details the post-trial processing of the appellant's case:

DATE	**EVENT**	**DAYS ELAPSED**
19 February 2003	The Court of Appeals for the Armed Forces (CAAF) set aside	0
21 March 2003	CAAF mandate issued	30
24 March 2003	The Military Justice Division of the Air Force Legal Services Agency (JAJM) sends record of trial to the convening authority with a suspense of 30 May 2003	33

[2] Our superior court also found it was not clear whether the convening properly reassessed the sentence in accordance with the requirements of *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) and *United States v. Reed*, 33 M.J. 98 (C.M.A. 1991). The appellant has not raised any concern with regard to this issue in his latest assignment of errors. We nonetheless find that the convening authority has complied with the requirements of *Sales* and *Reed.*

27 May 2003	Appellate defense counsel contacts legal office by email asking for a status update	97
9 June 2003	Appellate defense counsel again contacts legal office by email	110
7 October 2003	Staff judge advocate's recommendation (SJAR) completed	230
8 October 2003	Defense counsel served with SJAR	231
22 October 2003	Appellant served with SJAR	245
27 October 2003	Defense request for delay	250
3 November 2003	Clemency submitted	257
21 November 2003	Addendum to SJAR prepared	275
25 November 2003	Action taken	279
29 January 2004	Record returned to A.F. Ct. Crim. Appeals	344

Appellate defense counsel has not alleged, and we do not find, real harm or legal prejudice to the appellant from the slow post-trial processing in this case. He was under no restraint and, in fact, retired in the grade of E-6 on 30 April 2003. We are nonetheless mindful of our authority under Article 66(c), UCMJ, 10 U.S.C. § 866(c), to grant sentence relief for excessive post-trial delay, even in the absence of actual prejudice suffered by the appellant. *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). Under our broad discretion to determine sentence appropriateness and "do justice," we can grant whatever relief is deemed appropriate under the circumstances. *Id.* at 223. *See also United States v. Collazo*, 53 M.J. 721 (Army Ct. Crim. App. 2000), *pet. denied*, 55 M.J. 237 (C.A.A.F. 2001).

Despite the lack of specific prejudice, the appellant emphasizes that the delays in this case were inordinate, especially in view of the appellate defense counsel's efforts to contact the base legal office on two occasions to learn about the status of the post-trial processing. We note as a preliminary matter, that JAJM had established a 30 May 2003 deadline for completion of the new action. A few days before this deadline was to expire, appellate defense counsel sent an email to a technical sergeant assigned to the legal office. The email from appellate defense counsel stated, "I represent Sgt Josey on appeal and am following up on the status of his new post-trial processing. He has not yet been contacted by anyone. Please let me know if you need the contact information for him."

After getting no response from the technical sergeant, appellate defense counsel followed up 13 days later by sending an email to a master sergeant in the office, stating "I am again writing to inquire on the status of the *Josey* case (the new post-trial processing) since I have not heard back from you since the last e-mail I sent on 27 May 2003. Do you know the status? If not, could you refer me to the appropriate person to speak with?" The master sergeant forwarded the email to a lieutenant colonel assigned to

the legal office who immediately responded and advised the appellate defense counsel that the "new action is being drafted now." Unfortunately, it took the legal office another 120 days to complete the SJAR.

As indicated by our superior court in *Tardif*, an appellant has several remedies to pursue prior to asking this Court to exercise its broad discretion in the area of determining sentence appropriateness:

> Defense counsel can protect the interests of the accused through complaints to the military judge before authentication or to the convening authority after authentication and before action. After the convening authority's action, extraordinary writs may be appropriate in some circumstances. Appellate relief under Article 66(c) should be viewed as the last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review.

Id. at 225. Citing this portion of the *Tardif* opinion, the Army Court of Criminal Appeals recently held that failure to make a timely objection to dilatory post-trial processing constitutes waiver of any right to claim a sentence reduction. *United States v. Bodkins*, 59 M.J. 634, 637 (Army Ct. Crim. App. 2003).

While we commend the appellate defense counsel for monitoring the progression of post-trial processing on the new action, the initial inquiry in late May coincided with the JAJM deadline when post-trial processing could not reasonably have been perceived as excessively delayed. Moreover, given the language of the email message, it does not leave the impression it is a "complaint" about the slowness of the post-trial process or express any urgency--either explicitly or implicitly. Additionally, there was no follow-up whatsoever with the staff judge advocate or convening authority as time progressed.

In any event, we do not need to decide whether there was waiver in this case. Although unacceptably dilatory, the legal office moved forward at regular intervals after the JAJM suspense passed and appellate defense counsel had made inquiries. Under the totality of the circumstances, the delay was not so egregious so as to render the appellant's otherwise appropriate sentence inappropriate. *Cf. United States v. Garman*, 59 M.J. 677, 683 (Army Ct. Crim. App. 2003) (appendix lists 74 reported and unreported cases considering the issue of post-trial delay, two involving Air Force service members), *pet. denied*, No. 04-0251/AR (10 Mar 04).

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

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator