

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20220152

Sergeant (E-5)

JORGE L. ESPINAL,

United States Army,

Appellant

Tried at Vilseck, Germany, on 22 February and 30 March 2022, before a general 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

Assignments of Error

**I. WHETHER THE EVIDENCE IS LEGALLY AND
FACTUALLY SUFFICIENT TO SUPPORT APPELLANT'S
CONVICTION FOR FORGEY OF LEAVE AND EARNINGS
STATEMENTS (LESS).**

**II. 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 385 DAYS AFTER
SENTENCING.**

Statement of the Case

On 22 February and 30 March 2022, a military judge sitting as a general court-martial convicted appellant, Sergeant Jorge L. Espinal, contrary to his pleas, of forgery, false official statement, and larceny, in violation of Articles 105, 107,

and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 905, 907, and 921 [UCMJ]. (R. at 205; Charge Sheet). The military judge sentenced appellant to 120 days for the forgery, 30 days for the false official statement, and 60 days for the larceny, all periods of confinement to be served concurrently. (R. at 277). He also sentenced appellant to a bad-conduct discharge. (R. at 277).

On 5 April 2022, the convening authority took no action on the findings and sentence. (Action). On 12 June 2022, the military judge entered judgment. (Judgment of the Court). On 19 April 2023, this court docketed appellant's case. (Referral).

Statement of Facts

Those facts necessary for consideration of the Assignments of Errors are in the arguments below.

I. WHETHER THE EVIDENCE IS LEGALLY AND FACTUALLY SUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR FORGEY OF LEAVE AND EARNINGS STATEMENTS (LESs).

Facts Relevant to Assignment of Error

Appellant was charged with falsely altering his Leave and Earning Statements (LESs) "by removing the entitlement for basic allowance for housing and reducing the total income . . . which was used to the legal harm of Ms. [REDACTED], in that it caused the Weiden District Court to award Ms. [REDACTED] lower child support payment . . . than she would otherwise have been entitled to." (Charge Sheet).

Ms. [REDACTED] had sued appellant for child support in a German court. (R. at 76). The altered statements were submitted as part of a packet submitted by appellant's German attorney, [REDACTED], to the Weiden District Court. (R. at 78; Pros. Ex. 5). Ms. [REDACTED] testified the LESs did not look right to her, so she contacted her lawyer, but her lawyer failed to respond to Ms. [REDACTED]'s concern. (R. at 79). Ms. [REDACTED] testified that with the LESs appellant provided, she received 100% of the support she believed she was entitled to, but she believed she would have received 130-160% of the support had she had the unaltered LESs. (R. at 80). Ms. [REDACTED] testified the amount of support she received increased after she received the unaltered LESs. (R. at 81).

Ms. [REDACTED] admitted that the parties exchanged documents a "couple" of times. (R. 85). She also admitted she never saw appellant alter the documents, did not know if appellant personally altered the documents, and indeed never saw appellant in court. (R. at 85-86). Finally, she admitted that she settled on the amount she was paid in support by appellant. (R. at 85).

Mr. [REDACTED] the attorney who replaced Ms. [REDACTED] prior attorney, also testified at appellant's court-martial. (R. at 101). According to Mr. [REDACTED] judges at the family court use the LESs and other documents and factors to determine the appropriate amount of support to be provided. (R. a 101-02). Mr. [REDACTED] testified that Ms. [REDACTED] hired him because she was dissatisfied with the

agreement her prior attorney had reached with appellant and his counsel. (R. at 103). After Mr. [REDACTED] became involved with the case, Ms. [REDACTED] received more child support. (R. at 103-04).

On cross-examination, Mr. [REDACTED] testified he never saw appellant in court, and was unaware if appellant had ever altered any documents. (R. at 105). Mr. [REDACTED] also testified that, prior to his involvement in the case, Ms. [REDACTED] and appellant had reached an agreement on child support, and appellant was paying child support per that agreement. (R. at 105-06). Mr. [REDACTED] testified that, in his experience, the family court looks to a number of factors in determining the amount of child support to award, including debts and income of both parties. (R. 107-08). [REDACTED] agreed that “in Germany, there are other considerations that might be considered for support, to include . . . whether the mother is working.” (R. at 109).

Standard of Review

This court reviews questions of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

The test for legal sufficiency is “whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.” *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.

Ct. 2781, 61 L. Ed. 2d 560 (1979)). “[I]n resolving questions of legal sufficiency, [this court is] bound to draw every reasonable inference from the evidence of record in favor of the prosecution.” *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted).

