27 August 2014

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	USCA Dkt. No. 14-0057/AF
Second Lieutenant (O-1) WILIAM R. JONES, USAF *Appellant.*	)	Crim. App. No. 38028

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

ISSUE GRANTED

WHETHER THE DE FACTO OFFICER DOCTRINE CONFERRED VALIDITY UPON JUDGE SOYBEL'S PARTICIPATION IN THE AIR FORCE COURT OF CRIMINAL APPEALS' DECISION IN APPELLANT'S CASE.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(c), Uniform Code of Military Justice (UCMJ). This Honorable Court has discretionary jurisdiction to review this case under Article 67(a)(3), UCMJ, upon petition of Appellant and on good cause shown.

STATEMENT OF THE CASE

The government generally accepts Appellant's Statement of the Case.

STATEMENT OF FACTS

The facts necessary for disposition of this case are set forth in the argument below.

SUMMARY OF ARGUMENT

The de facto officer doctrine confers validity upon acts performed by a person action under the color of official title even though it is later discovered that the person was improperly appointed to office. Judge Soybel was appointed to AFCCA by the Secretary of Defense and acted on Appellant's case under the color of official title as a civilian appellate judge with AFCCA. At no point while his case was still pending before AFCCA, including during reconsideration, did Appellant challenge Judge Soybel's appointment.

Under the de facto officer doctrine, an aggrieved party must make a timely challenge at the earliest practicable time to the constitutional validity of the appointment of an officer who adjudicated his case. The issue of timeliness prevents impermissible collateral attacks on a presumptively legitimate decision by an officer acting under the color of official title. Because this case did not involve a jurisdictional attack on Judge Soybel's qualifications to serve as a civilian appellate judge and Appellant now merely attacks his method of appointment, this issue does not implicate this Court's exercise of supervisory powers and the de facto officer doctrine precludes consideration of Appellant's untimely claim.

ARGUMENT

THE DE FACTO OFFICER DOCTRINE DID CONFER VALIDITY UPON JUDGE SOYBEL'S PARTICIPATION IN THE AIR FORCE COURT OF CRIMINAL APPEALS' (AFFCA) DECISION IN APPELLANT'S CASE.

Standard of Review

Whether a service court of criminal appeals is properly constituted is a question of law reviewed de novo. United States v. Lane, 64 M.J. 1 (C.A.A.F. 2006).

Law and Analysis

This case does not represent the first time that the validity of an appellate judge's appointment has been questioned on appeal. *See* Weiss v. United States, 510 U.S. 163 (1994); Ryder v. United States, 515 U.S. 177 (1995); Edmond v. United States, 520 U.S. 651 (1997). Most recently, this Court determined that Judge Soybel's participation in an appellant's AFCCA panel was improper because he was not properly appointed in accordance with the Appointments Clause. United States v. Janssen, 73 M.J. 221 (C.A.A.F. 2014). However, the decision in Janssen is not dispositive of the issue in this case because of the de facto officer doctrine.

In Ryder, the Supreme Court determined "[t]he de facto officer doctrine confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's

appointment or election to office is deficient." Ryder v. United States, 515 U.S. 177, 180 (1995)(*citing* Norton v. Shelby County, 118 U.S. 425, 440 (1886). "The doctrine has generally been applied to individuals who are in possession of an office, are performing the duties of the office, and who maintain an appearance of right to the office." Equal Employment Opportunity Commission v. Sears, Roebuck and Co., 650 F.2d 14, 17 (2d Cir. 1981)(citations omitted). "The de facto doctrine springs from the fear of the chaos that would result from multiple and repetitious suits challenging every action by every official whose claim to office could be open to question, and seeks to protect the public by ensuring the orderly functioning of the government despite technical defects in title to office." Ryder, 515 U.S. at 180 (*citing* 63A Am.Jur.2d, Public Officers and Employees § 578, pp. 1080-81 (1984); *see also* Horwitz v. State Bd. of Medical Examiners of State of Colo., 822 F.2d 1508, 1516 (10th Cir. 1987)). Although the doctrine was not applied to the appellate judge in Ryder, the facts of this case indicate that the de facto officer doctrine would apply.[1]

