

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
PENLAND, MORRIS, and ARGUELLES¹
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist KALEB O. BAYLOR
United States Army, Appellant

ARMY 20210576

Headquarters, Fort Liberty
Troy A. Smith, Military Judge
Lieutenant Colonel Megan Wakefield, Acting Staff Judge Advocate (pre-trial)
Colonel Warren L. Wells, Staff Judge Advocate (post-trial)

For Appellant: Colonel Philip M. Staten, JA; Lieutenant Colonel Autumn R. Porter, JA; Major Robert W. Rodriguez, JA; Captain Rachel M. Rose, JA (on brief).

For Appellee: Lieutenant Colonel Jacqueline J. DeGaine, JA; Lieutenant Colonel Anthony O. Pottinger, JA; Major Justin L. Talley, JA (on brief).

30 October 2023

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent

ARGUELLES, Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of assault on an intimate partner, in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. §928 [UCMJ]. The military judge sentenced appellant to a bad-conduct discharge and confinement for 307 days. The convening authority took no action on the sentence.

The case is before this court for review pursuant to Article 66, UCMJ. Appellant raises one assignment of error, dilatory post-trial processing, which merits both discussion and relief. In addition, although not raised by appellant, based on

¹ Judge ARGUELLES decided this case while on active duty.

our independent review of the record, we find that the military judge failed to conduct a meaningful inquiry into all of the terms of the Plea Agreement. For the reasons that follow, however, this error merits discussion but no relief.²

BACKGROUND

After appellant and his girlfriend had consensual sex, he urinated in her vagina even though she told him not to. When confronted by the victim immediately after the incident, appellant laughed, and when later interviewed by CID, stated that he didn't care and that he did it because he was hoping the victim would get a yeast infection. The victim contracted a urinary tract infection as a result of appellant's conduct.

In discussing the terms of the Plea Agreement with appellant during the plea colloquy, the military judge failed to discuss those provisions of the agreement pertaining to appellant's right to withdraw his plea, the right of the convening authority to withdraw, appellant's waiver of his right to produce witnesses, and the implications of any other potential misconduct not charged.

Although the Record of Trial (ROT) was only 82 pages, a total of 637 days elapsed between adjournment and our receipt of the case. Of note, there was a delay of 123 days between the date the sentence was entered on 7 June 2021 and the Entry of Judgment was signed. Another 274 days passed until the ROT was first forwarded to the military judge. It then took the Office of the Staff Judge Advocate (OSJA) another 126 days before they reached out to the military judge to inquire about the delay in receiving his authentication. Specifically, there is an email in the file showing, although the ROT was originally emailed to the military judge on 7 July 2022 and despite getting no response, the OSJA waited until 9 November 2022 to contact the military judge again. In response to the court reporter's email, the military judge stated he did not recall ever receiving the first email and returned his authentication to her the same day. Finally, after the military judge authenticated the record, another 92 days elapsed before the ROT was certified by the court reporter.

While there was a "Post-Trial Processing Timeline" Memorandum ("memo") in the file, we note at the outset that its subject line incorrectly states that this was a

² Although the Plea Agreement in this case called for a mandatory punitive discharge, Block 24 of the Statement of Trial Results incorrectly states that a bad-conduct discharge was mandated. We will exercise our discretion to correct this error. See Rule for Courts-Martial 1111(c)(2); *United States v. Pennington*, ARMY 20190605, 2021 CCA LEXIS 101, at *5 (Army Ct. Crim. App. 3 Mar. 2021) (summ. disp.) ("Exercising our authority under R.C.M. 1111(c)(2), we note and correct the following issues in appellant's post-trial documents . . .").

Special Court-Martial. A subsequent paragraph incorrectly lists the name of another appellant. Given these glaring errors, it is obvious the memo was most likely the result of a “cut and paste” from a different case, which causes us to question its accuracy. Moreover, while the memo generally describes the significant turnover of court reporters over the period in question, it does not clearly state how many court reporters were actually present at the installation on any given date, or even during any given month. As such, we cannot accurately gauge the impact of the limited court reporter availability as it pertains to each of the significant delays in this case. Although the memo does not mention any court reporters by name, we are further troubled by the privacy implications of stating that one or more court reporters “left the service due to a medical evaluation board.” Finally, the memo does not describe any effort on the part of the OSJA to seek court reporter assistance from other installations, and/or to hire temporary civilian court reporters.

