IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.	Docket No. ARMY 20200282
Staff Sergeant (E-6) **HUGO L. FONT MACIAS**, United States Army, Appellant	Tried at Fort Bragg, North Carolina, on 3 June 2020, before a general court-martial convened by the Commander, 82d Airborne Division, Colonel Charles L. Pritchard, Military Judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignment of Error

WHETHER APPELLANT IS ENTITLED TO RELIEF FOR UNREASONABLE POST-TRIAL DELAY BY THE GOVERNMENT

Statement of the Case

On 3 June 2020, a military judge sitting as a general court-martial convicted appellant, in accordance with his pleas, of one specification of resisting apprehension, one specification of disrespect toward a superior commissioned officer, one specification of damaging nonmilitary property, one specification of carrying a concealed weapon, one specification of communicating a threat, one specification of escaping from confinement, two specifications of wrongful possession of controlled substances, and two specifications of wrongful

introduction of controlled substances, in violation of Articles 87a, 89, 109, 112a, 114, and 115, Uniform Code of Military Justice, 10 U.S.C. §§ 887a, 889, 909, 912a, 914, 915 (2018) [UCMJ]. (R. at 81). The military judge sentenced appellant to reduction to the grade of E-4, confinement for eleven months, and a bad-conduct discharge.[1] (R. at 112). The military judge also granted appellant 209 days of pretrial confinement credit. (R. at 112). On 25 August 2020, the military judge entered judgment. (Judgment).

Statement of Facts

A. Appellant's offenses.

1. Appellant disrespected a superior commissioned officer by contemptuously refusing his company commander's attempts to arrange medical treatment for him.

Between 1 and 7 November 2019, appellant's company commander, Captain (CPT) [redacted], discovered that appellant had missed medical appointments necessary

[1] The military judge sentenced appellant to confinement for one month each for Charges I, II, III, IV, and V, with these terms of confinement to run concurrently with each other and consecutively with the confinement for The Specification of Additional Charge I and with the concurrent confinement for the specifications of Additional Charge II. (R. at 112). The military judge also sentenced appellant to confinement for five months for Additional Charge I, to run consecutively with the confinement for the specifications of Charges I through V, and with the concurrent confinement for the specifications of Additional Charge II. (R. at 112). Finally, the military judge sentenced appellant to confinement for five months each for specifications one through four of Additional Charge II, to run concurrently with each other and consecutively with the confinement for The Specification of Additional Charge I and with the concurrent confinement for the specifications of Charges I through V. (R. at 112).

for appellant to continue receiving shots to help wean him off his heroin addiction. (R. at 22; Pros. Ex. 1, para. 3). During a meeting about these missed appointments, appellant argued with and yelled at CPT [redacted] to such an extent that appellant's face turned red. (R. at 22–23, 26; Pros. Ex. 1, para. 3). Captain [redacted] ordered appellant to go to the emergency room at Womack Army Hospital, but appellant disobeyed that order and did not go. (R. at 23; Pros. Ex. 1, para. 3).

2. Appellant unlawfully carried a concealed handgun onto the installation and wrongfully communicated a threat to shoot his company commander with his handgun.

On 5 November 2019, appellant reported for parachute detail and knowingly brought an unregistered and concealed 9mm handgun onto post.[2] (R. at 30; Pros. Ex. 1, para. 5). The next day, while appellant complained to Staff Sergeant (SSG) [redacted] about how "furious" he was at the command, he reached into his glovebox, pulled out the same handgun from 5 November 2019, pointed the handgun toward the company building, and told SSG [redacted] "I'm going to shoot that punk ass commander," or words to that effect. (R. at 35–36; Pros. Ex. 1, para. 6). Staff Sergeant [redacted] took appellant's threat seriously but waited until the next morning to inform CPT [redacted] of the threat. (R. at 36; Pros. Ex. 1, para. 6). Captain [redacted] immediately called the Military Police (MP). (R. at 36; Pros. Ex. 1, para. 7).

[2] Even if the handgun had been properly registered, appellant had a mental health profile that prohibited him from possessing weapons. (R. at 32).

3. Appellant resisted being apprehended by military police officers and damaged a military police vehicle by striking it.

On 7 November 2019, MP Officers Sergeant (SGT) [redacted] and Private First Class (PFC) [redacted] responded to CPT [redacted]'s call regarding appellant's threat to shoot him. (R. at 41; Pros. Ex. 1, para. 7). When they arrived, SGT [redacted] and PFC [redacted] located appellant, identified themselves as MPs, and told him they were detaining him for questioning. (R. at 41; Pros. Ex. 1, para. 7). Sergeant [redacted] searched appellant and found a syringe and a bag-like object in appellant's cargo pockets. (R. at 41; Pros. Ex. 1, para. 7). Based on this discovery, SGT [redacted] attempted to put appellant in handcuffs, but appellant pushed him off and tried to walk away. (R. at 41; Pros. Ex. 1, para. 7). A third MP, Corporal (CPL) [redacted], brought appellant to the ground where he was handcuffed. (R. at 41; Pros. Ex. 1, para. 7). Appellant continued to fight the MPs and was "tussling with them" even after he was brought to the ground and handcuffed. (R. at 44; Pros. Ex. 1, para. 7).

