IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Private First Class (E-3)
NOAH P. HULIHAN,
United States Army,
Appellant

BRIEF ON BEHALF OF APPELLEE

Docket No. ARMY 20220246

Tried at Fort Liberty, North Carolina, on 13, 20 January and 13 May 2022, before a general court-martial convened by Commander, Headquarters, Fort Liberty, Colonel G. Bret Bardorff and Lieutenant Colonel Trevor Barna, Military Judges, presiding.

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

Assignment of Error I

WHETHER XVIII AIRBORNE CORPS' DELAYED POST-TRIAL PROCESSING OF THIS CAASE MERITS RELIEF WHERE THE CASE WAS NOT REFERRED TO THE ARMY COURT OF CRIMINAL APPEALS UNTIL 584 DAYS AFTER SENTENCING

PANEL NO. 2

Statement of the Case

On 13 May 2022, a military judge sitting as a general court-martial convicted appellant, in accordance with his pleas, of two specifications of sexual assault of a child and one specification of abusive sexual contact, in violation of Articles 120b and 120, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 920b and 920. (Statement of Trial Results [STR], R. at 158). Upon appellant's guilty plea, government counsel dismissed all "offenses that the [appellant] pled not guilty,"[1] without prejudice, to ripen into prejudice, upon announcement of the sentence. (R. at 158; STR; App. Ex. 8. On the same day, the military judge sentenced appellant to seven years of confinement,[2] a reduction to the grade of E-1, and a dishonorable discharge. (STR; R. at 264). Appellant was credited with 403 days of confinement towards his sentence. (STR; R. at 264) On 23 June 2022 the convening authority took no action on the findings and sentence and disapproved appellant's request for waiver of automatic forfeitures. (Action). That same day, the military judge entered judgment. (Judgment).

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[1] Appellant pled not guilty to Charge I, Specifications 1, 2, 4, 5, and 7 (sexual abuse of a child and sexual assault of a child), Charge II, Specifications 1 and 2 (assault by strangulation of a child under the age of 16 years), Charge III, Specifications 1–7 (child pornography, general article, and violation of federal law), Additional Charge I Specification 1 (sexual assault), and The Specification of Additional Charge II (disobeying superior commissioned officer). (R. at 158). By pleading guilty, appellant gained an astonishing benefit from his bargain.

[2] Appellee adopts the chart created by appellant in his brief. (Appellant's Br. 2, n.2).

Statement of the Facts[3]

In March of 2020, appellant met Miss [redacted]. (Pros. Ex. 6 p. 2). The two corresponded by text message for some time and on 7 May 2020, they agreed to meet up. (Pros. Ex. 6 p. 2). Appellant picked up Miss [redacted] with his vehicle, alone. (Pros. Ex. 6 p. 2). The two engaged in vaginal sexual intercourse, with appellant fully aware that Miss [redacted] was 15 years old. (Pros. Ex. 6 p. 2).

Around this same time, appellant met Miss [redacted] on SnapChat. (Pros. Ex. 6 p. 2). After talking for approximately two weeks, appellant invited Miss [redacted] to meet him at a party in Myrtle Beach, South Carolina, the weekend of 15–16 May 2020. (Pros. Ex. 6 p. 2). Appellant planned to share a hotel room in Myrtle Beach with several other friends. (Pros. Ex. 6 p. 2). Miss [redacted], who had represented her age to be 18 years old to appellant, met the group at the hotel. (Pros. Ex. 6 p. 2). Upon meeting Miss [redacted] in person, it became clear by her behavior and appearance that she was under the age of 16 years old. (Pros. Ex. 6 p. 2). Members of the trip stated that from their first interactions with Miss [redacted] at the hotel, they knew her to be under 16 years old. (Pros. Ex. 6 p. 2). One of the member of the trip immediately confronted appellant about Miss [redacted]'s age, telling appellant that Miss

[3] The bulk of the allegations surrounded appellant's vaginal sexual intercourse with two minors: Miss [redacted] (15 years old) and Miss [redacted] (13 years old). (Pros. Ex. 6; Charge Sheet). Appellant was also charged with abusive sexual contact against a Ms. [redacted], an adult. (Pros. Ex. 6).

[redacted]'s appearance, behaviors, low alcohol tolerance, and lack of a driver's license or other identification all indicated that she was under 16 years old. (Pros. Ex. 6 p. 2). Though several members of the trip warned appellant about Miss [redacted]'s age. (Pros. Ex. 6 p. 2). However, appellant disregarded the cautionary advice, telling others that he did not care about her age. (Pros. Ex. 6 p. 2).