The test for factual sufficiency is “whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [the members of the court of criminal appeals] are themselves convinced of the [appellant's] guilt beyond a reasonable doubt.” *Turner*, 25 M.J. at 325. In conducting this unique appellate role, this court takes “a fresh, impartial look at the evidence,” and applies “neither a presumption of innocence nor a presumption of guilt” while making “[its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.” *Washington*, 57 M.J. at 399.¹

¹ Because the convictions here are for offenses that allegedly occurred before 1 January 2021, the “old” version of Article 66, UCMJ applies. *United States v. Scott*, ___ M.J. ___, 2023 CCA LEXIS 456, at *3-4 (Army Ct. Crim. App. 27 Oct. 2023) (citing Pub. L. No. 116-283, § 542(b), 134 Stat. 3611-12).

Law

Forgery's Legal Efficacy Requirement

Forgery pursuant to Article 105, UCMJ is a narrowly defined offense that is strictly interpreted. *United States v. Hopwood*, 30 M.J. 146, 147 (C.M.A. 1990).² To be guilty of forgery, an accused must not only make a false writing or altering of a document, but the writing or altering must have legal efficacy. *Id.* “[T]he writing must appear either on its face or from extrinsic facts to impose a legal liability on another, or to change a legal right or liability to the prejudice of another.” *Id.* (emphasis omitted) (quoting *Manual for Courts-Martial, United States* (1984 ed.), pt. IV, ¶ 48.c.(4)).

In *Hopwood*, the accused falsely signed his brother and sister-in-law's names to a credit application so he could buy a new car. *Id.* The then Court of Military Appeals found that Hopwood's falsely signing the application did not meet the narrow constraints of forgery under the UCMJ. *Id.* Hopwood could not “be successfully prosecuted [for forgery] because the application itself did not create or purport to create any legal right or liability on the part of [Hopwood's relatives].” *Id.*

² Pursuant to the Military Justice Act of 2016, forgery was re-numbered from Article 123 to Article 105, but forgery under the UCMJ still requires that the writing “would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice.” *Manual for Courts-Martial, United States* (2019 ed.) [MCM], pt. IV, ¶ 37.a.(1).

Similarly, in *United States v. Jones-Marshall*, the accused submitted falsified rental receipts and other documents as part of a scheme to steal money from the United States. 71 M.J. 534, 535 (Army Ct. Crim. App. 2012). Jones-Marshall submitted the leases and receipts and was reimbursed for false housing costs. *Id.* Nothing in the falsified documents created a liability or imposed any legal right on the United States. *Id.* Testimony at trial established that the falsified documents could be “part of any package necessary to claim reimbursement,” and that “additional, separate documents, including orders, that establish a reimbursable status, and a travel voucher, are essential” before Jones-Marshall could be reimbursed. *Id.* at 536.

This court noted that extrinsic documents may establish that forged documents have legal efficacy. *Id.* But those additional documents must actually confer legal efficacy on the document in question or establish that legal efficacy “inheres in the document alleged.” *Id.* “Additional documents that illustrate the alleged false documents as merely preliminary steps toward imposition of legal harm or perfection of a legal right . . . do not suffice as proof of forgery.” *Id.* Because the false leases, standing alone, did not impose a legal obligation on the United States—in other words, submitting the false leases to the Army did not obligate the United States to reimburse Jones-Marshall—the false leases as a matter of law lacked legal efficacy and could not support a forgery conviction. *Id.*

Furthermore, this court has twice rejected the notion that a leave and earning statement (LES) has legal efficacy. In *United States v. Vallejo-Pacheco*, the accused fabricated a LES in his brother's name to obtain a loan. Army 20120450, 2014 CCA LEXIS 131, at *2 (Army Ct. Crim. App. 27 Feb. 2014) ([mem. op.](#)). Vallejo-Pacheco pled guilty to forgery because, as his trial defense counsel theorized, "but-for" Vallejo-Pacheco furnishing the false LES, the loan would not have been accepted. *Id.* at *3. This court found the LES had no legal efficacy. *Id.* at *3-4. This court observed that the loan provider was free to ignore the LES if it so chose, and the LES did not, standing-alone or in conjunction with another document, establish any entitlement or obligation. *Id.* at *4. *See also United States v. Hobbs*, Army 20100791, 2011 CCA LEXIS 138, at *2 (Army Ct. Crim App. 29 Jul. 2011) (finding a LES lacked legal efficacy).

