IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**BRIEF ON BEHALF OF APPELLEE**
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 convened 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 one specification of assault and one specification of domestic violence in violation of Articles 128 and 128b, Uniform Code of Military Justice, 10 U.S.C. §§ 928 and 928b [UCMJ]. (R. at 46; Statement of Trial Results [STR]). The military judge sentenced appellant to be reduced to

the grade of E-1, to be confined for fifteen days for each specification (to run consecutively), and to be separated from the service with a bad-conduct discharge. (R. at 123; STR).

Statement of Facts

A. Appellant's Misconduct.

On or about 21 November 2020, appellant got into an argument with [redacted] and threw his cell phone at her, hitting her in the face and causing her bottom lip to bleed. (Pros. Ex. 1; R. at 18–20). On or about 22 September 2019, appellant and [redacted] got into another argument during which he threw food and various household items at her. (Pros. Ex. 1; R. at 24–28).

B. Plea Agreement

On 29 March 2022[1], appellant and the convening authority entered into a plea agreement which required appellant to plead guilty to two specifications and their charges.[2] The following sentencing limitations were agreed upon: to serve a minimum of thirty days and maximum sixty days confinement, to be reduced to the

[1] The plea agreement is dated 14 March 2022; however, the agreement was not signed by the convening authority until 29 March 2022. (App. Ex. I).

[2] Appellant was originally charged with two specifications of violating Article 120, UCMJ; four specifications of violating Article 128b, UCMJ; one specification of violating Article 128, UCMJ; and one specification of violating Article 134, UCMJ. (Charge Sheet). As part of the plea agreement, appellant agreed to plead guilty to one specification of violating Article 128b, UCMJ, and one specification of violating Article 128, UCMJ, in exchange for the remaining specifications and charges to be dismissed. (App. Ex. I).

grade of E-1, and a bad-conduct discharge would be adjudged. (App. Ex. I). The convening authority agreed to withdraw the charges and specifications from a general court-martial and refer to a special court-martial the charges appellant agreed to plead guilty to. (App. Ex. I). The convening authority further agreed to dismiss the charges and specifications appellant agreed to plead not guilty. (App. Ex. I).

C. Post-trial processing.

Appellant's court-martial adjourned on 2 May 2022. (R. at 124). On 14 July 2022, the convening authority took no action. (Action). On 11 April 2023, the military judge entered judgment. (Judgment). The trial counsel completed the pre-certification on 5 June 2023. (Precertification). The military judge authenticated the record on 5 June 2023. (Authentication). The court reporter certified the transcript on 5 June 2023. (Certification). The Office of the Staff Judge Advocate (OSJA) forwarded the record of trial to this court on 14 June 2023. (Chronology Sheet). The OSJA provided a letter detailing the post-trial processing of the case. (Timeline of Delayed Transcript and Record of Trial). This court docketed the case on 22 June 2023. (Referral and Designation of Counsel).

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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); *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011); *United States v. Anderson*, 82 M.J. 82, 85 (C.A.A.F. 2022).

Law

There are two distinct analyses in addressing claims of post-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, under the Fifth Amendment, to post-trial processing without unreasonable delay. *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 38 (C.A.A.F. 2003). In order to analyze post-trial delays and due process, appellate courts analyze four factors (*Barker* factors) that examine: "(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." *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *Moreno*, 63 M.J. at 135.[3] The four *Barker* factors must be balanced, and "no single factor [is] required to find that post-trial delay constitutes a due process violation." *United States v. Toohey*, 63 M.J. 353, 361 (*Toohey II*) (C.A.A.F. 2006) (quoting *Moreno*, 63 M.J. at 136) (citing *Barker*, 407 U.S. at 533). Additionally, Courts of Criminal Appeals (CCAs) will also further examine prejudice 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 139–40. None of these factors are implicated in this case. The *Barker* analysis, however, is not required if this 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).

