UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class SEAN H. GARDNER
United States Air Force

ACM S30091

27 March 2003

Sentence adjudged 23 January 2002 by SPCM convened at Scott Air Force Base, Illinois. Military Judge: Kurt D. Schuman.

Approved sentence: Bad-conduct discharge, confinement for 2 months, forfeiture of $737 pay per month for 2 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Lieutenant Colonel Brandon A. Burnett, and Major Patricia A. McHugh.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Captain Lane A. Thurgood.

Before

BRESLIN, STONE, and EDWARDS
Appellate Military Judges

PER CURIAM:

The appellant was convicted, in accordance with his pleas, of the wrongful use and distribution of marijuana, and the introduction of marijuana onto a military installation, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A special court-martial comprised of officer and enlisted members sentenced the appellant to a bad-conduct discharge, confinement for 2 months, forfeiture of $737.00 pay per month for 2 months, and reduction to E-1. The convening authority approved the sentence as adjudged.

The appellant claims the findings and sentence may not be approved because the record of trial does not demonstrate that the court-martial had jurisdiction over the appellant, and because there is no showing that the convening authority considered the appellant's post-trial clemency request. We disagree, and affirm.

Proof of Personal Jurisdiction

The appellant contends that the charges should be dismissed because the government did not present evidence establishing in personam jurisdiction over the appellant, a reservist. The appellant bases his argument on Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, paragraph 8.4 (2 Nov 1999), which provides, "In any case in which the accused is a member of an AFRES [Air Force Reserve] or ANG [Air National Guard] component, trial counsel must introduce sufficient evidence to establish in personam jurisdiction over the accused at the time of the offense." The appellant contends this regulation creates a separate affirmative requirement to prove jurisdiction, even where jurisdiction was not raised at trial.

Courts-martial have personal jurisdiction over any person subject to the Uniform Code of Military Justice (UCMJ). Article 2, UCMJ, 10 U.S.C. § 802. "The government may meet its burden of pleading personal jurisdiction by including in the specification a statement of the individual's rank, unit, and armed force." David A. Schlueter, *Military Criminal Justice: Practice and Procedure* 176 (5th ed. 1999). Ordinarily, an accused who wishes to challenge the jurisdiction of the court-martial would move to dismiss the charges under Rule for Courts-Martial (R.C.M.) 907(b)(1)(A). In that event, the burden of persuasion is on the government to show proper jurisdiction. R.C.M. 905(c)(2)(B). "[T]he prosecution must only prove personal jurisdiction over an accused reservist when the accused raises the issue at trial." *United States v. Oliver*, 56 M.J. 695, 699 (N.M. Ct. Crim. App. 2001), *aff'd*, 57 M.J. 170 (2002).

In this case, the specifications of the charge properly alleged that the appellant was an Airman First Class in the United States Air Force, assigned to the 375th Medical Group at Scott Air Force Base, Illinois. The allegation that the appellant was on active duty in the United States Air Force was sufficient to establish jurisdiction, absent objection. The appellant pled guilty to the specifications and the charge without raising any objection to jurisdiction. Therefore the government was not required to introduce additional evidence to establish personal jurisdiction at trial.

The appellant contends that the specifications were defective because they did not "establish the fact that Appellant was a reservist on active duty when he committed the offense." However, no special language is required in a specification to allege a basis of personal jurisdiction for military members on active duty. R.C.M. 307(c)(3), Discussion (C)(iv). Special language setting forth a basis for personal jurisdiction is only required for persons subject to the UCMJ under Article 2(a), subsections (3) through (12). As a reservist on active duty, the appellant was subject to jurisdiction under Article 2(a)(1). *See United States v. Cline*, 29 M.J. 83, 85-6 (C.M.A. 1989). Thus, no special language was appropriate in this case.

The appellant's argument that the language of AFI 51-201, ¶ 8.4, creates an affirmative requirement to present such evidence, even when there is no objection at trial, is not persuasive. From its context, the language of the instruction is advisory–there is no indication it was intended to create a new element for offenses committed by reservists beyond those defined by Congress in the UCMJ, or detailed by the President in the *Manual for Courts-Martial*. There is nothing to indicate that the instruction was intended to create some additional substantive right for an accused, such that a failure to follow the instruction's guidance would generate grounds for appellate relief.

Although trial defense counsel did not raise this issue, failure to move to dismiss for lack of jurisdiction at trial does not result in a waiver. R.C.M. 905(e); R.C.M. 907(b)(1)(A). Lack of jurisdiction may be raised for the first time on appeal. *United States v. Reid*, 46 M.J. 236, 240 (1997). In that circumstance, appellate courts have considered documentary evidence submitted on appeal to resolve the matter. *See Oliver*, 57 M.J. at 172-73; *United States v. Heimer*, 34 M.J. 541, 548-49 (A.F.C.M.R. 1991).

Government counsel submitted, without objection, copies of official orders and amendments reflecting the appellant's assignment from the 939th Rescue Wing, (Air Force Reserve Command) to the 375th Medical Group for active duty training. The orders clearly establish that the court-martial had personal jurisdiction over the appellant.

Post Trial Processing

The appellant correctly points out that the record of trial does not contain evidence that the convening authority received and considered the defense clemency submissions, as required by *United States v. Craig*, 28 M.J. 321 (C.M.A. 1989). In similar circumstances, we have allowed the government to "enhance the 'paper trail.'" *United States v. Blanch*, 29 M.J. 672, 673 (A.F.C.M.R. 1989). By separate motion, the government submitted the addendum to the staff judge advocate's recommendation. Considering this document, we are satisfied that the convening authority properly considered the appellant's clemency submissions before taking action in this case.

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

DEIRDRE A. KOKORA, Major, USAF
Chief Commissioner