Once inside the MP vehicle, appellant "began to spit into the vehicle's window and kick the doors." (R. at 57; Pros. Ex. 1, para. 8). As a result, one of the windows was unable to roll up or down. (R. at 57; Pros. Ex. 1, para. 8). The cost to repair the window was less than $500. (R. at 57; Pros. Ex. 1, para. 8).

4. Appellant wrongfully possessed multiple controlled substances and wrongfully introduced those controlled substances onto Fort Bragg, North Carolina.

On 7 November 2019, after handcuffing appellant, SGT [redacted] continued his search of appellant's person and removed the bag-like object and the syringe from his cargo pockets. (R. at 51; Pros. Ex. 1, para. 8). The bag-like object contained forty-eight baggies of a pink powder. (R. at 51; Pros. Ex. 1, para. 8). The MPs placed appellant in the back seat of the MP vehicle and requested his permission to search his personally owned vehicle (POV), to which he responded "fuck it, you can search my car; I don't care, you won't find any weapons," or words to that effect. (R. at 51; Pros. Ex. 1, para. 9). While searching appellant's POV, SGT [redacted] found rolled up tin foil that appeared to be a smoking device and also a small bag containing a white powdery substance. (R. at 51–52; Pros. Ex. 1, para. 9).

On 3 December 2019, the forty-eight baggies of pink powdery substance, syringe, rolled-up tin foil, and the bag of white powdery substance were all sent to the U.S. Army Criminal Investigation Laboratory. (Pros. Ex. 1, para. 11). The lab's tests concluded that: (1) each of the forty-eight baggies and syringe contained a mixture of heroin, fentanyl, and caffeine; and (2) the rolled-up tin foil and bag of white powdery substance contained .037 grams of cocaine. (Pros. Ex. 1, para. 11). During the military judge's providence inquiry, appellant stated that he had knowingly brought these substances onto the installation. (R. at 52).

5. Appellant escaped from confinement when he left the installation without authority after being ordered into pretrial confinement.

On 13 November 2019 at appellant's pretrial confinement determination hearing, the hearing officer ordered that appellant stay in confinement. (R. at 61; Pros. Ex. 1, para. 10). After the hearing, appellant received permission from CPT [redacted] to have dinner with his wife at the post exchange (PX) food court. (R. at 62; Pros. Ex. 1, para. 10). While at the PX, appellant ran away from his escorts and jumped into a vehicle waiting for him outside the PX, which brought him off-post. (R. at 64; Pros. Ex. 1, para. 10). Appellant's escorts, Fort Bragg MPs, Fayetteville Police Department officers, appellant's wife, and appellant's friend eventually got appellant back into custody. (R at 62–65; Pros. Ex. 1, para. 10). While at large, he informed one of his friends that he planned to go to the Fayetteville airport and leave town. (Pros. Ex. 1, para. 10).

B. The post-trial processing of appellant's case.

On 3 June 2020, appellant was sentenced. (Statement of Trial Results). On 15 June 2020, he submitted post-trial matters and requested that the convening authority defer automatic forfeitures, defer the adjudged reduction in rank, waive automatic forfeitures for the maximum term allowed by law, and count additional credit for or commute a portion of the remainder of his sentence. (Post-Trial Matters). On 17 August 2020, the Staff Judge Advocate (SJA) signed his clemency advice. (SJA Clemency Advice). On 20 August 2020, the convening

authority took no action on the findings or sentence and disapproved both appellant's requests to defer automatic forfeitures and of reduction in grade, but he approved appellant's request for waiver of automatic forfeitures for six months after entry of judgment. (Action). On 25 August 2020, the military judge entered judgment. (Judgment).

On 19 January 2021, the record of trial was served on trial counsel and defense counsel. (Trial Counsel Pre-Certification). On 22 February 2021, the trial counsel completed the precertification review.[3] (Trial Counsel Pre-Certification). On 2 March 2021, the military judge authenticated the record. (Authentication). On the same day, the court reporter certified the record of trial. (Court Reporter Certification). On 12 March 2021, this court docketed appellant's case. (Docketing Notice). The total number of days from adjournment to docketing was 282 days. (Docketing Notice).

Standard of Review

This court conducts a de novo review of claims of unreasonable post-trial delay. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006).

Law

Appellate courts conduct two distinct analyses in addressing claims of post-

[3] As noted by appellant, the trial counsel pre-certification is dated 27 January 2021, but the digital signature is dated 22 February 2021. (Appellant's Br. 3).

trial delay: determining whether appellant suffered a due process violation under the Constitution and determining sentence appropriateness under Article 66(d), UCMJ. *United States v. Simon*, 64 M.J. 205, 207 (C.A.A.F. 2006).