Argument

A. Legal Sufficiency

The altered LESs in this case had no legal efficacy. First, the LESs, standing alone, did not confer any right or obligation on either Ms. [REDACTED], appellant, or the Weiden court. *See Jones-Marshall*, 71 M.J. at 535. As Mr. [REDACTED] testified, the Weiden court had discretion to award child support based on a number of different factors, appellant's income being just one such discretionary factor, and appellant's submission of either accurate or inaccurate LESs did not obligate the Weiden court

to award Ms. [REDACTED] a certain amount of child support. Indeed, had the Weiden court ignored the documents altogether, Ms. [REDACTED] would have no legal recourse. Like the false receipts in *Jones-Marshall*, the LESs were “merely preliminary steps toward imposition of legal harm or perfection of a legal right,” and do not meet the narrow definition of forgery per the UCMJ. 71 M.J. at 535.

The government claimed at trial that it established the LESs had legal efficacy because Ms. [REDACTED] received greater child support after Mr. [REDACTED] assumed representation of Ms. [REDACTED] and introduced appellant’s complete LESs. (R. at 81, 103-04; App. Ex. IVB). But putting aside the effect the change of counsel had on the proceedings, the government fell into the “trap set by Article [105] for those who overlook the legal efficacy requirement necessary to properly prosecute forgery under the UCMJ.” *Jones-Marshall*, 71 M.J. at 535 (citing *United States v. Thomas*, 25 M.J. 396, 402 (C.M.A. 1988)).

The fact Ms. [REDACTED] received more child support does not establish appellant’s LESs had legal efficacy. After all, *Jones-Marshall* submitted ginned-up leases and receipts and received compensation—money—by submitting those false documents. 71 M.J. at 534. “The government also charged [Jones-Marshall] with forgery based on the falsified lease agreements and rental receipts she made that also served as the basis for the charged larceny and false claims.” *Id.* at 534-35. But the receipt of money did not transform the false documents into legally

efficacious documents. And in *Vallejo-Pacheco*, the accused received the loan he sought using false documents, but that receipt of the loan did not transform the false documents into legally efficacious forgeries. 2014 CCA LEXIS 131, at *2-4.

Finally, a determination that the LESs in this case were not “forged” pursuant to Article 105, UCMJ is consistent with this court’s prior decisions finding that LESs lacked legal efficacy. See *Vallejo-Pacheco*, 2014 CCA LEXIS 131; *Hobbs*, 2011 CCA LEXIS 138.

B. Factual Sufficiency

Even if the LESs somehow had legal efficacy, the evidence does not factually support that appellant altered the documents. The documents were submitted by appellant’s German counsel. (R. at 78; Pros. Ex. 5). Both Ms. [REDACTED] and Mr. [REDACTED] testified they never saw appellant in court. (R. at 85-86, 105). Nothing in Prosecution Exhibit 5 indicates appellant ever certified that the records his counsel submitted were true or accurate, or otherwise establishes appellant ever saw the packet submitted by his counsel. Nothing establishes the documents were not redacted by appellant’s German lawyer. Indeed, Prosecution Exhibit 5 hints at the possibility. Appellant’s lawyer informed the Weiden court that appellant’s “income documentation for the requested period will not be available . . . for internal office and organizational reasons.” (Pros. Ex. 5, Bates # 002190). Based on the evidence, this court cannot be satisfied that its “own independent

determination [establishes] the evidence constitutes proof of each required element beyond a reasonable doubt.” *Washington*, 57 M.J. at 399.

Conclusion

The LESs in this case lacked legal efficacy, and therefore could not serve as the basis for a forgery conviction. Furthermore, even if appellant’s pay stubs imposed a legal liability on appellant or changed a legal right to the prejudice of Ms. S.H., the evidence does not factually support a finding that appellant altered the documents. The military judge sentenced appellant to 120 days confinement for forgery, which exceeds his next longest sentence (for larceny) by sixty days. (R. at 277). Accordingly, this court should dismiss the forgery conviction and approve confinement for larceny to sixty days and confinement for false official statement to thirty days, both to run concurrently.

II. 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 385 DAYS AFTER SENTENCING.

Facts Relevant to Assignment of Error

The military judge sentenced appellant on 30 March 2022. (R. at 277). The next day, appellant submitted his post-trial matters. (Post-Trial Matters). On 12 June 2022, the military judge entered judgment. (Judgment of the Court). But this court did not docket this case until 19 April 2023. (Referral). The transcript

is only 277 pages. (R. at 219).

The Chief of Justice submitted a memorandum attempting to explain the difficulties the government had in preparing the record of trial. (Memorandum for Record: Timeline of the Delayed Transcript and Record of Trial in the Case of U.S. v. SGT Jorge L. Espinal (Delay Memo)). The memorandum documents an extraordinary number of technical failures in preparing appellant's record of trial, as well as failures in planning and execution.

