

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
SIMS, COOK, and GALLAGHER
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class JOHN M. DODSON
United States Army, Appellant

ARMY 20090378

Headquarters, Fort Stewart
Tara Osborn and Gregory Gross, Military Judges
Norman F.J. Allen, III, Staff Judge Advocate (pretrial)
Lieutenant Colonel Shane E. Barteo, Staff Judge Advocate (post-trial)

For Appellant: Colonel Patricia A. Ham, JA; Major Jacob D. Bashore, JA; Major Tiffany K. Dewell, JA (on brief). Colonel Patricia A. Ham, JA; Major Jacob D. Bashore, JA (on reply brief).

For Appellee: Major Amber J. Roach, JA; Captain Chad Fisher, JA; Major James A. Ewing, JA (on brief).

16 July 2012

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

COOK, Judge:

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of violating a lawful general order, making a false official statement, committing an indecent act, forcible sodomy and adultery, in violation of Articles 92, 107, 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907, 920, 925, and 934 (2006) [hereinafter UCMJ]. The panel sentenced appellant to a dishonorable discharge, confinement for seven years, total forfeiture of all pay and allowances and reduction to the grade of E-1. The convening authority approved only so much of the adjudged sentence as provided for a dishonorable discharge, total forfeiture of all pay and allowances, confinement for six years and ten months, and reduction to the grade of E-1.

This case is before this court for review under Article 66, UCMJ. Appellant raises three assignments of error, one of which merits discussion and relief.

Appellant, in a footnote, also correctly notes an error in the action, namely that the convening authority failed to credit appellant with forty-five days against his sentence to confinement. We will correct this error in our decretal paragraph. Finally, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant personally raises seven assignments of error, one of which merits discussion and relief.

LAW AND DISCUSSION

Adultery

Appellant asserts that Charge V and its Specification fail to state an offense because the specification does not allege the “terminal element” of an Article 134, UCMJ, clause 1 or 2 offense. As drafted, the specification alleges that appellant, a married man, committed adultery by wrongfully having sexual intercourse with Private First Class JH, a married woman who was not appellant’s wife. This specification did not explicitly allege an Article 134, UCMJ terminal element, specifically, that appellant’s conduct was prejudicial to good order and discipline and/or service discrediting.

The Specification of Charge V also did not allege the terminal element of an Article 134, UCMJ clause 1 or 2 offense by necessary implication. Pursuant to our superior court’s decisions in *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012), *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012) and *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), because the Specification of Charge V did not include the terminal element, it fails to state an offense. After reviewing the record of trial in its entirety, we find that “under the totality of the circumstances in this case, the Government’s error in failing to plead the terminal element of Article 134, UCMJ, resulted in material prejudice to [appellant’s] substantial, constitutional right to notice.” *Humphries*, 71 M.J. at 217 (citing *United States v. Girouard*, 70 M.J. 5, 11-12 (C.A.A.F. 2011); *United States v. McMurrin*, 70 M.J. 15, 19-20 (C.A.A.F. 2011); *Fosler*, 70 M.J. at 229). Accordingly, appellant’s conviction for adultery cannot stand.

In regards to sentencing, we conclude the members would properly have considered the evidence adduced regarding the adultery because the actions surrounding the adultery were inextricably linked to the offense of which the appellant was properly convicted. Because “the sentencing landscape would not have been drastically changed” by the absence of the Specification of Charge V, we are satisfied beyond a reasonable doubt the members would have adjudged a sentence no less than the sentence approved by the convening authority in this case. *United States v. Craig*, 67 M.J. 742, 746 (N.M. Ct.Crim.App. 2009) *aff’d*, 68 M.J. 399 (C.A.A.F. 2010); *see also United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006); *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986).

Post-Trial Delay

In matters submitted pursuant to *Grostefon*, appellant alleges the government was dilatory in the post-trial processing of his case because “[i]t took the government 189 days to process appellant’s record from announcement of sentence to action.” This calculation would have been accurate had the convening authority taken action in October of 2009. However, because the convening authority did not take action until October 29, 2010, over 550 days actually passed between sentencing and action being taken in regards to appellant’s case, a case that featured a 638-page record of trial.

A delay of over 550 days is presumptively unreasonable. *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). In the face of this delay, our next step is to apply the four factors set out in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), to determine whether appellant’s due process rights were violated.

As for the first factor, the length of the delay, a delay in excess of 550 days exceeds the 120-day presumption of unreasonableness by over a year. As for the second factor, reasons for delay, we reviewed the affidavit prepared by the chief of military justice which is included in the record and attached to this opinion (Appendix). We will discuss this affidavit below, but, in general, we do not find government counsel’s explanation for the delay in preparing a 638-page record of trial persuasive.

Although we find the first two factors to have been met, the last two *Barker* factors are wanting. Specifically, until appellant included this issue as part of his *Grostefon* submission on appeal, neither appellant nor counsel ever made an assertion of the right to timely review and appeal. Finally, we find appellant has not established that he has been prejudiced as a result of this delay. Appellant, in his *Grostefon* submission, argued that his “chance” to receive clemency or parole was denied until he received a copy of the record of trial. We are not persuaded by this argument and we also find no prejudice after reviewing the prejudice sub-factors found in *Moreno*.

Pursuant to our authority under Article 66(c), UCMJ, we have the authority to grant appropriate relief in cases where we have not found actual prejudice to the appellant, but “unreasonable and unexplained post-trial delays” are present. *United States v. Tardif*, 57 M.J. 219, 220 (C.A.A.F. 2002); see *United States v. Ney*, 68 M.J. 613, 617 (Army Ct. Crim. App. 2000); *United States v. Collazo*, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000). We are troubled by the lack of diligence displayed by both government counsel and appellant’s trial defense counsel, Major (MAJ) Kevin Landtroop, in regards to the post-trial processing of this case.

Although MAJ Landtroop's lack of responsiveness undoubtedly contributed to delaying the post-trial processing of this case,¹ much of the post-trial delay was driven by the government allowing the process to stop while waiting for MAJ Landtroop to complete his review of the record of trial. The futility of this course of action is evidenced by MAJ Landtroop's decision to not submit any record review matters. Instead, in May 2010, over a year after appellant was sentenced, but before the staff judge advocate (SJA) completed his recommendation, MAJ Landtroop submitted Rule for Courts-Martial [hereinafter R.C.M.] 1105 matters on behalf of appellant.

It can be assumed at this point that government counsel, belatedly, came to the conclusion that MAJ Landtroop was not going to submit record review matters. On 3 June 2010, government counsel conferred with the military judge in regards to not receiving MAJ Landtroop's review of the record. After presumably being informed by the military judge that the defense counsel was not required to submit matters in regards to his review of the record², government counsel, inexplicably, did not forward the record of trial to the military judge for authentication until 8 September 2010, a delay of over ninety days. Both of the military judges who participated in appellant's court-martial authenticated the record in short order and the SJA completed his recommendation on 13 October 2010.

The staff judge advocate recommendation (SJAR) and authenticated record of trial were sent to both appellant and defense counsel on 14 October 2010 and received by appellant on 18 October 2010.³ Neither appellant nor defense counsel

¹ See Affidavit of MAJ Andrew M. McKee, notarized on 11 May 2010, which was included in the record of trial as an unmarked appellate exhibit and is attached to this Memorandum Opinion at the Appendix. Per the affidavit, MAJ Landtroop's change of station from Fort Stewart, Georgia (the location of appellant's court-martial) to Charlottesville, Virginia, complicated the post-trial processing of multiple Fort Stewart cases, including appellant's case. Obviously, a mere change of station does not terminate a defense counsel's responsibility to his client.

² Pursuant to R.C.M. 1103(i)(1)(B), "Except when unreasonable delay will result, the trial counsel shall permit the defense counsel to examine the record before authentication."

³ Although the record contains sufficient evidence to prove that the record of trial and the SJAR were sent to MAJ Landtroop, and also reflects that MAJ Landtroop received the SJAR on 13 October 2010, it does not reflect the date on which he actually received the record of trial. Based on the facts of this case, we are convinced the government complied with R.C.M. 1106 requirements. No one—not MAJ Landtroop, appellant, or appellate counsel—has alleged that the government

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submitted any matters in addition to the matters previously submitted pursuant to R.C.M. 1105. Neither appellant nor defense counsel requested additional time beyond the ten days provided under R.C.M. 1105 or 1106 to submit additional matters.

On 29 October 2010, the SJA prepared his addendum. In his addendum, the SJA recommended that although defense had not raised post-trial delay as an issue, “out of an abundance of caution,” the convening authority should “grant clemency by decreasing the adjudge [sic] confinement by two months.” The convening authority thereafter reduced the approved confinement by two months. Nonetheless, based on the excessive and inexplicable post-trial delay in this case, we will grant additional relief in our decretal paragraph by further reducing the sentence to confinement by three months.

CONCLUSION

We have considered appellant’s remaining assignments of error, including the remaining matters asserted pursuant to *Grostefon*, and find them without merit. The finding of guilty to Charge V and its Specification are set aside and dismissed. We otherwise affirm the findings of guilty. After considering the entire record, the court affirms only so much of the sentence as provides for a dishonorable discharge, confinement for six years and seven months, forfeiture of all pay and allowances and reduction to the grade of E-1. Appellant will also be credited with forty-five days of confinement against his sentence to confinement.

Senior Judge SIMS and Judge GALLAGHER concur.



FOR THE COURT:

A handwritten signature in black ink, which appears to read "Malcolm H. Squires, Jr.".

MALCOLM H. SQUIRES, JR.
Clerk of Court

(. . . continued)

failed to comply with R.C.M. 1106. MAJ Landtroop, with significant and timely input from appellant, submitted extensive R.C.M. 1105 matters in May 2010. Nothing in the record reflects MAJ Landtroop or appellant requested additional time beyond the ten days afforded appellant and counsel to submit matters pursuant to R.C.M. 1106.