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U.S. Navy–Marine Corps Court of Criminal Appeals.

UNITED STATES
v.
Samuel E. TOOTLE II, Parachute Rigger Second Class (E–5), U.S. Navy.

NMCCA 9801945.
Sentence Adjudged 27 March 1998.
Decided 30 Nov. 2005.

Sentence adjudged 27 March 1998. Military Judge: G.E. Champagne. Review pursuant to Article 66(c), UCMJ, of General Court–Martial convened by Chief of Naval Education and Training, Naval Air Station, Pensacola, FL.
Capt James D. Valentine, USMC, Appellate Defense Counsel.

LT J.R. Goodman, JAGC, USNR, Appellate Defense Counsel.

LT M. Castelli, JAGC, USNR, Appellate Defense Counsel.

Maj Gregory Chaney, USMC, Appellate Defense Counsel.

LT Lars Johnson, JAGC, USNR, Appellate Government Counsel.

LT J.A. Lien, JAGC, USNR, Appellate Government Counsel.

Before CARVER, WAGNER, Senior Judges, and FELTHAM, Appellate Military Judge.

CARVER, Senior Judge:

***1** The appellant was convicted, pursuant to his pleas, of two specifications of false official statements, one specification of larceny, and one specification of presenting a false travel claim, in violation of Articles 107, 121, and 132, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 921, and 932. Contrary to his pleas, he was convicted by a general court-martial, composed of officer and enlisted members, of three specifications of violating the order of a superior officer, two specifications of sodomy, three specifications of aggravated assault, one specification of indecent acts, one specification of adultery, and one specification of obstruction of justice, in violation of Articles 90, 125, 128, and 134, UCMJ.

The appellant was sentenced to a dishonorable discharge and confinement for 3,140 days (approximately 8 years and 8 months). There was no pretrial agreement. The convening authority approved the sentence as adjudged.

The appellant's counsel assigned and briefed 18 errors. The appellant himself filed 21 supplemental assignments of error, pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A.1982). We will discuss the assignments of error concerning legal and factual sufficiency, ineffective assistance of counsel, unreasonable multiplication of charges, and appropriateness of the sentence. We will also address the issue of speedy review.

After carefully considering the record of trial, the appellant's assignments of error and supplemental assignments of error, the Government's response, and the reply briefs, we conclude that one of the specifications is not supported by the facts and must be set aside and dismissed. After corrective action, we conclude that the remaining findings of guilty and the sentence are correct in law and fact and that no other error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Facts

The appellant pled guilty to various offenses involving false claims. He enlisted in the U.S. Navy in 1979 and had been on continuous active duty since then. The appellant and his first wife, ST, separated in 1993 when she and their two sons moved to Mississippi. They divorced in 1994. When he made a permanent change of station move in 1996, he filed two false official statements regarding dependency and filed a false claim for

dependent travel and dislocation for ST and his children, overstating his travel pay entitlement by nearly $400.00. Further, he also received an additional $4,000.00 in variable housing allowance and basic allowance for quarters at the "with dependents" rate for which he was not entitled.

The remaining offenses were contested. In essence, the appellant was convicted of engaging in unprotected sexual activity with others and failing to inform them that he was HIV positive, in violation of a direct order. The appellant contends that the three primary witnesses against him were untruthful and should not be believed.[1]

***2** In 1986, the appellant was diagnosed as HIV positive. In late 1993, the appellant received and acknowledged a written "safe sex" order from a lieutenant in the Medical Service Corps. The order directed that, prior to engaging in sexual activity or other activity in which bodily fluids may be transmitted, the appellant must inform the partner of his HIV status. Further, even if the partner consented to sexual activity, the appellant was ordered to use a condom and to advise his partner that the use of a condom does not guarantee that the virus will not be transmitted during sexual activity. The order also contained other requirements regarding the donation of blood and disclosure to health care workers. The appellant acknowledged in writing that the order was punitive and that failure to comply could subject him to disciplinary action.

