UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Colonel MICHAEL D. LABOUNTY
United States Air Force

ACM 37523

26 July 2010

Sentence adjudged 10 June 2009 by GCM convened at Bolling Air Force Base, District of Columbia. Military Judge: Stephen Woody (sitting alone).

Approved sentence: Dismissal, confinement for 20 months, and a fine of $40,000 with an additional 6 months of confinement if not paid.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Nicholas W. McCue.

Appellate Counsel for the United States: Lieutenant Colonel Jeremy S. Weber, Captain G. Matt Osborn, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and HELGET
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, the appellant was convicted of five specifications of negligent dereliction of duty, four specifications of presenting false travel vouchers, one specification of conduct unbecoming an officer, and four specifications of fraternization, in violation of Articles 92, 132, 133, and 134, UCMJ, 10 U.S.C. §§ 892, 932, 933, 934. Contrary to his pleas, he was convicted of two specifications of larceny,[1] in violation of

[1] For one specification, the appellant pled guilty to the lesser-included offense of wrongful appropriation, but the military judge found him guilty of larceny. For the other specification, the military judge found the appellant guilty of larceny by exceptions and substitutions.

Article 121, UCMJ, 10 U.S.C. § 921. The adjudged and approved sentence consists of a dismissal, 20 months of confinement, and a fine of $40,000 with an additional 6 months of confinement if the fine is not paid.

The issue raised by the appellant on appeal is whether this Court should set aside that portion of the appellant's sentence ordering him to serve 20 months of confinement where his order to active duty for the purpose of his court-martial was not approved by the Secretary of the Air Force (SECAF). Finding no error, we affirm.

Background

The appellant was originally in the Oregon National Guard, but on 1 January 2008, the appellant transferred to the Air Force Reserves. He had 26 years and 8 months of service at the time of his court-martial. His financial difficulties, investment endeavors, and friendly behavior with enlisted personnel while on active duty orders directly led to the charges at his court-martial.

On 13 March 2006, the appellant began an extended active duty tour with an order issued under 10 U.S.C. § 12301(d). The appellant's active duty tour was continuously extended until late September 2007, when there was a two-day break between orders. Beginning again on 1 October 2007, the appellant was placed on an active duty order pursuant to 10 U.S.C. § 12301(d), where he remained until his service in the Oregon National Guard ended on 31 December 2007. The next day he entered the Air Force Reserves and was placed on an active duty tour.[2] SECAF did not approve this or any subsequent order or amendment. After his order to active duty in January 2008, the appellant was issued new orders or amendments of orders on five occasions. The third amendment to the order issued on 25 November 2008 is the subject of the issued raised on appeal.

Court-Martial Jurisdiction Over Reservists

The interpretation of a statute is a question of law that we review de novo. *United States v. Martinelli*, 62 M.J. 52, 56 (C.A.A.F. 2005) (citing *United States v. Falk*, 50 M.J. 385, 390 (C.A.A.F. 1999)).

The appellant's argument rests on the premise that he was ordered to active duty for the sole purpose of being tried by court-martial, as described in Article 2(d)(1),

[2] We note that Prosecution Exhibit 1, which includes the appellant's active duty orders and amendments, fails to include the second page of the order signed on 11 January 2008. This missing page contains the authority under which the appellant was put on active duty. The appellant received this order before the investigation for any of the charges began, and he has not raised an issue on appeal regarding this missing page. Additionally, until the final amendment of his final active duty order, all of his orders stated he was placed on active duty pursuant to 10 U.S.C. § 12301(d).

UCMJ, 10 U.S.C. § 802(d)(1), and therefore, Article 2(d)(5), UCMJ, prohibits him from being sentenced to confinement because SECAF did not approve his order to active duty.

Article 2, UCMJ, states:

(a) The following persons are subject to this chapter:

. . . .

(3) Members of a reserve component while on inactive-duty training, but in the case of members of . . . the Air National Guard of the United States only when in Federal service.

. . . .

(c) Not withstanding any other provision of law, a person serving with an armed force who—
(1) submitted voluntarily to military authority;
(2) met the mental competence and minimum age qualifications . . . of this title at the time of voluntary submission to military authority;
(3) received military pay or allowances; and
(4) performed military duties;
is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

(d)(1) A member of a reserve component who is not on active duty and who is made the subject of proceedings under section . . . 830 (article 30) with respect to an offense . . . may be ordered to active duty involuntarily for the purpose of

. . . .

(B) trial by court-martial;

. . . .

(5) A member ordered to active duty under paragraph (1), unless the order to active duty was approved by the Secretary concerned, may not
(A) be sentenced to confinement;

. . . .

The appellant's argument fails because he was already on active duty pursuant to an order under 10 U.S.C. § 12301(d). The appellant was not involuntarily ordered to active duty. The order the appellant relies upon was issued on 25 November 2008, and states the appellant was put on active duty pursuant to 10 U.S.C. § 12301(d) for "MANDAYS (ALL OTHERS)." The order directs the appellant to report at 0730 on 30 November 2008 and authorizes him one travel day. The order also states "THESE BACK TO BACK ORDERS AUTHORIZE YOU TO PERFORM THIS DUTY IN CONJUNCTION WITH THE FOLLOWING ORDER, TRACKING NUMBER: 1824273, PERIOD OF DUTY: 20080101 THRU 20081128." The order referenced is the one immediately preceding it. This earlier order had one amendment that extended it to 28 November 2008. As the appellant stated when questioned during the court-martial, he had been on continuous active duty since March 2006, with the exception of two days in September 2007, which are not relevant to the charged offenses or to the timing of his court-martial.

Despite the appellant's assertions at his court-martial, he now argues that he was not on active duty orders on 29 November 2008, and the order signed on 25 November 2008 was actually ordering him to active duty for the purpose of a court-martial. The appellant's Article 32, UCMJ, 10 U.S.C. § 832, hearing was also held on 25 November 2008. As noted above, the appellant's order signed on 25 November 2008 stated that his active duty service was to be performed in conjunction with the order that ended on 28 November 2008, and that he was ordered to active duty pursuant to 10 U.S.C. § 12301(d)—not 10 U.S.C. § 802. This evidence in conjunction with the one travel day authorized by the 25 November 2008 order demonstrates that there was no break in service between the two orders. Additionally, although the appellant's Article 32, UCMJ, hearing took place on 25 November 2008, the charges were not referred until 23 December 2008.

Even assuming, arguendo, the appellant was not on active duty on 29 November 2008, his return to active duty on 30 November 2008 was not for the purpose of a court-martial. The order states he was placed on active duty pursuant to 10 U.S.C. § 12301(d) for "MANDAYS (ALL OTHERS)" and his court-martial charges had not yet been referred to trial. Thus, when the order was signed on 25 November 2008, a court-martial was not a certainty.

Further, the amendment that the appellant specifically references is the third amendment to the order issued on 25 November 2008. In this amendment, dated 28 April 2009, the reason for the amendment is listed as "Per HQ USAF/A1MP, order extended 62 days effective 15 Apr 09 for UCMJ action under Title 10 USC 802." This is the first time action under the UCMJ is mentioned through the numerous orders and amendments that preceded it. Despite this reference to Article 2, UCMJ, the amendment did not automatically trigger the requirement for SECAF discussed in Article 2(d)(5)(A), UCMJ. As Article 2, UCMJ, clearly states, this requirement applies only when "[a] member of a

reserve component who is not on active duty . . . [is] ordered to active duty involuntarily for the purpose of . . . trial by court-martial." Article 2(d)(1)(B), UCMJ. Notwithstanding the appellant's argument, he was not ordered to active duty for his court-martial because he was already on active duty orders. Therefore, the SECAF approval requirement was never triggered and the appellant could be and was properly sentenced to confinement.

Conclusion

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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

JACKSON, Senior Judge and HELGET, Senior Judge participated in the decision of this Court prior to their reassignment on 15 July 2010 and 01 July 2010 respectively.

OFFICIAL

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