UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class AMY R. SHOOK
United States Air Force

ACM 37593 (f rev)

12 July 2012

Sentence adjudged 14 October 2009 by GCM convened at Travis Air Force Base, California. Military Judge: Jeffrey A. Ferguson.

Approved sentence: Bad-conduct discharge, confinement for 18 months, fine of $1,100.00, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel J. Bradley Roan; Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; Major Michael S. Kerr; Major Reggie D. Yager; Captain Nathan A. White; and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Naomi N. Porterfield; Captain Tyson D. Kindness; Captain Joseph Kubler; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

This opinion is subject to editorial correction before final release.

WEISS, Judge:

In accordance with her pleas of guilty to one charge including seven specifications of wrongful use and distribution of oxycodone, methadone, and methamphetamine, as well as wrongful use of heroin, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, a

general court-martial composed of officer members sentenced the appellant to a bad-conduct discharge, confinement for 3 years, a fine of $1,100.00, and reduction to E-1. Despite a pretrial agreement (PTA) that capped confinement at no more than 18 months, the convening authority initially approved the sentence as adjudged based on the appellant's alleged violation of the post-trial misconduct provision in her PTA.

We affirmed the findings but set aside the Action of the convening authority and returned the appellant's case to the convening authority with directions to properly conduct, if practicable, post-trial misconduct proceedings in accordance with Rule for Courts-Martial (R.C.M.) 1109. If deemed impracticable, then the convening authority could enter a new Action consistent with the terms of the PTA. *United States v. Shook*, 70 M.J. 578, 584 (A.F. Ct. Crim. App. 2011). The convening authority elected not to conduct proceedings under R.C.M. 1109; rather, on 26 August 2011, he entered a new Action that was consistent with his obligations under the terms of the PTA. The convening authority withdrew the original Action, dated 19 January 2010, and approved only so much of the sentence as provides for a bad-conduct discharge, confinement for 18 months, a fine of $1,100.00, and reduction to E-1.

With her case before this Court again, the appellant assigns two errors: (1) that the appellant was prejudiced by unreasonable appellate delay; and (2) that the Government failed to timely release the appellant from confinement after this Court's decision favorable to the appellant. Finding that the appellant was unlawfully continued in post-trial confinement beyond her required release date, we grant the appellant relief below.

Timing of Appellate Review

The appellant's case was docketed with this Court on 27 January 2010. Between the docket date and the rendering of this Court's initial decision on 14 July 2011, 533 days elapsed. The appellant claims this delay is facially unreasonable because: the appellant moved for expedited review five times; this Court issued 107 opinions in cases docketed after the appellant's case; and the appellant served confinement beyond her release date as determined by the pretrial agreement cap of 18 months.[1] Because this Court found error, the appellant asserts that she suffered prejudice from this delay in the form of oppressive incarceration and anxiety.

"[C]onvicted servicemembers have a due process right to timely review and appeal of courts-martial convictions." *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citations omitted). We review claims of denial of speedy post-trial review de novo. *Id*. We conduct this review using the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *Moreno*, 63 M.J. at 135. A delay is presumptively unreasonable if a decision in not issued by a service court of criminal appeals within 18 months (540 days) of the case being docketed. *Id.* at 142. Unless the length of the delay

[1] The Court did not grant expedited review.

is presumptively unreasonable, the full due process analysis of *Barker* is not triggered. *Id.* at 136. In the appellant's case, this Court completed appellate review and issued a decision within 18 months of the case being docketed. We find the 533-day delay in this case not unreasonable and that no further due process analysis is required. The appellant was not denied timely appellate review of her court-martial conviction.

Timing of Release

The appellant's second assignment of error has two prongs: (1) the Government abused the 30-day window in which to decide to move for reconsideration or certify this Court's decision to the Court of Appeals for the Armed Forces (CAAF) by unlawfully continuing to confine the appellant during this period despite the Government's decision not to pursue reconsideration or certification; and, (2) when the appellant's case was finally remanded to the convening authority 33 days after this Court's decision favorable to the appellant, the convening authority failed to immediately release the appellant from confinement and thereby unlawfully continued to confine her for an additional 13 days.