The appellant first met EE in 1994 at a bar in Pensacola, Florida. EE and the appellant engaged in sexual activity over 1,000 times from 1994 to 1997, to include vaginal, oral, and anal sex. They got married in August of 1996. EE testified that the appellant never told her that he was HIV positive and he never used a condom with her. She also said that they engaged in "threesomes" with a third male, Aviation Mechanic Second Class (AME2) JS, U.S. Navy. The appellant and JS did not engage in homosexual conduct, but each engaged in sex with EE in front of each other and without using condoms. AME2 JS testified under a grant of immunity and generally confirmed EE's testimony.

EE admitted that her pretrial statements were inconsistent with her testimony in several respects. She also admitted that she was convicted of first degree felony arson, third degree felony battery on a law enforcement officer, and third degree felony resisting an officer with violence.

EE married the appellant in August of 1996. In September, the appellant began an affair with enlisted Air Force reservist, ES, at Gulfport, Mississippi, where the appellant was assigned to law enforcement duties. ES was at Gulfport for active duty training. ES and the appellant engaged in vaginal and oral sex from September to November of 1996 when her training class ended and she left the area. She returned to Gulfport on 30 December 1996 to tell the appellant that she was pregnant and that he might be the father. They again had sex that night. At no time did the appellant tell ES that he was HIV positive nor did he use a condom with her.

Later, in early 1997, ES requested that the appellant's command assist her in getting support for her child. When the complaint was received, someone at the command realized that the appellant was HIV positive and contacted the Naval Criminal Investigative Service (NCIS) to start an investigation. When interviewed, ES initially told the NCIS special agent that the appellant had to be the father because he was her only sexual partner during that time period. When later told that DNA testing proved that the appellant was not the father of her child, ES said that she stated that the appellant was the father because he was the easiest partner to contact, but she was not really sure who the father might be.

In May 1997, the NCIS special agent interviewed the appellant who denied knowing ES or having sex with anyone but his wife, EE. When presented with a typed statement based upon the interview, the appellant refused to sign it and left the NCIS office.

***3** The agent then re-interviewed ES on 11 June 1997. She identified the appellant's photo and also said that the appellant had a wart or mole on his penis. On 23 July, the agent obtained a search authorization and, on the same day, took a photo of the appellant's penis, which showed a red lesion where ES said that the wart or mole used to be. A medical doctor opined that the lesion was 1 to 4 days old, but she could not be sure of the exact age of the injury. Another doctor testified that the appellant suffered from genital warts. The warts erupt on occasion and then often melt away on their own. If so, however, the warts gradually fall back into the skin and become smooth skin again. They do not fall off unless frozen or other treatment is done to remove them.

After receiving the complaint from ES, the NCIS

special agent tracked down the appellant's wife EE, who had moved to Miami. He interviewed EE in October or November of 1997. She testified that the appellant never told her that he was HIV positive and that they never used condoms during sex. She also said that she had previously seen a wart or mole on his penis. She said that when she had recently talked to the appellant, he mentioned to her that the wart on his penis fell off in August of 1997. As a result of his interview with EE, the NCIS special agent then tracked down AME2 JS and interviewed him. His statement, given before he received a grant of immunity, was generally consistent with his in-court testimony and with the testimony of EE.

The defense presented in-court and stipulated testimony of EE's former husband, the appellant's brother and his wife, and AE2 CC, who lived with the appellant and EE for 8 months, that EE was untruthful. In addition, AE2 CC testified by stipulation that in July of 1997 he witnessed an argument between the appellant and EE after which EE said that if the appellant left, she would ruin his military career.

The appellant's first wife, ST, testified that she was married to the appellant for almost 14 years, that he told her he was HIV positive in 1986, and that they always used a condom after that. They divorced in 1994. She has custody of their children and speaks regularly with the appellant. She is friendly with the appellant and realizes that she could lose her child support payments if he is convicted. A medical doctor testified that when a married person in the Navy is diagnosed with HIV, the infected person is ordinarily directed to contact the spouse in front of the doctor and tell her about the diagnosis. Then the doctor ordinarily talks to the spouse to set up counseling and medical care appointments.

