

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

D.A. WAGNER

R.E. VINCENT

E.B. STONE

UNITED STATES

v.

**Mikki E. ASHLEY
Sergeant (E-5), U.S. Marine Corps**

NMCCA 9901546

Decided 22 May 2007

Sentence adjudged 26 March 1998. Military Judge: J.R. Ewers, Jr. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Marine Forces Reserve, New Orleans, LA.

LT BRIAN MIZER, JAGC, USN, Appellate Defense Counsel
CDR PAUL BUNGE, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Senior Judge:

This case is before us for the second time, our previous decision having been set aside by our superior court and the case remanded to us to apply the correct standard of review to the issue of sentence appropriateness and to consider what, if any, relief should be awarded for a violation of the appellant's due process right to a timely appellate review of her court-martial. At trial, a military judge, sitting as a general court-martial, convicted the appellant, contrary to her plea, of larceny, in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. The appellant was sentenced to a bad-conduct discharge, a fine of \$2,500.00 (or confinement for 100 days if the fine is not paid), and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

Sentence Appropriateness

Sentence appropriateness requires the court to assure that justice is done and that the accused receives the punishment deserved. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). We consider the nature and seriousness of the offense as

well as the character of the offender. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Without deference to the military judge, we independently determine the appropriateness of the sentence under the circumstances of each case. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We do not, however, award clemency, as it is the exclusive command prerogative of the convening authority. *Baier*, 60 M.J. at 383; *Healy*, 26 M.J. at 396.

The appellant abused her position of trust with the United States Marine Corps' Toys for Tots program, stealing toys donated for distribution to the less fortunate. Additionally, the appellant in her unsworn statement requested that the judge consider awarding a discharge in lieu of confinement. Under the circumstances of this case, the appellant's request for the court to disapprove the bad-conduct discharge is without merit. We have considered the sentence, the offenses, and the offender, and find the sentence to be appropriate.

Appellate Delay

Our superior court has found a due process violation resulting from the post-trial processing and appellate review of this record of trial. The appellant was sentenced on 26 March 1998. The convening authority acted on the record of trial on 13 October 1998, 201 days later. More than one year thereafter, on 17 November 1999, the record was docketed with this court. The case was not fully briefed and in panel for review until 17 July 2002, 2 years and 8 months after docketing. This court did not issue its decision until 26 May 2005, almost 3 years after the case was brought into panel. The Court of Appeals for the Armed Forces issued its order remanding this case on 11 September 2006, over 1 year and 3 months later. This court notified the parties of our superior court's order on 9 February 2007. The parties once again fully briefed the case and it was brought back into panel for consideration on 19 April 2007. All together, the post-trial processing of this record of trial was deplorable, amounting to over nine years of aggregate delay.

In addressing what relief, if any, to grant in a case involving a similar delay of nearly 8 years between sentencing and our superior court's decision, the court above us stated:

Considering the totality of the circumstances in this case, we cannot be confident beyond a reasonable doubt that this delay has been harmless. Although we do not presume prejudice based on the length of the delay alone, we are mindful of the egregious delay in this case and the adverse impact such delays have upon the public perception of fairness in the military justice system.

United States v. Toohey, 63 M.J. 353, 363 (C.A.A.F. 2006). In determining what relief should be afforded in a particular case,

we are required to tailor the remedy to the circumstances of the case. *United States v. Moreno*, 63 M.J. 129, 143 (C.A.A.F. 2006). In the instant case, setting aside the punitive discharge would be disproportionate and setting aside the reduction in rate would not be meaningful. We, therefore, set aside the fine of \$2,500.00 as relief for the due process violation resulting from post-trial delay.

Conclusion

We find no other error materially prejudicial to the substantial rights of the appellant and adopt our reasoning as set forth in our decision dated 25 May 2005 with respect to all of the other assigned errors. Arts. 59(a) and 66(c), UCMJ. The findings of guilty and the remaining sentence are affirmed.

Judge VINCENT and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court