UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DEMARIO R. RILEY
United States Air Force

ACM S32097

19 November 2013

Sentence adjudged 4 May 2012 by SPCM convened at Nellis Air Force Base, Nevada. Military Judge: William C. Muldoon, Jr. (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 5 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Ja Rai A. Williams.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Rhea A. Lagano; and Gerald R. Bruce, Esquire.

Before

ORR, HARNEY, and MITCHELL
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MITCHELL, Judge:

A military judge, sitting as a special court-martial, convicted the appellant pursuant to his pleas, of one specification of willfully disobeying a superior commissioned officer's order; two specifications of failure to obey a lawful general order; two specifications of selling military property; one specification of wrongfully possessing marijuana; and one specification of larceny, in violation of Articles 90, 92, 108, 112a, and 121, UCMJ, 10 U.S.C. §§ 890, 892, 908, 912a, 921. The adjudged and approved sentence consisted of a bad-conduct discharge, confinement for 5 months, and reduction to E-1.

On appeal the appellant raises one issue, asserting the Government deprived him of his right to speedy post-trial processing as the time between adjournment of the court-martial and action by the convening authority totaled 147 days.

Background

At the time of his court-martial, the appellant was assigned to Detachment 1 of the 413th Flight Test Squadron, Nellis Air Force Base (AFB), Nevada. On two occasions the appellant sold military equipment he had stolen from his unit to a civilian he met online. The civilian notified law enforcement when the appellant first offered to sell him the equipment. The appellant sold military property consisting of two sets of night vision goggles, clip-on power supplies for the goggles, a helmet, a headset, and a small case for $800. The total value of the items was over $14,000. The appellant admitted he sold the military property to "make a quick buck" so he had additional cash for living expenses and to buy a new fish tank.

After his arrest on 9 January 2012, Air Force Office of Special Investigations (AFOSI) agents searched the appellant's home. The AFOSI agents discovered a red grinder and a multicolored glass smoking pipe, both of which contained marijuana. The AFOSI agents also discovered packets of "Spice."

On 2 February 2012, North Las Vegas police officers were dispatched to the appellant's house for a "health and wellness check." The officers observed rolled burnt cigarettes with a green leafy substance and a container of "Spice." Due to concerns about the appellant's physical and mental well-being, he was transported to a local hospital. The appellant was involuntarily committed to a treatment center from 2 February 2012 to 21 February 2012.

The appellant was readmitted to a hospital on 29 February 2012 due to his manifestation of psychotic symptoms consistent with "Spice" intoxication. A medical drug screening test indicated he had ingested marijuana. The appellant remained in inpatient care until 27 March 2012. This second commitment ended when he was transported to Hill AFB, Utah, for a mental examination inquiry ordered by the convening authority pursuant to Rule for Courts-Martial (R.C.M.) 706. That inquiry determined the appellant had bipolar disorder, but concluded he was able to appreciate the criminality of his conduct at the time of the offenses.

A military magistrate then issued a verbal order for the appellant to provide a urine sample for testing. The appellant was informed of this order, but indicated he would not provide a sample absent a written order. His commander then ordered him to comply with the magistrate's order and to produce a sample. The appellant replied, "no paperwork, no pee."

On 9 February 2012, a clinical psychologist at Nellis AFB, Nevada, diagnosed the appellant with Hallucinogen-induced Psychotic Disorder with Delusions.

Post-Trial Processing Delays

The appellant argues that the record of trial was not completed within a timely fashion, depriving him of his due process right to a speedy appellate review. We agree that the government failed to meet established standards; we do not agree that this failure violated his due process rights.

The appellant's court-martial began at 0858 hours and adjourned at 1646 hours on 4 May 2012. The appellant pled guilty pursuant to a pretrial agreement in which the convening authority agreed to refer the case to a special court-martial. Due to administrative errors with the detailing of a court reporter to transcribe the proceedings, the initial draft of the transcript was not completed until 31 July 2012. Pursuant to R.C.M. 1103(i)(1), both the trial and trial defense counsel reviewed the transcript prior to authentication. Trial defense counsel completed her review of the transcript on 10 August 2012; trial counsel completed his review on 6 September 2012. The military judge authenticated the record of trial on 10 September 2012. The staff judge advocate's recommendation (SJAR) was completed on 13 September 2012. Both the SJAR and the record of trial were served on the appellant on 13 September 2012.