A. Fifth Amendment procedural due process.

Servicemembers convicted at courts-martial have a due process right to a timely review and appeal of their convictions. *Moreno*, 63 M.J. at 135. Unreasonable delay in post-trial processing is presumed when "more than 150 days elapse between final adjournment and docketing with [the Army Court of Criminal Appeals]."[4] *United States v. Brown*, 81 M.J. 507, 510 (Army Ct. Crim. App. 2021). This presumption triggers a four-factor analysis (*Barker* factors) that examines: "(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 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). The four *Barker* factors must be balanced, and "no single factor [is] required to find that post-trial delay constitutes a due process violation." *Id*. at 136 (citing *Barker*,

[4] The government acknowledges this court's framework in *Brown* and will address the delay in light of a 150-day standard. However, the government notes that if the expressly conditional language of Article 66(d)(2), UCMJ, does not serve as a limitation on the immediately preceding Article 66(d)(1), UCMJ, then that provision serves no purpose. *See Brown*, 81 M.J. at 511 n.2 (rejecting any argument that this provision "somehow cabins our broad and well-established sentence appropriateness authority . . . to provide relief for dilatory post-trial processing occurring at other phases of a court-martial.").

407 U.S. at 533). However, the *Barker* analysis is not required if the court determines that any due process violation is harmless beyond a reasonable doubt. *United States v. Finch*, 64 M.J. 118, 125 (C.A.A.F. 2006).

Military Courts of Criminal Appeals (CCAs) will also further examine prejudice, one of the *Barker* factors, in light of three primary sub-factors: (1) prevention of oppressive incarceration; (2) minimization of appellant's anxiety and concern while awaiting the outcome of the appeal; and (3) limiting the possibility of impairment of the grounds for appeal and defense at a possible rehearing. *Moreno*, 63 M.J. at 138–39. The first sub-factor "is directly 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." *Moreno*, 63 M.J. at 139 (citing *Cody v. Henderson*, 936 F.2d 715, 720 (2d Cir. 1991)). Similarly, for the third sub-factor, the showing of prejudice "is directly 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. The second sub-factor requires an appellant to "show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Id*.

In situations where the appellant is unable to show they have suffered prejudice, "[the court] cannot find a due process violation unless the delay is so

egregious as to 'adversely affect the public's perception of the fairness and integrity of the military justice system.'" *Brown*, 81 M.J. at 511 (citing *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006)).

If the court finds a due process violation, the burden shifts to the government to prove the constitutional error was harmless beyond a reasonable doubt. *United States v. Ashby*, 68 M.J. 108, 125 (C.A.A.F. 2009) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). In determining whether a due process error was harmless beyond a reasonable doubt, the court analyzes the case for prejudice. *Ashby*, 68 M.J. at 125. This analysis is "separate and distinct from the consideration of prejudice as one of the four *Barker* factors." *Id*. Under this review, the court considers "the totality of the circumstances" based on the "entire record." *Id*. The court "will not presume prejudice from the length of the delay alone" but instead requires "evidence of prejudice in the record." *Id*.

B. Sentence appropriateness.

Absent a due process violation, the court next considers whether relief for excessive post-trial delay is warranted based on the CCA's sentence appropriateness authority under Article 66(d), UCMJ. *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). Pursuant to Article 66(d)(2), UCMJ, a CCA may "provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the

record." Similarly, in conducting its sentence appropriateness review under Article 66(d), a CCA has "broad discretion to grant or deny relief for unreasonable or unexplained [post-trial] delay . . . ." *Ashby*, 68 M.J. at 124 (quoting *United States v. Pflueger*, 65 M.J. 127, 128 (C.A.A.F. 2004)). Therefore, even without a showing of actual prejudice, the court may also grant relief for "unexplained and unreasonable post-trial delay." *Tardif*, 57 M.J. at 224 (citing *United States v. Collazo*, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000)).

When reviewing a sentence for appropriateness under Article 66(d)(1), the court is "required to determine what findings and sentence 'should be approved,' based on all the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay." *Id.* (citation omitted). The heart of "sentence review is to 'do justice.'" *Id.* at 223 (quoting *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991)). The court looks to the totality of the circumstances to determine what sentence should be approved in light of the post-trial processing. *United States v. Garman*, 59 M.J. 677, 678 (Army Ct. Crim. App. 2003). Moreover, even "unacceptably slow" post-trial processing does not immediately render a sentence inappropriate. *Id*. at 683. This is a "highly case specific" review. *Simon*, 64 M.J. at 207.

Argument

Appellant's case exceeded the presumptive 150-day standard under *Brown*. 81 M.J. at 510. However, the government did not violate appellant's due process rights because he failed to demand speedy post-trial processing and suffered no prejudice, and the delay was not egregious. Further, under the totality of the circumstances, he deserves no relief under a sentence appropriateness analysis. Therefore, this court should affirm the findings and sentence as adjudged.

A. Appellant's claim fails because he never demanded speedy post-trial processing and he has not demonstrated prejudice.

1. The first two *Barker* factors weigh in favor of appellant.

Here, 282 days elapsed between the adjudged sentence and the docketing of this case by this court, exceeding the timeline established in *Brown*. *Id.*; (Docketing Notice). Consequently, the first factor weighs in favor of appellant. The second factor also weighs in appellant's favor because there is no explanation in the record to account for the delay. *Moreno*, 63 M.J. at 136.

