UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman LAMARIO C. ROSS
United States Air Force

ACM 36139

13 December 2006

Sentence adjudged 11 August 2004 by GCM convened at Spangdahlem Air Base, Germany. Military Judge: William M. Burd and Adam Oler (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 20 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Sandra K. Whittington, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Kimani R. Eason.

Before

ORR, MATHEWS, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

MATHEWS, Judge:

The appellant was tried at Spangdahlem Air Base, Germany before a general court-martial convened under the authority of the Commander, Third Air Force (3 AF/CC). A military judge sitting alone found the appellant guilty of two specifications of assault consummated by a battery and three specifications of aggravated assault, in violation of Article 128, UCMJ, 10 U.S.C. § 928, and one specification of unlawful entry, in violation of Article 134, UCMJ, 10 U.S.C. §

934. The appellant's approved sentence consists of a bad-conduct discharge, confinement for 20 months, and reduction to E-1.

On appeal, the appellant does not contest the factual or legal sufficiency of the findings or the appropriateness of his sentence. Instead, he challenges the legitimacy of his court-martial, arguing, inter alia, that he is entitled to a new trial because the officer serving as 3 AF/CC was improperly appointed to command and, as a consequence, was not a proper court-martial convening authority. We disagree and affirm the appellant's conviction.

Background

The appellant was assigned to the 52d Aircraft Maintenance Squadron, a squadron of the 52d Fighter Wing, which, at the time of the appellant's court-martial, fell under the command of Third Air Force and, in turn, the United States Air Forces in Europe (USAFE). On 25 June 2004, the USAFE commander appointed Colonel (Col) JW as 3 AF/CC. At least two officers senior in grade to Col JW were assigned to Third Air Force at the time of his appointment to command: the brigadier generals commanding the 48th Fighter Wing and the 435th Air Base Wing. The government concedes that these officers were eligible to command and present for duty, and does not contend that they were otherwise disqualified from serving as 3 AF/CC.

On 1 July 2004, Col JW, in his putative capacity as 3 AF/CC, referred the appellant's case to trial by general court-martial. The appellant was initially arraigned on 21 July 2004; during arraignment, in response to a query by the military judge, the trial counsel announced that Col JW had referred the case while "fill[ing] in" for a general officer. Following arraignment, the appellant's court-martial recessed for twenty days. During the recess, command of Third Air Force passed to Major General (Maj Gen) MG. On 9 August 2004, the new 3 AF/CC replaced five of the officers named in the appellant's original convening order. The appellant was re-arraigned the following day and tried on the merits on 9-10 August 2004. Maj Gen MG continued to serve as convening authority for the appellant's court-martial, approving the appellant's sentence on 6 December 2004.

The appellant did not at any time prior to the conclusion of his trial question Col JW's authority to act as 3 AF/CC or to convene the appellant's court-martial. There is no evidence that either of the brigadier generals present in Third Air Force, or any other person, ever attempted to challenge Col JW's command.

Discussion

Officers who exercise command over air forces may convene general courts-martial. Article 22(a)(7), UCMJ, 10 U.S.C. § 822(a)(7). The commander of Third Air Force was recognized as a general court-martial convening authority "pursuant to Article 22(a)(7)" in Special Order GA-001, issued under the authority of the Secretary of the Air Force on 29 February 2004. The appellant does not contest the authority of 3 AF/CC to convene a general court-martial; instead, he contends that Col JW never properly held that office. Col JW's appointment to command Third Air Force, the appellant argues, violated Air Force regulations because there were other officers in Third Air Force senior in grade and eligible for duty. Because Col JW was not properly in command, the appellant contends, his court-martial lacked jurisdiction.

There being no dispute as to the facts surrounding the appellant's claim, we address the following three questions of law: (1) Did Col JW's appointment to command violate applicable Air Force regulations; (2) If so, was the violation jurisdictional in nature; and (3) If the violation was not jurisdictional, is the appellant nevertheless entitled to relief? We consider these issues de novo. *See, e.g., United States v. Hardy,* 60 M.J. 620 (A.F. Ct. Crim. App. 2004).

The first question need not detain us long. At the time of Col JW's appointment, Air Force Instruction (AFI) 51-604, *Appointment to and Assumption of Command* (1 Oct 2000), was the service regulation governing how officers take command of units in the Air Force.[1] Paragraph 2.5 of the AFI provided that officers "assigned to an organization, present for duty, eligible to command the organization, *and senior or equal in grade to all other officers in the organization* may be appointed to command the organization." *Id.* (emphasis added). The AFI went on to specify that when "one or more officers senior in grade . . . eligible to command and present for duty, are assigned to an Air Force unit, superior competent authority *may not appoint another officer of lower grade to command that unit* . . . ." *Id.* at ¶ 2.5.1 (emphasis added). Therefore, Col JW's appointment to command Third Air Force violated AFI 51-604.