[1] The application of the de facto officer doctrine should not be confused with an argument that a panel's decision survives improper appointment because the panel retained a quorum as quorum arguments have been found to be consistently without merit. *See* Ayshire Collieries Corp. v. United States, 331 U.S. 132 (1947)(ill judge unable to participate in determination of merits); United States v. Elliott, 15 M.J. 347, 348-49 (C.M.A. 1983)(appellate judge was "absent" from panel and decision occurred before judge was sworn-in and began performing appellate duties).

On 31 August 2012, Appellant submitted a lone assignment of error in his case. (J.A. at 8-19.) On 25 January 2013, Judge Soybel was appointed to serve as a civilian appellate judge on AFCCA by The Judge Advocate General of the Air Force under the apparent authority provided in Article 66(a), UCMJ. (J.A. at 1.) Appellant's supplemented his original assignment of error by raising five additional Grostefon[2] issues in a Motion for Leave to File Supplemental Assignments of Error filed on 2 April 2013 which was granted on 10 April 2013. (J.A. at 20-23.) However, on 15 April 2013, with Judge Soybel participating in the decision, AFCCA determined that Appellant's appeal had no merit. (J.A. at 24-25.) On 23 May 2013, AFCCA issued a Notice of Reconsideration of Appellant's case, among others, out of time for good cause shown. (J.A. at 26-27.)

On 25 June 2013, Judge Soybel was appointed to serve as a civilian appellate judge on AFCCA by the Secretary of Defense under the apparent authority provided in 5 U.S.C. § 3101 *et seq*. (J.A. at 28.) Thereafter, on 23 July 2013, AFCCA issued a Notice of Special Panel for Appellant's case which included Judge Soybel as part of the three-judge panel. (J.A. at 29.) Later that day, the panel issued a reconsidered decision in

[2] These new issues were raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982), and none of these issues challenged Judge Soybel's appointment to AFCCA.

Appellant's case, again, finding no merit in his appeal. (J.A. at 30-31.)

On 20 September 2013, Appellant filed a Motion for Leave to File Motion for Reconsideration Out of Time and Motion for Reconsideration with AFCCA. (J.A. at 32-35.) Nowhere within the Motion for Reconsideration did Appellant attack the validity of Judge Soybel's Appointment to the panel that considered his appeal. (Id.) On 2 October 2013, AFCCA denied Appellant's Motion for Reconsideration. (J.A. at 36-37.) In fact, Appellant never raised this issue until he filed his Supplement to Petition for Grant of Review on 10 October 2013.

As specified in Ryder, "one who makes a timely challenge[3] to the constitutional validity of the appointment of an officer who adjudicated his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred." 515 U.S. at 182-83 (emphasis added). This issue of timeliness was specifically addressed by this Honorable Court in Janssen when it determined that the de facto doctrine would not apply because that appellant "promptly challenged the composition of the panel through a motion to vacate while the case was still on direct review and received a

[3] The notion of timely challenge has been characterized as the raising of the issue at the "earliest practicable opportunity." Glidden Co. v. Zdanok, 370 U.S. 530, 536 (1962).

decision on the merits from a panel of that court." 73 M.J. at 226. "Prompt" challenges conferred upon a proper forum are particularly important because the de facto officer doctrine distinguishes between collateral attacks (challenges that an official is "improperly in office") and direct attacks (challenges that an officer lacks sufficient qualifications). Horwitz v. State Bd. of Medical Examiners of State of Colo., 822 F.2d 1508, 1516 (10th Cir. 1987).[4]