A. Chronology

The following case chronology is relevant to the decision of these issues:

14 October 2009: Sentence adjudged. The appellant entered confinement.

19 January 2010: Action of the convening authority approved the adjudged sentence.

27 January 2010: The appellant's case was docketed with this Court.

14 July 2011: This Court issued its initial opinion in *Shook*.

16 August 2011: Acting on behalf of The Air Force Judge Advocate General (TJAG), the Chief of the Appellate Records Branch of the Military Justice Division, Air Force Legal Operations Agency, remanded the appellant's case to the General Court-Martial Convening Authority (GCMCA) for a new action in compliance with this Court's opinion.

19 August 2011: Staff Judge Advocate Recommendation (SJAR). In the SJAR, the staff judge advocate informed the GCMCA, inter alia, of this Court's decision in *Shook* and advised, in pertinent part: "The Accused is currently in confinement at the Naval Consolidated Brig - Miramar, having served over 22 months of her sentence. Assuming we held the required [R.C.M. 1109] hearing and approved the sentence again, I expect [the appellant] would be released on parole fairly soon. At this point, I don't believe there is any benefit to anyone in pursuing this issue. Therefore, I recommend you approve a sentence consistent with the pretrial agreement."

19 August 2011: The appellant received the SJAR.

23 August 2011: The appellant's defense counsel received the SJAR and filed a clemency petition on behalf of the appellant.

25 August 2011: Addendum to the SJAR.

26 August 2011: New convening authority Action. The convening authority rescinded the original Action and approves, consistent with the terms of the pretrial agreement, "only so much of the sentence as provides for a bad conduct discharge, confinement for 18 months, a fine of $1,100.00, and reduction to the grade of E-1."

29 August 2011: The appellant was released from confinement.

B. Execution of 30-day Decision Window

The appellant argues that, when this Court set aside the Action of the convening authority for failure to comply with the post-trial misconduct provision of her PTA, this effectively reinstated the punishment limitations in her PTA (confinement not exceeding 18 months). And, having served confinement in excess of 18 months, the appellant claims she was entitled to release at the time this Court issued its opinion on 14 July 2011, because TJAG had decided not to pursue reconsideration by this Court or certification to the CAAF.

Decisions of this Court are not self-executing, but depend on TJAG and lower officials to execute its orders. *United States v. Miller*, 47 M.J. 352, 361 (C.A.A.F. 1997) (citations omitted). After an opinion of this Court is issued, two 30-day periods run concurrently: a 30-day period for TJAG to seek reconsideration by this Court and the 30-day period for TJAG certification to the CAAF. *Id*. An appellant's interest in a favorable opinion by this Court remains inchoate until TJAG makes a decision whether or not to pursue reconsideration or certification or the 30-day decision period expires. *Id*.; *United States v. Kreutzer*, 70 M.J. 444, 446 (C.A.A.F. 2012). During such period, an appellant serving a sentence to confinement remains confined. *Miller*, 47 M.J. at 361.

In her brief, the appellant concedes that decisions of this Court are not self-executing; however, the appellant alleges that TJAG made an immediate decision not to pursue reconsideration or certification, or, at the very least, made this decision at a point well before the expiration of the 30-day decision period. The appellant argues that, under these circumstances, continuing her confinement during this period was an abuse of the 30-day decision window and that she had a right to release from confinement at the time TJAG made the decision not to pursue her case further.

We find nothing in the record evidencing a TJAG decision to abide by this Court's decision prior to the date of the TJAG remand to the convening authority on 16 August

2011, and the appellant fails to demonstrate otherwise. Moreover, we note the appellant submitted a declaration from the Chief of the Appellate Records Branch of the Military Justice Division, Air Force Legal Operations Agency, which tends to reinforce our finding.[2] As is his option under the law, the record reflects that TJAG allowed the 30-day decision window to expire after which the appellant's case was remanded to the convening authority.[3] *Kreutzer*, 70 M.J. at 446. We hold, therefore, that the appellant was not entitled to release from confinement during this 30-day decision period.

C. Execution of Remand to Convening Authority

If not entitled to release from confinement during the 30-day decision window, the appellant contends the effect of our decision in *Shook* required her release no later than 16 August 2011, the date her case was remanded to the convening authority. She argues that she was unlawfully continued in confinement for 13 days until she was released on 29 August 2011.