Trial defense counsel submitted a clemency request on 21 September 2012. She petitioned the convening authority to set aside the bad-conduct discharge due to the post-trial delay. Trial defense counsel argued, "88 days to transcribe a one-day, guilty plea, judge alone trial is unreasonably excessive," citing both *Barker v. Wingo*, 407 U.S. 514 (1972) and *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). Trial defense counsel argued the delay prejudiced the appellant as the unreasonable delay increased the anxiety in relation to his bipolar disorder. For the first time, trial defense counsel demanded speedy post-trial processing.

In his clemency submission to the convening authority, the appellant asked the convening authority to not approve the bad-conduct discharge so he could receive treatment through the Veteran's Administration for his bipolar disorder. He noted while in confinement he studied to earn college credits. The appellant was released from confinement on 5 September 2012. After his release, the appellant volunteered to work at the chapel and performed work around the Security Forces Squadron.

The convening authority denied the clemency petition and approved the sentence as adjudged. The convening authority took action on 28 September 2012, 147 days after the court-martial. The appellant was then ordered onto excess leave.

We review de novo whether an appellant has been denied the due process right to speedy post-trial review and whether any constitutional error is harmless beyond a reasonable doubt. *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). The overall delay of more than 120 days between adjournment and action is presumptively unreasonable and triggers an analysis of the four factors elucidated in *Barker*. *Moreno*, 63 M.J. at 142; *United States v. Arriaga*, 70 M.J. 51, 57 (C.A.A.F. 2011). Those factors are "(1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant." *United States v. Mizgala*, 61 M.J. 122, 129 (C.A.A.F. 2005); *Barker*, 507 U.S. at 530.

The first two factors weigh in favor of the appellant, while the third and fourth factors weigh against him. First, the length of the delay is presumptively unreasonable and therefore satisfies the first *Barker* factor. *Moreno*, 63 M.J. at 142. Second, we find there was no legitimate reason for the delay. One reason for the delay argued by the Government was administrative error in the assignment of a court reporter to transcribe the proceedings. However, our superior court has held "that personnel and administrative issues . . . are not legitimate reasons justifying otherwise unreasonable post-trial delay." *Arriaga*, 70 M.J. at 57.

Third, the Government carries the burden of primary responsibility for speedy post-trial processing. *United States v. Bodkins*, 60 M.J. 322, 323-24 (C.A.A.F. 2004). However, the appellant did not assert his right to speedy post-trial processing until clemency, and then the convening authority took action within seven days. The single late request for speedy post-trial processing and the Government's prompt action after that request weighs slightly against the appellant. *See United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006).

However, on the fourth factor, the appellant fails to demonstrate any prejudice in this case. "An appellant must demonstrate a particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Arriaga*, 70 M.J. at 58 (citations omitted). Although the appellant was diagnosed with bipolar disorder, he was receiving medication and treatment for his condition. As expressed in his clemency, his anxiety was regarding the possible cessation of treatment after action and execution of a bad-conduct discharge, not anxiety due to the delay. He was also productive during his time pending action as he was working toward college credits and volunteering at the chapel. When there is no showing of prejudice under the fourth factor, "'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.'" *United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006) (quoting *United States v. Toohey*, 63 M.J. 353, 361-62 (C.A.A.F. 2006).

Having considered the totality of the circumstances and the entire record, when we balance the other three factors, we find the post-trial delay in this case to not be so egregious as to adversely affect the public's perception of fairness and integrity of the military justice system. We are convinced the error is harmless beyond a reasonable doubt.

While we find the post-trial delay was harmless, that does not end our analysis. Article 66(c), UCMJ, 10 U.S.C. § 866(c), empowers appellate courts with the authority to grant sentence relief for excessive post-trial delay without the showing of actual prejudice required by Article 59(a), UCMJ, 10 U.S.C. § 859(a). *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006).[1]

In *United States v. Brown*, 62 M.J. 602, 606-07 (N.M. Ct. Crim. App. 2005), our Navy and Marine Court colleagues identified a "non-exhaustive" list of factors to consider in evaluating whether Article 66(c), UCMJ, relief should be granted for post-trial delay. Among the non-prejudicial factors are the length and reasons for the delay; the length and complexity of the record; the offenses involved; and the evidence of bad faith or gross negligence in the post-trial process. *Id.* at 607. Finding gross negligence in a delay of almost 30 months from adjournment of trial until receipt of the record for review for a 96 page record of trial, the court disapproved the adjudged bad-conduct discharge.[2] *Id.* at 608.

