IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES	)	BRIEF ON BEHALF OF APPELLANT
Appellee	)	
	)	
v.	)	
	)	
Private First Class (E-3)	)	Crim. App. Dkt. No. 20190618
JACOB L. BRUBAKER-ESCOBAR	)	
United States Army	)	USCA Dkt. No. 20-0345/AR
Appellant	)	

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

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WHETHER THE CONVENING AUTHORITY'S FAILURE TO TAKE ACTION ON THE SENTENCE AS A RESULT OF THE STAFF JUDGE ADVOCATE'S ERRONEOUS ADVICE DEPRIVED THE ARMY COURT OF JURISDICTION UNDER ARTICLE 66, UCMJ.

Statement of Statutory Jurisdiction

For the reasons set forth below, the Army Court of Criminal Appeals (Army Court) lacked jurisdiction over this matter under Article 66, Uniform Code of Military Justice [UCMJ]; 10 U.S.C. § 866 (2018). Despite the Army Court's lack of jurisdiction, it reviewed this case, and Article 67(a)(3), UCMJ, grants this Honorable Court jurisdiction over any cases reviewed by the Army Court.

Statement of the Case

On July 12 and September 16, 2019, at Fort Hood, Texas, a military judge sitting as a general court-martial convicted appellant, Private First Class Jacob L. Brubaker-Escobar, pursuant to his pleas, of five specifications of maltreatment and one specification of assault consummated by a battery, in violation of Articles 93 and 128, UCMJ. (JA012-016). The military judge sentenced appellant to be reduced to the grade of E-1 and discharged from the service with a bad-conduct discharge. (JA011). The convening authority took "No action" on the findings and the sentence. (JA019). The military judge entered judgment on September 26,

2019. (JA020). On June 9, 2020, the Army Court affirmed the findings and sentence "as entered in the Judgment." (JA002).

Appellant was notified of the Army Court's decision, and in accordance with Rules 19 and 20 of this Court's Rules of Practice and Procedure, appellate defense counsel filed a Petition for Grant of Review and a Supplement on August 7, 2020. This Court granted Appellant's petition for grant of review on October 30, 2020, and ordered briefing under Rule 25. (JA001).

Summary of the Argument

Executive Order 13825, 83 Fed. Reg. 9889 (Mar. 1, 2018) (EO 13825), which the President issued to implement the Military Justice Act of 2016 (MJA 16)[1], mandated that when an accused is convicted of an offense occurring prior to January 1, 2019, the convening authority must take action on the adjudged sentence in accordance with the version of Article 60, UCMJ in effect at the time of the earliest offense—just as convening authorities had done in every case prior to MJA 16's entry into force. In this case, however, the convening authority followed the SJA's erroneous advice to take "No Action" on the sentence, despite the fact that appellant's earliest misconduct occurred on April 1, 2018.

[1] National Defense Authorization Act for Fiscal Year 2017, Pub. Law 114-328, §5542 (Dec. 23, 2016).

This error is jurisdictional. Under Article 66(b)(3), UCMJ, a service court of criminal appeals (CCA) only has jurisdiction over a court-martial "in which the judgment entered into the record under [Article 60c, UCMJ] includes a sentence of . . . [a] dishonorable discharge or bad-conduct discharge, or confinement for 2 years or more." Without the convening authority taking the pre-requisite step of approving the sentence as mandated in EO 13825 and the version of Article 60, UCMJ in effect on April 1, 2018, the military judge could not and did not enter a valid judgment into the record under Article 60c, UCMJ. Without a valid entry of judgment, the jurisdictional requirements of Article 66(b)(3), UCMJ were not met. The Army Court therefore erred in testing this error for prejudice.

Statement of Facts

On June 26, 2019, the convening authority referred several charges against appellant to court-martial. (JA004-005). All of the charged offenses allegedly occurred between April and December of 2018. *Id*. On September 16, 2019, appellant pled guilty to some of the charged offenses, the earliest of which allegedly occurred on April 1, 2018. *Id*.

On the day of sentencing, the military judge completed the Statement of Trial Results, which accurately reflected the adjudged findings and sentence. (JA012-016). The same day, appellant elected to waive the right to submit post-trial matters under Rule for Court-Martial (RCM) 1106. (JA017).

On September 25, 2019, the Staff Judge Advocate (SJA) signed his clemency advice to the convening authority. (JA018). The SJA noted that the convening authority could disapprove any portion of the sentence relating to the reduction in pay grade, but could not disapprove, commute, or suspend any portion of the bad-conduct discharge. *Id*. However, the SJA ultimately recommended that the convening authority "take no action on the findings and the sentence." *Id*. Pursuant to that advice, the convening authority executed a document stating he was taking "No Action" on the findings or the sentence. (JA019).

On September 26, 2019, the military judge filled out and signed a form labeled "Judgment of the Court." The Judgment incorporated by reference the Statement of Trial Results and noted that the convening authority had taken "No Action." (JA020). The record was then referred to the Army Court for review, as the adjudged sentence included a bad-conduct discharge. (JA012).

In a per curiam decision, the Army Court affirmed the findings of guilty and the sentence. (JA002). In a footnote, the Army Court concluded that the convening authority had erred by not taking action on the sentence. (JA002-003). However, it determined the error was procedural, rather than jurisdictional, and that there was no prejudice to appellant's "substantial right to seek clemency from the convening authority." *Id*. (citing *United States v. Coffman*, 79 M.J. 820 (A. Ct. Crim. App. 2020)).

Standard of Review

This Court reviews questions of jurisdiction and statutory interpretation de novo. *United States v. Carter*, 76 M.J. 293, 295 (C.A.A.F. 2017). Jurisdictional questions are not subject to waiver. *United States v. Alexander*, 61 M.J. 266, 269 (C.A.A.F. 2005).

Law

"The courts of criminal appeals are courts of limited jurisdiction, defined entirely by statute." *United States v. Arness*, 74 M.J. 441, 442 (C.A.A.F. 2015). Article 66, UCMJ, is the statute that lays out the prerequisites for the CCAs' limited jurisdiction.

Prior to January 1, 2019, the effective date of MJA16, the CCAs had jurisdiction over cases "in which the sentence, *as approved*, extend[ed] to . . .[a] dishonorable or bad-conduct discharge, or confinement for one year or more." Article 66, UCMJ (2012 & Supp. V 2018) (emphasis added). Article 60(b)(2)(A), UCMJ (2012 & Supp. V 2018), mandated that "[a]ction on the sentence of a court-martial *shall be taken* by the convening authority or by another person authorized to act under this section." (emphasis added). As a result, both Article 60 and Article 66, UCMJ, through their plain and clear language, required a convening authority to approve a qualifying sentence as a condition precedent to CCA jurisdiction.

The MJA16 made significant changes to the post-trial process. One of these changes was to relieve the convening authority of the requirement that he or she affirmatively take action on the sentence. Article 60a(a)(1)(A), UCMJ (2018) ("The convening authority . . . *may* act on the sentence of the court-martial only as provided in subsection (b), (c), or (d).") (emphasis added). Further, the CCAs were given automatic jurisdiction over "a court-martial in which the judgment entered into the record under [Article 60c, UCMJ] includes *a sentence*[2] of . . . dishonorable or bad-conduct discharge, or confinement of 2 years or more." Article 66(b)(3), UCMJ (2018). The CCAs are only permitted to act "with respect to the findings and sentence as entered into the record under [Article 60c, UCMJ]." Article 66(d)(1), UCMJ (2018).

The process for entering judgment is laid out in the brand new Article 60c, UCMJ (2018). Article 60c, UCMJ, provides, "*[i]n accordance with rules prescribed by the President*" the military judge will enter a judgment into the record that consists of the Statement of Trial Results and "[a]ny modifications of, or supplements to, the Statement of Trial Results by reason of . . . any post-trial action by the convening authority." (emphasis added).

[2] The words "as approved" were stricken from the statute, ostensibly because there would be cases where the convening authority no longer acted on the findings or sentence.

To effectuate Congress' mandate in Article 60c, the President issued EO 13825. The EO amended the Manual for Courts-Martial and applied MJA16 to offenses committed prior to January 1, 2019. In relevant part, the Executive Order provided:

> If the accused is found guilty of a specification alleging the commission of one or more offenses before January 1, 2019, Article 60 of the UCMJ, as in effect on the date of the earliest offense of which the accused has been found guilty, shall apply to the convening authority . . . to the extent that Article 60:
>
> (1) requires action by the convening authority on the sentence[.]