The appellant misconstrues the effect of our opinion. We did not necessarily order the imposition of the PTA's limitation on confinement. *Shook*, 70 M.J. at 584. Rather, we set aside the convening authority's Action and gave the convening authority the option of properly conducting a R.C.M. 1109 hearing into the allegations of the appellant's post-trial misconduct--which could have resulted in the convening authority again approving the adjudged sentence to confinement of 3 years. *Id*. On the other hand, if a hearing was deemed impracticable, our opinion required the convening authority to enter a new Action consistent with his obligations under the terms of PTA--which included the obligation to approve no confinement in excess of 18 months. *Id*. By necessity, inherent in our opinion is an allowance for a reasonable amount of time after remand for the convening authority to consider and make a decision as to the practicability of conducting a R.C.M. 1109 hearing.

At the time of the remand from TJAG to the convening authority on 16 August 2011, the appellant remained convicted of her crimes and was serving a lawfully adjudged sentence to confinement for 3 years, a sentence she had not yet completed. Our opinion, in effect, necessarily limited the appellant's confinement to no more than 18 months only *if* the convening authority decided not to proceed with a R.C.M. 1109 hearing. Therefore, although the appellant had served more than 18 months in confinement, we find that she was not entitled to release from confinement prior to 26 August 2011, the day the convening authority, having opted to forego the

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[2] *See* Appellant's Motion to Attach Document, 20 January 2012, Declaration of Hattie D. Simmons, dated 19 January 2011 [sic], which states in part: "In all cases where the record is held for 30 days, once the 30-day period expires, I will forward the record of trial to the convening authority for a new action consistent with the opinion of the Air Force Court of Criminal Appeals. I do so in my capacity as agent for the Judge Advocate General."

[3] The appellant's case was remanded to the convening authority on 16 August 2011, 33 days after this Court's decision, because the 30-day decision period expired on a Saturday, 13 August 2011. *See* A.F. CT. CRIM. APP. R. PRAC. AND PROC. 7, 19 (2010); C.A.A.F. R. 19(b)(3), 34 (2011).

R.C.M. 1109 process, approved a sentence to confinement of 18 months. *Id.*; *see also Kreutzer*, 70 M.J. at 446-47.

We also find that the delay between the date of remand and the convening authority's new Action, a period of 10 days, was not unreasonable. As detailed in the chronology above, during this period, the convening authority received the SJAR, a clemency petition from the appellant, and the SJAR addendum. As such, under these circumstances, the appellant's argument for release from confinement prior to 26 August 2011 is without merit.

D. Execution of Convening Authority's Action

What this Court does not find legally justifiable is the appellant's continued confinement beyond 26 August 2011, the date of the convening authority's Action approving a sentence to confinement of 18 months. A military member "should not be required to surrender [her] freedom for even [a] short time unless it is found that the law so requires." *Noyd v. Bond*, 395 U.S. 683, 699 (1969). Having already served more than her approved sentence to confinement, the appellant was unlawfully continued in confinement for an additional three days and is entitled to relief. The appellant requests set aside of the bad-conduct discharge as the only meaningful relief available to her. We disagree.

The appellant was convicted of wrongfully using and distributing several different illegal drugs. Given the seriousness of the offenses as compared to the relatively brief period of the appellant's unlawful post-trial confinement, we find that setting aside the bad-conduct discharge is disproportionate to the harm suffered by the appellant, especially where monetary relief is available. *See United States v. Zarbatany*, 70 M.J. 169, 177 (C.A.A.F. 2011) (addressing the determination of meaningful relief in the context of unlawful conditions of pretrial confinement, Article 13, UCMJ, 10 U.S.C. § 813). We find that, under the circumstances of this case, setting aside the fine of $1,100.00 is both meaningful and appropriate relief for the post-trial confinement violation. Therefore, we modify the sentence to a bad-conduct discharge, confinement for 18 months, and reduction to E-1.

Conclusion

The findings were previously affirmed. *Shook,* 70 M.J. at 584. The sentence, as modified, is 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). Accordingly, the sentence, as modified, is

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court