Here, the Government took 147 days to reach action in a case where the transcript was 192 pages. From the time the court was called to order until the court-martial was adjourned was less than eight hours, to include all court recesses. According to the chronology in the record of trial, once a court reporter was appropriately detailed, the initial draft of the transcript was completed in two days. The other required portions of the record of trial were not unduly burdensome as there were only 10 prosecution exhibits, 14 defense exhibits, and 4 appellate exhibits. While we do not find any "bad faith" nor any "gross negligence" on the part of the government, we also do not hold the appellant responsible for the lack of "institutional vigilance" in the post-trial processing of his case. *See Harvey*, 64 M.J. at 23; *Moreno*, 63 M.J. at 137. Like our superior court, we find it weighs heavily in the appellant's favor when "[t]he Government has not presented any legitimate reasons or exceptional circumstances for this lengthy period." *Harvey*, 64 M.J. at 23 (footnote omitted).

[1] We are aware similar issues have been raised in other cases tried at the same base close in time to this case. *United States v. Alaniz*, ACM S32072 (A.F. Ct. Crim. App. 18 November 2013) (unpub. op.), *United States v. Payne*, ACM S32093 (A.F. Ct. Crim. App. 14 November 2013) (unpub. op.) Each case had its own unique set of facts that were analyzed for the purpose of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006) and *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002). While we find it troubling that the same base had three cases that failed to meet established time standards, we conclude that this is not a systemic problem but rather an episodic one.

[2] The court-martial adjourned on 19 December 2002 and the convening authority's action was completed on 16 May 2005. *United States v. Brown*, 62 M.J. 602, 604 (N.M. App. Ct. 2005).

In the absence of evidence of legitimate reasons to explain the lengthy delay, we find that the Government acted indifferently in meeting well-established and clearly defined time standards.

Unlike cases where the appellant cannot articulate any heightened anxiety, here the appellant had a known mental disorder. The Government was aware of the appellant's mental health condition prior to the court-martial convening. We did not find that the appellant's bipolar disorder created prejudice for the reasons set forth above. Similarly, we do not find that his diagnosed mental disorder weighs in his favor in determining the sentence that should be approved given the presumptively unreasonable processing. Article 66(c), UCMJ. The appellant was receiving adequate medical treatment. In his clemency request he implied that his "heightened anxiety" was about the cessation of treatment should the convening authority approve the adjudged bad-conduct discharge. Therefore, his anxiety was neither caused nor increased by the post-trial delay, he was instead concerned that his treatment would end once the post-trial processing was complete.

Trial defense counsel acted in a timely fashion in filing a clemency submission. R.C.M. 1105 provides the appellant 10 days to submit matters, and the appellant submitted matters in 8 days. This is unlike cases where an appellant requests additional time that results in the initial *Moreno* threshold to be exceeded.[3] The diligence of trial defense counsel in prompt action on behalf of her client weighs in the appellant's favor and stands in marked contrast to the indifferent efforts of the Government.

In counter-balance to the Government's indifferent processing of this case, the appellant was convicted of serious offenses. He stole over $14,000 worth of military equipment and engaged in the repeated use of an intoxicating substance to the point that it caused chemically induced psychosis. His willful use of this substance resulted in his hospitalization.

We are presented with an approved sentence that was appropriate at the time it was announced and sentence relief is only being considered because of the Government's failure to timely process the case after adjournment. "In any case, it is simply unacceptable for any convening authority to amply sow the fertile fields of courts-martial referral without preparing for a timely harvest of the resulting records of trial." *Brown*, 62 M.J. at 606.

[3] *See United States v. Negron*, ACM 37754 (f rev) (A.F. Ct. Crim. App. 26 September 2013) (denying *Tardif* relief when 146 days from adjournment to action, where the appellant took 34 days to submit clemency).

The appellant's requested relief to set aside the bad-conduct discharge is disproportionate. "[A]ppellate courts are not limited to either tolerating the intolerable or giving an appellant a windfall." *Tardif*, 57 M.J. at 225. We may order day-for-day confinement credit, among other remedies. *Moreno*, 63 M.J. at 143. However, "[a]ppellate relief under Article 66(c) should be viewed as the last recourse to vindicate where appropriate, an appellant's right to timely…review." *Tardif*, 57 M.J. at 225. Due to the Government's failure to provide evidence justifying the violation of established time standards in post-trial processing, we are left to balance all the above factors in a case with significant misconduct and a relatively short period of delay. Based on the totality of the circumstances discussed above, we find that sentence relief is not appropriate.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ. 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court