During sentencing, EE testified that she had been diagnosed as HIV positive, but she did not know if she contracted the disease from the appellant because she had been with as many as 3 other men during that time period.[2] The appellant's civilian and military supervisors testified that he was a trustworthy, dependable, and outstanding law enforcement patrolman. ST testified that he was a good father. The appellant made an unsworn statement in which he said he had served 19 years in the Navy and still liked the Navy. He was proud of his uniform. He said that he believed he was closer to death because his HIV platelet count was going up. He loved his 2 sons and visited them as often as he could.

Legal and Factual Sufficiency

A. Standard of Review

***4** The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 318–19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *United States v. Turner,* 25 M.J. 324, 325 (C.M.A.1987); *United States v. Reed,* 51 M.J. 559, 561–62 (N.M.Crim.Ct.App.1999), *aff'd,* 54 M.J. 37 (C.A.A.F.2000); *see also* Art. 66(c), UCMJ.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner,* 25 M.J. at 325; *see also* Art. 66(c), UCMJ. We must review the entire record, giving no deference to the verdict:

> The Court of Criminal Appeals is required to conduct a *de novo* review of the entire record of a trial, which includes the evidence presented by the parties and the findings of guilt. Such a review involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66(c), UCMJ, to take into account the fact that the trial court saw and heard the witnesses.
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> In the performance of its Article 66(c), UCMJ, functions, the Court of Criminal Appeals applies neither a presumption of innocence nor a presumption of guilt. The court must assess the evidence in the entire record without regard to the findings reached by the trial court, and it must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt. In contrast to the lay members who serve on courts-martial, the mature and experienced judges who serve on the Courts of Criminal Appeals are presumed to know and apply the law correctly without the necessity of a rhetorical reminder of the "presumption of innocence."

United States v. Washington, 57 M.J. 394, 399–400 (C.A.A.F.2002). Reasonable doubt does not require

that the evidence presented be free from conflict. *United States v. Lips,* 22 M.J. 679, 684 (A.F.C.M.R.1986). Further, this court may believe one part of a witness' testimony and disbelieve other aspects of his or her testimony. *United States v. Harris,* 8 M.J. 52, 59 (C.M.A.1979).

B. Obstruction of Justice[3]

The appellant contends that the evidence was legally and factually insufficient to support the finding of guilty to the offense of obstruction of justice. We agree.

The Government's theory of liability was that the appellant removed the wart on his penis in order to prevent being identified by ES as his sexual partner. We agree that the evidence proves that the appellant was suffering from genital warts, that warts occasionally erupted on his penis and then went away, that he removed one of those warts sometime from 19 July 1997 to 22 July 1997, and that a wart had been removed before he was examined by NCIS on 23 July 1997. We further agree that, at an earlier interview with NCIS, the appellant had denied knowing or having sex with ES and, therefore, had a motive to avoid being identified as her lover.

But no evidence was presented that the appellant removed the wart in order to avoid identification. The Government did not present any evidence that the appellant was aware that ES had told NCIS a month before the search that he had a wart on his penis. Nor was there any evidence that the appellant was aware that NCIS was going to examine his penis for the wart. Thus, we find that the evidence is legally insufficient to support the finding of guilty.

***5** In our decretal paragraph, we will set aside and dismiss the finding of guilty to the offense of obstruction of justice. Upon reassessment, we find that the sentence received by the appellant would not have been any lighter even if he had not been charged with that offense. We further find that the sentence is appropriate for this offender and the remaining offenses. *See United States v. Peoples,* 29 M.J. 426, 428 (C.M.A.1990); *United States v. Sales,* 22 M.J. 305, 307 (C.M.A.1986); *United States v. Suzuki,* 20 M.J. 248, 249 (C.M.A.1985).

C. Aggravated Assault On EE[4]

The appellant contends that the evidence was insufficient to support the finding of guilty of aggravated assault with a means likely to produce death or grievous bodily harm on EE by wrongfully engaging in sexual intercourse without using a condom. The appellant asserts that the Government failed to prove that EE became HIV positive through contact with the appellant. We deny relief.

Whether EE actually contracted HIV or not is not an element of the type of aggravated assault that was charged against the appellant. In fact, the evidence that EE became HIV positive was not introduced in evidence until after findings were announced. "It is well settled that an HIV-positive soldier can be convicted of assault under Article 128, UCMJ, for engaging in unwarned, unprotected sexual intercourse." *United States v. Perez,* 33 M.J. 1050, 1053 (A.C.M.R.1991)(citing *United States v. Johnson,* 30 M.J. 53 (C.M.A.1990) and *United States v. Stewart,* 29 M.J. 92 (C.M.A.1989)).

D. Aggravated Assault on EE and ES[5]

The appellant claims that the evidence is legally insufficient to support findings of guilty to all three aggravated assault offenses because he had previously received a vasectomy and could not, therefore, transmit HIV during intercourse. The appellant relies upon *Perez,* 33 M.J. at 1053. We decline to grant relief.

In *Perez,* the Government expert testified that the appellant could transmit HIV during normal sexual activity if he had the virus in his semen. He was not asked about the effect of a vasectomy or about transmitting the virus other than by seminal fluid. A defense expert then testified that the appellant could not transmit the virus to his sexual partner because, due to the vasectomy, he had no virus in his semen. Therefore, the Army court dismissed the finding of guilty due to a failure of proof. Notably, however, the court also wrote:

> Our holding is based on a failure of proof; we do not determine as a matter of medical scientific fact that a HIV-positive male who had a vasectomy cannot transmit the AIDS virus through sexual intercourse.

***6** *Perez,* 33 M.J. at 1054 n. 2. Therefore, *Perez* does not stand for the proposition that it is scientifically impossible for an HIV positive male who had a vasectomy to transmit HIV during

sexual activity. Even if that were a fact, we doubt that it would apply to the exchange of other bodily fluids that might occur during vaginal, anal, and oral sexual activity, especially if there was a lesion on the penis.

E. Offenses Involving ES[6]

The appellant claims that evidence of guilt of the offenses involving ES is factually insufficient because ES is not believable as a witness. In particular, the appellant points out that ES initially claimed that the appellant was the father of her child. She only admitted that she had sex with several men during that time period after she was presented with DNA evidence proving that the appellant was not the father. There were also some other minor inconsistencies in her testimony.

Nonetheless, after reviewing all the evidence, we are convinced of the credibility of ES and of the appellant's guilt. We find that other evidence corroborates most of her testimony. She testified that she met the appellant while on duty for training at Gulfport, Mississippi; she correctly identified the appellant from a photo lineup; she identified the location where a wart had been located on the appellant's penis; and she stated that the appellant was performing law enforcement duties at Gulfport. Further, we find that the appellant lied when he told NCIS that he did not know ES.

Ineffective Assistance of Counsel

The appellant claims that his trial defense team, consisting of a civilian counsel and two military counsel, was deficient in several respects. We decline to grant relief.

A. Standard of Review

The U.S. Supreme Court has articulated two prongs that an appellate court must find before concluding that relief is required for ineffective assistance of counsel: deficient performance and prejudice. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Constitutional standard applies to military cases. *United States v. Scott,* 24 M.J. 186 (C.M.A.1987). The Supreme Court explained the two components as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687. Counsel is presumed to have performed in a competent, professional manner. *Id.* at 689. To overcome this presumption, an appellant must show specific defects in counsel's performance that were "unreasonable under prevailing professional norms." *United States v. Anderson,* 55 M.J. 198, 201 (C.A.A.F.2001). "[T]he appropriate test for prejudice under *Strickland* is whether there is a reasonable probability that, but for counsel's error, there would have been a different result." *United States v. Quick,* 59 M.J. 383, 386–87 (C.A.A.F.2004).

