**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)**

**16 March 2010**

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, Major Shannon A. Bennett, Major John N. Page III, and Major Tiffany M. Wagner.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Lieutenant Colonel Matthew S. Ward, Major Kimani R. Eason, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

UPON FURTHER REVIEW



JACKSON, Senior Judge:

In accordance with his pleas, a military judge sitting as a general court-martial convicted the appellant of two specifications of selling military property without authority, one specification of disposing of military property without authority, one specification of attempting to sell military property without authority, two specifications

of stealing military property, and one specification of wrongfully appropriating military property, in violation of Articles 108 and 121, UCMJ, 10 U.S.C. §§ 908, 921. The military judge sentenced the appellant to a bad-conduct discharge, eight months of confinement, forfeiture of $640 pay per month for eight months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged, deferred the reduction in grade until action, and waived automatic forfeitures for the benefit of the appellant's spouse and his dependent child from a previous marriage.

This case is once again before us on further review. On 31 August 2007, this Court set aside the convening authority's action and returned the record to The Judge Advocate General for remand to the convening authority for post-trial processing for failing to address the appellant's request to defer the adjudged forfeitures, consistent with *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002). *United States v. McDaniel*, ACM 36649 (A.F. Ct. Crim. App. 31 Aug 2007) (unpub. op.).

On 25 February 2008, 178 days after this Court's remand, the convening authority accomplished a new action approving the bad-conduct discharge, eight months of confinement, and reduction to the grade of E-1 but disapproving the adjudged forfeiture of pay. On 13 March 2009, 382 days after the convening authority's new action, this Court received the record of trial. A memorandum from the Military Justice Division of the Air Force Legal Operations Agency indicates personnel with the Eglin Air Force Base legal office inadvertently filed the record of trial and rediscovered the record of trial during an annual review.

On 30 March 2009, this Court affirmed the findings and the sentence. *United States v. McDaniel*, ACM 36649 (f rev) (A.F. Ct. Crim. App. 30 Mar 2009) (unpub. op.). On 29 May 2009, the appellant timely appealed to our superior court and on 8 October 2009, our superior court set aside this Court's decision and returned the record of trial to The Judge Advocate General for remand to this Court for a new review under Article 66, UCMJ, 10 U.S.C. § 866, with assistance of counsel under Article 70, UCMJ, 10 U.S.C. § 870. *United States v. McDaniel*, No. 09-0642/AF (C.A.A.F. 8 Oct 2009).

On appeal, the appellant asks this Court to provide him with meaningful relief because his due process right to timely post-trial processing was violated when the government took an unreasonable 560 days to return the record of trial to this Court after we remanded his case to the convening authority for a new action. Finding no prejudicial error, we affirm.

*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);

*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); *Toohey v. United States*, 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 while 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." *Id.* 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." *Id.* at 139. Conversely, if an appellant has been incarcerated during the appeal period and his substantive appeal is, in fact, meritorious, then the incarceration may have been oppressive. *Id.*

The second sub-factor, anxiety and concerns, "involves constitutionally cognizable anxiety that arises from excessive delay." *Id.* To meet this sub-factor, an appellant will be required to show "particularized anxiety" that is distinguishable from the normal anxiety experienced by prisoners awaiting their appellate decisions. *Id.* at 139-40.

The last sub-factor, impairment of an appellant's 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. If an appellant does not have a meritorious appeal, there obviously will be no prejudice arising from a rehearing." *Id.* at 140. 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 if the case is not docketed with this Court within 30 days of the convening authority's action. *Id.* at 142. When this due process analysis is triggered by a facially unreasonable delay, we analyze each factor and make a determination as to whether the 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. *Id.* (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.*

(citing *Barker*, 407 U.S. at 533). Having enunciated the "post-trial delay" test, we now apply this test to the case sub judice.

The appellant's case was docketed with this Court 560 days after we remanded the case to the convening authority for a new action and 382 days after the convening authority took new action in this case. Thus, there is a presumption that the delay was unreasonable. *See id.* at 142. Moreover, the government, by its own admission, offers no reasonable explanation to rebut the presumption of unreasonableness. Docketing the appellant's case with this Court is essentially a clerical task, the delay of which is "'the least defensible of all' post-trial delays." *Id.* at 137 (quoting *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990)). In short, *Barker* factors one and two favor the appellant.

With respect to *Barker* factor three, we note that 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; yet, an appellant's failure to object or assert his rights does not waive his right to a speedy trial. *Id.* at 138 (citing *Barker*, 407 U.S. at 528). Moreover, the onus is on the government, not the appellant, to ensure that the appellant's record of trial is transmitted to this Court within 30 days after the convening authority's action. *Id.* The government has failed in this task. However, given that the appellant waited until this appeal to object or assert his right to a speedy trial, *Barker* factor three weighs *slightly* in favor of the government.

Concerning the issue of prejudice, we make the following observations: (1) there has been no oppressive incarceration pending appeal because the appellant's claims on appeal are without merit; thus, he is in no worse position due to the delay; (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 he is not entitled to a rehearing. The appellant has not suffered prejudice because of the delay and, thus, 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 qualitatively balance the factors to determine whether the appellant was denied due process. The fact that the appellant waited until this appeal to assert his speedy trial rights undermines his stated desire for a speedy trial. Additionally, the appellant experienced no prejudice from the delay. In the final analysis, the appellant suffered no due process violation.

Moreover, assuming, arguendo, that the appellant suffered a due process violation, he would still not be entitled to any relief. Article 66(c), UCMJ, provides that this Court "may affirm . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Our superior court has concluded that the courts of criminal appeals have the power to, "in the

interests of justice, substantially lessen the rigor of a legal sentence." *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955), *quoted in United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002).

Under our Article 66, UCMJ, authority to ensure an appropriate sentence, this Court is empowered to grant relief, *when warranted*, for excessive post-trial delay in processing an appellant's case. *Tardif*, 57 M.J. at 224-25. In exercising this power, this Court may fashion a remedy we believe appropriate to address "the harm suffered." *Id.* at 225 (quoting *United States v. Becker*, 53 M.J. 229, 232 (C.A.A.F. 2000)). To address his post-trial delay, the appellant asks this Court to "grant meaningful relief." We decline to do so. While there was a delay in the post-trial processing of the appellant's case, the requested relief would result in a windfall for the appellant—a windfall we are unwilling to provide. After reviewing the entire record, including the submission of counsel, we conclude that even if the appellant suffered a due process violation, the relief sought is not 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

CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court