

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
D.O. VOLLENWEIDER, V.S. COUCH, E.S. WHITE
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JOHN A. DOSSEY
Hull Maintenance Technician Third Class (Surface Warfare) (E-4), U.S. NAVY**

**NMCCA 200700537
Review of a Government Appeal pursuant to Article 62, UCMJ.**

Military Judge: CDR Lewis T. Booker Jr., JAGC, USN.
Convening Authority: Commanding Officer, USS NASSAU (LHA 4).
For the Accused: LCDR Kelvin M. Stroble, JAGC, USN.
For the Government: Maj Brian K. Keller, USMC.

23 October 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VOLLENWEIDER, Senior Judge:

In this appeal, the Government asks this court to rule that (1) the military judge's ruling excluding evidence was an abuse of discretion, and (2) the military judge's declaration of mistrial was a nullity. We find that the declaration of mistrial was valid and prevents our consideration of the evidentiary ruling that the Government seeks to appeal.

Facts

The accused in this case was charged with a variety of offenses arising out of his alleged use of Government computers to search for and look at child pornography. The accused moved *in limine* to exclude information resulting from a search of the computers

he allegedly used and the server for those computers. The military judge granted the motion in part. Later in the trial, the military judge determined that evidence in violation of his ruling had come before the members in the form of a prosecution exhibit.

At that point he held an Article 39(a), UCMJ, session to discuss the matter with counsel. Trial counsel, in continuing to argue the Government's position, stated:

Well, if Your Honor feels that any person's navigation through the worldwide web is communicating information, then I guess that would -- and the government would have to appeal that ruling, because we don't agree -- that that wasn't what the ruling - the ruling was that the Internet history comes in, and all the experts have told us that this is - comes right out of the Internet history file, and this is the user's Internet history. This is his navigation. Mr. Ciaccio said it again - on the worldwide web, this is the type of files that were - when we merge the two sessions - 11th and today - this is the type of file that the accused didn't even know was being created; he didn't know it was being captured. It's done automatically in accordance with the operating system, and it's exactly what you indicated within Larson in your ruling here in Larson - this is the information that the court admitted in Larson. This is the Internet history ---

Record at 419.¹ The trial counsel's argument was followed by defense counsel's argument on the merits of the exclusion order. *Id.* at 419-20.

After these arguments by counsel, the military judge declared a mistrial as to the charges affected by the admission of the evidence being discussed. *Id.* at 420. Immediately thereafter, the trial counsel asked for a recess, which was granted. *Id.* After the recess, trial counsel stated that the Government "has already moved for an appeal under 908 per your ruling prior to the granting of the mistrial. Further the government also moves for an appeal of the mistrial." *Id.* at 422. This Government appeal resulted.

¹ The Government's brief states that these words of the trial counsel, without reference to their context, "indicated the Government intended to appeal his suppression ruling" and that they amounted to a request for delay causing an automatic stay under R.C.M. 908(b)(1). We do not find that interpretation reasonable.

Mistrial Declaration

The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings. RULE FOR COURTS-MARTIAL 915(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). For example, a mistrial may be appropriate when inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members. R.C.M. 915(a), Discussion. In this case, the military judge obviously believed that the presentation of search terms used by the accused to plumb the Internet for child pornography, in violation of his evidentiary ruling, was very prejudicial.

When it appears that grounds for a mistrial may exist, the military judge shall inquire into the views of the parties on the matter and then decide the matter as an interlocutory question. R.C.M. 915(b). "Because consent or lack thereof by the defense to a mistrial may be determinative of a former jeopardy motion at a second trial, the views of the defense must be sought." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), App. 21, Rule 915(b) at A21-63. In this case, the military judge did not seek the positions of the parties on a mistrial and thus did not obtain the consent of the defense. This failure does not invalidate the declaration. 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 7-22.00 (2d ed. 1999).

A declaration of a mistrial shall have the effect of withdrawing the affected charges and specifications from the court-martial, and the affected charges are returned to the convening authority, who may refer them anew or otherwise dispose of them. R.C.M. 915(c)(1) and Discussion. This occurs instantaneously upon announcement of the military judge's declaration as a matter of law, and no further action by the military judge or the parties is required to return the affected charges to the convening authority.

Government Appeal

Article 62, UCMJ, states in pertinent part:

(a) (1) In a trial by court-martial in which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal the following (other than an order or ruling that is, or that amounts

to, a finding of not guilty with respect to the charge or specification):

(A) An order or ruling of the military judge which terminates the proceedings with respect to a charge or specification.

(B) An order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding.