Binding precedent from our superior appellate court compels us to find, however, that this violation did not deprive the appellant's court-martial of jurisdiction. The power to act as a convening authority attaches to the office of command, not the particular person occupying it. *See United States v. Brown,* 39 M.J. 114, 117 (C.M.A. 1994); *United States v. Bunting,* 15 C.M.R. 84, 87 (C.M.A. 1954). Where, as here, an officer exercises *de facto* command, that officer also

[1] A new version of AFI 51-604 was issued on 4 April 2006. There are no differences between the versions of the instruction material to the resolution of the appellant's claim.

may exercise the convening authority power that attaches to the command. *United States v. Watson,* 37 M.J. 166, 168 (C.M.A. 1993) (emphasis added). This is true even where the officer exercising command is junior to another who might otherwise lawfully have assumed command. *United States v. Yates,* 28 M.J. 60, 61-63 (C.M.A. 1989).

In *United States v. Jette,* 25 M.J. 16 (C.M.A. 1987), our Superior Court faced a very similar situation. Rejecting that appellant's claim that the putative convening authority "was not empowered to act as convening authority because he did not assume command in accordance with . . . service regulations," the court found that the officer "functioned as the commander" and that there was "no evidence . . . any other officer challenged [his] right to command." *Id.* at 18-19. Even if the regulation was violated, the court concluded, appellate courts "are not justified in attaching jurisdictional significance to service regulations in the absence of their express characterization as such by Congress." *Id.* at 18. No such express Congressional characterization appends to AFI 51-604.

The appellant's court-martial had jurisdiction despite the circumstances of Col JW's appointment.[2] Furthermore, we find no other basis for the appellant to assert a claim based on the government's failure to abide by AFI 51-604. An appellant may assert a violation of a regulation only if it was prescribed to protect the appellant's rights. *United States v. Kohut,* 44 M.J. 245, 250 (C.A.A.F. 1996). The AFI here provides a comprehensive framework for the acquisition and exercise of command, but nothing in it suggests it was in any way intended to protect the appellant's rights. Finally, even if the appellant had standing, we find that any error was cured when Maj Gen MG subsequently ratified Col JW's referral by taking action on the appellant's sentence. *Brown,* 39 M.J. at 118.[3]

Other Issues

The appellant contends, and the government concedes, that the Specification of Charge I, and Specifications 1 and 2 of Charge II, should be merged. We agree. The Specification of Charge I is hereby amended to read:

> In that SENIOR AIRMAN LAMARIO C. ROSS, United States Air Force, 52d Aircraft Maintenance Squadron, Spangdahlem Air Base, Germany, did, at or near Trier, Germany, on or about 20 March 2004,

[2] While we believe this conclusion is compelled by case law, we do not "encourage deliberate or negligent violations of service regulations," and our decision should not be construed as approval -- tacit or otherwise -- of procedures contravening AFI 51-604. *Yates,* 28 M.J. at 63.

[3] Our decision on this issue moots the appellant's claim that, because it does not address the jurisdictional question, the staff judge advocate's recommendation is defective.

> commit an assault upon Luc Kim Ta, by gouging her eyes with his fingers, cutting her on the face, arm, and hand with a shard from a broken glass teapot, and punching her in the face with closed fists and kicking her in the head and torso with boot-shod feet, with a force likely to inflict death or grievous bodily harm, to wit: forcibly driving his fingers into the eye sockets of the said Luc Kim Ta, forcibly cutting her on her face, arm, and hand with a broken shard of glass, punching with closed fists and kicking with boot-shod feet.

Charge II and its Specifications are dismissed.

Reassessing the appellant's sentence in light of the modified findings, we find that the military judge would have imposed a sentence no different from the one actually imposed at trial. *United States v. Doss,* 57 M.J. 182, 185 (C.A.A.F. 2002). Moreover, we find the reassessed sentence appropriate for this appellant and his crimes. *United States v. Baier*, 60 M.J. 382, 383 (C.A.A.F. 2005); Article 66(c), UCMJ, 10 U.S.C. § 866(c).

Conclusion

The approved findings, as modified, and the sentence, as reassessed, 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 (C.A.A.F. 2000). Accordingly, the findings, as modified, and the sentence, as reassessed are

AFFIRMED.

ORR, Senior Judge (dissenting):

As articulated by the majority, Col JW's appointment to command Third Air Force violated AFI 51-604. Because the convening authority was not properly in command, I am not convinced that he had the authority to convene the appellant's courts-martial. Therefore, I respectfully dissent.

I agree with the majority's interpretation of our Superior Court's decisions in the *Watson* and the *Yates* cases. However, the facts of this case are distinguishable from the cases cited by the majority. The officers who convened the trials in the *Watson* and *Yates* cases were junior in rank, but in the same grade as a more senior officer within the command. As a result, these convening authorities were eligible for command, they just were not properly appointed. In

the case sub judice, the commander of USAFE, appointed Col JW as the commander of Third Air Force when there were two brigadier generals within the command who were eligible to command the organization. Because of this grade disparity, the commander of USAFE did not have the authority to appoint Col JW as the commander. His appointment was not an administrative oversight; it was a violation of AFI 51-604 and long-standing military customs and traditions. As a result, I am convinced Col JW was ineligible to serve as the commander of Third Air Force or as the convening authority. Therefore, the trial court convened by Col JW lacked jurisdiction to try the appellant. I would set aside the appellant's conviction and authorize a rehearing by a properly convened court-martial.

Senior Judge ORR participated prior to his reassignment.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator