IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.	Docket No. ARMY 20230066
Specialist (E-4) **BRIAN S. RODGER,** United States Army, Appellant	Tried at Fort Stewart, Georgia, on 21 July 2022, 27 October 2022, and 15 February 2023, before a general court-martial convened by the Commander, Headquarters and Fort Stewart, Lieutenant Colonel Albert G. Courie III, 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 WARRANTS RELIEF WHERE THE CASE WAS NOT DOCKETED BY THE ARMY COURT OF CRIMINAL APPEALS UNTIL 378 DAYS AFTER SENTENCING.

Statement of the Case

On 15 February 2023, a military judge sitting as a general court-martial convicted appellant, in accordance with his pleas, of two specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice, 10 U.S.C. § 928b, [UCMJ]. (R. at 51, 101; Statement of Trial Results [STR]).[1] The military

[1] In accordance with his plea agreement, appellant pleaded not guilty to Charge I and its Specification, Charge II and its Specification, and Specifications 1, 2, 3, 4,

judge sentenced appellant to be reduced to the grade of E-1, to be confined for three months, and to be discharged from the service with a bad-conduct discharge. (R. at 184; STR).[2]

Statement of Facts

A. Appellant physically abused [redacted].

On or about 11 October 2021 in Savannah, Georgia, appellant got into an argument with [redacted]. (R. at 61–62; Pros. Ex. 1, p. 3). During the argument, appellant shoved the victim with his hand on her shoulder. (R. at 61–62, 65; Pros. Ex. 1, p. 3). He then grabbed her arms and pinned them to her side while she was on the ground. (R. at 61, 69, 71; Pros. Ex. 1, p. 3).

B. Plea Agreement

On 1 February 2023,[3] appellant and the convening authority entered into a plea agreement which required appellant to plead guilty to two specifications of domestic violence in exchange for sentencing limitations and the convening

---

5, and 6 of Charge III. (R. at 51; App. Ex. IX). The government moved to dismiss, without prejudice, the specifications and charges to which appellant pleaded not guilty, to ripen into prejudice upon completion of appellate review. (R. at 101; App. Ex. IX; STR).

[2] The military judge sentenced appellant to three months confinement for Specification 7 of Charge III and three months confinement for Specification 8 of Charge III. (R. at 184; STR). All sentences to confinement were to be served concurrently. (R. at 184; STR).

[3] The plea agreement is dated 25 January 2023; however, the convening authority did not sign the agreement until 1 February 2023. (App. Ex. IX).

authority agreeing to dismiss certain charges and specifications. (App. Ex. IX). The following sentencing limitations were agreed upon: to serve a minimum of three months confinement and maximum six months confinement for each specification, to run concurrently. (App. Ex. IX). A bad-conduct discharge shall be adjudged. (App. Ex. IX). All other lawful punishments may be adjudged. (App. Ex. IX).

C. Post-trial processing.

Appellant's court-martial adjourned on 15 February 2023. (R. at 184). On 22 February 2023, appellant requested that the convening authority "grant speedy post-trial matters and max clemency allowed by law." (Post-Trial Matters). On 15 March 2023, the convening authority took no action on the findings or sentence. (Action). The military judge entered judgment on 22 March 2023. (Judgment). The trial counsel completed the pre-certification on 28 September 2023. (Precertification). The military judge authenticated the record on 5 January 2024. (Authentication). On 7 February 2024, the Office of the Staff Judge Advocate (OSJA) provided a memorandum detailing the post-trial processing of the case. (Post-Trial Processing Memorandum). On 22 February 2024, the military judge certified the record of trial due to the absence of the three court-reporters. (Certification). This court docketed the case on 27 February 2024. (Referral and Designation of Counsel).

Assignment of Error

WHETHER THE DILATORY POST-TRIAL PROCESSING WARRANTS RELIEF WHERE THE CASE WAS NOT DOCKETED BY THE ARMY COURT OF CRIMINAL APPEALS UNTIL 378 DAYS AFTER SENTENCING.

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).

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); *United States v. Moreno*,

63, M.J. 129, 135 (C.A.A.F 2006).[4] 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). 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 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

[4] 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, and appellant does not allege any prejudice.

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." *Winfield*, 83 M.J. at 666. 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

Based on the *Barker* factors, the government did not violate appellant's due process rights. Further, considering the totality of the circumstances in this case, appellant deserves no relief under a sentence appropriateness analysis because appellant did not suffer prejudice, his sentence is appropriate, and there is no harm to correct. Finally, appellant has not demonstrated error or excessive delay under Article 66(d)(2), UCMJ, that would warrant relief. Therefore, this court should affirm the findings and sentence as adjudged.

A. The first and third *Barker* factors weigh in favor of appellant.

From the date appellant's court-martial adjourned to when this court referred the case to counsel, 377 days elapsed. (R. at 184; Referral and Designation of Counsel). Thus, under the particular facts of this case, the first factor weighs in favor of appellant.

Appellant requested speedy post-trial processing on 22 February 2023. (Post-Trial Matters). This also weighs in appellant's favor.

B. The second and fourth *Barker* factor weighs in favor of the government.

The OSJA attributes the delay to a lack of court-reporters. (Post-Trial Processing Memorandum). The OSJA unsuccessfully attempted to outsource

transcriptions services to a contractor. (Post-Trial Processing Memorandum). They also tried to utilize the regional court-reporter initiative and reached out to their higher headquarters, both without success. (Post-Trial Processing Memorandum). Finally, they attempted to use the USALSA Flexible Litigation Augmentation Support contract, but that failed, too. (Post-Trial Processing Memorandum). Based on the provided justification, the second *Barker* factor weighs in favor of the government.

Appellant does not allege that he suffered any prejudice. Therefore, the fourth *Barker* factor weighs in favor of the government.

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

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. *Id.*, at 145. Even if this court found a due process violation, appellant has pointed to no specific harm, as argued above, so any due process violation is harmless beyond a reasonable doubt. *See United States v. Bush*, 68 M.J. 96, 104 (C.A.A.F. 2009) (holding that seven-year post-trial delay due process violation was harmless beyond a reasonable doubt); *See also United States v. Allende*, 66 M.J. 142, 145 (C.A.A.F. 2008) (holding that appellant did not

suffer detriment to his legal position in his appeal as a result of an almost seven year delay between adjournment and completion of appellate review).

D. Appellant does not merit relief under an Article 66(d)(2) analysis.

Under the specific facts of this case, while the delay was long, it was not excessive. If this court finds excessive delay, however, Article 66(d)(2) "dictates [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." *Winfield*, 83 M.J. at 666. Appellant asks this court to grant "a minimum of 30 days of sentence relief and/or other appropriate relief for the post-trial delay." (Appellant's Br. 11). No relief is appropriate in this case. Appellant pleaded guilty to two specifications of domestic violence in violation of Article 128b, UCMJ. (STR; R. at 51, 101). Based solely on the specifications appellant pleaded guilty to at the general court-martial, he faced a maximum punishment of reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for seven years, and a dishonorable discharge. (R. at 84; *MCM*, 2019, App'x. 12). Appellant's plea agreement limited appellant's confinement to a maximum of six months confinement. (STR; App. Ex. IX). Appellant was sentenced to three months, a fraction of the maximum punishment he was facing if he had not pleaded guilty and only half of his bargained for maximum confinement limitation. (STR; R. at 184). Any sentence relief is inappropriate in this case.

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and sentence and deny relief.

CHASE C. CLEVELAND
MAJ, JA
Branch Chief, Government Appellate Division

RICHARD E. GORINI
COL, JA
Chief, Government Appellate Division

CERTIFICATE OF SERVICE, U. S. v. RODGER (20230066)

I hereby certify that a copy of the foregoing was sent via electronic submission to the Army Court of Criminal Appeals and the Defense Appellate Division at [redacted] on the 7th day of August, 2024.

[redacted]

DANIEL L. MANN
Senior Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546

[redacted]