2. Appellant did not assert his speedy post-trial rights.

Regarding the third *Barker* factor, appellant never asserted his right to speedy post-trial processing.[5] *Moreno*, 63 M.J. at 136. Although appellant's

[5] Under the post-MJA 2016 procedures, the submission of post-trial matters pursuant to R.C.M. 1106—the traditional vehicle for raising post-trial delay concerns—occurs prior to the entry of judgment. Because the court reporter is

failure to act does not waive his speedy post-trial rights, *Id.* at 138, the third *Barker* factor favors the government.

3. Appellant has not suffered prejudice.

Finally, appellant suffered no "real harm or legal prejudice" flowing from the post-trial processing of his case. *See United States v. Santoro*, 46 M.J. 244, 347 (C.A.A.F. 1997) (noting "[h]ad [appellant] been prejudiced, we are certain he would have complained" (citing *United States v. Jenkins*, 38 M.J. 287, 289 (C.A.A.F. 1993))). Notably, appellant's brief cites no particularized prejudice, and an analysis of the three *Moreno* sub-factors shows that he suffered none.

First, appellant received the benefit of his bargain and was sentenced to the minimum amount of confinement possible pursuant to his plea agreement. (R. at 112; Plea Agreement). This fact negates any potential argument that appellant suffered from "oppressive incarceration." *Moreno*, 63 M.J. at 138–39. Additionally, appellant's sole basis for appeal is this dilatory post-trial processing assignment of error. (Appellant's Br. 1). Without substantive grounds for appeal, appellant cannot claim prejudice on the basis of oppressive incarceration or

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supposed to certify the record of trial "as soon as practicable after the judgment has been entered into the record," R.C.M. 1112(c)(2), the rules do not contemplate an intervening period during which an appellant would have the opportunity to raise concerns about any delay that occurs after the judgment, and thus do not expressly provide for a vehicle for raising such concerns. In this case, appellant failed to raise any post-trial delay concerns in any forum at the installation level, which could have been done in a post-trial motion under R.C.M. 1104(b)(1)(E).

potential harm at a rehearing, as the prejudice analysis "is directly related to the success or failure of an appellant's substantive appeal." *Moreno*, 63 M.J. at 139–40. Appellant has also failed to indicate any "particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Id*. at 139. Ultimately, appellant provides no basis for particularized prejudice, and this *Barker* factor weighs heavily in the government's favor.

Additionally, appellant has not shown that the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system" and overcome the absence of prejudice. *Brown*, 81 M.J. at 511 (citing *Toohey*, 63 M.J. at 362). Therefore, under the "difficult and sensitive balancing process," the facts of this case show that appellant did not suffer a due process violation. *Moreno*, 63 M.J. at 145.

B. The delay does not merit relief under this court's sentence appropriateness analysis.

Even where no due process violation occurs, this court must still determine "on the basis of the entire record" what sentence "should be approved." UCMJ art. 66(d). Appellant's sentence is appropriate based the totality of the circumstances: the seriousness of his crimes, the maximum allowable punishment for his conviction, appellant's entitlement to pretrial confinement credit, and favorable action taken by the convening authority. *See Garman*, 59 M.J. at 678 (noting that

this court "look[s] to the totality of the circumstances of the post-trial process" when assessing whether relief is warranted). The government acknowledges appellant's argument that Fort Bragg "is not a first-time offender when it comes to excessive post-trial delay," but does not believe this fact merits relief here. [6] (Appellant's Br. 7).

Appellant asks this court to disapprove his bad-conduct discharge. (Appellant's Br. 8). However, even if this court were to grant relief in this case, setting aside the punitive discharge would be extreme in light of his serious misconduct. See *United States v. Collins*, 44 M.J. 830, 833 (Army Ct. Crim. App. 1996) (holding that disapproval of the bad-conduct discharge—even when all confinement had been served—would be "totally disproportionate to the harm suffered, would provide appellant with a major windfall, and would be too drastic a remedy in light of the seriousness of appellant's misconduct"). Here, not only did appellant disobey his commander's orders, he also threatened to shoot him with a concealed handgun that he had unlawfully brought onto post. (Pros. Ex. 1, p. 2). Appellant also had significant amounts of controlled substances in his possession on post. (Pros. Ex. 1, para. 11). Furthermore, appellant resisted arrest and

[6] The totality of the circumstances in this case is distinct from the "unique" circumstances in *United States v. Hotaling*, and such an "extreme and drastic remedy" as setting aside appellant's punitive discharge is not warranted here. ARMY 20190360, 2020 CCA LEXIS 449, at *9 (Army Ct. Crim. App. 11 Dec. 2020) (mem. op.).

repeatedly kicked the window of an MP vehicle after being detained. (Pros. Ex. 1, p. 3). Finally, in return for his commander allowing him to have dinner with his wife after being ordered to stay in pretrial confinement, he fled post and devised a plan to go to the Fayetteville airport. (Pros. Ex. 1, pp. 3–4).

Appellant faced a maximum punishment of reduction to the grade of E-1, total forfeiture of all pay and allowances, confinement for twenty-eight years, and a dishonorable discharge.[7] (R. at 66). Yet, in accordance with his plea agreement, he received a mere confinement for eleven months, reduction to the grade of E-1, and a bad-conduct discharge. (R. at 112). The military judge also granted appellant 209 days of pretrial confinement credit. (R. at 112). Furthermore, the convening authority took favorable action when he approved appellant's request for waiver of automatic forfeitures for six months after the entry of judgment for the benefit of appellant's wife. (Action).

When considering the totality of the circumstances, including the post-trial processing, seriousness of appellant's offenses, and the lack of prejudice, appellant deserves no relief from his adjudged sentence. *Garman*, 59 M.J. at 678.

[7] Pursuant to the plea agreement, the maximum punishment appellant could receive was sixteen months. (Plea Agreement).

Conclusion

WHEREFORE, the government respectfully requests this honorable court affirm the findings and sentence.

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APPENDIX

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Job Number: 152325821

Document (1)

1. *United States v. Hotaling, 2020 CCA LEXIS 449*

Client/Matter: -None-

Search Terms: 2020 CCA LEXIS 449

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	-None-

United States v. Hotaling

United States Army Court of Criminal Appeals

December 11, 2020, Decided

ARMY 20190360

Reporter
2020 CCA LEXIS 449 *; 2020 WL 7334091

UNITED STATES, Appellee v. Private E2 BRIAN C. HOTALING, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, Fort Campbell. Matthew A. Calarco and Wendy P. Daknis, Military Judges, Colonel Andras M. Marton, Staff Judge Advocate (pretrial), Colonel Laura J. Calese, Staff Judge Advocate (post-trial).

Case Summary

Overview

HOLDINGS: [1]-The government's dilatory post-trial processing, 350 days between sentencing and action, was unreasonable but did not constitute a due process violation. None of the Staff Judge Advocate's (SJA's) listed reasons for the delay provided a justification, but there was no prejudice in the case; [2]-Relief was warranted under Unif. Code Mil. Justice art. 66(d), *10 U.S.C.S. § 866(d)*, and the servicemember's bad-conduct discharge was therefore set aside under the circumstances unique to the case, which included the failure to serve the servicemember with the SJA's recommendation for over six months and the persistent post-trial processing delays arising out of the Fort Campbell Office of the SJA.

Outcome

Findings of guilty affirmed. Bad-conduct discharge set aside.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Posttrial Sessions

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN1[] **Procedural Due Process, Scope of Protection**

The U.S. Army Court of Criminal Appeals has two distinct responsibilities in addressing post-trial delay. First, as a matter of law, the court reviews whether claims of excessive post-trial delay resulted in a due process violation. *U.S. Const. amend. V*. Second, even if the court does not find a due process violation, it may nonetheless grant an appellant relief for excessive post-trial delay under the court's broad authority of determining sentence appropriateness under Unif. Code Mil. Justice art. 66(d), *10 U.S.C.S. § 866(d)*.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Posttrial Sessions

Military & Veterans Law > Military

Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN2[] Posttrial Procedure, Actions by Convening Authority

The U.S. Army Court of Criminal Appeals reviews de novo whether an appellant has been denied his due process right to a speedy post-trial review. A presumption of unreasonable post-trial delay exists when the convening authority fails to take action within 120 days of completion of trial. In U.S. v. Moreno, the U.S. Court of Appeals for the Armed Forces adopted the four-factor balancing test from Barker v. Wingo, which a court employs when a presumption of unreasonable post-trial delay exists, to determine whether the post-trial delay constitutes a due process violation: (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. In assessing the fourth factor of prejudice, the court considers three sub-factors: (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.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN3[] Posttrial Procedure, Actions by Convening Authority

Personnel and administrative issues are not legitimate reasons justifying otherwise unreasonable post-trial delay.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN4[] Procedural Due Process, Scope of Protection

Absent a finding of prejudice, the U.S. Army Court of Criminal Appeals may still find a due process violation only when, in balancing the other three Moreno factors, the post-trial delay is so egregious that tolerating it would adversely affect the public's perception of fairness and integrity of the military justice system.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Posttrial Sessions

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Findings

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

Military & Veterans Law > ... > Courts Martial > Sentences > Cruel & Unusual Punishment

HN5[] Judicial Review, Courts of Criminal Appeals

In finding a post-trial delay was unreasonable but not unconstitutional, the U.S. Army Court of Criminal Appeals turns to its authority under Unif. Code Mil. Justice art. 66(d), *10 U.S.C.S. § 866(d)* to grant relief for excessive post-trial delay without a showing of actual prejudice within the meaning of Unif. Code Mil. Justice art. 59(a), *10 U.S.C.S. § 859(a)*. Specifically, the court next determines what findings and sentence should be approved based on all the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay.

Military & Veterans Law > ... > Courts Martial > Sentences > Punitive Discharge

HN6[] **Sentences, Punitive Discharge**

While military courts are unquestionably authorized to provide relief from a punitive discharge, the court must tailor an appropriate remedy for post-trial delay to the circumstances of the case.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Posttrial Sessions

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN7[] **Posttrial Procedure, Posttrial Sessions**

In providing a remedy for post-trial delay in a military case, it is important to consider at what point during the post-trial process the unreasonable delay occurred.

Counsel: For Appellant: Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Captain Paul T. Shirk, JA (on brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Major Christian E. DeLuke, JA; Captain Paul T. Shirk, JA (on reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Dustin B. Myrie, JA; Major John D. Martorana, JA (on brief).

Judges: Before KRIMBILL, BROOKHART, and ARGUELLES[1], Appellate Military Judges. Senior Judge BROOKHART and Judge ARGUELLES concur.

Opinion by: KRIMBILL

Opinion

MEMORANDUM OPINION

KRIMBILL, Chief Judge (IMA):

Appellant's case is the latest in a troubling line of cases arising from Fort Campbell fraught with unreasonable post-trial delay. Like its predecessors, this case raises substantial questions as to the appropriateness of appellant's sentence. After considering the circumstances unique to this case, we find that a punitive discharge is not an appropriate sentence for appellant. Accordingly, we set **[*2]** aside appellant's bad-conduct discharge, and affirm only so much of the sentence as provides for confinement for thirty days and reduction to the grade of E-1.[2]

Appellant's sole assignment of error concerns the dilatory post-trial processing of his case. Appellant alleges that the government's dilatory post-trial processing, 350 days between sentencing and action, warrants relief under *United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006)*. We agree relief is warranted for the flagrant disregard of timely post-trial processing in this case.

BACKGROUND

Appellant was a married twenty-four-year-old Soldier who served as a vehicle mechanic. He and his wife had two children of their own and one child from a previous relationship of appellant's wife. All three children were under the age of five years. The government charged appellant with three specifications of negligent failure to create a safe environment for his children. Specifically, appellant pleaded guilty to "failing to maintain sanitary living quarters" for his three minor children over a period of twelve days. Appellant's wife was present in the house for five of the twelve days charged. After the neglect was discovered, appellant was ordered to move into the barracks. Appellant ultimately **[*3]** spent approximately twenty-two months living in the barracks while awaiting trial.

Appellant pleaded guilty to all three specifications alleging neglect. During sentencing, appellant's former First Sergeant, who viewed the condition of appellant's home at the time the neglect was discovered, offered strikingly favorable testimony of appellant's performance as a Soldier. Other members of appellant's command provided less favorable testimony. Appellant was ultimately sentenced to a punitive discharge,

[1] Chief Judge (IMA) Krimbill and Judge Arguelles both decided this case while on active duty.

[2] A military judge sitting as a general court-martial convicted appellant, consistent with his pleas, of three specifications of child endangerment, in violation of *Article 134, Uniform Code of Military Justice*, *10 U.S.C. § 934* [UCMJ]. The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for thirty days, and reduction to the grade of E-1.

confinement for thirty days, and reduction to the grade of E-1.

The military judge announced appellant's sentence on 29 May 2019, and authenticated the 417-page transcript 78 days later.[3] The Fort Campbell Staff Judge Advocate (SJA) completed her recommendation (SJAR) on 17 October 2019, 141 days after the sentence was announced. Alarmingly, the government then failed to serve the record of trial and the SJAR on appellant until 20 April 2020-186 days after the SJA signed the SJAR. Essentially, it took the government over six months to place a copy of the record of trial and SJAR in the mail. In the six months that elapsed between signing the SJAR and serving it on appellant, appellant submitted **[*4]** two separate requests for speedy post-trial processing.[4]

Appellant submitted his post-trial submissions ten days after receiving a copy of the record of trial and SJAR, and supplemented those submissions four days later. In both his initial and supplemental post-trial submissions, appellant confronted the Fort Campbell Office of the Staff Judge Advocate (OSJA) with several of this court's recent opinions in which we provided relief to various appellants because of the Fort Campbell OSJA's inability to effectively and efficiently process cases after a sentence was announced.

In the addendum to the SJAR, the SJA attempted to justify the delay by identifying factors that ostensibly contributed to the post-trial delay in this case. Those factors include multiple deployments impacting legal personnel and post-trial oversight, an unprecedented increase in the volume and complexity of cases (including capital litigation), several unforeseen personnel challenges (including the unexpected resignation of the post-trial paralegal), and the COVID-19 pandemic.

In total, the Fort Campbell OSJA took 350 days (from 29 May 2019 to 13 May 2020) to process appellant's case post-trial, nearly 200 days of **[*5]** which were spent waiting to place documents in the mail.

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[3] Both of the military judges who presided over this case received the transcript on 31 July 2019 and authenticated it on 15 August 2019.

[4] Appellant submitted his first request on 12 December 2019 (197 days after announcement of the sentence), and his second request on 31 January 2020 (247 days after announcement of the sentence).

DISCUSSION

HN1[] This court has two distinct responsibilities in addressing post-trial delay. *See* United States v. Simon, 64 M.J. 205, 207 (C.A.A.F. 2006). First, as a matter of law, this court reviews whether claims of excessive post-trial delay resulted in a due process violation. *See* U.S. Const. amend. V; Diaz v. Judge Advocate General of the Navy, 59 M.J. 34, 38 (C.A.A.F. 2003). Second, even if we do not find a due process violation, we may nonetheless grant an appellant relief for excessive post-trial delay under our broad authority of determining sentence appropriateness under Article 66(d), UCMJ. *See* United States v. Tardif, 57 M.J. 219, 225 (C.A.A.F. 2002).

HN2[] We review de novo whether an appellant has been denied his due process right to a speedy post-trial review. Moreno, 63 M.J. at 135. A presumption of unreasonable post-trial delay exists when the convening authority fails to take action within 120 days of completion of trial. Id. at 142. In *Moreno*, our Superior Court adopted the four-factor balancing test from Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), which we employ when a presumption of unreasonable post-trial delay exists, to determine whether the post-trial delay constitutes a due process violation: "(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." *Id.* In assessing the fourth factor of prejudice, **[*6]** we consider three sub-factors: "(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 (quoting Rheuark v. Shaw, 628 F.2d 297, 303 n.8 (5th Cir. 1980)).

1. Due Process

In this case, the first factor weighs heavily in favor of appellant; 350 days from sentence announcement to action by the convening authority is presumptively unreasonable, as it is nearly three times the authorized processing time.

Related to the second prong, in the post-trial processing memo, the SJA stated that "[m]ultiple deployments . . . [an] increase in volume and complexity of cases . . .

unforeseen personnel challenges . . . [and] [f]rom 17 March 2020 to [13 May 2020], the COVID-19 pandemic" contributed to the post-trial delay in this case. Simply put, none of the listed reasons for the delay provides a justification for the inconceivable delay in this case. HN3[] First, "personnel and administrative issues . . . are not legitimate reasons justifying otherwise unreasonable post-trial delay." United States v. Arriaga, 70 M.J. 51, 57 (C.A.A.F. 2011) (citations omitted). **[*7]** Second, even if the purported reasons for the delay somehow justified the government's delay, it still took over six months (186 days) for the OSJA to perform the purely ministerial act of serving the SJAR and the record of trial on appellant. Depositing documents in the mail does not require any specialized legal training, nor does it require any significant time commitment. Third, while the COVID-19 pandemic could justify some amount of delay, the pandemic had virtually no impact on this case. By the SJA's own concession, the pandemic did not impact the OSJA until 17 March 2020, a time by which the government had already failed to simply mail the SJAR and record of trial for over five months. In total, the second factor also weighs heavily in favor of appellant.

The third factor likewise weighs in favor of appellant, as appellant submitted two separate requests for speedy post-trial processing. Regarding the fourth factor, appellant specifically acknowledges there was no prejudice in his case, nor do we identify any such prejudice based on our review of the record. As such, the fourth factor weighs in favor of the government.

HN4[] Absent a finding of prejudice, we may still find "a due **[*8]** process violation only when, in balancing the other three [*Moreno*] factors, the delay is so egregious that tolerating it would adversely affect the public's perception of fairness and integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006). Here, after balancing the four Moreno factors we decline appellant's invitation to find a due process violation. However, this court's analysis does not end there.

2. Article 66, UCMJ

HN5[] In finding the post-trial delay was unreasonable but not unconstitutional, we turn to our "authority under Article 66[(d), UCMJ] to grant relief for excessive post-trial delay without a showing of 'actual prejudice' within the meaning of Article 59(a)." Tardif, 57 M.J. at 224 (citing United States v. Collazo, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000)). Specifically, we next "determine what findings and sentence 'should be approved' based on all the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay." *Id.*

After considering the totality of the record of trial, we are convinced that appellant's punitive discharge should not be approved. HN6[] While military courts are unquestionably authorized to provide such relief, *see* id. at 225; Moreno, 63 M.J. at 143, we are cognizant that we must "tailor an appropriate remedy [for the post-trial delay] . . . to **[*9]** the circumstances of the case." United States v. Jones, 61 M.J. 80, 86 (C.A.A.F. 2005) (quoting Tardif, 57 M.J. at 225). In arriving at such an extreme and drastic remedy, we find the combination of four circumstances, unique to this case, warrant setting aside appellant's punitive discharge.

HN7[] First, it is important to consider at what point during the post-trial process the unreasonable delay occurred. Here, the most unreasonable portion of the delay occurred between the SJA signing the SJAR and service of the SJAR and record of trial on appellant. Once the SJAR was signed, the very next step in the post-trial processing was the service on appellant and his defense counsel. As noted in the *Barker* analysis above, service of the documents is ministerial and in all likelihood only required the OSJA to walk the documents to the mailroom. Despite the relative ease of completing this step, the OSJA failed to serve appellant with the SJAR and record of trial for over six months (186 days), which itself far exceeds the total permissible post-trial processing timeline.

Second, and somewhat intertwined with the first circumstance, is why the unreasonable delay occurred. We addressed this fully above in our analysis of the second Barker factor. It bears repeating, however, **[*10]** that the OSJA failed to provide even a plausible justification for the unreasonable delay. No amount of personnel shortage could necessitate a six-month delay in putting a 471-page record of trial and a one-page SJAR in the mail. Such a delay is simply unjustifiable.

Third, the SJA's recommendation to the convening authority in her addendum to the SJAR is particularly troubling. Therein, the SJA acknowledged that, at that time, this court had recently castigated Fort Campbell's post-trial processing in at least three separate opinions.[5]

[5] We note appellant's trial defense counsel highlighted this court's concern with Fort Campbell's post-trial processing in

The SJA also "agree[d] that the delay in providing a copy of the Record of Trial to [appellant] prejudice[d] his rights in the post-trial process."[6] Despite knowing that this court was providing remedies for Fort Campbell's repeated dilatory post-trial processing, and despite the apparent belief that appellant was prejudiced by the same dilatory post-trial processing, the SJA recommended that no clemency was warranted in this case.[7] Essentially, the SJA made a recommendation that she disagreed with this court about the import of and relief for unreasonable post-trial delay.