B. Failure to Properly Interview CE2 CC

***7** The appellant claims that his trial defense counsel failed to interview CE2 CC adequately before trial. The appellant now claims that if they had interviewed him more carefully, they would have discovered additional testimony pertinent to his defense. We find that the appellant has failed to meet his burden to show that counsel's performance was unreasonable under prevailing professional norms.

At trial, the defense moved for the presence of CE2 CC as a character witness adverse to the Government witness EE. The military judge denied the request, but the Government stipulated to his testimony that CE2 CC believed EE to be

untruthful.

After sentencing, the military judge conducted a post-trial Article 39a, UCMJ, session, called by the defense team regarding a claim of newly discovered evidence. CE2 CC testified at the Article 39a session that he had been interviewed 3 times by the appellant's detailed defense counsel and once by an NCIS special agent, but had not been told the charges against the appellant. He thought that the appellant was accused of beating or raping EE. Had he known of the charges against the appellant, he would have testified that on one occasion in July of 1997, when he was living with the appellant and EE, he observed EE popping pimples on the appellant's back. The pimples were bloody and filled with pus. EE got the blood and pus on her fingers and waved them in front of CE2 CC's face. The appellant then grabbed EE's hand and yelled at her not to do that. When she asked, "Why?" The appellant said, "You know why I did that." Since CE2 CC did not know that the appellant was HIV positive, he thought nothing more about the incident.

During argument on the claim of newly discovered evidence, the trial counsel contended that the new information from CE2 CC would have had no impact on the findings since the appellant was charged with violating the safe sex order both by failing to inform his partners and by not using condoms during sexual activity. At that point, CE2 CC, who had been allowed to observe the argument, leaned over the bar and talked to one of the defense counsel. CE2 CC was then allowed to go back on the stand. He testified that he now remembered that when he took out the trash a few times while living with them, he noticed that the trash contained several used condoms. Since he did not use the condoms and no one else was living in the house, he concluded that the appellant and EE must have been using condoms. The military judge later made findings of fact which are attached to the record as Appellate Exhibit L. They are not clearly erroneous and we adopt all 20 findings of fact as our own. As for finding 20, the military judge found:

> 20. Based on the content of his testimony, his demeanor, and the timing of the disclosure, the court makes the following findings regarding the testimony of PO [CC]
>
> ***8** a) He had a strong bias against the victim in this case, [EE].
>
> b) He had a strong bias in favor of the accused.
>
> c) The timing of his disclosure regarding his observation of condoms in the trash casts substantial doubt on the truthfulness of his testimony.

While we agree with that finding, we add finding of fact 21: As a result of our review of the record and the testimony of CE2 CC, especially the last minute remembrance of the condoms incident, we find that CE2 CC's testimony regarding both the pimples incident and the trash incident is suspect.

We further find that the defense counsel were not deficient in failing to interview CE2 CC regarding his knowledge of matters regarding the merits of the case. The counsel interviewed CE2 CC three times as a character witness. Obviously, they had no reason to ask him about other incidents. Before doing so, counsel must have some reason to interview prospective witnesses. They cannot be expected to interview every potential witness for any matter that might come up at trial. We note that the appellant has not alleged that the counsel failed to follow up on his suggestion to interview CE2 CC about either incident. If the pimples incident occurred, the appellant was present when it happened. Although the appellant is not required to testify, he certainly could have told his counsel about the incident before or during trial. In fact, the appellant was present in the courtroom when his counsel were arguing for the presence of CE2 CC as a character witness. If he knew about the pimples incident, he should have raised the matter then.

Assuming *arguendo* that counsel's performance was unreasonable, the error was nonetheless harmless beyond a reasonable doubt and would have had no effect on the outcome of the trial. First, as mentioned above, CE2 CC's testimony is simply not believable. Second, it would require considerable speculation to conclude that the pimples incident meant that EE knew that the appellant was HIV positive. It simply makes no logical sense to believe that EE would "play" with the appellant's blood if she knew that he was HIV positive.

