15 June 2015

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

SEBASTIAN P. LABELLA,
Airman First Class (E-3),
USAF Appellant.

Crim.App.No. 37679
USCA Dkt.No. 13-0502/AF

BRIEF ON BEHALF OF APPELLANT

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

Issue Presented

WHETHER APPELLANT'S PETITION FOR GRANT OF REVIEW SHOULD BE DISMISSED FOR LACK OF JURISDICTION WHEN THE COURT OF CRIMINAL APPEALS ENTERTAINED AN UNTIMELY FILED MOTION FOR RECONSIDERATION FOR "GOOD CAUSE," BUT DENIED THE MOTION ON OTHER GROUNDS, AND APPELLANT FILED A PETITION FOR GRANT OF REVIEW WITH THIS COURT UNDER ARTICLE 67, UCMJ, MORE THAN 60 DAYS AFTER THE ORIGINAL DECISION OF THE COURT OF CRIMINAL APPEALS, BUT WITHIN 60 DAYS OF THE FINAL DECISION ON THE MOTION FOR RECONSIDERATION. SEE, UNITED STATES v. RODRIGUEZ, 67 M.J. 110 (C.A.A.F. 2009); UNITED STATES v. SMITH, 68 M.J. 445 (C.A.A.F. 2010).

Statement of Statutory Jurisdiction

Pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2015), the U.S. Air Force Court of Criminal Appeals (AFCCA) twice affirmed Appellant's findings and sentence. Following AFCCA's grant of reconsideration, Appellant timely filed a petition for grant of review with this Court, bringing this case within its statutory jurisdiction under Article 67, UCMJ, 10 U.S.C. § 867 (2015).

Statement of the Case

On 6-9 April 2010, Appellant was tried by a general court-martial composed of officer members at Keesler Air Force Base, Mississippi. R. at 12, 180. Contrary to his plea, the members found Appellant guilty of two specifications of wrongfully and knowingly possessing child pornography in violation of Article 134, UCMJ. R. at 12.1, 170, 628.

The members sentenced Appellant to a dishonorable discharge, confinement for six months, forfeiture of $447.00 pay per month for three months, and reduction to E-1. R. at 717. On 28 May 2010, the convening authority approved the sentence as adjudged except for the dishonorable discharge, which was lessened to a bad-conduct discharge. Action, ROT, Vol. 4 of 5.

AFCCA reviewed Appellant's case twice–-once upon initial review and once upon remand from this Court–-and both times it affirmed the findings and sentence as approved by the convening authority. (J.A. at 1, 11.) In addition, AFCCA granted Appellant's Motion for Reconsideration Out-of-Time but denied the motion on other grounds. (J.A. at 45.) Following AFCCA's grant of reconsideration, Appellant petitioned this Court for review pursuant to Article 67, UCMJ, on 10 March 2015. Appellee subsequently filed a Motion to Dismiss Appellant's petition for lack of jurisdiction. (J.A. at 49). On 14 May 2015, this Court ordered the parties to submit briefs on the above issue.

Statement of Facts

On 15 February 2013 AFCCA affirmed Appellant's findings and sentence. (J.A. at 1.) On 21 August 2013, this Court set aside AFCCA's decision and ordered the case remanded to AFCCA for review of two issues. (J.A. at 9.) Subsequently, on 2 July 2014, AFCCA again affirmed Appellant's findings and sentence. (J.A. at 11). The Air Force Appellate Records Branch's Notification of Mailing indicates that a copy of AFCCA's 2 July 2014 decision was deposited in the U.S. mail by certified first-class mail on 3 July 2014 to the last address provided by Appellant. (J.A. at 23.)

Prior to AFCCA's 2 July 2014 decision, AFCCA purportedly granted Maj Zaven T. Saroyan's petition to withdraw as counsel, noting that Capt Travis L. Vaughan, an incoming attorney who was to be assigned to the Air Force Legal Operations Agency, Appellate Defense Division (AFLOA/JAJA), would be replacement counsel.[1] After AFCCA's 2 July 2014 decision, no petition was subsequently filed to this Court within the sixty-day period of time outlined in Article 67, UCMJ.

