

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
TOZZI, CAMPANELLA, and CELTNIEKS
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class BRANDON M. FORNEY
United States Army, Appellant

ARMY 20121018

Headquarters, 1st Cavalry Division
Gregory A. Gross, Military Judge
Lieutenant Colonel James D. Levine, II, Acting Staff Judge Advocate (advice and
addendum)
Colonel R. Tideman Penland, Jr., Staff Judge Advocate (post-trial recommendation)

For Appellant: Colonel Kevin Boyle, JA; Major Amy E. Nieman, JA; Captain
Patrick J. Scudieri, JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Major A.G. Courie, III, JA; Major
John K. Choike, JA; Captain Jaclyn E. Shea, JA (on brief).

16 April 2015

SUMMARY DISPOSITION

CAMPANELLA, Judge:

A panel of officer and enlisted members sitting as a special court-martial convicted appellant, contrary to his pleas, of one specification of assault with a means likely to produce death or grievous bodily harm, in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928 (2012) [hereinafter UCMJ]. The panel sentenced appellant to a bad-conduct discharge, confinement for six months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.*

This case is before for review us pursuant to Article 66, UCMJ.
Appellant raises two assignments of error, one of which requires discussion and

* The convening authority deferred appellant's automatic forfeitures until action.

relief. Specifically, appellant requests appropriate relief to remedy the dilatory post-trial processing in his case. We agree that relief is appropriate. We also find that matters raised personally by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982) are without merit.

Subtracting delay attributable to the defense in this case, the convening authority took action well over three hundred days after the sentence was adjudged. The record in this case consists of two volumes and the trial transcript is 191 pages. 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 also 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).

It took 266 days to transcribe the record in this case. Appellant raised the issue of dilatory post-trial processing in his Rule for Courts-Martial 1105-1106 matters. The staff judge advocate acknowledged but did not explain the delay to the convening authority. While the government has since explained the reasons for delay, documented reasons for delay should be made part of the record and available for review at all relevant times, including convening authority action. *See United States v. Moreno*, 63 M.J. 129, 143 (C.A.A.F. 2006) (“We expect convening authorities, reviewing authorities and the Courts of Criminal Appeals to document reasons for delay and to exercise the institutional vigilance that was absent in Moreno's case.”); *see also United States v. Canchalo*, 64 M.J. 245 (C.A.A.F. 2007); *United States v. Arias*, 72 M.J. 501 (Army Ct. Crim. App. 2013); *United States v. Bauerbach*, 55 M.J. 501 (Army Ct. Crim. App. 2001).

We find the reasons offered by the government are unreasonable under the totality of circumstances.

CONCLUSION

Upon consideration of the entire record, the findings of guilty are AFFIRMED. Given the dilatory post-trial processing, however, we affirm only so much of the sentence as extends to a bad-conduct discharge, confinement for five months, and reduction to the grade of E-1. All rights, privileges, and property, of which appellant has been deprived by virtue of

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this decision setting aside portions of the findings and sentence, are ordered restored.

Senior Judge TOZZI and Judge CELTNIEKS concur.



FOR THE COURT:

A handwritten signature in black ink, which appears to read "Malcolm H. Squires, Jr.", is written over the printed name.

MALCOLM H. SQUIRES, JR.
Clerk of Court