UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant SHAMUSH P. MYERS
United States Air Force

ACM 35781 (f rev)

12 December 2008

Sentence adjudged 29 September 2003 by GCM convened at Kirtland Air Force Base, New Mexico. Military Judge: Nancy J. Paul (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 24 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett (argued), Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Jennifer K. Martwick.

Appellate Counsel for the United States: Captain G. Matt Osborn (argued), Colonel Gerald R. Bruce, Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, Lieutenant Colonel Matthew S. Ward, Major Jeremy S. Weber, and Major Amy E. Hutchens.

Before

WISE, HEIMANN, and HELGET
Appellate Military Judges

UPON FURTHER REVIEW

HELGET, Judge:

On 29 September 2003, at Kirtland Air Force Base (AFB), New Mexico, a general court-martial, consisting of a military judge sitting alone, convicted the appellant in accordance with his pleas of conspiracy, wrongful use of cocaine, theft of goods, and uttering worthless checks in violation of Articles 81, 112a, 121, and 123a, UCMJ, 10 U.S.C. § 881, 912a, 921, 923a. The military judge sentenced the appellant to a bad-

conduct discharge, confinement for 24 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. On 9 December 2003, the convening authority initially approved the findings and sentence as adjudged but suspended the adjudged forfeiture of all pay and allowances and deferred and waived the mandatory forfeitures, with the direction that the appellant's pay and allowances be sent to his wife and children.

This case is before this Court for a second time. When this case was initially before us, the appellant made only one claim of error. Specifically, the appellant claimed that the convening authority's Action was defective in that it did not reflect the convening authority's approval of the appellant's request for deferment of reduction in rank until action was taken on his case. We agreed and, on 31 August 2005, remanded the case for a new Action.[1]

On 28 August 2007, two years after our initial decision, the convening authority issued an amended Action which reflects the deferment of the reduction in rank. The case was then re-docketed with our Court on 2 April 2008. The appellant now raises a new issue. The appellant asserts that his due process right to timely post-trial processing was violated when the government took an unreasonable 946 days to return the record of trial to this Court after this Court ordered a corrected Action to properly reflect appellant's approved deferment of reduction in rank.

Background

Prior to the charged offenses, the appellant and his wife had a joint checking account with AlaskaUSA Federal Credit Union. The appellant and his wife separated in May 2002. In June 2002, the appellant met and hired Ms. SM as part of his off-duty employment at the Kirtland AFB Commissary. The appellant moved in with Ms. SM shortly after they met. In August 2002, the appellant's spouse closed the AlaskaUSA Federal Credit Union account. Although he knew the account was closed, in November 2002, the appellant started writing checks on the account, and he also allowed Ms. SM to write checks on the account using his name. Together, they wrote 56 bad checks, totaling $8,856. The object of their conspiracy was to obtain material items which Ms. SM could use to trade for crack cocaine. The appellant also had an account with USAA in which he wrote five bad checks, totaling $466.06. In January 2003, the appellant opened an account with Wells Fargo. He and Ms. SM wrote 17 checks on this account, totaling $1,656.24. The vast majority of the checks were unlawfully made to Wal-Mart, Dillards, Best Buy, and Toys R Us for the procurement of articles and things of value.

From 1 September 2002 to 22 May 2003, the appellant wrongfully used crack cocaine with Ms. SM on approximately five separate occasions. On 16 December 2002,

[1] This case was returned to The Judge Advocate General for remand to the convening authority for a corrected Action under Rules for Courts-Martial 1107(g).

the appellant was randomly selected to provide a urine sample which tested positive for cocaine. On 8 January 2003, following an interview with the Air Force Office of Special Investigations, the appellant consented to provide an urine sample which also tested positive for cocaine. Further, on 22 May 2003, the day the appellant was placed in pretrial confinement, the urine sample he provided again tested positive for cocaine.

During the announcement of the sentence, the military judge recommended that the convening authority defer and/or waive any adjudged or automatic forfeitures for the benefit of the appellant's estranged spouse and two dependent children. On 2 October 2003, the convening authority approved the appellant's request for deferment of forfeitures and reduction in rank until he took action in the case. On 9 December 2003, the convening authority approved the findings and sentence as adjudged except he suspended the forfeiture of all pay and allowances for six months, deferred all of the adjudged and mandatory forfeitures from 14 days after the sentence was adjudged until action on 9 December 2003, and waived all of the mandatory forfeitures for six months for the benefit of the appellant's spouse and children. As stated above, the convening authority's Action failed to include the deferral of appellant's reduction in rank.

After our initial decision, dated 31 August 2005, the case was returned to Kirtland AFB for an amended Action. On 24 March 2007, the Air Force Military Justice Division (JAJM) contacted the Military Justice section at Kirtland AFB and requested the status of the case. As stated above, the convening authority issued the amended Action on 28 August 2007 and this case was not re-docketed with our Court until 2 April 2008. The total amount of time that elapsed from the date of our initial decision to the date the case was re-docketed with our Court is 946 days.

Timely Post-Trial Processing

The appellant alleges that his due process right to timely post-trial processing was violated when the government took an unreasonable 946 days to return the record of trial to this Court. Due process entitles convicted service members to a timely review and appeal of court-martial convictions. *United States v. Toohey*, 60 M.J. 100, 101 (C.A.A.F. 2004). "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). In conducting this review, we examine 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.

Length of the Delay

Initially, unless the delay is facially unreasonable, the full due process analysis will not be triggered. *Toohey*, 60 M.J. at 102. We conduct a case-by-case analysis to

determine if a given delay is facially unreasonable. *Id.* at 103. In this case, we conclude that taking 946 days to return the record of trial to this Court after our initial decision is facially unreasonable and thus this factor weighs heavily in appellant's favor.

Reasons for the Delay

The reasons for the delay also weigh in the appellant's favor. "Here we look at each stage of the post-trial period, at the [g]overnment's responsibility for any delay and at any explanations for delay including those attributable to [the appellant]." *United States v. Toohey*, 63 M.J. 353, 359 (C.A.A.F. 2006). The government provides no justifiable explanation for the 946 days it took to re-docket this case with our Court. Accordingly, we find this *Barker* factor weighs heavily in favor of the appellant.

Appellant's Assertion of the Right to a Timely Review and Appeal

In this case, the appellant never specifically asserted his right to a timely review. However, in *Moreno,* our superior court gave little weight to an appellant's failure to make such a request because it is the government's obligation to ensure a timely review of his case, and it is not the appellant's responsibility to complain in order to receive timely convening authority action. *Moreno*, 63 M.J. at 138. Considering the delay in this case was beyond the appellant's control and the government was entirely responsible for the delay, we find this factor weighs in favor of the appellant.

Prejudice

The appellant asserts that he was prejudiced by the delay in that his rank was erroneously reduced retroactively in January 2004 after the convening authority initially took action on 9 December 2003. From September through December 2003, the appellant continued to receive his pay and allowances at the E-5 rate. In January 2004, the appellant's grade reduction to E-1 was applied retroactively to 13 October 2004, fourteen days after announcement of the sentence. This created a debt of $5,185.65. From March 2004 to June 2004, the Defense Financial Accounting Service (DFAS) applied a total of $2,611.76 against the debt from the money paid to the appellant's dependents pursuant to the convening authority's waiver of the automatic forfeitures. The waiver period ended on 8 June 2004 and the appellant was not entitled to any further pay and allowances. On 24 June 2004, the appellant's appellate defense counsel faxed a copy of the convening authority's 2 October 2003 memo approving the deferment of the reduction in rank to DFAS. In response, as reflected on the appellant's July Leave and Earnings Statement, DFAS made the appropriate corrections to the appellant's rank and pay, but applied the corrected amount against the appellant's monetary punishment

balance caused by his adjudged forfeitures. As a result, the appellant claims his family never received the full benefit of the convening authority's intended waiver.[2]

The framework for analyzing prejudice under this fourth factor considers three interests: "(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted 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 (quoting *Rheuark v. Shaw*, 628 F.2d 297, 303 n. 8 (5th Cir. 1980)).

