UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ARTURO E. RIVERA
United States Air Force

ACM 37123

13 August 2008

Sentence adjudged 20 August 2007 by GCM convened at Kirtland Air Force Base, New Mexico. Military Judge: Steven Ehlenbeck (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 36 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Dwight H. Sullivan, Esquire (civilian counsel).

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Donna S. Rueppell, and Captain Jason M. Kellhofer.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

A military judge sitting as a general court-martial convicted the appellant, in accordance with his pleas, of one specification of rape in violation of Article 120, UCMJ, 10 U.S.C. § 920. The military judge sentenced the appellant to a dishonorable discharge, four years confinement, and a reduction to E-1. The convening authority approved the findings and, pursuant to a pretrial agreement, approved the dishonorable discharge, 36 months of confinement, and the reduction to E-1.

The appellant asks the Court to reduce the approved period of confinement by 30 days because of the following assertions of error: (1) the appellant's due process right to timely post-trial processing was violated because this Court did not receive his record of trial (ROT) until 60 days after the convening authority took action on the appellant's case; and (2) the unreasonable delay in forwarding the ROT to this Court renders a portion of his approved sentence inappropriate.* Finding no error, we affirm.

Discussion

Post-Trial Delay

On 28 September 2007, the convening authority took action on the appellant's case. The appellant's case was docketed with this Court on 27 November 2007—60 days after the convening authority took action on this case. "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) length of the delay; (2) reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Id.* at 135 (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)).

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 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." *Moreno*, 63 M.J. at 138-39.

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. Conversely, "if an appellant's substantive appeal is meritorious and the appellant has been incarcerated during the appeal period, the incarceration may have been oppressive." *Id.* at 139.

The second sub-factor (anxiety and concerns) involves constitutionally cognizable anxiety that arises from excessive delay. To meet this sub-factor, an appellant will be

* The appellant also alleges that the court-martial promulgating order is erroneous in that it fails to list a charge and specification that was withdrawn and dismissed pursuant to the appellant's pre-trial agreement. The government concedes error on this issue and the Court will direct the preparation of a corrected court-martial promulgating order.

required to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by appellants awaiting an appellate decision. *Id.* at 139-40. The last sub-factor (impairment of 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." *Id.* at 140. If an appellant does not have a meritorious appeal, there will be no prejudice arising from a rehearing; conversely, if an appellant has a meritorious appeal and a rehearing is authorized, the appellate delay may have a negative impact on the appellant's ability to prepare and present a defense at the rehearing. *Id.*

For courts-martial completed after 11 June 2006, we apply a presumption of unreasonable delay where the case is not docketed to this Court within 30 days of the convening authority's action. *Id.* at 142. Once this due process analysis is triggered by a facially unreasonable delay, "[w]e analyze each factor and make a determination as to whether that factor favors the [g]overnment 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." *Moreno*, 63 M.J. at 136 (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. *Moreno*, 63 M.J. at 136. Having enunciated the "post-trial delay" test, we now apply the test to the case *sub judice*.

The appellant's case was docketed with this Court 60 days after the convening authority took action. Thus, there is a presumption that the delay was unreasonable. *Id.* at 142. In an effort to rebut this presumption, the government offers the affidavit of Technical Sergeant LB, the non-commissioned officer in charge of the 377th Air Base Wing legal office. Technical Sergeant LB opines that the following may have caused a delay in the post-trial processing of the appellant's case: (1) a severe manning shortage in the legal office; (2) the lack of a law office superintendent; (3) office transitions; (4) a military justice section manned by inexperienced paralegals; and (5) the lack of a court reporter.

These circumstances notwithstanding, docketing the appellant's case with this Court is essentially a clerical task, the delay of which is "the least defensible of all." *Id.* at 137 (quoting *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990)). In short, the proffered reasons, while understandable, do not sufficiently justify the delay in docketing the appellant's case with this Court. Accordingly, *Barker* factors one and two favor the appellant.

With respect to *Barker* factor three, we note 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. However, 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 the appellant's ROT is transmitted to this Court within 30 days after the convening authority's action and the government has failed in this task. Given the appellant waited until this appeal to object or assert his right to a speedy trial, *Barker's* third factor 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 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. While there was a sufficient delay to create a rebuttable presumption of an unreasonable delay, the delay was not lengthy or extraordinary. In fact, on balance, we find the "delay stretches beyond the bare minimum needed to trigger judicial examination of [this] claim." *Doggett v. United States*, 505 U.S. 647, 652 (1992) (citing *Barker*, 407 U.S. at 533-534).

Moreover, the fact that the appellant waited until this appeal to assert his speedy trial rights, undermines his stated desire for a speedy trial. Lastly, the appellant experienced no prejudice from the delay. At the end of the day, the appellant experienced a short delay in the post-trial processing of his case. This delay caused no prejudice to the appellant and hardly constitutes a due process violation.

Remedy for Post-Trial Delay/Sentence Appropriateness

Article 66(c), UCMJ, 10 U.S.C. § 866(c) 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).

When considering sentence appropriateness, we should give "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268

(C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). However we are not authorized to engage in an exercise of clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

Under our Article 66, UCMJ authority to ensure an appropriate sentence, this Court is empowered to grant relief, *when warranted*, for the excessive post-trial delay in processing an appellant's case. *Tardif*, 57 M.J. at 224-25. In exercising this power, this Court is not limited to granting a dismissal but may fashion a remedy it believes appropriate to address the harm suffered. *Id.*

To address his post-trial delay, the appellant asks this Court to "find that one of the thirty-six months of approved confinement to be inappropriate." We decline to do so. While there was 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 relief is not warranted and that the appellant's sentence is not inappropriately severe.

Erroneous Promulgating Order

Finally, government counsel concedes that the promulgating order fails to list Charge II and its specification and the disposition of that charge and specification. Preparation of a corrected court-martial order, properly reflecting Charge II and its specification and the disposition of that charge and specification is hereby directed. *See United States v. Smith*, 30 M.J. 1022, 1028 (A.F.C.M.R. 1990).

Conclusion

The approved findings and the 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 findings and the sentence are

AFFIRMED.

OFFICIAL

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