On 17 November 2014, Maj Ja Rai A. Williams was notified that the Judge Advocate General of the U.S. Air Force detailed her as appellate defense counsel for Appellant pursuant to Article 70(a) and (c), UCMJ, 10 U.S.C. § 870 (2015), due to a

[1] Appellant has no documentation to provide to this Court in support of this assertion.

conflict of interest in the U.S. Air Force Appellate Defense Division. (J.A. at 24.) Maj Williams was previously assigned to AFLOA/JAJA and represented Appellant before this Court.

On 3 December 2014, Appellant filed a Motion for Reconsideration Out-of-Time to AFCCA. (J.A. at 30.) Appellant specifically requested AFCCA reconsider one of the assignments of error based on United States v. Piolunek, 72 M.J. 830 (C.A.A.F. 2015), which was pending review before this Court prior to AFCCA's 2 July 2014 decision and at the time of Appellant's request. (J.A. at 35.) Thus, Appellant argued that given the procedural posture of Piolunek and specifically that this Court granted review of Piolunek nearly three months prior to AFCCA's most recent decision in Appellant's case, it was reasonable for Appellant to believe that his counsel would either file a motion for reconsideration before AFCCA (seeking an abeyance of AFCCA's reconsideration decision pending the outcome in Piolunek) or petition this Court for further review of this Court's decision. (J.A. at 35).

Simultaneously, Appellant filed a motion to attach his sworn declaration. (J.A. at 26.) In his declaration, Appellant describes that he spoke with Maj Saroyan during the summer of 2014, shortly before AFCCA's 2 July 2014 opinion on the remanded issues. In this conversation, Maj Saroyan informed him of his pending separation from the Air Force and that new counsel would

be appointed. In October of 2014, Appellant contacted AFLOA/JAJA and was informed that a petition for review was not filed with this Court after AFCCA issued its 2 July 2014 opinion. This was contrary to Appellant's clearly expressed wishes. (J.A. at 26.) Appellant argued this deficiency constituted "good cause" for AFCCA to grant his untimely request for reconsideration. (J.A. at 34-35.) AFCCA considered Appellant's declaration in its order on the motion for reconsideration. (J.A. at 46-47.)

On 9 January 2015, AFCCA granted Appellant's Motion for Reconsideration but subsequently denied relief to the Appellant, upholding its 2 July 2014 decision. (J.A. at 45-47.) Citing to Bowles v. Russell, 551 U.S. 205, 210 (2007), AFCCA explained that Article 66, UCMJ, does not provide a time limitation on petitions for reconsideration and its 30-day limitation to file a motion for reconsideration is rule-based and subject to equitable tolling. (J.A. at 46.)

AFCCA presumed that it had jurisdiction to consider the out-of-time motion for reconsideration because Appellee had not provided it with any court-martial orders issued after the 2 July 2014 decision to indicate Article 76, UCMJ, 10 U.S.C. § 1076 (2015), has been triggered in this case. (J.A. at 46). Referencing Rule 19 of its Rules of Practice and Procedure, AFCCA concluded that Appellant had established good cause for

waiving the time limitation set forth in Rule 19(b). (J.A. at 46; J.A. at 60.) However, AFCCA denied the motion, finding it failed to state sufficient grounds for reconsidering its 2 July 2014 opinion. (J.A. at 46.)

The Air Force Appellate Records Branch mailed a copy of AFCCA's reconsideration order to Appellant on 9 March 2015.

Summary of Argument

When AFCCA granted Appellant's motion, it expanded the period within which Appellant could petition this Court for review, even though the sixty-day limitation period established in Article 67(b), UCMJ, expired. Appellant's sixty-day period for filing at this Court begins on the date the defense is formally notified, under the provisions of Article 67(b), UCMJ, of AFCCA's decision on reconsideration.

