

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Docket No. ARMY 20230219

Private (E-2)

JOEL SANTOS,

United States Army,

Appellant

Tried at Fort Polk,¹ Louisiana, on 24 April 2023, before a special court-martial convened by the Commander, Joint Readiness Training Center and Fort Polk, Colonel Maureen A. Kohn, Military Judge, presiding.

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

¹ At the time of trial, the installation was named Fort Polk. Effective 13 June 2023, the installation was officially redesignated as Fort Johnson. *See* Fort Johnson, Military Installations, Military OneSource, <https://installations.militaryonesource.mil/military-installation/fort-johnson> (last accessed 23 August 2024).

Assignments of Error²

I.

WHETHER APPELLANT WAS PROVIDENT TO SPECIFICATION 3 OF CHARGE IV (FALSE OFFICIAL STATEMENT), WHEN BOTH THE STIPULATION OF FACT AND PROVIDENCE INQUIRY REFERENCED A DIFFERENT SPECIAL AGENT FROM THE CHARGED LANGUAGE.

II.

WHETHER THE DILATORY POST-TRIAL PROCESSING WARRANTS RELIEF.

III.

WHETHER THE STATEMENT OF TRIAL RESULTS LISTS AN INACCURATE LOCATION FOR SPECIFICATION 1 OF CHARGE I.

² The government has reviewed appellant's *Groste fon* matters and submits that they lack merit. Should this court find any of appellant's *Groste fon* matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

Statement of the Case

On 24 April 2023, 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 Article 128b, Uniform Code of Military Justice, 10 U.S.C. § 928b (2018) [UCMJ], and three specifications of false official statement in violation of Article 107, UCMJ, 10 U.S.C. § 907 (2018).³ (R. at 61). On 24 April 2023, the military judge sentenced appellant to be confined for nine months and to receive a bad-conduct discharge.⁴ (R. at 77–79). On 25 May 2023,

³ The military judge granted trial counsel’s motion to dismiss without prejudice The Specification of Charge II and The Specification of Charge III (Charge Sheet; R. at 61). This dismissal will ripen into a dismissal with prejudice upon appellate review. (R. at 61).

⁴ The 9 months of confinement was segmented in the following way.

For Specification 1 of Charge I, appellant’s confinement was to be for 7 months; was to be served concurrently with confinement for Specification 2 of Charge I; and was to be served consecutively with the confinement for Specification 1, Specification 2, and Specification 3 of Charge IV.

For Specification 2 of Charge I, appellant’s confinement was to be for 8 months; was to be served concurrently with the confinement for Specification 1 of Charge I; and was to be served consecutively with the confinement for Specification 1, Specification 2, and Specification 3 of Charge IV.

For Specification 1 of Charge IV, appellant’s confinement was to be for 1 month; to be served concurrently with confinement for Specification 2 and Specification 3 of Charge IV; and was to be served consecutively with the confinement for Specification 1 and Specification 2 of Charge I.

the convening authority took no action on the findings and sentence as adjudged. (Action). On 26 June 2023, the military judge entered judgment. (Judgment).

Statement of Facts

Appellant and Ms. [REDACTED] entered into an exclusive romantic relationship soon after meeting on Tinder in July 2021. (R. at 19–20; Pros. Ex. 1 at pp. 1–2). They communicated daily and saw each other frequently. (Pros. Ex. 1 at pp. 1–2).

On 26 November 2021, while at Ms. [REDACTED]’s house, appellant “became annoyed” when Ms. [REDACTED] became intoxicated; appellant then slapped Ms. [REDACTED] in the face with an open hand. (R. at 19; Pros. Ex. 1 at pp. 2–3). Appellant stipulated that he slapped Ms. [REDACTED] without legal justification. (Pros. Ex. 1 at pp. 2–3). Appellant said he slapped Ms. [REDACTED] because “she was annoying me [appellant] while she was intoxicated.” (R. at 22).

Later, on 19 December 2021, while in the barracks, appellant and Ms. [REDACTED] got into a verbal argument. (R. at 19–20; Pros. Ex. 1 at pp. 2–3). Appellant became upset and again struck Ms. [REDACTED] in the face with an open-handed slap. (R.

For Specification 2 of Charge IV, appellant’s confinement was to be for 1 month; was to be served concurrently with confinement for Specification 1 and Specification 3 of Charge IV; and was to be served consecutively with the confinement for Specification 1 and Specification 2 of Charge I.

