UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Cadet NATHAN D. VAN VLIET
United States Air Force

ACM 36005 (f rev)

23 August 2010

Sentence adjudged 13 May 2004 by GCM convened at United States Air Force Academy, Colorado. Military Judge: Kurt D. Schuman (sitting alone).

Approved sentence: Dismissal and confinement for 19 months.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Marla J. Gillman, Major Sandra K. Whittington, Major David P. Bennett, and Frank J. Spinner, Esquire (civilian counsel).

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Lieutenant Colonel Jeremy S. Weber, Major Jefferson E. McBride, Captain Michael T. Rakowski, Captain Charles G. Warren, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

OPINION OF THE COURT

UPON FURTHER REVIEW

HELGET, Senior Judge:

In accordance with his pleas, a general court-martial, consisting of a military judge sitting alone, convicted the appellant of one specification of making a false official

statement, two specifications of larceny, and one specification of housebreaking, in violation of Articles 107, 121, and 130, UCMJ, 10 U.S.C. §§ 907, 921, 930. The military judge sentenced the appellant to a dismissal and confinement for 19 months.[1] On 27 July 2004, the convening authority initially approved the sentence as adjudged.

This case is before this Court for a third time. The appellant raises the following four assignments of error: (1) whether the appellant's due process right to timely post-trial processing was violated when the government took an unreasonable 951 days to return the record of trial to this Court after we first ordered new post-trial processing to allow the appellant to submit a Resignation for the Good of Service (commonly known as a Resignation in Lieu of Court-Martial or RILO) and for that request to be properly acted upon prior to the convening authority taking action;[2] (2) whether the appellant is entitled to relief because the staff judge advocate (SJA) and the convening authority failed to properly comply with this Court's original remand to conduct new post-trial processing and they did not properly complete new post-trial processing of the appellant's case;[3] (3) whether the unreasonable delay in the post-trial processing of the appellant's case renders the findings and the approved sentence inappropriate; and (4) whether the Action of the convening authority should be set aside because the fifth addendum to the staff judge advocate's recommendation (SJAR) incorrectly advised the convening authority that the RILO was untimely.

Background

The appellant was tried on 13 May 2004. At the time of trial, he was a 19-year-old cadet at the United States Air Force Academy (USAFA). Following his court-martial, on 24 June 2004, the appellant submitted both a RILO and a request for clemency from the convening authority. On 9 July 2004, the SJA at the USAFA completed an addendum to his SJAR wherein he stated that the appellant's RILO was untimely and should be treated as a clemency request. On 19 July 2004, the appellant's trial defense counsel filed a response to the addendum asserting that the RILO was not untimely and should be forwarded to the Secretary of the Air Force (the Secretary) prior to the convening authority taking action on the appellant's case. On 23 July 2004, the SJA completed a second addendum to the SJAR, in which he disagreed with the trial defense counsel. On 27 July 2004, the convening authority took action, approving the adjudged sentence without forwarding the RILO to the Secretary.

[1] The appellant requested that he be dismissed in lieu of lengthy confinement. A pretrial agreement in this case provided that the convening authority could not approve confinement in excess of 24 months.
[2] The appellant also requests that we include in our analysis an additional 93 days from the date this Court remanded the case for a second time until the convening authority took action on 10 February 2010.
[3] This assignment of error was previously addressed in our second decision, dated 24 November 2009, and we defer to that opinion on this issue.

In our original opinion on 6 November 2006, this Court found error in the SJA's advice to the convening authority. *United States v. Van Vliet*, 64 M.J. 539, 543 (A.F. Ct. Crim. App. 2006). More specifically, this Court held that the applicable instruction then in effect authorized the appellant to submit a RILO after his trial. *Id*. Accordingly, this Court set aside the Action and returned the record of trial to The Judge Advocate General for new post-trial processing consistent with our opinion. *Id.* This Court also stated, "In the event the Secretary denies the appellant's RILO request, Article 66, UCMJ, shall apply." *Id.*

On 11 December 2006, the record of trial was returned to the legal office at the USAFA (USAFA/JA) for new post-trial processing. In January 2007, the Air Force Legal Operations Agency, Military Justice Division advised USAFA/JA that the RILO would have to be processed through to the Secretary before new post-trial processing could take place. On 20 March 2007, the appellant's civilian appellate defense counsel advised USAFA/JA that the military area defense counsel (ADC), Captain (Capt) MB, would be handling the processing of the RILO. On 29 June 2007, a new ADC, Capt MT, notified USAFA/JA that he would be representing the appellant during post-trial processing. In an e-mail to USAFA/JA on 29 June 2007, Capt MT stated, "Before we resubmit his RILO, I need to see a copy of his original RILO request." In July 2007, Capt AL replaced Capt MT as the appellant's ADC.

The USAFA SJA signed the legal review for the RILO on 4 January 2008, and it was then routed through command channels to the Secretary. On 1 April 2008, the Secretary denied the appellant's 24 June 2004 RILO request. For a variety of reasons, the government took no further action in this case until 20 April 2009, when the new USAFA SJA signed a third addendum to the SJAR, which was sent directly to the convening authority. The third addendum was not served on the appellant or his defense counsel. On 27 April 2009, the convening authority issued a new Action in this case, approving the adjudged sentence.

In the summer of 2008, the appellant, Capt AL, and the appellant's civilian defense counsel, Mr. FS, met to discuss the RILO. At the time, the appellant was attempting to obtain all of his medical records from the Air Force because he wanted to submit them as an attachment to his RILO. Capt AL prepared a draft package, which he then forwarded to Mr. FS for final review. At some point, Capt AL contacted USAFA/JA and inquired about any particular timelines or deadlines for the appellant's RILO. USAFA/JA advised that they would check and get back to him, but this never occurred. The appellant and his counsel continued working on the RILO submission through most of 2008. At no point were they notified that USAFA/JA had sent the original RILO submission to the Secretary. In June 2009, the appellant first learned that the Secretary had denied his 24 June 2004 RILO submission on 1 April 2008, and that a new Action had been accomplished by the convening authority.

The case was re-docketed with our Court on 16 June 2009, at which time the appellant raised three new assignments of error. On 24 November 2009, this Court issued its second decision in this case, holding that the convening authority improperly took action because the SJA failed to serve the addendum to the SJAR on the appellant. *United States v. Van Vliet*, ACM 36005 (f rev), unpub. op. at 2 (A.F. Ct. Crim. App. 24 Nov 2009).

On 4 December 2009, pursuant to this Court's 24 November 2009 decision, the appellant was served with the fourth addendum to the SJAR and was afforded an opportunity to respond in accordance with Rule for Courts-Martial 1106(f)(1). On 28 December 2009, the appellant responded and asked the convening authority to reconsider the denial of his RILO that was originally submitted in 2004 and subsequently denied by the Secretary. The appellant specifically requested that the RILO be returned to the Secretary with updated letters attached to his 28 December 2009 submission. Alternatively, the appellant requested that the convening authority disapprove the findings and sentence and grant him a general discharge from the Air Force. On 8 January 2010, the appellant was served with the fifth addendum to the SJAR wherein the SJA advised the convening authority that the new RILO submitted by the appellant on 28 December 2009 was untimely pursuant to Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 8.17 (21 Dec 2007). On 13 January 2010, the appellant's counsel, Mr. FS, responded by asserting that the so-called new RILO was instead a request to resubmit the original RILO to the Secretary with updated documentation. He also asked the convening authority to consider the updated RILO submission for clemency purposes. On 10 February 2010, after receipt of a sixth and seventh addendum to the SJAR, the convening authority took action in this case, approving the adjudged sentence.

Discussion
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 951 days to return the record of trial to this Court after our initial decision plus an additional 93 days from the date we remanded the case for a second time until the convening authority took action on 10 February 2010. Due process entitles convicted servicemembers to a timely review and appeal of court-martial convictions. *Toohey v. United States*, 60 M.J. 100, 101-02 (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). As we conduct our review, we examine the four factors established by *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. The framework for analyzing prejudice 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.

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 951 days to return the record of trial to this Court after our initial decision is facially unreasonable; thus, this factor weighs heavily in the appellant's favor. However, we do not find that it was unreasonable for the government to take 93 days to process a new Action after we remanded the case for a second time.

The second factor, the reason for the delay, also weighs in the appellant's favor. "Here we look at each stage of the post-trial period, at the Government'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). While some of the delay in this case is attributable to the processing of the RILO, it should not have taken 951 days to return the record of trial to this Court. Accordingly, we find this *Barker* factor weighs in favor of the appellant.

With respect to the third factor, although the appellant never specifically asserted his right to a timely review, the appellant relies on *Moreno*, noting that our superior court did not give as much 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. However, the government asserts that the Supreme Court has found this factor to be the most important in determining whether a due process violation occurred. In *Barker*, the Supreme Court found that the appellant was trying to take advantage of a delay in his trial; therefore, it ruled that he was not denied his right to timely post-trial review. *Barker*, 407 U.S. at 534-35. In this case, however, there is no evidence that the appellant was trying to benefit from the delay. Accordingly, we find that this factor weighs slightly in favor of the government.

Turning to the fourth *Barker* factor, the appellant alleges that he has been prejudiced by the delay in post-trial processing because his opportunity to present his RILO request was harmed, thereby raising his anxiety to a level greater than that in the normal course of appeal. The appellant also claims that USAFA/JA compounded the error by failing to serve him with the third addendum to the SJAR, which contained new matters, and by not allowing him to submit new clemency matters. The Government argues that the appellant has suffered no actual prejudice from the delay and his argument that he has experienced particularized anxiety is baseless since he was out of jail and on appellate leave at the time he alleges that he suffered anxiety. *See United States v. Haney*, 64 M.J. 101, 108 (C.A.A.F. 2006). The government also argues that although the

appellant claims he experienced particularized anxiety because he was not allowed to submit an updated RILO, he has not shown that a right to submit an updated RILO actually exists. Further, as can be seen from the appellant's online resume and his declaration, he has been able to find employment and has even created his own S-Corporation. Therefore, the government asserts that he has not suffered any prejudice by the delay.