(2) An appeal of an order or ruling may not be taken unless the trial counsel provides the military judge with written notice of appeal from the order or ruling within 72 hours of the order or ruling. Such notice shall include a certification by the trial counsel that the appeal is not taken for the purpose of delay and (if the order or ruling appealed is one which excludes evidence) that the evidence excluded is substantial proof of a fact material in the proceeding.

This article is further elaborated on by the Rules of Courts-Martial.

After an order or ruling which may be subject to an appeal by the United States, the court-martial may not proceed, except as to matters unaffected by the ruling or order, if the trial counsel requests a delay to determine whether to file notice of appeal under Article 62. R.C.M. 908(b)(1). The decision whether to file a notice of appeal under this rule must be made within 72 hours of the ruling or order to be appealed. R.C.M. 908(b)(2). If the United States elects to appeal, the trial counsel shall provide the military judge with written notice to this effect not later than 72 hours after the ruling or order. Such notice shall identify the ruling or order to be appealed and the charges and specifications affected. R.C.M. 908(b)(3). Upon written notice to the military judge under Rule 908(b)(3), the ruling or order that is the subject of the appeal is automatically stayed and no session of the court-martial may proceed pending disposition by the Court of Criminal Appeals of the appeal (except in circumstances not relevant to the instant Government appeal).

In the case *sub judice*, the trial counsel did not ask for a stay or delay after the military judge's evidentiary ruling but before the declaration of mistrial. Trial counsel's equivocal

statements about possibly appealing the evidentiary ruling, made before the mistrial declaration, did not amount to either a notice of appeal or request for a stay until an appeal decision could be made. Therefore, when the trial counsel asked for time to consider an appeal and subsequently announced the Government would appeal, the affected charges had, by operation of law, been returned to the convening authority. The Government's remedy is thus not an appeal, but the opportunity to retry the affected charges at a new court-martial.

We do not have jurisdiction to grant the relief requested. Consequently, we do not reach the question of the correctness of the military judge's evidentiary ruling, nor offer any opinion as to whether the evidentiary ruling at issue would become the law of the case in a subsequent trial of the affected charges.

Conclusion

For the foregoing reasons, the Government's appeal is dismissed.

Judge COUCH concurs.

WHITE, Judge (concurring in part & in the result):

I concur the court lacks jurisdiction over the Government appeal of both the purported 6 June 2007 evidentiary ruling by the trial judge and his declaration of a mistrial. I write separately, however, to emphasize two points.

I. Jurisdiction over Appeal from Declaration Mistrial

First, while the principles of law concerning mistrials laid out in Senior Judge Vollenweider's opinion are all true statements, I do not think they are sufficient to explain why we do not have jurisdiction over a Government appeal from a declaration of mistrial. It cannot be the case that simply because a mistrial withdraws the charges and extinguishes the court-martial's existence, we therefore lack jurisdiction under Article 62. A trial judge's dismissal of charges (not amounting to a finding of not guilty) likewise terminates the court-martial's jurisdiction -- indeed, it completely wipes away the charges -- yet such a ruling is indisputably appealable under Article 62(a)(1)(A). Consequently, we must look beyond the effects of a mistrial declaration to Article 62 itself to determine whether we have jurisdiction to review a declaration of mistrial.

Article 62(a)(1)(A), UCMJ, confers on this court jurisdiction over Government appeals from an order or ruling by a military judge, presiding at a court-martial which may adjudge a punitive discharge, that terminates the proceedings with respect to a charge or specification. Art. 62, UCMJ. If the declaration of a mistrial "terminates the proceedings," then we have jurisdiction; if it does not, we lack jurisdiction.

Both the opinions of our superior court interpreting Article 62, UCMJ, and the legislative history of that statute establish that "Article 62 was intended by Congress to be interpreted and applied in the same manner as the federal Criminal Appeals Act, 18 U.S.C. § 3731." *United States v. Brooks*, 42 M.J. 484, 486 (C.A.A.F. 1995); see *United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995); *United States v. True*, 28 M.J. 1, 3 (C.M.A. 1989); *Hearings Before the Subcommittee on Manpower and Personnel of the Committee on Armed Services, United States Senate*, 98th Cong. 33, 46, 48, 52, 97 (1982)(statements of: Honorable William H. Taft IV, Department of Defense General Counsel; Major General Hugh J. Clausen, Judge Advocate General of the Army; Major General Thomas B. Bruton, Judge Advocate General of the Air Force; Rear Admiral John S. Jenkins, Judge Advocate General of the Navy; Honorable Robinson O. Everett, Chief Judge, Court of Military Appeals); *Hearings on S. 974 Before the Military Personnel and Compensation Subcommittee of the Committee on Armed Forces, House of Representatives*, 98th Cong. 38 (1983)(Statement of Honorable William H. Taft, IV, Department of Defense General Counsel); H.R. REP. NO. 98-549 at 19 (1983); S. REP. NO. 98-53 at 6, 23 (1983); 129 CONG. REC. S5613 (1983).

