UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant DALE W. ZINN
United States Air Force

ACM 34434

22 January 2003

Sentence adjudged 31 August 2000 by GCM convened at Spangdahlem Air Base, Germany. Military Judge: Mary M. Boone.

Approved sentence: Confinement for 1 year and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Lieutenant Colonel Timothy W. Murphy, and Major Maria A. Fried.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Mitchel Neurock.

Before
BURD, PECINOVSKY, and EDWARDS
Appellate Military Judges

OPINION OF THE COURT

PECINOVSKY, Judge:

The appellant was convicted, pursuant to his pleas, of one specification of willful dereliction of duty by misusing his government-issued travel card on divers occasions, four specifications of failure to go to his appointed place of duty, seven specifications of uttering worthless checks (six of which were on divers occasions), and one specification of dishonorable failure to pay a just debt, in violation of Articles 86, 92, 123a, and 134 UCMJ, 10 U.S.C. §§ 886, 892, 923a, 934. He was sentenced by officer members to confinement for one year and reduction to E-1. The appellant argues that he was prejudiced due to excess delay in post-trial processing and that it was plain error to allow the prosecution to introduce testimony rebutting the appellant's belief that he could "die at any time." Also, the appellant raises three issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). He claims the use of his prior statements without rights advisement constituted plain error. He also claims his sanity board results were

erroneous and that he had a mental defect at the time of the commission of the offenses. Finally, the appellant claims that his guilty pleas were improvident because he was taking anti-depressant medication (Zoloft), which made him physically unable to report to work or alternatively, the members should have been instructed that the medication was a mitigating factor. We affirm the findings and sentence.

I. Facts

Between April and October 1999, the appellant improperly charged over $10,000 on his government-issued travel card for unofficial purposes, including $6,900 for baseball card collections. As of August 2000, the appellant still owed $8,492.14 on his government-issued travel card. The account had been closed because of delinquency and collection letters had been sent to the appellant between 4 January and 3 March 2000.

In addition to the misuse of the government travel card, the appellant uttered $7,800 in worthless checks to the 86th Services Squadron at Ramstein Air Base (AB), Germany and to the 52nd Services Squadron at Spangdahlem AB, Germany. His problems worsened when he failed to go to his appointed place of duty on four occasions between 8 March and 7 April 2000.

The appellant's trial, which took three days to complete, ended on 31 August 2000. The court reporter completed the 388-page record of trial on 21 September 2000. The record was mailed electronically to the trial counsel on 21 September 2000, who reviewed the transcript. After receiving corrections via email from trial counsel, the court reporter sent the completed transcript to Spangdahlem AB on 2 October 2000. The military judge authenticated the record on 25 November 2000. The defense counsel received the authenticated copy of the record of trial on 17 January 2001. The staff judge advocate's recommendation was completed on 31 January 2001 and the appellant filed his clemency matters the following day. The convening authority's action was accomplished on 15 February 2001.

II. Post-trial processing delay

The appellant seeks relief for excess post-trial processing delay. In *United States v. Williams*, 55 M.J. 302, 304-05 (2001), *cert. denied*, 534 U.S. 1169 (2002), and *United States v. Banks*, 7 M.J. 92, 93-94 (C.M.A. 1979), our superior court held that post-trial delay will not be a basis for relief unless the appellant can demonstrate some prejudice. *See United States v. Bell*, 46 M.J. 351, 353 (1997); *United States v. Hudson*, 46 M.J. 226, 227 (1997); *United States v. Jenkins*, 38 M.J. 287, 288 (C.M.A. 1993). In *United States v. Nelson***,** this Court held that "the accused seeking relief from post-trial delay in taking final action in the case must show both that the delay was unreasonable and 'real harm or legal prejudice flowing from that delay.'" *United States v. Nelson***,** 46 M.J. 764, 766 (A.F. Ct. Crim. App. 1997), *aff'd in part and modified in part*, 49 M.J. 147 (1998)

(quoting *Jenkins*, 38 M.J. at 288), (citing *Banks*). This is true even when the accused is under continuous post-trial restraint. *Banks*, 7 M.J. at 93. The burden to show prejudice rests with the appellant. *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990). "[R]elief may not be predicated upon claims of prejudice that are unverified and unverifiable." *Id.*

The requirement for a showing of specific prejudice was recently revisited by our superior court in *United States v. Tardif*, 57 M.J. 219 (2002). In a splintered decision, with Chief Judge Crawford and Senior Judge Sullivan vigorously dissenting, the court held that the service appellate courts have authority under Article 66(c), UCMJ, 10 U.S.C. § 866(c), "to apply the *Timmons* approach, recently repeated in *Becker*, to post-trial delays, and to tailor an appropriate remedy, if any is warranted, to the circumstances of the case." *Tardif*, 57 M.J. at 225. *See United States v. Becker*, 53 M.J. 229, 232 (2000); *United States v. Timmons*, 46 C.M.R. 226, 227 (C.M.A. 1973).

