UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	)	**Misc. Dkt. No. 2010-06**
Appellant	)	
	)	
v.	)	
	)	**ORDER**
Airman First Class (E-3)	)	
TRAVIS Q. HARRIS,	)	
USAF,	)	
Appellee	)	**Panel No. 2**

On 26 January 2010, one charge and specification of wrongful divers use of marijuana was referred to a special court-martial. On 10 March 2010, two additional charges were referred to the appellee's court-martial. On 15 March 2010, the appellee was arraigned. After his arraignment, the appellee moved to dismiss Additional Charge II and its Specification, which alleged that the appellee broke restriction. On 16 March 2010, the military judge granted the appellee's motion and dismissed Additional Charge II and its Specification.

On that same day, the appellee and the convening authority entered into a pretrial agreement wherein the appellee agreed to plead guilty to the remaining charges and specifications in return for the convening authority's promise not to approve a punitive discharge. On 17 March 2010, the government provided the military judge with notice of its intent to file an Article 62, UCMJ, 10 U.S.C. § 862, appeal on her dismissal of Additional Charge II and its Specification. Later that day, the military judge, sitting as the special court-martial, found the appellee guilty of the remaining charges and specifications in accordance with his pleas, and sentenced him to three months of confinement, forfeiture of $900 pay per month for three months, and reduction to E-1.

On 22 April 2010, counsel for the United States Air Force filed an Appeal Under Article 62, UCMJ, requesting that this Court set aside the military judge's ruling that dismissed Additional Charge II and its Specification. On 12 May 2010, the date the appellee's response was due to this Court, the appellee filed a motion with this Court to dismiss the appellant's Article 62, UCMJ, appeal or, in the alternative, to stay this Court's ruling pending the completion of the record of trial on those charges and specifications to which the appellee pled and was found guilty. As the basis for his motion, he opines that this Court lacks Article 62, UCMJ, jurisdiction since the government elected to proceed to trial on the remaining charges and specifications of which the appellee was convicted and sentenced.

We disagree. The military judge's ruling dismissing Additional Charge II and its Specification is properly subject to government appeal. Article 62(a)(1)(A), UCMJ; Rule for Courts-Martial (R.C.M.) 908(a). Moreover, we can find no authority to support the appellee's assertion that the parties' election to proceed to trial on the other charges and specifications deprived this Court of jurisdiction on the appellant's Article 62, UCMJ, appeal. On this point, we note that while the government could have requested a stay in the proceeding pending resolution of its Article 62, UCMJ, appeal, it was not obliged to do so. R.C.M. 908(b)(4)(B)(i) provides that "[w]hen trial on the merits has not begun, a severance [of the charges] may be granted upon request of all the parties." By entering into the aforementioned pretrial agreement and agreeing to proceed to trial on the remaining charges and specifications, the parties, through their actions, severed the dismissed charge and specification (the subject of this appeal) from the remaining charges and specifications. In short, this Court has jurisdiction over the appellant's Article 62, UCMJ, appeal. Considering the fact that the remaining charges and specifications have little to do with the issue on appeal, we deny the appellee's motion to dismiss the appellant's Article 62, UCMJ, appeal or to stay the appeal.

On 3 June 2010, the appellee filed a motion for an extension of time, 22 days after its response was due to this Court, ostensible to file a response to the Article 62 appeal. Article 62, UCMJ appeals, to the extent practicable, are given priority over all other appeals. R.C.M. 908(c)(2) and AFCCA Rule 21(e). This Court takes the appellee's 12 May 2010 submission, a substantive submission that was filed on the date that its Article 62, UCMJ response was due, as its response to the Article 62, UCMJ appeal.

On 7 June 2010, the appellant filed a motion for leave to file a response to e-mail correspondence and to attach e-mail correspondence.

Background

On 14 September 2009, the appellee provided a urine sample for testing pursuant to a random unit sweep, and his urine sample subsequently tested positive for tetrahydrocannabinol (THC), a marijuana metabolite. On four subsequent occasions, the appellee provided a urine sample pursuant to the wing's drug re-inspection policy and those samples also tested positive for THC. Alarmed over the appellee's five positive urinalysis results and unaware that on 10 December 2009 the appellee submitted a urine sample that would subsequently test negative, the appellee's commander restricted the appellee to the confines of Buckley Air Force Base, Colorado on 15 December 2009. The commander's purpose for the restriction was to "secure [the appellee's] safety and that of [his] fellow airmen and to ensure [the appellee's] presence at trial."

