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

Before
D.E. O'TOOLE, V.S. COUCH, J.A. MAKSYM
Appellate Military Judges

UNITED STATES OF AMERICA

v.

SIDNEY T. RICHARDSON IV
SERGEANT (E-5), U.S. MARINE CORPS RESERVE

NMCCA 200800316
GENERAL COURT-MARTIAL

Sentence Adjudged: 11 January 2008.
Military Judge: LtCol Jeffrey Meeks, USMC.
Convening Authority: Commanding general, 4th Marine Division, New Orleans, LA.
Staff Judge Advocate's Recommendation: Col J.M. Sessoms, USMC.
For Appellant: CAPT Martin Grover, JAGC, USN.
For Appellee: Maj Elizabeth Harvey, USMC.

14 July 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

MAKSYM, Judge:

A military judge sitting as a general court-martial accepted the appellant's conditional plea of guilty of one specification of larceny in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. The appellant was sentenced to confinement for one year, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge from the United States Marine Corps. Per the mandate of the pretrial agreement, the convening authority approved only so much of the sentence as included confinement for eight months, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant's assignments of error center upon his general claim that when he was brought to trial, he had already been honorably discharged from the Marine Corps due to expiration of his contract of enlistment.[1] After carefully considering the parties' briefs and the record of trial, we are convinced that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 66(c) and 59(a), UCMJ.

Statement of Facts

It is undisputed that the appellant was released for purposes of terminal leave from his command on 22 January 2007. *See* Appellant's Brief of 8 Aug 2008 at 3; Government's Answer of 25 Sep 2008 at 2. This took place after the appellant had admitted that he had stolen approximately 31 Global Positioning System Personal Navigators from his unit. Record at 46. It is also clear that the appellant was issued a DD-214, which purported to tender him an honorable discharge, and was informed that his term of active service would end on 6 February 2007. Appellant's Brief at 3; Government's Answer at 2. The Government contends that the appellant's commanding officer placed him on legal hold by a formal letter effective 1 February 2007, but was unable to communicate directly with the appellant. Government's Answer at 2; Appellate Exhibit IV at 14. Subsequently, the appellant was charged, however, the charge sheet contained a misidentified command and that charge sheet was withdrawn and destroyed. AE XIV at 11-12; Record at 13. Ultimately, the appellant was charged anew and proceeded to trial after an investigative hearing convened under Article 32, UCMJ. AE XIV at 12; Record at 70.

Discussion

I. Standard of Review

We employ the *de novo* standard in reviewing whether an accused received a speedy trial in accordance with RULE FOR COURTS-MARTIAL 707, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). *See United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999)(citing *United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F. 1997)). In this review, "the military judge's findings of fact are given 'substantial deference and will be reversed only for clear

[1] The appellant advances the following assignments of error for adjudication:

I. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY DENYING APPELLANT'S MOTION TO DISMISS PURSUANT TO RULE FOR COURTS-MARTIAL 707?

II. WHETHER THE COURT-MARTIAL HAD PERSONAL JURISDICTION OVER APPELLANT PURSUANT TO RULE FOR COURTS-MARTIAL 202?

III. WHETHER THE CONVENING AUTHORITY LACKED THE AUTHORITY TO APPROVE APPELLANT'S BAD CONDUCT DISCHARGE BECAUSE HE HAD PREVIOUSLY BEEN ISSUED AN HONORABLE DISCHARGE?

error.'" *Id.* (citations omitted). As for the personal jurisdiction issue, "[w]hen 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)(citing *United States v. Owens*, 51 M.J. 204, 209 (C.A.A.F. 1999)).

II. Speedy Trial

An accused must be brought to trial within 120 days of preferral of charges. R.C.M. 707(a)(1). In the case of a dismissal of charges, a new 120-day time period begins on the date of re-preferral. R.C.M. 707(b)(3)(A)(i). While dismissal of charges is ordinarily accomplished "by lining out and initialing the deleted specifications," R.C.M. 401(c)(1), Discussion, the rules with regard to the manner of dismissal are not overly formalistic and generally "[d]ismissal occurs when action is taken by a commander that terminates the charges," *United States v. Bolado*, 34 M.J. 732, 737 (N.M.C.M.R. 1991), *aff'd,* 36 M.J. 2 (C.M.A 1992). *See United States v. Young*, 61 M.J. 501, 504 (Army Ct.Crim.App. 2005)(holding that "while no particular form is required, *some* action must be taken in order to accomplish a dismissal of the charges"). Once charges are dismissed, "further disposition under R.C.M. 306(c) of the offenses is not barred." R.C.M. 401(c)(1).

In this case, the original charges were preferred on 3 May 2007. AE XIV at 5. Upon the appellant's return to the Marine Corps following his terminal leave period, the appellant's unit had been deactivated. *Id.* at 4. Notwithstanding this fact, the original charge sheet reflected the appellant's former commanding officer. *Id.* at 5. In order to remedy that error, the successor convening authority dismissed the charges by shredding the original charge sheet and then repreferred the charges on 18 June 2007. *Id.*; Record at 13. The appellant was arraigned on 11 October 2007 in accordance with R.C.M. 904, 115 days from the date of repreferral by the new convening authority. AE XIV at 7; Record at 7.

While the manner of the dismissal in this case, shredding of the charge sheet, does not comport with the "lining out" language of R.C.M. 401(c)(1), the convening authority plainly took action to terminate the charges in accordance with *Bolado*, and the appellant was taken to trial within the 120-day window mandated by R.C.M. 707. *Bolado*, 34 M.J. at 737. For these reasons, we are satisfied that the charges were properly dismissed, and the 120-day requirement of R.C.M. 707 was met.

III. Personal Jurisdiction

A requisite for a court-martial is *in personam* jurisdiction; in other words "the accused must be a person subject to court-martial jurisdiction." R.C.M. 201(b)(4). Active duty personnel

are generally subject to court-martial jurisdiction, however "[c]ourt-martial jurisdiction over active duty personnel ordinarily ends on delivery of a discharge certificate or its equivalent to the person concerned issued pursuant to competent orders." R.C.M. 202(a), Discussion; *see United States v. Howard*, 20 M.J. 353, 354 (C.M.A. 1985). Relying upon 10 U.S.C. § 1168(a), our superior court has held that valid discharge from active duty service requires the following: 1) delivery of a valid discharge certificate; 2) a final accounting of pay; and 3) "the appellant must undergo the 'clearing' process required under appropriate service regulations to separate him from military service." *United States v. King*, 27 M.J. 327, 329 (C.M.A. 1989)(citations omitted); *see also United States v. Hart*, 66 M.J. 273, 276-77 (C.A.A.F. 2008).[2]

Marine Corps service regulations state that "a discharge or separation takes effect at 2359 on the date of the discharge or separation" and "final pay or a substantial portion of final pay will be prepared and delivered to the Marine on the date of discharge or release from active duty." Marine Corps Separation and Retirement Manual ¶ 1007(7) (6 June 2007). Moreover, the service regulations make it clear that terminal leave runs until the end of a Marine's service obligation and "terminal leave is not granted until all separation requirements both administrative and medical are complete." *Id.* at ¶ 1010(2).

If jurisdiction attaches to a Marine prior to his or her discharge, he or she may be retained on active duty beyond his or her established separation date. *Id.* at ¶ 1008(1)(b). Although the Rules for Courts-Martial specify that "court-martial jurisdiction attaches over a person when action with a view to trial of that person is taken," the Court of Appeals for the Armed Forces has broadly interpreted the phrase "action with a view to trial" to include interrogating a servicemember as a "suspect." R.C.M. 202(c); *see United States v. Self*, 13 M.J. 132, 138 (C.M.A. 1982); *see also United States v. Wilson*, 53 M.J. 327, 329-30 (C.A.A.F. 2000).[3]

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[2] "A member of an armed force may not be discharged or released from active duty until his discharge certificate or certificate of release from active duty, respectively, and his final pay or a substantial part of that pay, are ready for delivery to him or his next of kin or legal representative." 10 U.S.C. § 1168 (a).

[3] "[W]hen a criminal investigation reaches the point where the guilt of a particular suspect seems particularly clear and it is highly likely that he will be prosecuted, we believe that the investigative actions can fulfill the requirements of [R.C.M. 202(c)(1)] even though no formal charges have been preferred." *Self*, 13 M.J. at 137-38. The CAAF went on to state that "any acts of military officials which authoritatively presage a court-martial, when viewed in the light of surrounding circumstances, are surely sufficient under [R.C.M. 202(c)(1)] to authorize retention on active duty for purposes of trial." *Id.* at 138.

In this case, the appellant did receive his certificate of discharge on 22 January 2007 in the form of his DD-214 and was permitted to go on terminal leave on 23 January 2007. AE IX at 2. However, the appellant was made aware through the letter authorizing his terminal leave that, despite being detached from his unit on 22 January 2007, his service obligation would not expire until 6 February 2007. AE IV at 12. Moreover, the DD-214 explicitly stated 6 February 2007 as the appellant's separation date. *Id*. at 13. This is in accordance with the Marine Corps Separation and Retirement Manual's policy on terminal leave running "until the date of EAS." Marine Corps Separation and Retirement Manual ¶ 1010(2). Nor was final payment made to the appellant until 6 February 2007, after he had already validly been placed on legal hold by his command on 1 February 2007. To be sure, it was not until 14 February 2007 that the appellant was in fact notified of the hold placed on his separation from the Marine Corps, but while the command's failure to swiftly and effectively notify the appellant of his status is troubling, it does not alter the jurisdictional foundation of this case.

It can be inferred from the Marine Corps Separation and Retirement Manual that all administrative and medical separation requirements had been completed by the appellant prior to authorization of his terminal leave, however without having attained his discharge date and receipt of his final pay prior to being placed on legal hold, the appellant was still on active duty when jurisdiction attached in this case. *See Melanson*, 53 M.J. at 4 (holding that "in the absence of a clear showing of an intent to discharge a servicemember prior to 2400 hours, we will presume that a discharge has taken effect in accordance with the regulation"). In resolving that the appellant was indeed subject to court-martial jurisdiction, we also resolve that the convening authority in this case did have the authority to approve the appellant's bad-conduct discharge.

Conclusion

Accordingly, the findings and the sentence, as approved, are affirmed.

Chief Judge O'TOOLE and Senior Judge COUCH concur.

For the Court

R.H. TROIDL
Clerk of Court