Standard of Review

“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)).

Law

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 this court has overruled its previous 150-day limit of presumptive unreasonableness, it may find excessive delay “based on an examination of all relevant circumstances” under Article 66(d)(2). *United States v. Winfield*, 83 M.J. 662, 665-66 (Army Ct. Crim. App. 2023); *see also United States v. Sepulveda*, ARMY 20220241, 2023 CCA Lexis 223, at *3 (Army Ct. Crim. App. 5 May 2023)

([summ. disp.](#)); *United States v. Morris*, ARMY 20210624, 2023 CCA Lexis 197, at *2 (Army Ct. Crim. App. 8 May 2023) ([summ. disp.](#)), pet. denied, 2023 CAAF LEXIS 409, at *1 (C.A.A.F. 2023).

Argument

Following adjournment, the government took 385 days to docket appellant’s case at this court. Although the government provided a memo attempting to explain what it admits is a delayed record and transcript, that memo does not provide a reasonable explanation for the delay. (Delay Memo).

First, the government identified five separate technical failures that delayed the production of appellant’s record of trial. During September and November, the file became corrupted, and transcription had to be begun anew. (Delay Memo, ¶ 5). The second “technical” glitch occurred on 19 January 2023, when the “eclipse program” caused the transcript to “no longer compl[y] with standards.” (Delay Memo, ¶ 10.) Another “computer error” in February resulted in the file no longer being accessible. (Delay Memo, ¶ 15). And again in February, “a computer glitch deleted all progress on the corrections.” (Delay Memo, ¶ 19). In March, Sergeant (SGT) Martinez, the court reporter responsible for preparing the record (and the “victim” of most of the glitches that occurred) needed a new work computer after his previous computer “got disabled.” (Delay Memo, ¶ 25). While in any endeavor one might encounter a glitch or two, five catastrophic technical failures

points to user error, not happenstance.

The government's errors were not only technical in nature. Four other errors that impacted the preparation of the record were the result of the government's lackadaisical or slapdash approach in assembling the record. In January 2023, nine months after appellant's court-martial, SGT [REDACTED] noticed missing appellate exhibits. (Delay Memo, ¶ 11). A few weeks later, on 31 January 2023, SGT [REDACTED] noticed more missing documents, this time from the pretrial allied papers, including "a complete CID file." (Delay Memo, ¶ 13). On 13 March 2023, almost six weeks after first discovering the missing allied papers documents, and almost a year after appellant was sentenced, SGT [REDACTED] "engaged the litigation paralegals again" to find the missing documents. (Delay Memo, ¶ 24). On 4 April 2023, over a year after appellant was sentenced, SGT [REDACTED] finally received a compact disc (CD) containing the CID investigation. (Delay Memo, ¶ 30).³

The government's failure here was total: in supervision, in technical competence, and in alacrity. At every step in the process there was error and unreasonable delay. The delay here was egregious.

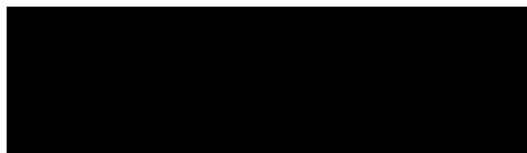
The courts in *Morris* and *Winfield* could not identify appropriate relief, despite finding excessive delay. Here, appellant was sentenced to 120 days of

³ The eROT provided to this court reflects the slapdash nature of work done preparing appellant's record of trial. It contains numerous "placeholders," and hundreds of pages of the Appellate Exhibits are not in the eROT.

confinement and a punitive discharge, thus appropriate relief is readily available. Appellant had years of creditable service. (Def. Ex. H, Good Soldier Book). Appellant also served far longer in confinement, as established in Assignment of Error I, than was appropriate, further demonstrating that he was actually harmed by his delayed appeal. Appellant had completed his confinement six months before this court received his record of trial. Under the unique circumstances here, including the government's demonstrated lack of competence, appellant's years of creditable service, and his erroneous conviction, this court should not approve appellant's bad-conduct discharge.

Conclusion

For the foregoing reasons, this court should dismiss the forgery conviction and grant appropriate relief for the erroneous conviction and for the post-trial delay.



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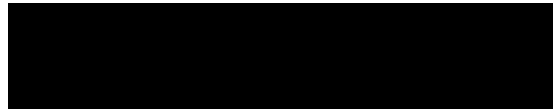
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army
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