In this case, Appellant made no effort to raise the issue of Judge Soybel's appointment to the attention of AFCCA despite a meaningful opportunity to do so. As indicated in Janssen, 73 M.J. at 223, that appellant moved AFCCA to vacate its decision on 16 August 2013, arguing that the Secretary of Defense did not have the legitimate statutory authority to appoint civilian judges. Here, on 20 September 2013 (over a month after the Janssen Motion to Vacate, Appellant filed a Motion for Reconsideration in which that same issue was never raised. (J.A. at 32-35.) Appellant should not be rewarded for failing to raise a commonly recognized issue and then be permitted to complain about it to a higher appellate court at time he sees

[4] This case would represent a collateral attack because Appellant's arguments pertain to the manner in which Judge Soybel was appointed and not upon Judge Soybel's qualifications for which he is eminently qualified, especially given his prior active duty service as a military appellate judge on the same court. (*See* J.A. at 2-7.)

fit. Acceptance of untimely complaints runs contrary to the spirit of the de facto officer doctrine and invites appellate gamesmanship. Therefore, Appellant's belated request for relief before this Honorable Court represents an untimely request for relief that permits application of the de facto officer doctrine to AFCCA's decision in Appellant's case.

In his brief, Appellant argues that his untimely request should still be considered by this Court. (App. Br. at 6.) Appellant argues that untimeliness will be excused in certain cases because consideration is "fundamental to the proper administration of justice and are essentially jurisdictional errors that cannot be waived or tolerated." (Id.)(*citing* Glidden Co. v. Zdanok, 370 U.S. 530, 535-36 (1962)). This argument represents a misapplication of judicial oversight.

Appellant's primary case in support of his contention is Nguyen v. United States, 539 U.S. 69 (2003). In Nguyen, the appellant's case was heard on appeal by a panel that consisted of two Article III judges of the Ninth Circuit and a third non-Article III judge from the Northern Mariana Islands. Id. at 73. The appellant never objected to the constitution of his appellate panel until his petition for certiorari to the Supreme Court. Id. Our Supreme Court granted review "to determine whether the Court of Appeals has 'so far departed from the accepted and usual course of judicial proceedings as to call for

an exercise of this Court's supervisory powers.'" Id. at 74 (*quoting* Pet. for Cert. in No. 01-10873, p. 6; Pet. for Cert. in No. 02-5034, p. 5). Ultimately, the Supreme Court determined that that Nguyen differed from ordinary de facto officer doctrine cases because those cases dealt with "action[s] which could have been taken, if properly pursued" and this one "which could never have been taken at all." Id. at 79.

This case is markedly different from Nguyen. First, this case does not represent the need for this Court's exercise of "supervisory powers" because Nguyen is not an Appointments Clause case but instead involved the misapplication of statutory law by the lower appellate court in how it conducts its appellate business. Id. at 80-81. Second, as detailed above, Nguyen dealt with the qualifications of the non-Article III judge (direct attack) rather than constitutionality of the judge's appointment to his position as judge (collateral attack). In this regard, Nguyen does not represent any deviation from the de facto officer doctrine but instead reinforces the rationale that direct attacks are permissible issues for review because they involve jurisdictional issues for which the de facto officer doctrine would not apply. *See also* Horwitz, 822 F.2d at 1512; United States v. American-Foreign S.S. Corp., 363 U.S. 685, 687, 691 (attack of qualification of

retired judge to participate on an en banc panel rather than judge's appointment as a judge).

In the end, this case is not a jurisdictional one but rather a case involving the proper appointment of Judge Soybel to Appellant's AFCCA panel. Appellant did not raise this issue at the "earliest practicable time" before AFCCA and ignored the issue when he asked for reconsideration. Therefore, Appellant's attack on Judge Soybel's appointment is untimely, as indicated by Ryder and Janssen, and application of the de facto officer doctrine precludes consideration of this collateral attack by this Honorable Court.

CONCLUSION

WHEREFORE, this Court should affirm the findings and sentence.

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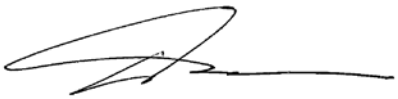
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 27 August 2014 via electronic filing.



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