

24 September 2014

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,)	BRIEF ON BEHALF
<i>Appellant & Cross-Appellee,</i>)	OF THE UNITED STATES
)	
v.)	
)	
Lieutenant Colonel (O-5))	USCA Dkt. No. 14-5007/AF
STEVEN S. MORITA, USAF,)	
<i>Appellee & Cross-Appellant.</i>)	Crim. App. No. ACM 37838

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 PRESENTED

**WHETHER THE AIR FORCE COURT OF CRIMINAL
APPEALS ERRED BY FINDING THAT A RESERVIST
CAN CREATE COURT-MARTIAL JURISDICTION BY
FORGING ACTIVE DUTY ORDERS AND/OR INACTIVE-
DUTY TRAINING ORDERS AND BY FINDING THAT
COURT-MARTIAL JURISDICTION EXISTED FOR EACH
120-DAY PERIOD LISTED ON THE THREE
APPLICATIONS FOR MPA MAN-DAY TOURS.**

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ). This Court has jurisdiction to review that decision pursuant to Article 67(a)(3).

Statement of the Case

On 14, 27, 28, 30 September and 1-3 October 2010, Appellee & Cross-Appellant (hereinafter "Appellee") was tried at a general court-martial by a panel of officer members at Travis AFB, CA. Contrary to his pleas, Appellee was found guilty of seven specifications alleging violations of Article 123

(Forgery), one specification alleging a violation of Article 121 (Larceny), and one specification alleging a violation of Article 132 (Frauds against the United States). Appellee was sentenced to dismissal, confinement for twelve months, and a \$75,000 fine. (R. at 1517.) On 26 January 2011, the convening authority approved the sentence as adjudged.

This case was filed with the Air Force Court of Criminal Appeals (AFCCA) on or about 10 February 2011. On 7 May 2012, Appellee filed his Assignments of Error. On 11 July 2012, the Government filed its Answer to the Assignments of Error. On 23 July 2012, Appellee filed a Reply. On 1 August 2013, AFCCA ordered oral argument, scheduled for 11 September 2013. Oral argument was continued until 15 November 2013, and the Government filed a supplemental brief on 26 September 2013. Appellee filed a reply to the supplemental brief on 17 October 2013. The Government responded to the reply brief on 24 October 2013.

On 10 January 2014, AFCCA issued its published decision in this case. See United States v. Morita, 73 M.J. 548 (A.F. Ct. Crim. App. 2014). In its decision, AFCCA found that the trial court lacked subject matter jurisdiction over some of Appellee's crimes and refused to consider a Government motion to attach Air Force Forms 938 and Air Force Repository Printouts (pay records). Id. at 557. This issue was certified to this Honorable Court on 22 April 2014.

On 19 May 2014, Appellee filed a Supplement to Petition for Grant of Review. On 25 July 2014, this Honorable Court granted Appellee's Petition on the issue stated above.

STATEMENT OF FACTS

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

SUMMARY OF ARGUMENT

First, AFCCA properly held that to the extent Appellee was in active military status or performing IDTs, the Government had jurisdiction over offenses occurring during those time periods, pursuant to Article 2(a), UCMJ, even if some portion of the documents contained forgeries by Appellee. This was supported by evidence that Appellee was compensated and received military credit under those orders. This evidence also supports AFCCA's finding that the 120-day periods on the MPA orders were approved. Finally, AFCCA properly held that inactive duty training records were adequate to convey jurisdiction, pursuant to Article 2(a), UCMJ, because the inactive duty training Form 40A requires an official signature authorizing training prior to the training as well as signatures by the member and certifying official certifying the dates and hours of IDTs completed after the fact.

ARGUMENT

I.

AFCCA PROPERLY FOUND THAT APPELLEE WAS UNDER AIR FORCE JURISDICTION WHEN HE WAS ON ACTIVE DUTY ORDERS OR IDT ORDERS.¹

Standard of Review

Whether a court-martial had subject matter and personal jurisdiction over an accused is a question of law reviewed de novo. United States v. Melandson, 53 M.J. 1, 2 (C.A.A.F. 2000). The burden is placed on the government to establish jurisdiction by a preponderance of the evidence. United States v. Oliver, 57 M.J. 170, 172 (C.A.A.F. 2002).

Law and Analysis

Appellee's jurisdictional challenge focuses on whether AFCCA misapplied Article 2(a), UCMJ, by expanding jurisdiction over reservists in cases where certain sections of the orders are forged by Appellee. Appellee argues that orders he forged cannot lawfully call a reservist to active duty, AFCCA relied on a faulty construction of Article 2(a), and AFCCA erred in relying on records of inactive duty training.

AFCCA held that "Article 2(a), UCMJ, conditions subject matter jurisdiction on the member's official status at the time of the offenses." Morita, 73 M.J. at 559. Finding that to the extent the Government presented evidence that Appellee was in

¹ To be clear, the United States maintains its position that a portion of AFCCA's decision concerning jurisdiction was erroneous as set forth in the United States' brief in support of the certified issue.

active military status or performing IDTs, the Government had jurisdiction over offenses occurring during those time periods, pursuant to Article 2(a), UCMJ, even if some of these documents contained forgeries by Appellee. Id. Citing Appellee's clear purpose at the time he took the nefarious actions in order to receive compensation and military credit under those orders, which he did, AFCCA found Appellee's argument that any reservist misconduct committed while on forged orders to be out of the Government's jurisdiction overbroad. Id.