For Specification 3 of Charge IV, appellant’s confinement was to be for 1 month; was to be served concurrently with confinement for Specification 1 and Specification 2 of Charge IV; and was to be served consecutively with the confinement for Specification 1 and Specification 2 of Charge I. (R. at 77–79).

at 19–20). Appellant stipulated that he struck Ms. [REDACTED] without legal justification. (Pros. Ex. 1 at pp. 2–3). When Ms. [REDACTED] tried to “get away from [appellant],” he grabbed her by the shoulder and shoved her to the ground. (R. at 19, 23–24; Pros. Ex. 1 at pp. 2–3). Appellant also stipulated that he grabbed and shoved Ms. [REDACTED] without legal justification. (Pros. Ex. 1 at pp. 2–3).

On 28 December 2021, an agent from the U.S. Army Criminal Investigation Division (CID) interviewed appellant. (Pros. Ex. 1 at pp. 3–4; R. at 31–32, 35–36). In an attempt to deceive the CID investigator, Special Agent [REDACTED] during the start of the interview, appellant lied to Special Agent [REDACTED] when he falsely claimed to not have “any social media accounts.” (Pros. Ex. at pp. 3–4).

Appellant later again lied to Special Agent [REDACTED] (Pros. Ex. 1 at p. 3; R. at 31–32, 35–36). In another attempt to deceive Special Agent [REDACTED] appellant falsely said that “he had not communicated with his sister recently.” (Pros. Ex. 1 at p. 3).

On 7 March 2023, appellant and the convening authority entered into a plea agreement that required appellant to plead guilty to five specifications in exchange for sentencing limitations. (App. Ex. V). The sentencing limitations included the following: total confinement must be between eight months and twelve months, appellant must be sentenced to one month to two months of confinement for each specification of Charge IV, the confinement for all three specifications of Charge IV must run concurrently with each other, the confinement for the specifications of

Charge I and the confinement for the specifications of Charge IV must run consecutively, the charges must be referred to a special court-martial, and a bad-conduct discharge must be adjudged. (App. Ex. V at pp. 3–4; R. a 53–55). Appellant told the military judge that it was his “expressed desire to be discharged from the service with a bad-conduct discharge because [he] believe[s] it’s in [his] best interest and get what [he] believe[s] is a favorable plea agreement[.]” (R. at 55).

Assignment of Error I

WHETHER APPELLANT WAS PROVIDENT TO SPECIFICATION 3 OF CHARGE IV (FALSE OFFICIAL STATEMENT), WHEN BOTH THE STIPULATION OF FACT AND PROVIDENCE INQUIRY REFERENCED A DIFFERENT SPECIAL AGENT FROM THE CHARGED LANGUAGE.

Appellee agrees that appellant was not provident as to Specification 3 of Charge IV. But this error would not affect the overall sentence of nine months and a bad-conduct discharge. (R. at 77–79; App. Ex. V at pp. 3–4).

Appellant was sentenced to one month of confinement for each of the three specifications of Charge IV; and the respective periods of confinement for all three specifications were to run concurrently with each other. (R. at 77–79; App. Ex. V at p. 4; Statement of Trial Results). Therefore, even if the one month of confinement for Specification 3 of Charge IV is set aside, appellant would still be

confined for one month in order to serve his adjudged period of confinement for Specifications 1 and 2 of Charge IV.

Lastly, even if this court sets aside the conviction for Specification 3 of Charge IV, appellant's sentence still appropriately includes a bad-conduct discharge and nine months of confinement because the plea agreement similarly requires that a bad-conduct discharge be adjudged and that appellant receive a minimum of eight months of confinement. (App. Ex. V at p. 3; R. at 53, 55). And putting aside the plea agreement, appellant's remaining four convictions merit a bad-conduct discharge and nine months of confinement—indeed, appellant violently attacked Ms. [REDACTED] twice and then doubled-down on his crimes by lying twice to Special Agent [REDACTED]. Appellant not only repeatedly struck his romantic partner, but he deliberately tried to deceive a CID agent. (R. at 77–79; Pros. Ex. 1 at pp. 2–4).

The military judge appropriately adjudged a sentence that was commensurate with the egregiousness of appellant's four remaining convictions; the sentence was in accordance with a negotiated plea agreement that appellant freely entered into; and the setting aside of the conviction under Specification 3 of Charge IV will have no material effect on the bottom-line overall sentence. (App. Ex. V at pp. 2–4). Therefore, the sentence should be upheld as appropriate. *See United States v. Flores*, 84 M.J. 277, 278 (2024) (“We hold that when a Court of

Criminal Appeals (CCA) conducts a sentence appropriateness review under Article 66(d), Uniform Code of Military Justice (UCMJ) . . . , the CCA must consider the appropriateness of each segment of a segmented sentence and the appropriateness of the sentence as a whole.”).

Assignment of Error II

WHETHER THE DILATORY POST-TRIAL PROCESSING WARRANTS RELIEF.

Additional Facts

After appellant was sentenced on 24 April 2023, the convening authority took “no action” on the findings and sentence thirty-one days later on 25 May 2023. (R. at 78, 81; Action). The military judge then entered judgment on 26 June 2023. (Judgment).

The transcription was completed on 10 August 2023. (Chief of Military Justice Memorandum for Record, dated 3 November 2023 (“MFR”)). The trial counsel completed errata on 31 August 2023. (MFR).

The military judge authenticated the record of trial on 10 October 2023. (MFR). The court reporter certified the record of trial and transcript on 6 November 2023. (Court Reporter Certification). On 17 November 2023, this court docketed appellant’s case. From the date appellant’s court-martial adjourned to when this court referred the case to counsel, 207 days elapsed. (R. at 78, 81; Referral and Designation of Counsel).

Between the date of final adjournment until the date that this court docketed appellant's case, appellant did not assert any right to timely review and appeal. (Appellant's Br. 8–14). Appellant also “cannot articulate any prejudice,” for purposes of analyzing post-trial delay under *Barker v. Wingo*, 407 U.S. 514 (1972). (Appellant's Br. 13). And there is no indication or allegation of bad faith on the part of the government in the post-trial processing. (Appellant's Br. 8–14; MFR).

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, 664, 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 Fifth Amendment of the Constitution, and determining sentence appropriateness under Article 66(d), UCMJ, 10 U.S.C. § 866(d) (2018). *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 the following: “(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.” *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citing *Barker*, 407 U.S. at 530).⁵ 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). 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 in which an appellant is unable to show that he has 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

⁵ Additionally, Courts of Criminal Appeals 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 is implicated in this case, and appellant does not allege any prejudice.

beyond a reasonable doubt. *United States v. Ashby*, 68 M.J. 108, 122, 125 (C.A.A.F. 2009) (citing *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.* at 125. 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 reduction in his sentence 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. Therefore, this court should affirm the sentence as adjudged.

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

From the date when appellant's court-martial adjourned till the date when this court referred the case to counsel, 207 days elapsed. (R. at 78, 81; Referral and Designation of Counsel). Thus, under the particular facts of this case, the first *Barker* factor weighs in favor of appellant.

Based on the justifications the Chief of Military Justice provided, the second *Barker* factor weighs in favor of appellant. (MFR).

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

Turning to the third *Barker* factor, appellant failed to assert any right to timely review and appeal until the filing of his initial appellate brief. Though appellant's failure does not waive appellant's speedy-post-trial rights, the third *Barker* factor, nevertheless, favors the government. *Moreno*, 63 M.J. at 138. The Supreme Court of the United States in *Barker* succinctly stated: "We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker*, 407 U.S. at 532.

Finally, appellant does not allege that he suffered any prejudice. (Appellant's Br. 13). 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 thus appellant has failed to overcome the absence of prejudice. *Toohey*, 63 M.J. at 362. Therefore, the "difficult and sensitive balancing process" of the facts of this case show that appellant did not suffer a due-process violation. *Barker*, 407 U.S. at 533.

When compared with other past cases that found no due-process violation, the post-trial delay here does not rank as a due-process violation. For example, in

United States v. Othuru, 65 M.J. 375, 380 (C.A.A.F. 2007), there was a delay of 1,298 days between the end of the servicemember’s trial and the date that the CCA rendered its decision; and there was a delay of 271 days between the date when the servicemember was sentenced and the date when the case was docketed before the CCA. The *Othuru* court found that the two *Barker* factors of length of delay and reasons for delay weighed in favor of the servicemember. *Id.* Nonetheless, the court found no denial of due process, citing the servicemember’s failure to “complain about the delay in his case until he filed his initial brief at the Court of Criminal Appeals” and finding “no basis for a finding of prejudice in this case.” *Id.* Similar to the servicemember in *Othuru*, appellant suffered no due-process violation, because he cannot articulate any prejudice, and appellant never asserted any right to timely review and appeal until he filed his initial appellate brief. (Appellant’s Br. 8–14).

For another example of no due-process violation, in *United States v. Anderson*, 82 M.J. 82, 85–87 (C.A.A.F. 2022), there were 481 days of government delay, and the court found that the three *Barker* factors of length of delay, reasons for delay, and assertion of rights weighed in the servicemember’s favor. Nonetheless, the *Anderson* court found no due-process violation, citing the lack of prejudice against appellant and stating that the “delay like the one in the present case is not severe enough to taint public perception of the military justice system.”

Anderson, 82 M.J. at 87–88. The court also found, “There is no indication of bad faith on the part of any of the Government actors.” *Id.* at 88. Similar to *Anderson*, appellant here cannot articulate prejudice, and there is no indication or allegation of bad faith on the part of the government. (Appellant’s Br. 8–14; MFR). Therefore, appellant has failed to show that the post-trial delay here amounted to a violation of due process.

