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

BEFORE

C.L. CARVER **D.A. WAGNER** **A. DIAZ**

UNITED STATES

v.

John T. TODD, Jr.
Storekeeper Second Class (E-5), U.S. Navy

NMCCA 200300125 Decided 8 August 2005

Sentence adjudged 1 April 2002. Military Judge: E.W. Loughran. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commandant, Naval District Washington, Washington Navy Yard, Washington DC.

CAPT DIANE KARR, JAGC, USNR, Appellate Defense Counsel
Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel

DIAZ, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of three specifications of larceny and two specifications of wrongful appropriation, in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. The military judge sentenced the appellant to confinement for 1 year, a fine of $5,000.00, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority disapproved the adjudged fine, and otherwise approved the sentence, but he suspended all confinement in excess of 60 days for 12 months.[1]

[1] As the Government correctly notes, the pretrial agreement in this case does not recite an inception date regarding the suspended confinement, and the convening authority's action fails to set a date. We also note that the pretrial agreement does not include a provision deferring the balance of the sentence to confinement pending the convening authority's action. As a result, the adjudged sentence to confinement continued to run until the convening authority took his action on 20 November 2002, leaving little for the convening authority to suspend. We discern no prejudice to the appellant

We have carefully considered the record of trial, the appellant's sole assignment 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 that the military judge erred in denying his motion to dismiss the offenses for lack of personal jurisdiction. We disagree.

In resolving the motion at trial, the military judge made findings of fact and conclusions of law. We accept a military judge's findings of fact unless they are clearly erroneous. We review his conclusions of law *de novo*. *Lawrence v. Makysm,* 58 M.J. 808, 810 (N.M.Ct.Crim.App. 2003)(quoting *United States v. Springer,* 58 M.J. 164, 167 (C.A.A.F. 2003)), *pet. denied,* 59 M.J. 123 (C.A.A.F. 2003).

We find that the evidence supports the military judge's findings in this case and therefore adopt those findings as our own. Among other things, the military judge found:

1. That the appellant's End of Active Obligated Service (EAOS) was 7 February 2001;

2. That on 26 January 2001, at the request of the appellant's command, the Naval Criminal Investigative Service (NCIS) began an investigation into the appellant's alleged improper use of a government credit card;

3. That on 26 January 2001, NCIS agents advised the appellant of his rights and also told him that he was suspected of theft of government property;

4. That on 26 January 2001, the appellant waived his rights and gave an incriminating statement to NCIS;

5. That on 26 January 2001, the appellant also gave the NCIS agents consent to search his residence where they located some of the items that the appellant identified as having been purchased using a government credit card;

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from these errors—the latter actually benefited the appellant and, as for the former, the twelve-month period of suspension (whether measured from the date of trial or the date of the convening authority's action) has long since run.

6. That on 30 January 2001, the appellant was placed on legal hold by his command;

7. That the appellant continued to receive pay and benefits past his EAOS while the case progressed to trial;

8. That sometime in April 2001, at the request of the appellant and his civilian counsel, a trial defense counsel at the local Naval Legal Service Office (who had not been detailed to represent the appellant), contacted the staff judge advocate (SJA) to inquire as to the status of the investigation;

9. That on 6 July 2001, that same trial defense counsel made another inquiry as to the status of the case, and was informed by the SJA that the matter remained under investigation;

10. That on 4 October 2001, following a turnover in the SJA's office and a review by the incoming SJA of the NCIS investigation and four binders of related documents, the appellant's command preferred charges against him; and

11. That on 7 January 2002, the convening authority referred the charges to trial by general court-martial.

Record at 38-41.

Based on these findings, the military judge determined that (a) the appellant was never discharged or released from active duty; (b) the appellant's command initiated prosecutorial action against him on 26 January 2001 when it asked NCIS to commence an investigation; (c) the appellant received normal pay and benefits during the entire time that the case was being investigated and processed for trial; and (d) although a military lawyer made at least two inquiries on the appellant's behalf regarding the status of the investigation, neither the appellant nor his trial lawyers ever requested or demanded that he be released from active duty. Record at 39-40. Accordingly, the military judge concluded that the government had personal jurisdiction over the appellant for purposes of this court-martial. Record at 40. We agree.

A court-martial may try, convict, and punish only those who are properly subject to its jurisdiction. RULE FOR COURTS-MARTIAL 201(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). A servicemember on active duty is subject to court-martial

jurisdiction until lawfully discharged. R.C.M. 201(c)(1), Discussion.

With respect to a servicemember nearing the end of his obligated service:

> [T]he Government loses jurisdiction to try [that individual] unless either (a) prior to his date of separation, some official action has been taken by which [a court] "can say that at some precise moment the sovereign had authoritatively signaled its intent to impose its legal processes upon the individual," *United States v. Smith,* 4 M.J. 265, 267 (C.M.A. 1978); or (b) after the member's date of separation, he does not object "to his continued retention"; or (c) if the servicemember "objects to his continued retention" on active duty after his date of separation and demands his discharge or release, the Government takes official action with the view to prosecution within a "reasonable time" after the servicemember's protest of his retention in the service.

United States v. Fitzpatrick, 14 M.J. 394, 397 (C.M.A. 1983)(internal footnote and citation omitted). *See also* R.C.M. 202(c)(1)(“Court-martial jurisdiction attaches over a person when action with a view to trial of that person is taken.").

"Actions by which court-martial jurisdiction attaches include: apprehension; imposition of restraint, such as restriction, arrest, or confinement; and preferral of charges." R.C.M. 202(c)(2). It is well-settled, however, that the list contained in R.C.M. 202(c)(2), is illustrative and not all-inclusive. *United States v. Self,* 13 M.J. 132, 138 (C.M.A. 1982); *United States v. Wheeley,* 6 M.J. 220, 222 (C.M.A. 1979); *United States v. Benford,* 27 M.J. 518, 520-21 (N.M.C.M.R. 1988). Instead, "[a]ny acts of military officials which authoritatively presage a court-martial, when viewed in the light of surrounding circumstances, are [deemed sufficient] . . . to authorize retention on active duty for purposes of trial." *Self*, 13 M.J. at 138.

We have previously held that investigative actions may constitute sufficient official action to preserve military jurisdiction, even where the accused is not formally placed on legal hold until after the date of his separation from the service. *See United States v. Lee,* 43 M.J. 794, 797

(N.M.Ct.Crim.App. 1995). Consistent with *Lee,* we conclude that court-martial jurisdiction in this case attached as early as 26 January 2001 (when NCIS commenced its investigation) and certainly no later than 30 January 2001 (when the appellant was notified that he was being placed on legal hold). We also find that these actions were taken prior to the appellant's EAOS.

As a result, we attach no legal significance to the subsequent inquiries made by a military lawyer on the appellant's behalf as to the status of the case. Even if these inquiries might somehow be viewed as objections to the appellant's continued retention on active duty, they occurred long after the appellant's command had "signaled its intent to impose its legal processes upon [the appellant.]" *Fitzpatrick,* 14 M.J. at 397. Accordingly, we affirm the military judge's ruling that the appellant's court-martial possessed *in personam* jurisdiction over him.

Missing Article 34 Advice Letter

Before submitting his brief on the sole assignment of error, the appellant's counsel correctly advised the Court that the record of trial did not include the SJA's Article 34, UCMJ, advice letter to the convening authority. The Government has been unable to locate the document. We suspect that one was never prepared in this case, given that the trial counsel advised the military judge at trial that the investigating officer had forwarded the charges to the convening authority with recommendations as to proper disposition. Record at 2.

The appellant, however, has declined to assign error to this omission, perhaps recognizing that his failure to complain about the omission at trial (or in a post-trial submission) forfeits the issue on appeal. *See* R.C.M. 905(e). In any event, we conclude that the appellant was not prejudiced by the error. *See generally United States v. Murray,* 25 M.J. 445 (C.M.A. 1988)(stating that courts of criminal appeals should test such omissions for prejudice in the normal course of appellate review).

Admittedly, the investigating officer in this case, while forcefully recommending trial by general court-martial, also recommended (without any substantive explanation) that two of the five larceny specifications under Charge II be stricken, and that several other larceny specifications be pled as violations of Article 134, UCMJ (alleging theft of services). Instead, the

convening authority referred the original preferred charges to trial without amendment.

We would be speculating as to what advice the SJA would have proffered had he done his statutory duty in this case. Nevertheless, a good indication of harmless error can be found in the pretrial agreement and in the appellant's provident pleas. *See Murray,* 25 M.J. at 449. After carefully considering the record in this case, we are satisfied that the charges (as drafted) were serious enough and were properly supported by evidence prior to referral to a general court-martial. *Id.; see also United States v. Christy,* 18 M.J. 688, 690-91 (N.M.C.M.R. 1984)(stating that an authorized holder of a government credit card who uses it to make unauthorized purchases may be charged with larceny of government property or, alternatively, with theft of the money the government pays for the goods or services obtained). Accordingly, we decline to grant relief.

Conclusion

We affirm the findings and sentence as approved by the convening authority.

Senior Judge Carver and Judge Wagner concur.

For the Court

R.H. TROIDL
Clerk of Court