The question remains as to what the "*Timmons* approach, recently repeated in *Becker*" entails. *Tardif*, 57 M.J. at 225. Under *Timmons*, the "denial of the right to speedy trial resulted in dismissal of the charges only if reversible trial errors occurred and it was impossible to cure those errors at a rehearing because of the excessive post-trial delay." *Tardif*, 57 M.J. at 224. In *Timmons*, the Court of Military Appeals noted that the service appellate court had "purged the effect of a trial error by modifying the findings, making dismissal of the charges unwarranted." *Tardif*, 57 M.J. at 224. The "*Timmons* approach," concerning dismissal of charges because of post-trial delay, was clarified in *United States v. Gray*, 47 C.M.R. 484, 486 (C.M.A. 1973). In *Gray*, the Court of Military Appeals required:

> [B]efore ordering a dismissal of the charges because of post-trial delay there must be some error in the proceedings which requires that a rehearing be held and that because of the delay appellant would be either prejudiced in the presentation of his case at a rehearing or that no useful purpose would otherwise be served by continuing the proceedings.

Id.

In *Becker*, our superior court held that the remedy for "speedy trial" violations "should be tailored to the harm suffered." *Becker*, 53 M.J. 232. Therefore, under the *Timmons* or *Becker* approach in remedying post-trial delay, the remedy should be tailored to the prejudice or the harm suffered by the appellant. However, the bottom line in *Tardif* is that the service courts of criminal appeals *may* grant relief for post-trial delay, pursuant to Art. 66(c), UCMJ, and *may* tailor an appropriate remedy based upon the circumstances of the case. *Tardif*, 57 M.J. at 225.

Notwithstanding this authority under Article 66(c), UCMJ to grant relief for post-trial delay, we will grant relief only upon a showing of specific prejudice to the appellant. In *United States v. Bigelow*, 55 M.J. 531 (2001), *aff'd*, 57 M.J. 64 (2002), this Court held that "to succeed on a claim of unreasonable post-trial delay, an appellant must show specific prejudice, regardless of the length of the delay. A showing of unexplained and inordinate delay, standing alone, is insufficient. The appellant 'must demonstrate some real harm or legal prejudice flowing from that delay.'" *Bigelow*, 55 M.J. at 533 (citations omitted). Here, the appellant has failed to demonstrate any claim of prejudice flowing from the post-trial delay. Absent a showing of prejudice, this Court will not grant relief for post-trial delay.

III. Admission of testimony concerning the appellant's medical condition

During the sentencing portion of the trial, the appellant made an unsworn statement in which he stated, "I was, and still am, afraid that I will have another heart attack and die at any time." In rebuttal, the government called Dr. Jennifer Maher, who testified concerning the appellant's heart condition. The trial counsel asked Dr. Maher if she could comment on the appellant's risk of death in the immediate future. Dr. Maher responded, "There is no anticipated immediate risk of death." The appellant failed to object to this rebuttal evidence, but now argues that admission of Dr. Maher's testimony constituted plain error.

Having failed to object to Dr. Maher's testimony at trial, the appellant waived any issue concerning this evidence, absent plain error. *United States v. Gilley*, 56 M.J. 113, 122 (2001) (citing *United States v. Powell*, 49 M.J. 460, 462-64 (1998)). The plain error must materially prejudice the substantial rights of the appellant. Article 59(a), UCMJ, 10 U.S.C. § 859(a); *Gilley*, 56 M.J. at 122. The admission of Dr. Maher's testimony was not plain error. The appellant now argues that his statements concerning his medical condition were merely opinion, and not subject to rebuttal. However, the appellant, in his unsworn statement provided the court with a detailed factual recitation of his medical condition and the events surrounding his heart attack. The government properly rebutted these factual statements, pursuant to Rule for Courts-Martial 1001(c)(2)(C).

IV. Grostefon issues

The appellant raises three issues, pursuant to *Grostefon*. First, the appellant claims that the use of his statements without rights advisement constituted plain error. Second, the appellant claims that the sanity board results were erroneous and he had a mental defect at the time of the commission of the offenses. Finally, he claims that his guilty pleas to Charge III, violations of Art. 86, UCMJ, were improvident because he was taking Zoloft, which made him physically unable to report to work or in the alternative, the members should have been instructed that the medication was a mitigating factor. We have fully considered these allegations and find them to be without merit.

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Art. 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator