

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20220216

Specialist (E-4)

Nicholas D. Amador, II

United States Army,

Appellant

Tried at Vilseck, Germany, on 2 May 2022, before a special court-martial appointed by the Commander, 7th Army Training Command, Lieutenant Colonel Thomas P. Hynes, military judge, presiding.

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

Assignment of Error

**WHETHER THE DILATORY POST-TRIAL PROCESSING
OF THIS CASE WARRANTS RELIEF WHERE THE CASE
WAS NOT DOCKETED BY THE ARMY COURT OF
CRIMINAL APPEALS UNTIL 415 DAYS AFTER
SENTENCING.**

Statement of the Case

On 2 May 2022, a military judge sitting as a special court-martial convicted appellant, in accordance with his pleas, of two specifications of domestic violence in violation of Articles 128b Uniform Code of Military Justice, 10 U.S.C. §§ 928b [UCMJ]. (Statement of Trial Results). The military judge sentenced appellant to thirty days confinement and a Bad Conduct Discharge. (Statement of Trial Results).

On 14 June 2022, the convening authority approved appellant's request for waiver of automatic forfeitures and took no action on the findings and sentence. (Action) (Approval of 1106 Matters). On 11 April 2023, the military judge entered judgment. (Judgment of the Court). On 22 June 2023, this court docketed appellant's case. (Referral).

WHETHER THE DILATORY POST-TRIAL PROCESSING OF THIS CASE WARRANTS RELIEF WHERE THE CASE WAS NOT DOCKETED BY THE ARMY COURT OF CRIMINAL APPEALS UNTIL 415 DAYS AFTER SENTENCING.

Facts Relevant to Assignment of Error

The military judge sentenced appellant on 2 May 2022. Just under a month after the sentencing, appellant submitted post-trial matters. (Post-Trial Matters). But it was not until nearly a year later on 11 April 2023, the military judge entered judgment. (Judgment).

The Chief of Justice attempted to account for this incredible amount of delay. Between 6 May 2022 and 21 April 2023 the unit conducted just four courts-martial. (Timeline of the Delayed Transcript). The rest of the time accounted for is leave, four-day weekends, the occasional motions hearing and various trainings.

(Timeline of the Delayed Transcript). It was not until 30 November 2022¹ that the primary court reporter started creating the transcript in this case. (Timeline of the Delayed Transcript). On 1 December the court reporter realized the Article 32 audio was corrupted, and the entire month of December 2022 was spent searching for “working Article 32 audio.” (Timeline of the Delayed Transcript)

The errata was not submitted to the military judge until 12 February 2023. (Timeline of the Delayed Transcript). No work was done on post-trial during the entire month of March 2023. (Timeline of the Delayed Transcript). Finally on 14 April 2023 the record was sent to the military judge for authentication, but due to “training sessions, meetings, a broken computer and approved leave – the court reporter was still unable to certify the transcript. (Timeline of the Delayed Transcript)

From May to June 2023, trainings, sick call and a still not working computer stymied certification. (Timeline of the Delayed Transcript). The transcript was finally sent off on 14 June 2023. (Chronology Sheet). This court referred the case on 22 June 2023. (Referral).

In the interim, appellant has been applying to technical and trade schools,

¹ The Timeline of Delayed Transcript lists the date as 30 November 2023—this was clearly an error.

however, for appellant to qualify for tuition assistance, these schools require a copy of appellant's DD214. (Appellant's Affidavit) (Email to Nicholas Amador from Texas State Technical College (TSTC) Veteran Services Department).

Standard of Review and Law

“Claims of unreasonable post-trial delay are reviewed de novo.” *United States v. Cooper*, ARMY 20200614, 2022 CCA LEXIS 399, at *2 (Army Ct. Crim. App. 7 July 2022) ([summ. disp.](#)) (citing *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). A convicted soldier's right to Due Process includes a timely review and appeal of his conviction. *United States v. Toohey*, 60 M.J. 100, 101 (C.A.A.F. 2004). Even without specific prejudice, this court can still grant relief in cases where there is unreasonable and unexplained post-trial delay. *United States v. Toohey II*, 63 M.J. 353, 362 (C.A.A.F. 2006).

