UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman DEREK A. BLANTON
United States Air Force

ACM S31536

09 June 2009

Sentence adjudged 01 August 2008 by SPCM convened at Dyess Air Force Base, Texas. Military Judge: Maura T. McGowan.

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Major Jeremy S. Weber, Captain Coretta E. Gray, and Gerald R. Bruce, Esquire.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with the appellant's pleas, a military judge sitting as a special court-martial convicted him of one specification of divers wrongful use of marijuana and one specification of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A panel of officers sentenced the appellant to a bad-conduct discharge and reduction to E-1. The convening authority approved the sentence as adjudged. On appeal the appellant raises the following assignments of error: (1) the court-martial lacked *in personam* jurisdiction over him because two days after his term of enlistment had expired and before court-martial charges were preferred against him, Air Force officials notified him that his discharge certificate was completed; and (2) a new Court-

Martial Order (CMO) is required because the original order misstated the UCMJ article of which he was convicted. Finding no prejudicial error, we affirm.*

Background

Between 15 February 2008 and 5 March 2008, the appellant was dining with a friend at a local restaurant. After dinner, the appellant's friend invited him over to DH's house, and while there, the appellant was offered and smoked a cigar laced with marijuana and cocaine. Unfortunately for the appellant, on 5 March 2008, the appellant was randomly selected to provide a urine sample. The appellant provided a sample, the sample was sent to the Air Force Drug Testing Laboratory (AFDTL), and his sample subsequently tested positive for marijuana and cocaine. On 15 March 2008, the appellant saw DH at a local night club and while there was offered and smoked a cigar that had been laced with marijuana.

On 18 March 2008, agents with the Air Force Office of Special Investigations (AFOSI) summoned the appellant to their office for an interview. After a proper rights advisement, the appellant waived his rights and consented to a urinalysis. The appellant provided a sample, the sample was sent to the AFDTL, and his sample subsequently tested positive for marijuana. On 26 March 2008, AFOSI agents interviewed the appellant a second time and after a proper rights advisement, the appellant waived his rights and confessed to smoking marijuana on 15 March 2008.

On 15 April 2008, a paralegal with the base legal office requested the appellant be placed on administrative hold. In her request, the paralegal advised that the appellant should not be allowed to separate without prior coordination with the base legal office. The next day, a clerk with the mission support squadron confirmed the appellant had been placed on administrative hold. On 21 April 2008, the base staff judge advocate requested the appellant be placed on administrative hold immediately and to remain on administrative hold for six months. In his request, the staff judge advocate advised that the appellant was the subject of an ongoing AFOSI investigation, that court-martial charges were pending upon the completion of the investigation, and that administrative hold would, inter alia, prevent the appellant from separating. On 24 April 2008, a clerk with the mission support squadron confirmed the appellant had been placed on administrative hold. On 1 July 2008, a charge was preferred against the appellant.

At the time of preferral it is unknown whether the appellant's original 7 June 2008 date of separation had been changed, but as of 31 July 2008, the appellant's date of separation was extended to September 2008. The appellant never received a final pay and accounting. At trial, the appellant moved to dismiss the charge and specifications –

* Both parties acknowledge that the Court-Martial Order (CMO) erroneously lists the charge of which the appellant was convicted as "Article 112" rather than "Article 112a." The Court orders the promulgation of a corrected CMO properly reflecting the charge of which the appellant was convicted as "Article 112a."

opining the court-martial lacked *in personam* jurisdiction over him because the government had failed to take any of the actions required to attach jurisdiction under Rule for Courts-Martial (R.C.M.) 202(c)(2) prior to the expiration of his term of service (ETS).

In Personam Jurisdiction

"We review jurisdictional challenges de novo, accepting the military judge's findings of fact unless they are clearly erroneous or are not supported by the record." *Webb v. United States*, Misc. Dkt. No. 2009-01, slip op. at 4 (A.F. Ct. Crim. App. 20 Mar 2009) (citing *United States v. Hart*, 66 M.J. 273, 276 (C.A.A.F. 2008)). In the instant case, the military judge's findings of fact are sufficiently supported by the record, are not clearly erroneous, and we adopt them as our own. "*[I]n personam* jurisdiction over a military person is lost upon his discharge from the service, absent some saving circumstance or statutory authorization." *Id.* (quoting *United States v. Howard*, 20 M.J. 353, 354 (C.M.A. 1985)). "However, the mere expiration of a member's [ETS] does not automatically equate to a 'discharge' or a resulting loss of military jurisdiction under this rule." *Id.* In fact, as we have held, "[m]ilitary jurisdiction continues to exist over those who are 'awaiting discharge after expiration of their terms of enlistment.'" *Id.* (quoting Article 2(a)(1), UCMJ, 10 U.S.C. § 802(a)(1); *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006)). For ETS cases, as opposed to early separation cases, a valid discharge occurs when there has been delivery of a valid discharge certificate *and* a final accounting of pay. *Id.* at 8 (citing 10 U.S.C. § 1168(a)).

Moreover, as long as "actual discharge from the military has not yet occurred, court-martial jurisdiction attaches 'when action with a view to trial of that person is taken.'" *Id.* (quoting R.C.M. 202(c)(1)). While jurisdiction attaches when any of the actions taken under R.C.M. 202(c)(2) occur, such actions are by no means the only methods by which jurisdiction attaches. *Id.* (citing *United States v. Self*, 13 M.J. 132, 138 (C.M.A. 1982) (quoting *United States v. Wheeley*, 6 M.J. 220, 222 (C.M.A. 1979))). Criminally investigating a member with a view toward trial and placing a member on administrative hold prior to his ETS are other means by which jurisdiction attaches. *Id.* (citing *United States v. Lee*, 43 M.J. 794, 797 (N.M. Ct. Crim. App. 1995), *rev. denied*, 44 M.J. 262 (C.A.A.F. 1996); *United States v. Williams*, 53 M.J. 316, 317 (C.A.A.F. 2000)).

In the instant case, the military judge found that the appellant had not been discharged because he had not received a final accounting of pay. Additionally, she found that the government's actions in criminally investigating the appellant and placing him on administrative hold were actions taken by the government with "a view towards trial" and as such, had the effect of attaching court-martial jurisdiction over the appellant. We agree with the military judge's findings that the appellant had not been discharged.

First, there is no evidence in the record that a valid discharge certificate was delivered to the appellant. The Secretary of the Air Force has given staff judge advocates the discretionary authority to place members on administrative hold, effectively precluding the members' discharge at their ETS. *Id.* at 10 (citing Air Force Instruction (AFI) 36-3208, *Administrative Separation of Airmen* (9 Jul 2004), ¶ 2.4.). On 24 April 2008, at the staff judge advocate's request, the appellant was placed on administrative hold. Moreover, assuming there was a subsequent delivery of a discharge certificate, it would have been in contravention of the administrative hold and without legal effect. *Id.* (citing *United States v. Wilson*, 53 M.J. 327, 333 (C.A.A.F. 2000); *United States v. Garvin*, 26 M.J. 194, 195-96 (C.M.A. 1988); *Wilson v. Courter*, 46 M.J. 745, 749 (A.F. Ct. Crim. App. 1997), *pet. denied*, 47 M.J. 80 (C.A.A.F. 1997)). Second, the appellant never received a final accounting of pay.

We also agree with the military judge's findings that the court-martial jurisdiction attached over the appellant when AFOSI agents initiated a criminal investigation against the appellant and when the staff judge advocate took actions to place the appellant on administrative hold. Put simply, the government had court-martial jurisdiction over the appellant to try him for his crimes.

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.

OFFICIAL

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