In situations where an appellant is unable to show they have suffered prejudice, the court will find a due process violation only when, "in balancing the other three factors, [the post-trial] delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military

[3] *See also United States v. Anderson*, 82 M.J. 82, 88–90 (C.A.A.F. 2022) (Maggs, J., concurring) (questioning the continued viability of *Moreno* in light of the Military Justice Act of 2016 and *United States v. Betterman*, 578 U.S. 437 (2016)).

justice system." *Toohey*, 63 M.J. at 362. 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. *Id*. 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, this court next considers whether relief for excessive post-trial delay is warranted based on the CCA's sentence appropriateness authority under Article 66(d)(1), UCMJ. *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

Additionally, pursuant to Article 66(d)(2), UCMJ, a CCA "may provide appropriate relief if the accused demonstrates . . . excessive delay in the processing of the court-martial after the judgment was entered into the record." Because Article 66(d)(2), UCMJ, does not define "excessive delay," "in considering whether a delay is excessive this court will broadly focus on the totality of the

circumstances surrounding the post-trial processing timeline for each case, balancing the interplay between factors such as chronology, complexity, and unavailability, as well as the unit's memorialized justifications for any delay." *United States v. Winfield*, 83 M.J. 662, 666 (Army Ct. Crim. App. 2023). Even if there is excessive delay, "Article 66(d)(2) dictates [that this court] 'may provide appropriate relief' and leaves the determination as to whether relief is provided, and what type of relief is appropriate, to [this court's] discretion." *Id*.

Argument[4]

Under the facts of this case, the government agrees with appellant that setting-aside 30 days of confinement is appropriate under Article 66(d)(2), UCMJ.[5]

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[4] Any potential due process error was harmless beyond a reasonable doubt because when considering the totality of the circumstances, appellant has not suffered prejudice. Appellant alleges that he suffered actual prejudice because he has applied for tuition assistance for technical and trade schools; however, he cannot receive the tuition assistance without his Department of Defense Form 214 [DD 214]. (Appellant's Br. 7–8). While appellant alleges that he suffered prejudice due to a lack of a DD 214, he has failed to show that he would even be entitled to tuition assistance or the G.I. Bill with an adjudged punitive discharge that would be reflected on the DD 214. Appellant has failed to show that the delay was 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. As such, the "difficult and sensitive balancing process" of the facts of this case show that appellant did not suffer a due process violation. *Moreno*, 63 M.J. at 145.

[5] *See United States v. Wilson*, ARMY 20210462 (Army Ct. Crim. App. 29 Nov. 2023) (summ. disp) (finding that fifteen days of sentencing relief is appropriate for excessive post-trial delay where 577 days elapsed from adjournment to the court's receipt of the record of trial); *United States v. Boothby*, ARMY 20210445 (Army Ct. Crim. App. 28 Nov. 2023) (summ. disp.) (granting fifteen days of sentencing

Appellant also asks this court to set-aside his bad conduct discharge. (Appellant's Br. 8). However, setting-aside the bad conduct discharge is not appropriate in this case. Setting aside appellant's punitive discharge would be a windfall to appellant considering the nature of the charges to which he pleaded guilty. *Winfield*, 83 M.J. at 666. Appellant pleaded guilty to domestic violence and assault consummated by a battery. (STR). Prior to entering into the plea agreement, appellant faced an additional two specifications of sexual assault, three specifications of domestic violence, and one specification of abusing an animal. (Charge Sheet). Appellant's plea agreement required that the convening authority dismiss those charges and limit appellant's confinement to sixty days. (App. Ex. I). The plea agreement allowed for a minimum of thirty days confinement (fifteen days for each specification to run consecutively). (App. Ex. I). During sentencing, defense counsel stated "Your Honor…I would ask you to sentence Specialist Amador to 15 days for each charge, totaling 30 days of confinement. I believe that is more than enough punishment considering that he is going to be separated with a bad-conduct discharge…" (R. at 119). Appellant received the minimum required confinement (thirty days) allowed by the plea agreement and argued for by his defense counsel.

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relief where 583 days elapsed from adjournment to the court's receipt of the record of trial); *United States v. Sandoval*, ARMY 20220198 (Army Ct. Crim. App. 27 November 2023) (summ. disp.) (granting thirty days of sentencing relief for excessive post-trial delay where 268 days elapsed from adjournment to the courts receipt of appellant's case).

See generally United States v. Morris, ARMY 20210624, 2023 CCA LEXIS 197, at *2–3 (Army Ct. Crim. App. 8 May 2023) (summ. disp.) (finding that, although the post-trial delay violated appellant's Due Process Clause of the Fifth Amendment, there was "no appropriate relief available under either the Constitution or the UCMJ . . . mindful that the adjudged sentence was identical to appellant's request" since the appellant specifically bargained to receive a dismissal in her plea agreement).

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and grant sentence relief in the form of thirty days of confinement credit.

[redacted]

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CERTIFICATE OF SERVICE U.S. v. AMADOR (20220216)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on this 7th day of December, 2023.

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