While Appellee disputes AFCCA's supporting reference to United States v. Meadows, 13 M.J. 165, 168 n.4 (C.M.A. 1982), a finding that a member's actions could have the effect of conveying court-martial jurisdiction is indeed within this Court's decision. Specifically, this Court stated that "[a]lthough an accused cannot create court-martial jurisdiction by consent, under some circumstances his actions may have the effect of establishing court-martial jurisdiction." Id. Appellee seeks to evade court-martial jurisdiction by asking this Court to reject significant periods of active duty and inactive duty training (IDT) resulting from his own conniving scheme where he used hundreds of pages of forged documents, such as military orders, travel authorizations, travel vouchers, and training records, to place himself in an active military status or IDTs to steal money from the Air Force.

Furthermore, while Appellee highlights the examples cited in Meadows as being very different situations than the case at bar, this is not a complete picture of the case law. A review of the cases cited by the Court of Military Appeals illustrates the broad factual landscape involving jurisdictional challenges. For example, in one of the cited cases, United States v. Wheeler, the appellant confessed while he was in reserve status to a murder committed while he was on active duty. 28 C.M.R. 212, 216 (C.M.A. 1959). After his arrest, the appellant made a voluntary request for recall to active duty, knowing that he would be subject to a court-martial. Id. While the Court of Military Appeals found jurisdiction on other grounds, the purpose of the appellant was the sole reason relied upon by the Chief Judge in concurrence to convey jurisdiction. Id. at 219. The majority opinion noted the issue but did not analyze it as jurisdiction was found under then-Article 3(a), UCMJ. Id. Focusing on Appellee's purpose in this case, AFCCA aptly noted the absurdity of a rule where,

a member who fraudulently obtains military orders through forgery, is compensated for those orders, and receives military credit under those orders, simply because of the fraudulent nature of the member's own actions. We find this position to be overbroad and contrary to the appellant's purpose at the time he took these actions to have his record reflect he was in military status.

Morita, 73 M.J. at 548.

Furthermore, this Court can be assured that AFCCA's ruling would not open the floodgates of jurisdiction over reservists. This case represents a unique fact pattern where a reserve military officer used his military status and specifically, his unit assignment and responsibilities, as criminal tools. It would be the rare case indeed that would replicate such a scenario. Appellee argues that AFCCA's ruling would subject a reservist who forges orders at home and then commits a crime at home to court-martial jurisdiction. Logic and common sense dictates that there is no flood of reservists forging orders and then committing a crime unrelated to those orders, e.g., use marijuana. Appellee invited jurisdiction though his own actions. Looking at the totality of this evidence, it far, far exceeds such a scenario. As such, with the government's burden of proof to establish jurisdiction to be by a preponderance of the evidence, or more likely than not, the government has clearly met its burden. See United States v. Oliver, 57 M.J. 170, 172 (C.A.A.F. 2002).

Appellee also argues that the government failed to meet its burden with regard to the 120-day MPA orders because there was no email introduced by the government into evidence that his orders were approved by the Surgeon General. This completely disregards the voluminous evidence proving Appellee's 120-day MPA orders were approved in the form of compensation and

military credits for that time. Again, Appellee attempts to create a higher burden of proof to establish jurisdiction than this Court's precedent in Oliver. Id.

Additionally, Appellee argues that AFCCA ignored Article 2(a)'s language that a reservist performing IDTs must be "lawfully called to or ordered into, or to duty in or for training in, the armed forces." However, reservists performing IDTs are subject to court-martial jurisdiction pursuant to Article 2(a)(3), UCMJ which includes "members of a reserve component while on inactive-duty training. . . ." Therefore, Appellee's argument should be rejected.

Finally, Appellee's argument that a completed Form 40A, Record of Individual Inactive Duty Training, regardless of forgeries, does not subject the member to court-martial jurisdiction is incorrect. It is true that the Form 40A records the reserve member's IDT 40s for payment and/or points. However, Section III entitled "Authorization for Training, Telecommuting, Transient Quarters and Subsistence" must be signed the same day or prior to the first date of training. As opposed to request for MPA days, there are no "before the fact" orders for IDTs. Instead, the certifying official signs Section III which authorizes training and after training is performed, the reservist and certifying official sign Section IV certifying the training was performed on the dates and duty hours listed on

the form. Clearly, Form 40As are sufficient to prove court-martial jurisdiction over reservists, and Appellee's argument should be rejected.

Accordingly, the United States respectfully requests this Honorable Court find court-martial jurisdiction existed over Appellee during his 120-day MPA orders and IDT orders.

Conclusion

WHEREFORE, the United States respectfully requests this Honorable Court uphold that portion of AFCCA's ruling that court-martial jurisdiction existed over Appellee during the periods covered by his 120-MPA orders and IDT orders.

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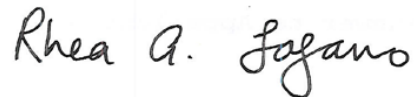
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to
the Court, Mr. Matthew Siroka, and to the Appellate Defense
Division on 24 September 2014.



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Date: 24 September 2014