After learning that the appellee's 10 December 2009 urine sample tested negative, the appellee's commander decided to continue the restriction as ordered. On 5 March 2010, the appellee was alleged to have broken restriction and on 10 March 2010, the convening authority referred a breaking restriction charge and specification to the

appellee's special court-martial. At trial, the appellee moved to dismiss the breaking restriction charge and specification, opining that his negative urinalysis abrogated his commander's basis for the restriction. The appellee's commander testified on the motion and advised the court that after learning of the appellee's negative urinalysis result, he considered removing the restriction but kept it in place in light of the appellee's prior drug use, the appellee's potential for relapse, the ineffectiveness of verbal counseling to prevent a relapse, and the effectiveness of the restriction in preventing a relapse. After hearing argument on the motion, the military judge ruled that the restriction became unlawful once the appellee's commander was aware of the appellee's negative urinalysis results and "no longer had reason to believe the [appellee] would engage in foreseeable, additional misconduct," granted the appellee's motion, and dismissed the breaking restriction charge and specification.

Law

As this Court reviews the issue of lawfulness of orders under a de novo standard, we could decide this issue on the basis of the record before us. *United States v. Deisher*, 61 M.J. 313, 319 (C.A.A.F. 2005). Alternately, this Court could decline to conduct a de novo review and instead examine the ruling of the military judge. *Id*. This Court reviews a military judge's ruling on a motion to dismiss for an abuse of discretion. *United States v. Gore*, 60 M.J. 178, 186-87 (C.A.A.F. 2004). A military judge abuses her discretion when her "findings of fact are clearly erroneous or if [her] decision is influenced by an erroneous view of the law." *Id.* at 187 (quoting *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995)). In other words, we will give due deference to the trial bench's determination of facts unless the factual determinations are unsupported by the record.

Discussion

We examined the military judge's ruling for an abuse of discretion and conducted a de novo review. Here, the military judge found the appellee's commander "no longer had reason to believe the [appellee] would engage in foreseeable, additional misconduct." First, there is no evidence in the record to support this finding. Second, and most importantly, this finding is clearly in contradiction with the commander's testimony. The appellee's commander testified in no uncertain terms that he believed the appellee had the potential to relapse because of his past drug use and that restriction was necessary because verbal counseling had proven ineffective in preventing the appellee's drug use. Put simply, the military judge's finding that the appellee's commander "no longer had reason to believe the [appellee] would engage in foreseeable, additional misconduct" was clearly erroneous. Accordingly, we hold that the military judge abused her discretion in both finding the restriction unlawful and dismissing Additional Charge II and its Specification.

After conducting a de novo review, we find that the appellee's commander continued the restriction out of a bona fide concern that the appellee would continue

using drugs if the restriction was lifted, a concern supported by the appellee's past drug use, the ineffectiveness of counseling in stemming the appellee's drug use, and the effectiveness of the restriction in preventing further drug use. We find that the continued restriction was lawful, and the alleged violation of the restriction may be proscribed as a violation of Article 134, UCMJ, 10 U.S.C. § 934.

On consideration of the United States Appeal Under Article 62, UCMJ, it is by the Court on this 7th day of June 2010,

ORDERED:

That the appellee's Motion to Dismiss the appellant's Article 62, UCMJ, appeal or, in the alternative, to stay the appeal, is hereby **DENIED**;

That the appellee's 3 June 2010 Motion for an Enlargement of Time, is hereby **DENIED**;

That the appellant's 7 June 2010 Motion for Leave to File a Response to E-mail Correspondence and to Attach E-mail Correspondence, is hereby **DENIED**;

That the United States Appeal Under Article 62, UCMJ, is hereby **GRANTED**. The ruling of the military judge is vacated and the record is remanded for further proceedings consistent with this opinion.

(BRAND, Chief Judge; JACKSON, Senior Judge; and THOMPSON, Judge participating).

FOR THE COURT

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court