Finally, the persistent post-trial processing delays arising out of the Fort Campbell **[*11]** OSJA also factor into our analysis. The sluggish post-trial processing in this case is yet another example of Fort Campbell's seeming inability to fulfill its legal obligations with respect to post-trial processing of courts-martial. Within just the past year, this court has cited dilatory post-trial processing at Fort Campbell in eight cases;[8] this case marks the ninth such finding. Despite our repeated repudiation of Fort Campbell's post-trial processing performance, the problem persists. We yet again remind military justice practitioners that "[i]ncidents of poor administration reflect adversely on the United States Army and the military justice system." *United States v. Carroll, 40 M.J. 554, 557 n.8 (A.C.M.R. 1994)*. The time is now to improve post-trial processing at Fort Campbell.

Having considered the entire record, especially the four circumstances listed above, and exercising our authority under *Article. 66, UCMJ*, we find appellant is entitled to relief for the dilatory post-trial processing of his case. Appellant's punitive discharge "should [not] be approved" under the unique facts and circumstances of this case.[9] *See UCMJ art. 66(d)*.

CONCLUSION

The findings of guilty are AFFIRMED. Appellant's bad-conduct discharge is SET ASIDE. Only so much of the sentence as provides for confinement for thirty days and reduction to the grade of E-1 is AFFIRMED. All rights, privileges, and property of which appellant has been deprived by virtue of that portion of the sentence set aside by this decision are ordered restored. *See UCMJ arts. 58b(c)* and *75(a)*.

Senior Judge BROOKHART and Judge ARGUELLES concur.

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appellant's post-trial submissions to the convening authority.

[6] As noted above, we disagree that appellant suffered any actual prejudice as a result of the delay.

[7] The convening authority's clemency powers were limited by *Article 60, UCMJ*. However, appellant specifically requested a recommendation from the convening authority to this court concerning appropriate clemency in this case.

[8] *United States v. Badgett, ARMY 20190177, 2020 CCA LEXIS 403, at *6 (Army Ct. Crim. App. 4 Nov. 2020 (summ. disp.)* (post-trial processing delay of 343 days warranted sentence credit); *United States v. Hickey*, ARMY 20190072 (Army Ct. Crim. App. 7 Oct. 2020) (decision) (dilatory post-trial processing warranted a two-month reduction in sentence); *United States v. Barchers*, ARMY 20180648 (Army Ct. Crim. App. 30 Sep. 2020) (decision) (granting sentence relief for 129-day lapse between appellant's post-trial submission and convening authority action); *United States v. Feeney-Clark, ARMY 20180694, 2020 CCA LEXIS 256, at *7 (Army Ct. Crim. App. 29 Jul. 2020)* (mem. op.) (finding post-trial delay of 303 days unreasonable, but unable to provide meaningful sentence credit); *United States v. Diaz, ARMY 20180556, 2020 CCA LEXIS 154, at *7 (Army Ct. Crim. App. 11 May 2020) (summ. disp.)* (post-trial processing delay of 303 days warranted sentence credit); *United States v. Notter, ARMY 20180503, 2020 CCA LEXIS 150, at *6 (Army Ct. Crim. App. 4 May 2020)* (summ. disp.) (post-trial processing delay of 337 days warranted sentence credit); *States v. Ponder, ARMY 20180515, 2020 CCA LEXIS 38, at *3 (Army Ct. Crim. App. 10 Feb. 2020)* (summ. disp.) (post-trial processing delay of 296 days warranted sentence credit); and *United States v. Kizzee, ARMY 20180241, 2019 CCA LEXIS 508, at *7 (Army Ct. Crim. App. 12 Dec. 2019)* (summ. disp.) (post-trial processing delay of 274 days warranted sentence credit).

[9] We note that in *Feeney-Clark*, another panel of this court elected not to set aside the punitive discharge, finding the punitive discharge in that case "to be appropriate when considering" the circumstances of that case. *ARMY 20180694, 2020 CCA LEXIS 256, at *5-6 n.5*. Our decision in this case in no way conflicts with the decision in *Feeney-Clark*. Instead, we are merely convinced that appellant's punitive discharge is not appropriate given the unique facts and circumstances of this case. We further reject the Government's contention that *Feeney-Clark* stands for the proposition that our setting aside the punitive discharge in this case amounts to clemency. *Cf.* ***[*12]*** *United States v. Hobbs, 30 M.J. 1095, 1097 (N.M.C.M.R. 1989)* ("[T]o provide relief for the inordinately long and prejudicial post-trial delay, we find the appropriate remedy under the circumstances is disapproval of the badconduct discharge.").

CERTIFICATE OF SERVICE, U.S. v. FONT MACIAS (20200282)

I certify that the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted]

[redacted] on the 5th day of November, 2021.

[redacted]

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