In 1983, Congress amended Article 62, UCMJ, to give the Government a right to appeal certain rulings and orders. Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983). At that time, the federal Criminal Appeals Act permitted the Government, subject to certain limitations not relevant here, to appeal orders dismissing an indictment or information, as well as those suppressing or excluding evidence.¹ 18 U.S.C. § 3731.

¹ Shortly after Congress amended Article 62 to permit Government appeals, it amended the Criminal Appeals Act to permit the Government to appeal from orders granting a new trial after verdict or judgment, in addition to appeals from dismissals and evidentiary rulings. Pub. L. No. 98-473, § 1206, 98 Stat. 2153 (1984). That amendment is not relevant to our analysis of Article 62 for two reasons. First, it came after the enactment of the current Article 62, and therefore does not tell us anything about what Congress intended when it enacted that Article. Second, the rules concerning new trials after verdict in civilian federal courts have no counterpart in the Rules for Courts-Martial.

The statute did not permit, either by its terms or as interpreted by the United States Supreme Court, a Government appeal from an order declaring a mistrial. *Id.*; *United States v. Jorn*, 400 U.S. 470, 476 (1971). If, therefore, we interpret Article 62 consistently with the Criminal Appeals Act, a mistrial does not fall within its grant of jurisdiction.

Further, what little legislative history there is on the subject suggests Congress intended the words "terminates the proceedings" in Article 62 to mean essentially dismissal. In explaining the Military Justice Act of 1983 on the Senate Floor, Senator Jepsen² said the following:

Under federal civilian law, an interlocutory ruling by the trial judge that excluded certain evidence or *otherwise results in dismissal of charges* generally is subject to review at the request of the Government. This is not available in military law, and *results in dismissal of charges without appellate review*. The bill permits interlocutory appeal by the Government under standards similar to those applicable in federal civilian law under 18 U.S.C. Section 3731.

129 Cong. Rec. S5613 (1983)(emphasis added). Similar language is found in the House Report on the bill. H. REP. NO. 98-549 at 19 (1983). Finally, the previous version of Article 62, which was stricken by the 1983 amendment, provided that "if a specification before a court-martial has been *dismissed* on motion and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration of the ruling and any further appropriate action." 70A STAT. 58 (emphasis added). While Congress clearly intended to remove convening authorities from these issues, and allow the Government to appeal directly to the Courts of Criminal Appeal, there is absolutely nothing in the legislative history to suggest Congress intended, by using the language "terminates the proceedings," to broaden the scope of appealable orders beyond dismissals.

Because Congress did not intend to include a declaration of mistrial within the category of rulings and orders made appealable by Article 62(a)(1)(A), this court does not have jurisdiction over a Government appeal from a declaration of mistrial.

² Senator Jepsen was Chairman of the Manpower and Personnel Subcommittee of the Senate Armed Services Committee, the Subcommittee responsible for marking up the legislation, and the author of the Senate Committee Report on the bill, S. REP. NO. 98-53.

II. Jurisdiction over the Ruling Excluding Evidence

I concur with Senior Judge Vollenweider that the military judge did not issue an appealable ruling excluding evidence on 6 June 2007, but rather merely noticed a violation of his earlier, 17 May 2007 order, and then took steps to remedy that violation. Further, I concur that the trial counsel's statements at page 419 of the record did not constitute either a notice of appeal or a request for a stay to consider an appeal. Accordingly, we lack jurisdiction under Article 62, UCMJ.

I respectfully disagree, however, with the suggestion that, assuming, *arguendo*, the trial judge made an evidentiary ruling on 6 June, we lack jurisdiction to consider that ruling because the trial judge declared a mistrial before the Government noticed an appeal from that ruling. We have found no military precedent (and counsel have cited none) that holds an intervening declaration of mistrial cuts off this court's appellate jurisdiction over a timely-noticed appeal from an appealable ruling or order. There are, to be sure, good reasons for thinking an intervening declaration of mistrial deprives us of Article 62, UCMJ, jurisdiction to review a pre-mistrial evidentiary ruling. There are also, in my view, good reasons for thinking it does not. At present, it is sufficient to say that, because that is an open question, and because it is not necessary to address that question to resolve the case *sub judice*, I would leave any discussion of the effect of a declaration of mistrial on our Article 62, UCMJ, jurisdiction for another day.

For the Court

R.H. TROIDL
Clerk of Court

Senior Judge VOLLENWEIDER participated in the decision of this Government appeal prior to detaching from the Court.