C. Failure to Prove that EE Contracted HIV From Someone Else

The appellant claims that his counsel were deficient because they failed to request that EE's

blood sample be tested to determine if the appellant was the source of her HIV. We decline to grant relief.

We do not find that counsel's performance was deficient. We can hardly second-guess counsel after trial that they should have pursued a different tactic and had the sample tested. But, even if the counsel erred in failing to do so, there was no harm to the appellant. During sentencing, EE briefly testified under direct examination:

> Q. What is your relationship to the accused?
>
> A. I am his wife.
>
> Q. Are you a mother, Ms. [E]?
>
> A. Yes, I am.
>
> Q. How old is the child?
>
> ***9** A. He just turned five.
>
> Q. How do you feel about what your husband has done?
>
> A. It all came totally as a shock. I never knew about the HIV. I never even thought about there being other women. I thought that, you know, we had our ups and downs, but we had a pretty good marriage. *I am HIV positive, and I believe that I got it from Mr. Tootle. I have testified that I have been with other men during this relationship with him. I can't confirm that it came from him, but it's something I believe.*
>
> Q. Is there anything else you would like to say?
>
> A. [Crying] I want to know why. I want to know why he never told me. I want to know how he could lie down with me each night, every night, and never say a word.

Record at 446–47 (emphasis added). The civilian defense counsel then successfully cross-examined her about her inconsistency in complaining about the appellant's infidelity while she was also involved with other men. Under cross-examination, EE admitted that she did not even know the names of her various partners. In short, the court members no doubt gave very little weight to the testimony that she thought the appellant had given her HIV. In reviewing the appropriateness of the sentence later in this opinion, we give this testimony no weight at all.

D. Remaining Claims of Ineffectiveness

The appellant also claims that his counsel were ineffective for failing adequately to cross-examine EE when she testified on the merits. We disagree and find that the defense team thoroughly cross-examined her. The appellant also claims that his counsel were defective in failing to offer medical records to show that he did not have genital warts on his penis during certain time periods. We find that this evidence would have had little value since the expert testified that genital warts come and go. We, therefore, find that if the defense counsel were ineffective in this regard, the error had no effect on the result. Finally, the appellant claims that the combined ineffectiveness casts doubt on the reliability of the findings and sentence. On the contrary, we find upon review of the entire record that the defense team performed quite well. We decline to grant relief.

Unreasonable Multiplication of Charges

The appellant contends that the offenses of violating the safe sex order are an unreasonable multiplication of charges regarding both ES and EE as to aggravated assault, sodomy, and, in the case of EE, indecent acts. The appellant requests that we dismiss all but the order violations. We disagree and decline to grant relief.

We find that each offense is entirely separate and aimed at distinctly different misconduct. Engaging in various forms of unprotected sexual activity was not the only way to violate the order. The separate charges did not unfairly increase the appellant's punitive exposure. Further, we find no evidence of prosecutorial overreaching or abuse. *See United States v. Quiroz,* 53 M.J. 600, 607 (C.A.A.F.2000).

The appellant also claims that the two specifications of violating the safe sex order regarding ES were an unreasonable multiplication of charges because the Government could have charged all the conduct in one specification by alleging that the conduct occurred on divers occasions over the entire time period. The first specification charged the appellant with violating the order on divers occasions from September 7 through November 30. The second specification charged the appellant with violating the order on one occasion on December 30.

***10** The first specification covered the misconduct

when ES was present in Gulfport and had sexual activity with the appellant on a regular basis. ES then left the area when her training ended. She returned on 30 December to complain that the appellant was the father of her unborn child. The appellant again engaged in unprotect sexual activity with her. We find and hold that it was not unreasonable for the Government to charge this conduct in two separate specifications.

