**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Staff Sergeant BRENTON MCDANIEL**
**United States Air Force**

**ACM 36649 (f rev)**

**30 March 2009**

Sentence adjudged 10 January 2006 by GCM convened at Eglin Air Force Base, Florida. Military Judge: Dawn Eflein (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 8 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major John N. Page III.

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

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

UPON FURTHER REVIEW



PER CURIAM:

This case is before our Court for further review because the original Action was set aside. *United States v. McDaniel*, ACM 36649 (A.F. Ct. Crim. App. 31 Aug 2007) (unpub. op.). This Court returned the case to The Judge Advocate General for remand to the convening authority for a new Action because the staff judge advocate's (SJA's) advice was defective in that it did not provide the convening authority with the advice contemplated by *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002). Namely, the SJA's advice was defective with regard to the deferment of forfeitures and the impact of adjudged forfeitures on the waiver of mandatory forfeitures. On 25 February 2008, the

convening authority completed a new Action to comply with our holding. On 13 March 2009, this case came before this Court for further review with no additional assignments of error.

*Post-Trial Delay*

An issue not raised on appeal is the post-trial delay in processing the appellant's case. In examining this issue we follow our superior court's guidance in using the four factors enunciated in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). Those factors are: (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) (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *United States v. Toohey*, 60 M.J. 100, 102 (C.A.A.F. 2004)).

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. In this case, an overall delay of 382 days between the convening authority's new action and the docketing of this case with this Court is facially unreasonable.[1] A facially unreasonable delay would ordinarily trigger an analysis to determine if the appellant's due process rights have been violated.[2] However, when we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we need not engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. Having considered the totality of the circumstances and 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 and that no relief is warranted.

*Conclusion*

Having previously held the findings to be correct in law and fact, we hold the sentence to also be 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. 37, 41 (C.A.A.F. 2000).

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[1] A representative from the base legal office asserts they misfiled the record of trial after the convening authority took new action and rediscovered the record of trial during an annual review of their file plan.

[2] In conducting the analysis "[w]e usually analyze each factor and make a determination as to whether that factor favors the government or the appellant." *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2006) (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." *Id.* (citing *Barker v. Wingo*, 407 U.S. 514, 533 (1972)).

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL


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