However, even if AFCCA's grant of the motion to reconsider did not extend the period of time within which Appellant could petition this Court for review, Appellant requests the sixty-day time period imposed by Article 67(b) be waived for good cause, for the reason that his former appellate counsel's failed to file a timely petition before this Court.

The Supreme Court in Henderson v. Shinseki, 562 U.S. 428 (2011) and United States v. Wong, __ U.S. __, 135 S. Ct. 1625, 191 L. Ed. 2d 533, (2015), highlight the need for a more particularized approach to the issue of whether a statutory

period should be treated as jurisdictional and beg this Court to determine that Rodriguez was wrongly decided.

Argument

APPELLANT'S PETITION FOR GRANT OF REVIEW SHOULD *NOT* BE DISMISSED FOR LACK OF JURISDICTION WHEN THE COURT OF CRIMINAL APPEALS ENTERTAINED AN UNTIMELY FILED MOTION FOR RECONSIDERATION FOR "GOOD CAUSE," BUT DENIED THE MOTION ON OTHER GROUNDS, AND APPELLANT FILED A PETITION FOR GRANT OF REVIEW WITH THIS COURT UNDER ARTICLE 67, UCMJ, MORE THAN 60 DAYS AFTER THE ORIGINAL DECISION OF THE COURT OF CRIMINAL APPEALS, BUT WITHIN 60 DAYS OF THE FINAL DECISION ON THE MOTION FOR RECONSIDERATION. SEE, UNITED STATES v. RODRIGUEZ, 67 M.J. 110 (C.A.A.F. 2009); UNITED STATES v. SMITH, 68 M.J. 445 (C.A.A.F. 2010).

Standard of Review

"Jurisdiction is the power of a court to try and determine a case and to render a valid judgment. Jurisdiction 'is a legal question which [this Court reviews] de novo.'" United States v. Harmon, 63 M.J. 98, 101 (C.A.A.F. 2006).

Discussion

Appellant's most recent petition for review was timely filed

Article 67(a), UCMJ, provides this Court shall review the record in "all cases reviewed by a Court of Criminal Appeals in which, upon a petition of the accused and on good cause shown, this Court has granted review." (J.A. at 65.) Article 67(b), UCMJ, further states an accused has sixty days to petition this Court for review from the earlier of "(1) the date on which the accused is notified of the decision of the Court of Criminal

Appeals; or (2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any) is deposited in the United States mail for delivery by first-class certified mail to the accused . . . .” Id.

Article 66, UCMJ, provides “[t]he Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals . . . .” (J.A. at 63.) Rule 19(b) of AFCCA’s Rules of Practice and Procedure[2] states that it has the discretion to reconsider its decision upon motion by appellate defense counsel of an appellant “[p]rovided a petition for grant of review or certificate or review has not been filed with [this Court].” (J.A. at 60.) According to Rule 19(d), “[t]he time limitations prescribed by this rule shall not be extended . . . beyond the expiration of the time for filing a petition for review or writ appeal with the United States Court of Appeals for the Armed Forces, except that the time for filing briefs by either party may be extended for good cause. (J.A. at 61.)

This Court has long recognized the inherent authority of the lower court to reconsider its own decisions. See, e.g., United States v. Sparks, 5 U.S.C.M.A. 453, 18 C.M.R. 77 (C.M.A. 1955)(stating “no petition for review by this Court preceded the

[2] Rule 19 is uniform for all four of the Courts of Criminal Appeals’ Rules of Practice and Procedure.

denied motion for reconsideration, and thus pretermitted the exercise of board jurisdiction"); United States v. Corbin, 3 U.S.C.M.A. 99, 11 C.M.R. 99 (C.M.A. 1953)(stating "that a board does possess power to reconsider its decision so long as the accused has not pretermitted the exercise thereof by petitioning this Court"); United States v. Reeves, 3 C.M.R. 122 (C.M.A. 1952)(stating "boards of review must clothe themselves with some of the powers inherent in courts," including "the right to correct clerical errors, inadvertently entered decisions, and those decisions which are clearly wrong as a matter of law); United States v. Jackson, 7 C.M.R. 55 (C.M.A. 1953)(stating "we wish to distinctly avoid a position which might operate to deprive a military service of full opportunity to correct the errors of its own tribunals").