LAW AND DISCUSSION

A. Plea Colloquy Error

A military judge has a duty to conduct a meaningful inquiry into the terms of a pretrial agreement. *United States v. Felder*, 59 M.J. 444, 446 (C.A.A.F. 2004) (“The accused must know and understand not only the agreement’s impact on the charges and specifications which bear on the plea, the limitation on sentence, but also other terms of the agreement, including consequences of future misconduct or waiver of rights”); *United States v. Williams*, 60 M.J. 360, 362 (C.A.A.F. 2004) (“We have long emphasized the critical role that the military judge and counsel must play to ensure that the record reflects a clear, shared understanding of the terms of any pretrial agreement between an accused and the convening authority.”). *See also* Rule for Courts-Martial 910(f)(4)(A)(1) (“The military judge shall inquire to ensure: that the accused understands the agreement”). A military judge’s failure to inquire into all of the relevant terms of a plea agreement is tested for prejudicial error under Article 59(a), UCMJ. *Felder*, 59 M.J. at 446.

As noted above, there were multiple provisions in the plea agreement about which the military judge made no effort to ensure that appellant was cognizant, much less that he knew and understood what they meant. Nevertheless, appellant did not seek to withdraw from his plea agreement either at trial or on appeal, and we note that at the end of the plea colloquy, the military judge confirmed that appellant had enough time to go over the agreement with his counsel and that he fully understood its terms. As such, the military judge’s error in failing to cover all of the terms of the plea agreement is harmless. *See United States v. Hunter*, 65 M.J. 399, 403 (C.A.A.F. 2008) (“Where there is ‘no evidence or representation before this Court that Appellant misunderstood the terms of his agreement, that the operation of any term was frustrated, or that Appellant’s participation in agreement was anything

other than wholly voluntary’ we will not find prejudice”) citing *Felder*, 59 M.J. at 446.

B. Post-Trial Delay

We review allegations of unreasonable post-trial delay de novo. *United States v. Anderson*, 82 M.J. 82, 85 (C.A.A.F. 2022) citing *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006)).

Since at least 2002, the Court of Appeals for the Armed Forces (CAAF) has recognized that service level courts of appeal have two separate and independent avenues to provide relief for dilatory post-trial processing: (1) the Due Process Clause of the Fifth Amendment; and (2) the statutory basis under Article 66 when there is no showing of “actual prejudice.” See *United States v. Grant*, 82 M.J. 814, 819 (Army Ct. Crim. App. 2022) (“Absent a due process violation, we still have authority under Article 66, UCMJ, to grant relief ‘when appropriate under the circumstances’”) citing *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *Toohey v. United States*, 60 M.J. 100, 101-02 (C.A.A.F. 2004) (holding the right to timely appellate review has both statutory roots under Article 66 and constitutional roots under the Due Process Clause).³

In *Toohey*, the CAAF adopted the four-factor balancing test from *Barker v. Wingo*, 407 U.S. 514 (1972), to determine whether the post-trial delay constitutes a due process violation: (1) length of the delay; (2) reasons for the delay; (3) the appellant's assertion of his right to a timely appeal; and (4) prejudice to the appellant. 60 M.J. at 102.

³ Prior to the implementation of the Military Justice Act of 2016 (MJA 2016) in January 2019, Article 66(d)(1), UCMJ granted this court the statutory authority to “affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved.” MJA 2016 amended Article 66, UCMJ, to add a new section (d)(2), which provides in pertinent part that this court “may provide appropriate relief if the accused demonstrates error or excessive delay in the processing of a court-martial after the judgment was entered into the record” There is nothing, however, in the plain language of Article 66(d)(2) indicating or in any way suggesting that Congress sought to: (1) overrule *Toohey* or otherwise alter the use of the *Barker* test to analyze a Due Process claim as set forth below; or, (2) overrule CAAF precedent recognizing our discretion to afford relief under Article 66(d)(1). See *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982) (holding that going behind the plain language of a statute in search of a possibly contrary congressional intent is a step to be taken cautiously).