Ms. [redacted] had the appearance of someone under the age of 16 to all of those around her because she was in fact 13 years old. (Pros. Ex. 6 p. 2). Appellant provided alcohol to Ms. [redacted] and engaged in vaginal sexual intercourse with her on at least two occasions over the course of that weekend. (Pros. Ex. 6 p. 2). Appellant filmed and maintained a copy of Miss [redacted] and himself having sex on his phone. (Pros. Ex. 6 p. 2).

On 6 November 2021, in violation of his command's orders, appellant attended a "barracks party." (Pros. Ex. 6 p. 2). There he met Ms. [redacted], who appellant observed to be consuming a large amount of vodka. (Pros. Ex. 6 p. 2). Ms. [redacted] was so intoxicated that she required assistance walking. (Pros. Ex. 6 p. 2). Concerned about Ms. [redacted]'s state of intoxication, the party host took the vodka bottle from her and hid it. (Pros. Ex. 6 p. 2). Appellant helped a disoriented Ms. [redacted] to his vehicle, where she fell asleep in his car. (Pros. Ex. 6 p. 2). Appellant told other party goers that he would take help Ms. [redacted] back to the barracks. (Pros. Ex. 6 p. 2).

However, appellant only helped Ms. [redacted] to his barracks bedroom. (Pros. Ex. 6 p. 2). When Appellant laid Ms. [redacted] down on the bed, she complained that her head hurt. (Pros. Ex. 6 p. 2). Due to his observations, appellant should have known that Ms. [redacted] was too intoxicated to consent to sexual activity. (Pros. Ex. 6 p. 2–3). Regardless, appellant began to kiss and suck on Ms. [redacted]'s breast, with the intent to gratify his own sexual desire, leaving several bruises on Ms. [redacted]'s breasts. (Pros. Ex. 6 p. 3).

On 13 May 2022, appellant's court martial adjourned. (R. at 265). Appellant did not demand speedy post-trial. On 22 June 2022, the Staff Judge Advocate provided clemency advice to the convening authority, and on the following day, the convening authority took action. (SJA Advice; Action). The entry of judgment occurred 5 July 2022, the record of trial was certified 6 December 2023, and forwarded to this court on 18 December 2023. (Judgement; Certification; Chronology). Between adjournment and forwarding the records, 584 days elapsed.

The Office of the Staff Judge Advocate (OSJA) of XVIII Airborne Corps and Fort Liberty submitted a Memorandum describing the post-trial processing timeline. (Post-Trial Processing Timeline MFR (MFR)). In it, they detailed the significant manpower constraints and a large backlog of post-trial actions. (MFR). Though the OSJA contracted with a civilian transcription service, the work product

still required review and indexing by a court reporter, a scarce resource for the OSJA. As such, the service was not able to provide a finished product, in part because they did not use the Eclipse system, and also due to accuracy issues.[4]

Standard of Review

This court conducts a de novo review of claims of unreasonable post-trial delay. *United States v. Winfield*, 83, M.J. 662, 666 (Army Ct. Crim. App. 2023); *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

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, 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.

[4] The transcription service had difficulty interpreting military jargon, and was unable to clarify inaudible portions of the record, as they were not present for the court-martial. (MFR at 2)

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 (C.A.A.F. 2006) (quoting *Moreno*, 63 M.J. at 136) (citing *Barker*, 407 U.S. at 533).[5] However, the *Barker* analysis 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 the 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 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. *Ashby*, 68 M.J. at 125. This analysis is "separate

[5] Additionally, Courts of Criminal Appeals (CCAs) will 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.

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. Article 66(d), UCMJ: Sentence Appropriateness and Excessive Delay.

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." Since 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). Should this court find 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

The government did not violate appellant's due process rights because there was no prejudice. 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. The first *Barker* factor weighs in favor of appellant.

From the date the military judge adjourned appellant's court-martial to the date of forwarding to this court, 584 days elapsed. Thus, under the specific facts of this case, the first factor weighs in favor of appellant.

B. The remaining three *Barker* factors weigh in favor of the government.

The Chief of Military Justice for XVIII Airborne Corps & Fort Liberty included a three-page, single-spaced memorandum detailing the operational, personnel, logistical, and technological impediments to timely processing appellant's record. (Post-Trial Processing Memorandum). Under the circumstances of this case, this factor favors the government. Additionally, appellant failed to demand speedy post-trial processing, which also favors the government. Per the fourth factor, appellant fails to establish prejudice. "[A]ppellant is in no worse position due to the delay," because he cannot cite nor

attribute any error to the government other than post-trial delay. *Moreno*, 63 M.J. at 139. Appellant's brief cites no particularized prejudice, or any prejudice specific to appellant himself, while asking this court to grant relief on no other basis than the delay itself. (Appellant's Br. 10).

C. The delay does not impugn the fairness or integrity of the military justice system.

Appellant argues that the OSJA's reasons offered for the delay, if accepted, would "diminish the public's perception of the fairness and integrity of the military justice system." (Appellant's Br. 10) (quoting *Toohey*, 63 M.J. at 362).

If anything about this case were to impugn the public's perception of the military justice system, it would be the fact that a military judge accepted this plea agreement. By all accounts, appellant a minor[6], recorded himself doing so, and possessed child pornography. (Pros. Ex. 6). Further, nearly all of these allegations were corroborated by digital evidence. After being charged with those offenses, and while under orders to remain on Fort Liberty, appellant left Fort Liberty, attended a party, singled out a woman he knew to be drunk, helped her physically get into his car, escorted her to his barracks bed, waited until she was unconscious, and sexually violated her by biting her breasts and leaving bruises. (Pros. Ex. 6 p.

[6] By providing providing alcohol to Miss [redacted] before engaging in vaginal intercourse with her, appellant "administered an intoxicant" to a child who had attained the age of 12 years, thereby satisfying all elements of Rape of Child. Article 120b, UCMJ.

2–3). After doing all of this, appellant was given the opportunity to plead guilty to two specifications of mere sexual assault of a child, and one specification of abusive sexual contact. (Pros. Ex. 6). Truly, it would be these issues and appellant's lenient sentence that would give the public pause about the military justice system.

Rather, appellant's prayer for relief encourages this court to send a message to the XVIII Airborne Corps OSJA by giving appellant a windfall. (Appellant's Br. 12). Appellant further cites twenty-one recent cases originating from the same OSJA, all suffering from post-trial delay, as further evidence that sentencing relief would "send a message." (Appellant's Br. 11 n.3).[7] However, all these cites do is illustrate the true scope of the military justice load borne by the XVIII Airborne Corps OSJA, who by all accounts did their best with the meager resources at their disposal. (MFR). Such a claim in the absence of prejudice is contrary to this superior court's jurisprudence and therefore his claim for relief fails.

[7] This court should reject appellant's request that it take judicial notice of the post-trial delays in other cases from the same jurisdiction and decide this case based solely on facts in the record. *See United States. v. Jessie*, 79 M.J. 437, 441 (C.A.A.F. 2020) ("*Fagnan* established a clear rule that the CCAs may not consider anything outside of the 'entire record' when reviewing a sentence under [Article 66(d)], UCMJ." (citing *United States v. Fagnan*, 12 U.S.C.M.A. 192, 194; 30 C.M.R. 192, 194 (1961)). Further, a number of cases cited by appellant are not yet before this court, and at least one, *United States v. Alfred*, ARMY 20220126, originates from a different jurisdiction as appellant's case and the other cases cited by appellant.

D. Appellant does not merit relief under a 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." Art. 66(d), UCMJ. In this case, the post-trial delay in no way affected the trial proceedings that produced appellant's sentence. Further, appellant's sentence is appropriate in light of his crime and the maximum allowable punishment for his conviction.

The crimes appellant pled to only covered a small portion of his known criminality. (Pros. Ex. 6). Appellant had sexual intercourse with Ms. [redacted], a girl he knew to be in her early teens. (R. at 91). Ms. [redacted] was 13 years old at the time, and her young age was apparent based on her appearance, her high pitched voice, small stature, and immature, childlike behavior. (R. at 91). Appellant provided her with alcohol, an intoxicant.[8] (Pros. Ex. 6). Appellant had sex with her not once, but twice. (Pros. Ex. 6, p. 2). Appellant's actions, established in the Stipulation of Fact, meets all of the elements of rape of a child, an offense punishable by a lifetime of confinement. (*Manual for Courts-Martial*, *United States* (2019 ed.) [MCM] App'x 12).

[8] The military judge asked appellant during his providence inquiry if he had provided Ms. [redacted] with alcohol. Appellant skirted the question, answering, "She knew there was drinks – there was alcohol in the fridge. I can't remember if she grabbed one or not." (R. at 113). However, appellant stipulated that he did provide Ms. [redacted] with alcohol: "[Appellant] disregarded this conversation and said he did not care about [Ms. [redacted]'s] age, and subsequently provided alcohol to and engaged in sexual intercourse with [Ms. [redacted]] on two occasions. (Pros. Ex. 6, p. 2).

In light of the seriousness of the offenses for which appellant was convicted this court should affirm appellant's sentence. *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).

Conclusion

WHEREFORE, the government respectfully requests this honorable court affirm the findings and sentence as approved by the convening authority.

[redacted]

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Certificate of Filing and Service

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] on the 1st day of July, 2024.

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APPENDIX