IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

W.L. RITTER **K.K. THOMPSON** **J.F. FELTHAM**

UNITED STATES

v.

Daniel N. ENGLE
Corporal (E-4), U. S. Marine Corps

NMCCA 200501044 Decided 31 May 2006

Sentence adjudged 19 January 2005. Military Judge: M.J. Griffith. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Division, Camp Lejeune, NC.

LT J. GOLDSMITH, JAGC, USN, Appellate Defense Counsel
LT KYLE KNEESE, JAGC, USNR, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel
LT GUILLERMO J. ROJAS, JAGC, USNR, Appellate Government Counsel

FELTHAM, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of making a false official statement, selling military property of the United States of a value of $500.00 or less, and wrongfully disposing of military property of the United States of a value of more than $500.00, in violation of Articles 107 and 108, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 908. The convening authority approved the adjudged sentence of confinement for nine months, a $1,500.00 fine, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant contends the military judge erred when he held that the Marine Corps retained *in personam* jurisdiction over him after he completed the discharge "clearing" process, received a final accounting of pay, and was mailed a valid discharge certificate. He also contends that the military judge and/or trial counsel committed error by failing to authenticate the record of trial. We have examined the record of trial, the

appellant's two assignments of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

In Personam Jurisdiction

The appellant contends the court-martial lacked *in personam* jurisdiction because the Marine Corps discharged him prior to his conviction. We disagree.

1. Factual Background

The appellant enlisted in the Marine Corps for a period of four years and began active service on 11 May 2000. His final duty assignment was to the 1st Battalion, 8th Marine Regiment, 2d Marine Division, at Marine Corps Base, Camp Lejeune, North Carolina. His original separation date would have been 10 May 2004.

In February 2004, the appellant offered a Small Arms Protective Insert (SAPI) plate for sale on the Internet auction site eBay. The listing contained a photograph of the item, including U.S. Government markings, and indicated the seller was from North Carolina. An undercover Defense Criminal Investigative Service (DCIS) agent saw the listing, opened an account with eBay under the pseudonym "rogue1warrior," and bid on the SAPI plate.

On 10 February 2004, the agent won the item with a bid of $305.00. An electronic message from eBay instructed the agent to send payment to the appellant at his home address in a military family housing area aboard Camp Lejeune. On 11 February 2004, the agent made electronic payment to the appellant through PayPal, an Internet payment service available to eBay users, and later received the SAPI plate in the mail. Around 7 March 2004, the appellant paid a fellow Marine $250.00 for six additional SAPI plates, which he also intended to sell on eBay.

On 10 March 2004, the appellant gave a sworn statement to the Naval Criminal Investigative Service (NCIS) in which he admitted selling the SAPI plate on eBay in February 2004. The appellant also completed his command's check-out process on 10 March 2004, and went on terminal leave from the Marine Corps. He moved home to Salina, Kansas, taking the six SAPI plates he obtained from the other Marine on 7 March with him.

On 24 March 2004, NCIS briefed the appellant's commanding officer on the status of its investigation. At that time, the commanding officer indicated he would not likely recall the appellant from terminal leave to prosecute him for his alleged misconduct, but would defer a final decision until he reviewed the NCIS Report of Investigation.

On 6 April 2004, the appellant's wife told him that law enforcement personnel had questioned her about SAPI plates. The appellant then disposed of the six SAPI plates in his possession by dumping them in a field near his home. DCIS agents recovered two of these plates the next day. On 8 April 2004, an NCIS agent interviewed the appellant, who told the agent he acquired the six SAPI plates by purchasing them at a yard sale. He later admitted this statement was false.

The appellant's affidavit of 17 December 2004 indicates the Executive Officer, 1st Battalion, 8th Marine Regiment, 2d Marine Division, called the appellant at his home in Kansas on 8 April 2004, revoked his terminal leave, and ordered him to report to Camp Lejeune. Appellate Exhibit I. The affidavit states the executive officer told the appellant he was the subject of an investigation, and would be "run" as a deserter if he did not return to his command. *Id*. The appellant returned to Camp Lejeune on 12 April 2004, reported to his command, but did not formally check-in. *Id*. He claims he did not begin receiving pay until 15 June 2004, after he complained to his administrative shop that he was not being paid. *Id*.

On 3 May 2004, the appellant's commanding officer decided to prosecute him, and issued a letter (signed by direction) to the Officer In Charge, 2d Marine Division Personnel Administration Center (DPAC) asking to have the appellant placed on legal hold. The letter, Appellate Exhibit III, stated that the appellant was brought off terminal leave on 3 May 2004 to be "processed for a General Court-Martial," and directed the DPAC to make appropriate unit diary and service record book entries. The DPAC did not immediately act on this request.

Unit Diary entry 087 from the DPAC indicates the legal hold request was not entered into the administrative system until 12 May 2004. The entry had both effective and actual dates of 9 May 2004, and read as follows: "SNM PENDING GEN COURT MARTIAL - RECVD LEGAL HOLD LTR 5800 CO 1/8 DTD 20040503." Appellate Exhibit I. Although the DPAC was supposed to "flag" the appellant's record to ensure continuing jurisdiction over him, it failed to do so.

Unit Diary entry 086 indicates the appellant was erroneously dropped to the IRR upon his Expiration of Active Service (EAS), and read as follows: "REACHED EAS AND WAS DROPPED ON DIARY 4056. SNM IS BEING PUT ON LEGAL HOLD DTD 20040511." Appellate Exhibit I. Unit Diary entry 088 indicates the appellant was given a final accounting of pay, and his credit union records reflect the receipt of his final pay, in the form of two direct deposits to his credit union account, on 19 May 2004. *Id*. The appellant's affidavit of 17 December 2004 indicates he received a DD Form 214 (DD-214) (a discharge certificate) in the mail on 16 May 2004. *Id.* The DD-214 reflected a separation date of 10 May 2004. *Id*.

2. Discussion of the Applicable Law

For a court-martial to have jurisdiction, "[t]he accused must be a person subject to court-martial jurisdiction." RULE FOR COURTS-MARTIAL 201(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). "Courts-martial may try any person when authorized to do so under the code." R.C.M. 202(a). Persons subject to the UCMJ include members of a regular component of the armed forces. Art. 2(a)(1), UCMJ. "Jurisdiction of a court-martial depends solely on the accused's status as a member of the military." *United States v. Williams*, 51 M.J. 592, 594 (N.M.Ct.Crim.App. 1999) (citing *Solorio v. United States*, 483 U.S. 435 (1987)), *aff'd*, 53 M.J. 316 (C.A.A.F. 2000). Ordinarily, the delivery of a valid discharge certificate serves to terminate court-martial jurisdiction. R.C.M. 202(a), Discussion. However, "[c]ourt-martial jurisdiction over a person attaches when action with a view to trial of that person is taken." R.C.M. 202(c)(1). Once court-martial jurisdiction over a person attaches, such jurisdiction continues for all purposes of trial, sentence, and punishment. *Id*.

"When an accused contests personal jurisdiction on appeal, we review that question of law de novo, accepting the military judge's findings of historical facts unless they are clearly erroneous or unsupported in the record." *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000). We find that the military judge's findings of fact, as set forth in Appellate Exhibit V, Motion to Dismiss (Jurisdiction): Court Findings and Conclusions of 21 December 2004, are not clearly erroneous or unsupported, and, with the exception of an incorrect date in Finding of Fact No. 8, accept them. Finding of Fact No. 8 identifies 10 May 2004 as the inception date of the appellant's terminal leave. It is clear from the evidence in the record that the appellant began his terminal leave on 10 March 2004, not 10 May.

The appellant's claim of lack of jurisdiction is grounded on the principle that "the delivery of a valid discharge certificate or its equivalent ordinarily serves to terminate court-martial jurisdiction." R.C.M. 202(a), Discussion § (2)(B). In this case, however, the evidence clearly shows that the discharge certificate mailed to the appellant was not valid, as it was issued in error after his commanding officer requested that he be placed on legal hold.

The appellant argues that the Government intended to discharge him when it dropped him from the rolls on 10 May 2004 and mailed his DD-214 to his Kansas address. We disagree. The criteria for proper discharge were made clear by our superior court in *United States v. Williams*, 53 M.J. 316, 317 (C.A.A.F. 2000)(citing *United States v. King*, 27 M.J. 327, 329 (C.M.A. 1989. Three elements must be present to effectuate a proper discharge: (1) delivery of a valid discharge certificate; (2) a

final accounting of pay; and (3) completion of a "clearing" process, as required under appropriate service regulations. *Id*.

Although the appellant received a DD-214, it was not sanctioned by his battalion commanding officer -- in fact, it was directly contrary to that officer's earlier legal hold request of 3 May 2004 -- and, therefore, was issued in error. This court has previously held that *in personam* jurisdiction was preserved when a DD-214 was issued contrary to a commanding officer's prior legal hold request. *United States v. Douglas*, No. 200401186, unpublished op. (N.M.Ct.Crim.App. 23 Feb 2006). We have also held that jurisdiction was retained over an appellant when investigatory action commenced prior to the delivery of a discharge certificate and there was no evidence to suggest that the purported discharge was "an informed exercise of discretion." *United States v. Harmon*, 60 M.J. 776, 779 (N.M.Ct.Crim.App. 2004), *aff'd*, 63 M.J. 98 (C.A.A.F. 2006).

The NCIS began investigating the appellant on 10 March 2004, and he provided a sworn statement the same day. Appellate Exhibit IV. Therefore, even if the appellant had received an otherwise valid discharge in May 2004, court-martial jurisdiction did not terminate because he was already being investigated two months prior to his original separation date of 10 May 2004.

We note our superior court's opinion that the authority to retain an individual on active duty for trial by court-martial is "discretionary and not self-executing." *Smith v. Vanderbush*, 47 M.J. 56, 58 (C.A.A.F. 1997)(citing R.C.M. 202 Discussion). The attachment of court-martial jurisdiction in no way prevents a command from exercising its discretion to issue a lawful discharge that terminates jurisdiction. *Id*. at 60. In *Vanderbush*, our superior court held that the Army lost court-martial jurisdiction over an appellant it lawfully discharged after court-martial preferral and arraignment, but prior to the adjudication of findings. *Id*. at 59-61. Of critical importance to the *Vanderbush* holding, however, was the fact that the commander who preferred the charges against Sergeant Vanderbush was notified of his pending discharge by the sergeant's civilian supervisor, yet did nothing to prevent it. *Id*. at 57.

Unlike the commander in *Vanderbush*, the appellant's commanding officer took deliberate action to prevent the appellant's discharge when he signed the legal hold request on 3 May 2004, seven days prior to the appellant's original separation date. The fact that the appellant had been under investigation for nearly two months when the commanding officer signed the legal hold request, that the command's executive officer telephoned the appellant to cancel his terminal leave and ordered him to return to Camp Lejeune because he was under investigation, and that the legal hold request specifically stated the appellant was to be "processed for a general court-martial," all clearly indicate the DPAC delivered the discharge certificate to the appellant without an informed exercise of

discretion. Therefore, we find that *in personam* jurisdiction over the appellant did not terminate upon delivery of his discharge certificate.

Authentication of the Record of Trial

In his second assignment of error, the appellant claims the military judge and/or trial counsel failed to authenticate the record in accordance with R.C.M. 1104(a)(2)(B). We decline to grant relief.

Substitute authentication of the record by the trial counsel is authorized by R.C.M. 1104(a)(2)(B) where the military judge is dead, disabled, or absent. The "authentication page" in the instant case consists of two pages of the record and an attachment. Page 104 is entitled "AUTHENTICATION OF THE RECORD OF TRIAL IN THE CASE OF [the appellant]." On 31 March 2005, the trial counsel signed page 104, indicating he had examined the record of trial, caused necessary changes to be made in order to accurately report the proceedings, and made the record available to the trial defense counsel for examination.

On 10 March 2005, the military judge, Major Mark J. Griffith, signed a letter indicating he would no longer be able to authenticate records of trial due to his permanent change of station from the Piedmont Judicial Circuit. In his absence, pursuant to R.C.M. 1104(a)(2)(B), Major Griffith authorized counsel to authenticate records of trial in which he was the presiding judge. The trial counsel inserted a copy of Major Griffith's letter in the record, immediately after page 104. Record at 104-05.

The convening authority did not take action in this case until 17 May 2005. On 2 May 2005, the trial defense counsel submitted a letter of clemency to the convening authority. He did not raise any issue relative to the accuracy or the verbatim nature of the transcript of the proceedings. Nor has the appellant identified any transcription error to this court.

Although it was error for the trial counsel to fail to sign page 105, we find the error harmless. Lack of an authentication signature has not impeded us in performing a meaningful review of the appellant's trial or any of his assignments of error. In the absence of some allegation of prejudice, or prejudicial impact ascertained by us, we find that the second assignment of error does not merit relief and decline to return the record for a proper authentication. "To hold otherwise would be to elevate form over substance and would constitute an unnecessary interference with appellant's interest in receiving a timely review on the merits of his case." *United States v. Robinson*, 24 M.J. 649, 654 (N.M.C.M.R. 1987).

Variance

Although not raised as an assignment of error, we note that the evidence supporting the appellant's plea of guilty to Specification 1 of Charge II, which consists of his answers during the providence inquiry and a stipulation of fact, established that he did not engage in criminal conduct on the date alleged in Specification 1.

In every charge and specification, the time of the commission of the offense should be stated with sufficient precision to identify the actual offense and enable the accused to understand the particular act alleged. *United States v. Sell*, 11 C.M.R. 202 (C.M.A. 1953). While the language "between about" in a specification allows for some variance in the proven dates, this phrase must be construed reasonably in the light of the circumstances of the particular case. *United States v. Nunn*, 5 C.M.R. 334, 339 (N.B.R. 1952)("'About' or 'approximately' allows a play within somewhat narrow limits"). *See also United States v. Brown*, 16 C.M.R. 257 (C.M.A. 1954); *United States v. Squirrell*, 7 C.M.R. 22 (C.M.A. 1953).

In the appellant's case, a stipulation of fact was entered into between the appellant and the Government. Prosecution Exhibit 2. In the stipulation, the appellant indicated the undercover DCIS agent placed the winning bid for the SAPI plate listed on eBay on 10 February 2004, and that the agent sent payment to him on 11 February 2004. *Id*. The date alleged for this transaction in Specification 1 of Charge II was 28 March 2004. Charge Sheet.

The appellant testified during the providence inquiry that he sold the SAPI plate on "about" 28 March 2004; that he had "completely checked out" of his command, and gone on terminal leave, before 28 March 2004; but he answered in the affirmative when the military judge asked him if he admitted "that the sale occurred on board Camp Lejeune in some sense." Record at 57, 59-60. In the stipulation, the appellant indicated he "relocated" to Salina, Kansas, on "about 12 March 2004." Prosecution Exhibit 2.

The military judge accepted the appellant's plea of guilty to Specification 1 of Charge II, and announced his findings. Despite the variance between the date alleged in the charge sheet, the date indicated by the appellant's testimony during the providence inquiry, and the date indicated in the stipulation of fact, the military judge did not announce his findings by exceptions and substitutions. Record at 87.

The failure to enter findings by exceptions and substitutions did not prejudice the appellant, as it pertained only to the date on which the offense occurred and did not indicate any greater criminal conduct than that which actually occurred. Nonetheless, the appellant is entitled to findings of

guilt that accurately reflect what he did. *United States v. Pryor*, 57 M.J. 821, 825 (N.M.Ct.Crim.App. 2003). We shall take corrective action below.

Conclusion

Accordingly, we except the language "28 March 2004" from Specification 1 of Charge II, and substitute the following language "11 February 2004." The excepted language is set aside and dismissed. The findings, as excepted and substituted, are affirmed. Further, we reassess the sentence in accordance with the principles discussed in *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998). Having reassessed the sentence, we affirm the sentence as originally adjudged. An appropriate convening authority shall issue a supplemental court-martial order, consistent with the opinion of this court.

Senior Judge RITTER and Judge THOMPSON concur.

For the Court

R.H. TROIDL
Clerk of Court