

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
TOZZI, CAMPANELLA, and CELTNIIEKS
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant MICHAEL W. LONG, II
United States Army, Appellant

ARMY 20120166

Headquarters, Fort Hood
James L. Varley, Military Judge
Colonel Stuart W. Risch, Staff Judge Advocate (pretrial)
Colonel Richard W. Rousseau, Staff Judge Advocate (post-trial)

For Appellant: Colonel Kevin M. Boyle, JA; Major Michael P. Gordon, JA; Captain Robert H. Meek, III, JA (on brief).

For Appellee: Major A.G. Courie III, JA; Major Steven J. Collins, JA; Captain Anne C. Hsieh, JA (on brief).

24 August 2015

SUMMARY DISPOSITION

TOZZI, Senior Judge:

An officer panel sitting as a general court-martial convicted appellant, contrary to his plea, of one specification of negligent homicide, in violation of Article 134 Uniform Code of Military Justice, 10 U.S.C. §§ 934 (2006) [hereinafter UCMJ]. The panel sentenced appellant to a bad-conduct discharge and confinement for six months. The convening authority approved the adjudged sentence.

Appellant's case is before this court for review under Article 66, UCMJ. Appellate counsel assigned three errors to this court, and appellant personally raised matters pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Two of the assigned errors warrant discussion and relief. The matters raised pursuant to *Grostefon* are without merit.

LAW AND DISCUSSION

Legal and Factual Sufficiency

This court reviews legal and factual sufficiency issues de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). In conducting our review, we must determine “whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.” *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Appellant was found guilty of The Specification of Charge II, in violation of Article 134, UCMJ, as follows:

[Appellant], U.S. Army, did, at or near Fort Hood, Texas, on or about 22 July 2009, unlawfully kill [V.R.C.], by operating a motorcycle in a negligent manner, such conduct being prejudicial to good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

The government concedes that evidence presented at trial does not show that appellant’s conduct was prejudicial to good order and discipline under Clause 1 of Article 134, UCMJ. *See Manual for Courts-Martial, United States* (2006 ed.), Part IV, ¶ 60.c.(1), (2), (3). Although appellant’s misconduct took place during midpoint deployment leave, and it is likely that his injuries caused him not to redeploy with his unit, the government offered no evidence at trial to prove this. Therefore, on the record before us, we accept the government’s concession that appellant’s conduct was not prejudicial to good order and discipline.

There is, however, a factual basis to support that appellant’s conduct is service discrediting. *See United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011). Consequently, we will dismiss the language “prejudicial to good order and discipline in the armed forces” from The Specification of Charge II.

Dilatory Post-Trial Processing

The convening authority took action 642 days after the sentence was adjudged, 612 of which are attributable to the government. The record in this case consists of eight volumes, and the trial transcript is 988 pages. It took 425 days to transcribe the record. Additionally, after action, it took fifty-seven days for this court to receive the record of trial. The government provided an explanation for this delay, citing a backlog of cases and shortage of court reporters.

Although we find no due process violation in the post-trial processing of appellant’s case, we must still review the appropriateness of the sentence in light of the unjustified dilatory post-trial processing. UCMJ art. 66(c); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002) (“[Pursuant to Article 66(c), UCMJ, service courts are] required to determine what findings and sentence ‘should be approved,’ based on all the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay.”). *See generally United States v. Toohey*, 63 M.J. 353, 362-63 (C.A.A.F. 2006); *United States v. Ney*, 68 M.J. 613, 617 (Army Ct. Crim. App. 2010); *United States v. Collazo*, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000).

Despite the government’s explanation, the delay between announcement of sentence and action could “adversely affect the public’s perception of the fairness and integrity of the military justice system” *Ney*, 68 M.J. at 617. Thus, we find that relief is appropriate under the facts of this case.

CONCLUSION

The court affirms only so much of the finding of guilty of The Specification of Charge II as finds that:

[Appellant], U.S. Army, did, at or near Fort Hood, Texas, on or about 22 July 2009, unlawfully kill [V.R.C.], by operating a motorcycle in a negligent manner, such conduct being of a nature to bring discredit upon the armed forces.

Given the dilatory post-trial processing, however, we affirm only so much of the sentence as provides for a bad-conduct discharge and confinement for five months. 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. *See* UCMJ arts. 58b(c), and 75(a).

Judge CAMPANELLA and Judge CELTNIIEKS 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