We find that the appellant has not shown how he was prejudiced by the delay. In the summer of 2008, the appellant and his counsel met to discuss the RILO. A year later, in June of 2009, the appellant had still not yet submitted an updated RILO, so it appears he was in no hurry to do so. It was not the delay that prejudiced the appellant. If anything, it was the fact that he was not afforded an opportunity to update his original RILO which may have caused some anxiety; however, the appellant has not shown that he was entitled to submit a new or an updated RILO. Accordingly, we conclude that the prejudice factor weighs against the appellant.

In *Toohey*, our superior court held that "where there is no finding of *Barker* 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 951 days to complete an amended Action after this Court has remanded a case is definitely outrageous and cannot be tolerated.

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. We review the record de novo to determine if the post-trial delay was harmless. *United States v. Bush*, 68 M.J. 96, 102 (C.A.A.F. 2009). Unlike in the trial error arena where a determination of harmless beyond a reasonable doubt tests whether the error contributed to the appellant's conviction or sentence, in post-trial delay cases we must "determine whether other prejudicial impact is present from the delay." *Id*. We look at the totality of the circumstances to determine whether the due process violation is harmless beyond a reasonable doubt. *Id*. at 103. When there is a post-trial delay due process violation, the burden to show harmlessness rests upon the government. *Id*. at 102.

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 been able to obtain employment and has not been prejudiced by the delay. Accordingly, considering the totality of the circumstances, the government has met its burden in

showing that the error was harmless beyond a reasonable doubt.[4] Furthermore, considering the serious nature of the appellant's misconduct, no further relief is warranted.

Post-Trial Advice and Action

The appellant asserts that he is entitled to relief because the USAFA SJA incorrectly advised the convening authority in the fifth addendum to the SJAR that the appellant could not submit a RILO post-arraignment pursuant to AFI 51-201, ¶ 8.17. The appellant claims that he did not submit a new RILO on 28 December 2009, but instead merely supplemented the original RILO that was filed in 2004.

We review post-trial processing issues de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004). In determining whether an error occurred in post-trial processing, an appellant must make "some colorable showing of possible prejudice." *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000) (quoting *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998)).

AFI 51-201, ¶ 8.17 provides:

> Officer Resignations for the Good of the Service (RILOs). [Special court-martial convening authorities, general court-martial convening authorities and major command] commanders are authorized to deny RILOs submitted prior to the referral of charges. If denied, the officer may again submit a RILO after referral of charges. Once referral of charges occurs, RILOs may only be acted upon at the Secretarial level. A RILO may not be submitted post-arraignment.

Although the SJA referenced the correct provision of AFI 51-201 and provided the current guidance to the convening authority, the prohibition against submitting a RILO post-arraignment did not appear in the 26 November 2003 edition of the instruction relied upon by this Court in our initial decision. The appellant asserts that it was inappropriate to hold the change to the instruction against him since it occurred after his successful appeal to this Court in November 2006. Additionally, the appellant claims that the prohibition should not apply because the 28 December 2009 submission was intended to supplement the 2004 RILO by providing the convening authority with a more accurate picture of the appellant's rehabilitation and positive contributions to society since his court-martial five and a half years earlier. Therefore, he asserts that the 2009 RILO request should be processed under the 26 November 2003 version of AFI 51-201 which was in effect at the time of his court-martial. The appellant claims that he has been

[4] 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.

harmed because he has never been afforded the opportunity to update his original RILO. On the other hand, the government asserts that the updated 2009 RILO was actually a new RILO since the Secretary denied the original RILO on 1 April 2008, approximately 20 months earlier. As the Secretary's decision was final and cannot be supplemented, the SJA was correct in applying the 2007 version of AFI 51-201 that prohibits the submission of a RILO post-arraignment.

We concur with the government that the SJA did not improperly advise the convening authority in this case. Regardless of the label given to the 2009 RILO by the appellant, we find it is a new RILO for purposes of AFI 51-201 since the Secretary denied the first request. Although the appellant should have been informed of the Secretary's decision immediately after it was issued on 1 April 2008, as we stated in our most recent opinion, "whether or not the appellant should be afforded an opportunity to re-submit his RILO is not a proper issue before this Court." *Van Vliet*, unpub. op. at 2. We further note that the convening authority was provided with both of the RILO submissions for consideration in determining whether or not to grant clemency, and he elected to approve the adjudged sentence. Accordingly, under the circumstances of this case, we affirm the most recent Action.

Unreasonable Delay

In a separate assignment of error, the appellant, citing *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002), asks this Court to set aside the findings and sentence in his case under Article 66(c), UCMJ, 10 U.S.C. § 866(c), or in the alternative, to grant an opportunity to submit a new RILO. We decline. Based on our review of this case, the appellant is not entitled to any relief under Article 66(c), UCMJ.

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.

HELGET, Senior Judge, participated in the decision of this Court prior to his reassignment on 1 July 2010.

OFFICIAL

STEVEN LUCAS
Clerk of the Court