The appellant has failed to show that any of the three interests apply in this case. The appellant's sentence included confinement for 24 months.[3] On 31 August 2005, when we remanded this case, the appellant had already been released from confinement. Therefore, his incarceration was not lengthened by the delay.

The anxiety and concern sub-factor "require[s] an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Id.* at 140. Although the appellant's pay and allowances were affected by the initial Action, dated 9 December 2003, DFAS was made aware of the error in June 2004 and had all of the information it needed to correct the error. The convening authority's amended Action, dated 28 August 2007, did not provide DFAS with any additional information it needed to correct the appellant's pay and, in fact, DFAS took no further action as a result of the amended Action. Accordingly, we find that the appellant suffered no particularized anxiety greater than the normal anxiety experienced by an appellant awaiting an appellate decision.

Finally, the appellant has not shown how the delay has limited in some way his grounds for appeal or impaired his defenses in case of reversal and retrial. Accordingly, this sub-factor is not present in this case.

We conclude that the appellant experienced no prejudice from oppressive incarceration, no particularized anxiety or concern awaiting the outcome of his appeal, and no impairment of his defense in that there will be no retrial. This prejudice factor therefore weighs against the appellant.

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[2] The government included in its response to the appellant's assignment of errors an affidavit from Staff Sergeant (SSgt) NW, a Financial Services Action Officer at Lackland Air Force Base, Texas, who conducted an audit of the appellant's military pay record. According to SSgt NW, the appellant's dependents were actually overpaid $2,663 during the waiver period.

[3] At trial, the appellant was also credited with 130 days of pretrial confinement.

Conclusion--Barker Factors

In *United States v. Toohey, 63 M.J. 353, 362 (C.A.A. F. 2006)*, our superior court held that "where there is no finding of *Barke*r prejudice, we will find a due process violation only when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohey,* 63 M.J. at 362.

The post-trial processing delay in this case was clearly egregious. Taking 727 days to complete an amended Action after this Court has remanded a case and then taking an additional 219 days to re-docket the case with our Court is definitely outrageous and cannot be tolerated. This case illustrates a complete collapse of the post-trial process.

Relief for the Due Process Violation

"Where we find constitutional error, we grant relief unless this [C]ourt is convinced beyond a reasonable doubt that the constitutional error is harmless." *Id.* at 363. Although the post-trial delay in this case was outrageous and the appellant has had to wait much longer than normal for appellate review of his case, the appellant has failed to present any substantial harm that was caused by the delay.[4] Considering the totality of the circumstances, we are confident that the delay has been harmless and no relief is appropriate.[5] *See United States v. Allende*, 66 M.J. 142, 145 (C.A.A.F. 2008).

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, 10 U.S.C. § 866(c); *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000).

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[4] Although the appellant asserts that his dependents were incorrectly paid by the Defense Financial Accounting Service (DFAS) in 2004, no substantial evidence was presented showing the subsequent post-trial delay in this case affected the appropriate amount the appellant's dependents should have been paid. A different result may have occurred had DFAS waited until the amended Action, dated 28 August 2007, or our appellate review, to correct the appellant's pay and allowances.

[5] In light of the egregiousness of the delay, we have forwarded the record of trial to The Judge Advocate General of the Air Force for his review and consideration.

Accordingly, the approved findings and sentence are

AFFIRMED.

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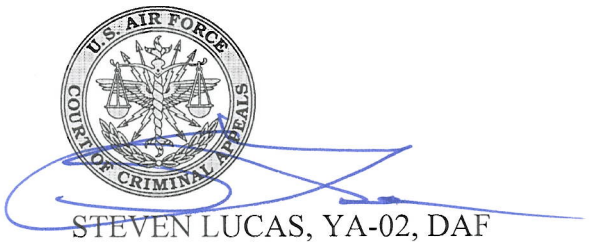

STEVEN LUCAS, YA-02, DAF
Clerk of the Court