This Court has also held that "until a Court of Criminal Appeals renders a decision on a reconsideration request, either by denying reconsideration or by granting reconsideration and rendering a new decision, there is no CCA decision for this Court to review." United States v. Smith, 68 M.J. 445, 446-447 (C.A.A.F. 2010). Therefore, the sixty-day period for filing petitions for review begins on the date the defense is formally notified under Article 67(b), UCMJ, of the CCA's decision on reconsideration. Smith, 68 M.J. at 447.

AFCCA used its discretion and granted Appellant's untimely

motion for reconsideration for good cause. Its decision on the motion was made before any action was taken in the case which would divest AFCCA of jurisdiction to reconsider its holding. By granting the motion, AFCCA expanded the period within which he could petition this Court for review, even though the sixty-day limitation period established in Article 67 expired. See Sparks, 5 U.S.C.M.A. at 459 ("A second motion for reconsideration by a board will have no effect in expanding the period within which an accused may petition this Court for review, nor will it extend the jurisdiction of the board–-unless the motion is granted prior to the filing of a petition or certificate in this Court").

AFCCA has control over a proceeding until a petition of review is filed with this Court. This is important due to its responsibility to ensure its inchoate decisions can be reviewed when certain matters come to its attention. Thus, Appellant's sixty-day period for filing at this Court begins on the date the defense is formally notified, under the provisions of Article 67(b), UCMJ, of AFCCA's decision on reconsideration.

This Court should reverse its decision in United States v. Rodriguez and equitable tolling should be granted to Appellant

The right to be represented by counsel is among the most fundamental of rights. The Supreme Court has long recognized this right. "Of all of the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have" Penson v. Ohio, 488 U.S. 75, 83 (1988). Article 70, UCMJ, 10 U.S.C. § 870 (2015), directs the Judge Advocates General to detail an appellate defense counsel to represent an accused during the appellate process. The actual or constructive denial of the assistance of counsel is legally presumed to result of prejudice. Penson 488 U.S. at 88; see also, Strickland v. Washington, 466 U.S. 668, 692 (1984). "Because the fundamental importance of the assistance of counsel does not cease as the prosecutorial process moves from the trial to the appellate stage the presumption of prejudice must extend as well to the denial of counsel on appeal." Penson 488 U.S. at 88. Denial of appellate counsel is presumptively prejudicial. Id. at 88; United States v. May, 47 M.J. 478, 481 (C.A.A.F. 1998). Where appellate counsel does nothing, an appellant has been effectively deprived of counsel and prejudice is presumed. May 47 M.J. at 481.

Should this Court find that AFCCA's grant of the motion for

reconsideration did not extend the period of time within which Appellant could petition this Court for review, Appellant requests the sixty-day time period imposed by Article 67(b) be waived for good cause, that is, his former appellate counsel's failure to file a timely petition before this Court. Appellant was deprived of counsel from the time AFCCA purportedly granted Maj Saroyan's petition to withdraw as counsel until the time Maj Williams was appointed as counsel because AFLOA/JAJA failed to meet the filing deadlines to petition this Court. Appellant's counsel bears primary responsibility for this failure and it deprived Appellant of counsel to his prejudice. Thus there is good cause to entertain his out-of-time petition.

In Rodriguez, 67 M.J. at 111, this Court concluded that in light of Bowles "the congressionally-created statutory period within which an accused may file a petition for grant of review is jurisdictional" and, thus, this Court lacks the authority to entertain such a petition. Prior to this decision and dating back to 1952, this Court did not view the statutory limitation as a jurisdictional bar to entertaining such petitions but stated the Supreme Court in Bowles changed the analytical landscape. Rodriguez, 67 M.J. at 112-113. According to this Court, "[t]he Supreme Court held that where a limitation is derived from a statute the taking of an appeal within the prescribed time is mandatory and jurisdictional." Id. at 113

(internal quotes omitted). This Court found that pursuant to the plain language of Article 67(b), UCMJ, one must file a petition within the sixty-day time limitation and that the legislative history of the statute "provides a clear picture of congressional intent." Id. at 115.