With respect to the length of the delay, in *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006), the CAAF established a presumption of reasonableness for post-trial processing where the convening authority took initial post-trial action within 120 days of trial, and the case was docketed with this court 30 days later. In light of the changes implemented by MJA 2016, we modified the *Moreno* timeline in *United States v. Brown* by holding that “this court will presume unreasonable delay in cases where more than 150 days elapse between final adjournment and docketing with this court.” 81 M.J. 507, 510 (Army Ct. Crim. App. 2021). In *Brown*, we also reiterated that “just as it was under the old procedures, staff judge advocates are advised to explain post-trial processing delays” *Id.* at 511.

In *United States v. Winfield*, we overruled *Brown*’s 150-day time limit, finding instead that some cases might justifiably take longer than 150 days to process for review, and that others should take significantly less time. 83 M.J. 662, 665 (Army Ct. Crim. App. 2023). Instead of imposing a bright-line time limit, we reaffirmed the requirement for an explanation as set forth in *Brown* and held that in determining the reasonableness of the delay, “we will scrutinize even more closely the unit-level explanations for post-trial processing delays.” *Id.* Because this is a case that should have taken significantly less than 150 days to process, the length of the post-trial delay weighs heavily in favor of appellant.

Likewise, with respect to the purported reasons for the delay, given the deficiencies in the memo as noted above, this factor also weighs heavily in favor of appellant. *See United States v. Arriaga*, 70 M.J. 51, 56 (C.A.A.F. 2011) (“[P]ersonnel and administrative issues, such as those raised by the Government in this case, are not legitimate reasons justifying otherwise unreasonable post-trial delay”); *Winfield*, 83 M.J. at 665-66 (“Staff judge advocates who decline to memorialize delays with thorough, credible, and relevant specificity do so at the peril of their units’ cases on appeal”); *United States v. Jackson*, 74 M.J. 710, 719 (Army Ct. Crim. App. 2015) (rejecting the government’s explanation for the delay based on “court reporter shortages and high number of cases tried”). Along the same lines, and further highlighting the OSJA’s lackluster approach to post-trial processing, we are also troubled by the fact that the court reporter waited four months to reengage with the military judge after he did not respond to her initial email transmitting the ROT for authentication.

As to the third *Barker* factor, because appellant did not assert his right to a timely appeal, this factor weighs in favor of the government.

In assessing the fourth *Barker* factor of prejudice, we consider three sub-factors: “(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person’s grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired.” *Moreno*, 63 M.J. at 138-39, quoting *Rheuark v. Shaw*, 628 F.2d 297, 303

n.8 (5th Cir. 1980). The first sub-factor is directly related to the success or failure of appellant's substantive appeal, and the second sub-factor requires appellant to show particularized anxiety that is distinguishable from the normal anxiety of waiting for an appellate decision. *Id.* at 139-40. Applied in this case, because appellant does not raise any substantive issues on appeal other than post-trial delay, and has not demonstrated any "particularized" anxiety, the fourth *Barker* factor also weighs in favor of the government.

When there is no finding of prejudice under the fourth *Barker* factor, as is the case here, a due process violation only occurs when "in balancing the three other factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Anderson*, 82 M.J. at 87 citing *Toohey*, 63 M.J. at 362. This is such a case. In balancing the four *Barker* factors, we find that given the extreme length of the delay, taken in combination with government's conduct and unavailing purported justification, relief is warranted under the Due Process Clause. Moreover, given the unique facts and circumstances of this case, we cannot conclude the post-trial delay was harmless beyond a reasonable doubt. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006) ("If we conclude that an appellant has been denied the due process right to speedy post-trial review and appeal, 'we grant relief unless this court is convinced beyond a reasonable doubt that the constitutional error is harmless'") (quoting *Toohey*, 63 M.J. at 363).

For all of the same reasons, we find that relief is also warranted under both Article 66(d)(1) and 66(d)(2), UCMJ.

CONCLUSION

Upon consideration of the entire record, the finding of guilty is AFFIRMED. While we are confident that appellant deserved the confinement imposed on the day he was sentenced, the government's egregious failure to diligently process the case post-trial now merits the setting aside of his entire period of confinement. As such, only so much of the sentence extending to a bad conduct discharge is AFFIRMED. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of his sentence set aside by this decision are ordered restored.

Senior Judge PENLAND and Judge MORRIS concur.

FOR THE COURT:



JAMES W. HERRING, JR.
Clerk of Court