UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant WALTER T. WORLEY
United States Air Force

ACM 37318

30 March 2010

Sentence adjudged 30 June 2008 by GCM convened at Kirtland Air Force Base, New Mexico. Military Judge: Ronald A. Gregory (sitting alone).

Approved sentence: Confinement for 1 year and reduction to E-4.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, Major Tiffany M. Wagner, Major Lance J. Wood, Major Patrick E. Neighbors, Captain Phillip T. Korman, and Joseph W. Kastl, Esquire (civilian counsel).

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Senior Judge:

Pursuant to his pleas, a military judge sitting as a general court-martial convicted the appellant of one specification of divers distribution of child pornography in violation of 18 U.S.C. § 2252(a)(2), one specification of divers possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B), one specification of divers distribution of child pornography, one specification of divers possession of child pornography, one specification of divers communication of indecent language, and one specification of communication of indecent language, in violation of Article 134, UCMJ, 10 U.S.C. §

934.[1] The adjudged sentence consists of a bad-conduct discharge, one year of confinement, and reduction to the grade of E-4. Pursuant to the pretrial agreement, the convening authority approved the confinement for one year and the reduction to the grade of E-4.

On appeal, the appellant asks the Court not to affirm the findings and the sentence or, in the alternative, to affirm a sentence of "no sentence" and disapprove the reduction in rank. He opines that the Court lacks jurisdiction to conduct appellate review of his case because the armed forces lost in personam jurisdiction over him as a result of: (1) denying him appellate leave; (2) granting him a valid discharge; and (3) an affirmative abatement that occurred as a result of his valid discharge. Finding no prejudicial error, we affirm the findings and the sentence.

Background

In March 2004, the Dallas Police Department received information that someone with the Yahoo! username "bigtie3002" had posted child pornography on the Internet. The Dallas Police Department determined that the username belonged to the appellant and subpoenaed e-mail records associated with the username. A review of the records disclosed that on several occasions between 5 June 2003 and 10 May 2004, the appellant sent e-mails to EP, an individual who identified herself as a 14 year-old girl, discussing his incestuous relationship with his sister, and giving EP instructions on how to begin sexual relations with her brother. A review of the records also disclosed an e-mail, with an attached image, that the appellant sent to another individual commenting on how the attached image would sexually arouse the individual.

The Dallas Police Department concluded its investigation and transferred its findings to the Department of Homeland Security, Internet Crimes Enforcement (ICE). On 25 May 2005, the appellant gave ICE consent to search his home and his computers. ICE searched the appellant's home and computers, found no child pornography, and relinquished investigative jurisdiction, along with their report, to agents with the Air Force Office of Special Investigations (AFOSI).

On 14 June 2005, AFOSI agents summoned the appellant to their offices for an interview. After a proper rights advisement, the appellant waived his rights, agreed to answer questions, and admitted to using the Yahoo! usernames "bigtie3002" and "Bill Westbroock." He also admitted to being a member of approximately 97 chat room groups, some of which displayed adult and child pornography, to downloading images

[1] The appellant and the convening authority entered into a pretrial agreement wherein the appellant agreed to plead guilty to the aforementioned charges and specifications in return for the convening authority's promise to withdraw and dismiss with prejudice a violation of a lawful general regulation charge and specification, to not approve a punitive discharge provided the appellant immediately began procedures to secure his retirement from the United States Air Force, and to not approve confinement in excess of two years.

from the chat rooms, and to uploading images to the chat rooms. Of the images the appellant downloaded and uploaded to the chat rooms, six were identified as known child pornography. At trial the appellant providently pled and was found guilty of the aforementioned offenses. On 1 August 2009, after serving his sentence, the appellant was granted a retirement from the United States Air Force.

In Personam Jurisdiction

We review jurisdictional challenges de novo. *U.S. v. Davis*, 63 M.J. 171, 176 (C.A.A.F. 2006) (citing *United States v. Melanson,* 53 M.J. 1, 2 (C.A.A.F. 2000)). "When court-martial jurisdiction has been invoked properly at the time of trial, the jurisdiction of the [respective] Court of Criminal Appeals to review the case does not depend on whether a person remains in the armed forces at the time of such review." *Denedo v. United States*, 66 M.J. 114, 125 (C.A.A.F. 2008), *aff'd and remanded,* 129 S. Ct. 2213 (2009). Rather, if an appellant's court-martial had jurisdiction over him and the offenses, the respective Court of Criminal Appeals will have jurisdiction to review his findings and sentence. *Id.*

In the instant case, it is indisputable that the appellant's court-martial had jurisdiction over him and the offenses. Thus, this Court has jurisdiction to review his findings and sentence. The fact that the appellant was not placed on appellate leave following the completion of his court-martial sentence is not fatal to this Court's jurisdiction because there is no legal nexus between appellate leave and the retention of court-martial jurisdiction.[2]

Additionally, while a military member's valid discharge prior to trial may, absent some saving circumstance or statutory authorization, deprive a service of in personam jurisdiction,[3] the appellant's valid discharge argument is without merit for two reasons. First, there is no evidence that the appellant was discharged from the service. Rather, the record demonstrates the appellant retired from the service. As a retired member receiving retirement pay, the appellant remains a member of the armed forces subject to court-martial jurisdiction, jurisdiction that necessarily gives this Court the authority to act on his findings and sentence. Article 2(a)(4), UCMJ, 10 U.S.C. § 802(a)(4); *Pearson v. Bloss*, 28 M.J. 376, 380 (C.M.A. 1989). Second, assuming, arguendo, that the appellant was discharged from the service, any such discharge would have occurred after his court-

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[2] While an accused who has been sentenced by a court-martial *may* be required to take leave pending appellate review, the decision to place an accused on appellate leave is a matter solely within the sound discretion of the respective service secretary. Article 76a, UCMJ, 10 U.S.C. § 876a. Moreover, we are unable to discern any authority, statutorily, regulatory, or otherwise, that makes appellate leave status a condition for in personam jurisdiction.

[3] *United States v. Hart*, 66 M.J. 273, 276 (C.A.A.F. 2008), *cert. denied*, 129 S. Ct. 310 (2008); *United States v. Howard*, 20 M.J. 353, 354 (C.M.A. 1985).

martial, and a post-conviction discharge does not deprive this Court of the ability to act on the findings and sentence. *Steele v. Van Riper*, 50 M.J. 89, 91-92 (C.A.A.F. 1999).

Lastly, the appellant's affirmative abatement argument is likewise without merit. An "abatement ab initio has the effect of 'eliminating or nullifying' the proceeding or conviction 'for a reason unrelated to the merits' of the case." *United States v. Rorie*, 58 M.J. 399, 400 (C.A.A.F. 2003) (quoting *Black's Law Dictionary* 2 (7th ed. 1999)). "[I]t is as if the defendant had never been indicted and convicted." *Id.* (alteration in original) (quoting *United States v. Logal,* 106 F.3d 1547, 1551-52 (11th Cir.1997)). The rule of abatement ab initio is a matter of policy in the federal courts and historically has been applied in three situations: (1) where an appellant dies prior to the completion of appellate review; (2) where an appellant is administratively discharged prior to appellate review, and it is clear from the record that the separation authority discharged the appellant with the clear understanding that the discharge would nullify the court-martial; and (3) where the government is obliged to produce a witness and the military judge abates the proceedings because of the government's failure to produce the witness. *See Rorie*, 58 M.J. at 400-06; *United States v. Harris*, 24 M.J. 622, 624, n.4 (A.C.M.R. 1987).

The first situation is inapplicable because the appellant does not cite this as a basis for abatement. With respect to the second situation, we note that the appellant retired from and was not discharged from the service and for the aforementioned reasons we have the authority to review his findings and sentence. Moreover, the appellant's pretrial agreement makes it abundantly clear that the convening authority only allowed the appellant to immediately apply for retirement as a means to avoid a punitive discharge and not as a means to nullify his court-martial.[4] Lastly, abatement that follows the government's failure to produce a witness has historically been viewed as a continuation of a court-martial and not a nullification of a court-martial and, in any event, is inapplicable to the present case. *See* Rule for Courts-Martial 703; *Harris*, 24 M.J. at 625. In short, we have jurisdiction to review the appellant's findings and sentence and have conducted our review accordingly.

Conclusion

The findings and the 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).

[4] "When an appellate issue concerns the meaning and effect of a pretrial agreement, interpretation of the agreement is a question of law, subject to review under a de novo standard." *United States v. Smead*, 68 M.J. 44, 59 (C.A.A.F. 2009) (citing *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006)).

Accordingly, the findings and the sentence are

AFFIRMED.

OFFICIAL

CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court