Even if this court found a due-process violation, appellant has pointed to no specific harm that amounted to prejudice (Appellant’s Br. 8–14); 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 a seven-year delay between adjournment and completion of appellate review).

D. Appellant’s case does not merit any sentence reduction under Article 66(d), UCMJ.

Under the specific facts of this case, the delay was not excessive. If this court finds excessive delay, however, 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.”

Winfield, 83 M.J. at 666 (internal quotation marks omitted). Appellant asks this

court to reduce appellant's confinement by at least thirty days. (Appellant's Br. 14). No reduction of appellant's sentence is appropriate in this case.

Even if this court were to set aside the conviction under Specification 3 of Charge IV, appellant providently pleaded guilty to two specifications of domestic violence and two specifications of false official statement in violation of Articles 107 and 128b, UCMJ. (Charge Sheet; App. Ex. V at pp. 2–4; R. at 59–61; Statement of Trial Results). Appellant entered into a favorable plea agreement that limited his confinement to twelve months. (App. Ex. V at pp. 3–4). This plea agreement benefited the government by requiring a bad-conduct discharge and a minimum confinement of eight months. (App. Ex. V at pp. 3–4).

Putting aside the plea agreement's terms, appellant's four convictions reflect serious misconduct that merits a bad-conduct discharge and nine months of confinement. Indeed, appellant demonstrated violent behavior by physically attacking his romantic partner twice, and then demonstrated his mendacious behavior by later lying twice to CID. (R. at 77–79; Pros. Ex. 1 at pp. 2–4).

Appellant's sentence is appropriate because of appellant's repeated acts of domestic violence, his multiple false official statements, and the terms of his negotiated plea agreement. Therefore, any sentence reduction here would be inappropriate.

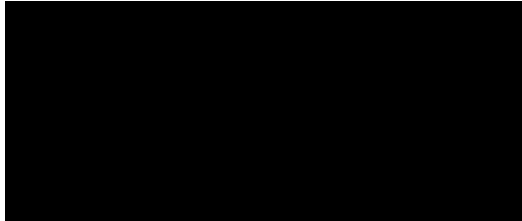
Assignment of Error III

**WHETHER THE STATEMENT OF TRIAL
RESULTS LISTS AN INACCURATE LOCATION
FOR SPECIFICATION 1 OF CHARGE I**

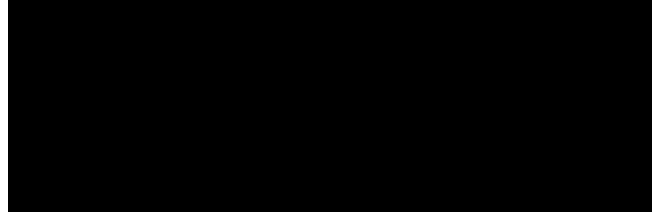
Appellee agrees that the Statement of Trial Results should be administratively corrected. For Specification 1 of Charge I, the Statement of Trial Results erroneously has this language: “at or near Fort Polk, Louisiana”. (Statement of Trial Results). The language for Specification 1 of Charge I, in the Statement of Trial Results, should be amended to correctly say the following: “at or near Florien, Louisiana”. This correction would be in accordance with the Charge Sheet, the providence inquiry, and the Stipulation of Fact. (Charge Sheet; R. at 16–17, 19; Pros. Ex. 1 at p. 2). To be clear, this administrative correction does not affect the findings or sentence.

Conclusion

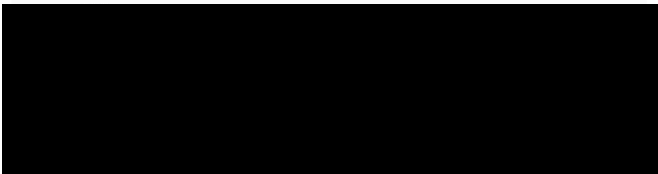
WHEREFORE, the government respectfully requests that this honorable court affirm (1) only so much of the findings of guilty of Specification 1 and Specification 2 of Charge I, and of Specification 1 and Specification 2 of Charge IV; and (2) the entirety of the sentence.



JOSEPH H. LAM
MAJ, JA
Appellate Attorney, Government
Appellate Division



LISA LIMB
MAJ, JA
Branch Chief, Government
Appellate Division



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

CERTIFICATE OF SERVICE, U.S. v. SANTOS (20230219)

I certify that a copy of the foregoing was sent via electronic submission to the
Defense Appellate Division at [REDACTED]

[REDACTED] on the 26th day of September, 2024.

[REDACTED]
Senior Paralegal Specialist
Government Appellate Division
[REDACTED]