Where post-trial delay is found to be unreasonable, but not a due process violation, this court still has “authority under Article 66[(d)(1), UCMJ,] to grant relief for excessive post-trial delay without a showing of ‘actual prejudice’ within the meaning of Article 59(a).” *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002) (citing *United States v. Collazo*, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000)). In deciding what findings and sentence should be approved, this court looks to “all the facts and circumstances reflected in the record, including the

unexplained and unreasonable post-trial delay.” *Id.* at 224. “Dilatory post-trial processing, without an acceptable explanation, is a denial of fundamental military justice, not a question of clemency.” *United States v. Ponder*, ARMY 20180515, 2020 CCA LEXIS 38, at *3 (Army Ct. Crim. App. 10 Feb. 2020) ([summ. disp.](#)) (quoting *United States v. Bauerbach*, 55 M.J. 501, 507 (Army Ct. Crim. App. 2001)) (granting relief for excessive post-trial delay in light of government’s failure to provide adequate reasons).

Article 66(d)(2), UCMJ authorizes courts of criminal appeals to “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. . . .” Although the court has overruled their previous 150-day limit of presumptive unreasonableness, it will find excessive delay “based on an examination of all relevant circumstances” under Article 66(d)(2). *United States v. Winfield*, No. ARMY 20210092, 2023 CCA LEXIS 189, at *6 (Army Ct. Crim. App. Apr. 27, 2023) ([mem. op.](#)). *See also United States v. Sepulveda*, No. ARMY 20220241, 223 CCA Lexis 223 (Army Ct. Crim. App. May 5, 2023) (summ. disp.); *United States v. Morris*, No. ARMY 20210624, 2023 CCA Lexis 197 (Army Ct. App. May 8, 2023

Argument

Following adjournment, the government took 408 days to send appellant's case at this court. The government failed to give a reasonable explanation for the delay. (Post-Trial Processing Timeline Letter). While appellant submitted his matters pursuant to R.C.M. 1106 on 1 June 2022, the transcript was not certified until 5 June 2023 *over an entire year later*. (Court Reporter Certification). The government's failure to plan for court reporter limited availability or have any plan to address computer issues is unacceptable. Even those government failures aside, there is no explanation for entire months passing, for instance in March 2023, where no work was done on appellant's case.

Even more troubling, the court reporters spent months attempting rectify an audio issue with the Article 32, when appellant's case was referred to a special court-martial and thus no Article 32 preliminary hearing was required. This fact alone indicates there was not adequate supervision over the court-reporting team.

Recently, this court found a 100-day unexplained delay between authentication and docketing as "unacceptable" and provided fifteen days of sentence relief. *Sepulveda*, at *2. Here, the delay was over four times as much, while the given reasons for the delay are lacking. Similarly in *Morris*, the court found over sixty-day delay between trial counsel's precertification and the military

judge's authentication to be "excessive" under Article 66(d)(2) and the delay "rises to a level of egregiousness such that it would adversely affect the public's perception of the fairness and integrity of the military justice" under the Due Process Clause of the Fifth Amendment. *Morris*, at *3 (citing *Toohey II*, 63 M.J. at 362). The delay here was even more egregious. The 950-page record took over a year to get to the trial counsel for review. Appellant served his sentence and has been out of the military for nearly a year and a half with no closure.

The reason for the delay was negligence, at best. Thus, appellant is entitled to a meaningful relief that also addresses public's perception of the integrity of the military justice system.

The courts in *Morris* and *Winfield* could not identify appropriate relief, despite finding excessive delay. Here, appellant was sentenced to thirty days confinement and a punitive discharge, thus appropriate relief is readily available. Therefore, appellant asks this court to disapprove the entirety of appellant's thirty-day sentence. This is necessary to address the government's negligence throughout the post-trial process and in particular, the entire month that passed without any work on appellant's case whatsoever. This remedy is appropriate for the egregious and unreasonable delay.

While relief for confinement is appropriate even in the absence of prejudice,

appellant suffered actual prejudice here and thus the Bad Conduct Discharge must be remitted as well. Appellant needs his DD214 to receive tuition assistance for technical and trade schools. (Appellant's Affidavit) (Email to Nicholas Amador from TSTC Veteran Services Department). The excessive day delay left the appellant with the choice of withdrawing his case from appellant review and forfeiting potential relief from this court, or continuing with his appeal and be forced to pay for technical school out of pocket. This prejudice should result in the court remitting the Bad Conduct Discharge and the confinement in this case.

Conclusion

For the foregoing reasons, this court should grant appropriate relief for the post-trial delay.



Matthew S. Fields
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division



Mitchell D. Herniak
Major, Judge Advocate
Branch Chief
Defense Appellate Division



Autumn R. Porter
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army
Court and Government Appellate Division on November 14, 2023.



MICHELLE L.W. SURRATT
Paralegal Specialist
Defense Appellate Division