However, in Henderson, 562 U.S. at 435, the Supreme Court reinforced "that a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction." The Supreme Court maintained that "other rules, even if important and mandatory . . . should not be given the jurisdictional brand." Id. at 435. Furthermore, "[a]mong the types of rules that should not be described as jurisdictional are what [the Supreme Court has] called 'claim-processing rules'" which are "rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." Id. In determining whether Congress mandated that a statutorily imposed deadline be jurisdictional, the Supreme Court applies Arbaugh v. Y & H Corp., 546 U.S. 500, 515-516 (2006) "to see if there is any 'clear' indication that Congress wanted the rule to be 'jurisdictional.'" Id. at 435-436. Rejecting the Government's argument that all statutory deadlines for taking appeals in civil cases are jurisdictional, the Supreme Court stated that

Congress need not use "magic words in order to speak clearly on this point[,]" and that "context" is relevant. Id. at 436. The Court ultimately held that while the provision at issue was an "important procedural rule" it did not have "jurisdictional attributes." Id. at 442-443.

Furthermore, in Wong, 191 L. Ed. 2d at 542, the Supreme Court said "the Government must clear a high bar to establish that a statute of limitations is jurisdictional." The Court emphasized that "procedural rules, including time bars, cabin a court's power only if Congress has 'clearly stated' as much." Id. at 542. "Absent such a clear statement courts should treat the restriction as nonjurisdictional." Id. (internal quotes omitted). In applying this "clear statement" rule, the Supreme Court has made it plain "that most time bars are nonjurisdictional." Id. The Court stressed "[t]ime and again, we have described filing deadlines as 'quintessential claim-processing rules' which 'seek to promote the orderly progress of litigation,' but do not deprive a court of authority to hear a case." Id., citing Henderson, 562 U.S. at 435. Essentially, "Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it." Id. at 542. In looking at the specific terms of the provision at issue, the Supreme Court implied that legislative history alone could

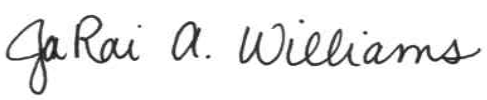
not provide the "clear statement" required from Congress in order to deem a statute imposing a time bar to be jurisdictional. Id. at 543. After examining the terms of the provision, the Supreme Court ultimately found that Congress provided no "plain statement" that would deem the provision jurisdictional. Id. at 549.

Both Henderson and Wong highlight the need for a more particularized approach to the issue of whether a statutory period should be treated as jurisdictional and underscore the need for this Court to reexamine its decision in Rodriguez. The additional analysis and emphasis offered in both of these decisions make it clear that the Supreme Court did not establish a statutory, rule-based distinction in Bowles. As such, filing timelines should not be interpreted as jurisdictional absent a "clear indication" that this was Congress' intention. There is nothing in the language of Article 67, UCMJ, which would indicate that Congress intended the sixty-day time frame for a petition for review to be jurisdictional. Rodriguez must be reversed. The legislative history that this Court relied on in Rodriguez to determine Congress' intent is just not enough to find that the doors of the courthouse should be closed to the men and women this Court was created to protect.

Conclusion

This Court should not dismiss Appellant's petition for lack of jurisdiction.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

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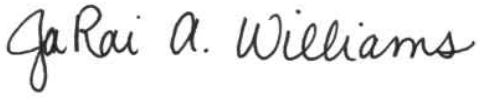

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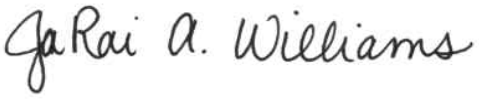

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