Appropriateness of the Sentence

The appellant contends that the sentence is inappropriately severe. However, after reviewing the entire record, we find that the sentence is appropriate for this offender and his offenses. *United States v. Baier,* 60 M.J. 382 (C.A.A.F.2005); *United States v. Healy,* 26 M.J. 394, 395 (C.M.A.1988); *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A.1982).

Remaining Assignments of Error

The remaining assignments of error are without merit and are denied.

Speedy Review

Although not raised by the appellant as an assignment of error, we believe it appropriate to address the issue of speedy review in light of the lengthy delay in this case. Upon review, we decline to grant relief.

We consider four factors in determining if post-trial delay violates the appellant's due process rights: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to a timely appeal, and (4) prejudice to the appellant. *United States v. Jones,* 61 M.J. 80, 83 (C.A.A.F.2005)(citing *Toohey v. United States,* 60 M.J. 100, 102 (C.A.A.F.2004). If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Id.* Moreover, in extreme cases, the delay itself may " 'give rise to a strong presumption of evidentiary prejudice.' " *Id.* (quoting *Toohey,* 60 M.J. at 102).

In this case, our opinion will be issued some 7 years since the appellant was sentenced. Most of that delay has occurred at the appellate level. The convening authority took his action less than 2 months after the last session of trial. The record was thereafter docketed with our court less than 2 months later. But it took another 5 years before all the pleadings were filed. The massive record of trial includes 525 pages of text; a full volume of trial exhibits nearly 2" in thickness; and multiple volumes of post-trial motions, pleadings, and attachments. When stacked, the post-trial documents alone exceed 14" in height. The large record, the many and complex offenses, and the numerous issues presented after trial adequately explain the delay at this level.

But regardless of the reasons for the delay, we find that the delay alone is facially unreasonable, triggering a due process review. We next look to the third and fourth due process factors. We find no assertion of the right to a timely appeal, nor do we find any evidence of prejudice. We, therefore, conclude that there has been no due process violation due to the post-trial delay.

***11** We are also aware of our authority to grant relief under Article 66, UCMJ, even in the absence of specific prejudice, but we decline to do so. *Jones,* 61 M.J. at 83; *United States v. Oestmann,* 61 M.J. 103 (C.A.A.F.2005); *Toohey,* 60 M.J. at 100; *Diaz v. Judge Advocate General of the Navy,* 59 M.J. 34, 37 (C.A.A.F.2003); *United States v. Tardif,* 57 M.J. 219, 224 (C.A.A.F.2002).

Conclusion

Accordingly, the findings of guilty to Additional Additional Charge II and its specification[7] are set aside and dismissed. The remaining findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Senior Judge WAGNER and Judge FELTHAM concur.

Footnotes

[1] The appellant did not testify. He made an unsworn statement in sentencing, but did not discuss the merits of the case.

[2] Pursuant to an order by the U.S. Court of Appeals for the Armed Forces, EE's blood sample has been preserved by the Government for any court-ordered testing regarding the source of the HIV. We conclude that no such testing is required, but the Government is directed to retain the blood sample until no longer required to do so by our superior court.

[3] Additional Additional Charge III and its specification. The military judge renumbered the charges and specifications after arraignment to account for withdrawn charges and in order to rearrange them in numerical order. They were renumbered again for the cleansed charge sheet for the court members. In order to avoid further confusion, we will refer to the charges and specifications as numbered in the court-martial order.

[4] Specification 1 of Charge II.

[5] Specifications 1, 2, and 3 of Charge II.

[6] Specifications 2 and 3 of Charge II (aggravated assault of ES), Specification 1 of Additional Charge VI (adultery with ES), Specifications 2 and 3 of Additional Additional Charge I (violation of safe sex order), the specification of Additional Additional Charge II (sodomy). Due to the use of a different numbering scheme, it is difficult to determine if the appellant raised insufficiency of evidence as to both the sodomy and adultery offenses or only as to one. Since both involve the testimony of ES, we will consider the assignment of error as referring to all offenses involving ES.

[7] Obstruction of justice.