Executive Order 13825, §6(b). (JA043).

Argument

1. The military judge could not validly enter judgment without the convening authority first taking action on the sentence.

Executive Order 13825 mandated that the convening authority in the instant case take action on appellant's sentence, because the version of Article 60, UCMJ, in effect at the time of appellant's earliest misconduct required him to do so. However, following the SJA's clemency advice, the convening authority took "No Action" on appellant's sentence. The failure to act on the sentence clearly violated the plain language of Section 6(b) of Exec. Order 13825, as well as the 2018 version of Article 60.

The convening authority's failure to take this prerequisite step broke a key link in the chain necessary for the Army Court to obtain jurisdiction. The military

judge was required to enter judgment "in accordance with the rules prescribed by the President." Article 60c, UCMJ (2018). Here, the rules prescribed by the President for post-trial processing of cases straddling the effective date of MJA 16 required the convening authority to take action on the adjudged sentence. Thus, the convening authority's failure to follow EO 13825's mandate meant the military judge could not enter a sentence into the judgment "in accordance with the rules prescribed by the President." This defect invalidated the entry of judgment, or at the very least, meant the military judge did not enter a valid sentence into the Judgment.

Whether the non-compliance with Article 60c, UCMJ, invalidated the entire judgment or just the sentence, the result is the same: it deprived the CCA of its statutory jurisdictional basis under Article 66(b)(3) and its authority to act on the sentence under Article 66(d)(1). This is so because both of those provisions require the judgment be entered pursuant to Article 60c, UCMJ. That did not happen in this case because no one followed the President's rules in EO 13825.

2. The Army Court's reading of Article 66, UCMJ, would lead to an arbitrary and absurd result.

The Army Court's conclusion that this was error, but that it was merely procedural, rather than jurisdictional, was based on its own opinion in *United States v. Coffman*, 79 M.J. 820 (A. Ct. Crim. App. 2020). In essence, the Army Court in *Coffman* used an overly technical reading of Article 66, UCMJ, to

conclude that it has jurisdiction as long as the Judgment on its face includes a sentence that meets the jurisdictional minimum—regardless of whether the sentence was entered properly under Article 60c, UCMJ. This Court should not validate this interpretation of Article 66, UCMJ, because it produces an absurd result. *See United States v. Berry*, 78 M.J. 70, 81 (C.A.A.F. 2018) ("The plain language [of a statute] will control, unless such an interpretation would lead to an absurd result.") (internal quotations omitted).

The absurd result under the Army Court's interpretation of Article 66, UCMJ, is that a CCA's jurisdiction would depend entirely on what is written in the Judgment, even if what is written is incorrect. Consider a scenario where the military judge adjudges a rank reduction and a bad-conduct discharge, but mistakenly omits the adjudged bad-conduct discharge from the Statement of Trial results, which is later approved by the convening authority and incorporated into the Judgment. If all that matters is what is written in the judgment, as the Army Court implied in *Coffman*, the CCA would not have jurisdiction over that case solely because of a ministerial oversight. By the same token, a scrivener's error on the sentence could *confer* automatic jurisdiction in a case where the adjudged sentence did *not* meet the jurisdictional minimum. These absurd results cannot be what Congress intended, but are entirely possible if this Court finds that

jurisdiction is conferred solely based on what words appear on the face of the Judgment, as the Army Court held.

Reading Article 66, UCMJ, to confer jurisdiction when a sentence meeting the jurisdictional minimum is entered *validly* under Article 60c, UCMJ, is not only a fair interpretation of the plain language of Article 66, UCMJ, but also one that avoids such absurd results. Applying this more reasonable reading of Article 66, UCMJ, to appellant's case, the Army Court lacked jurisdiction because the Judgment did not enter a *valid* sentence into the record (even though it correctly included the adjudged sentence and noted that the convening authority took "No Action" on the sentence) due to the noncompliance with EO 13825.

Conclusion

Because the convening authority did not comply with EO 13825 and, thus, the military judge did not properly enter Judgment in this case, the Army Court lacked jurisdiction under Article 66, UCMJ (2018). Accordingly, this Court should set aside the Army Court's decision and return the record to The Judge Advocate General for appropriate action.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Brubaker-Escobar, Crim. App. Dkt. No. 20190618, USCA Dkt. No. 20-0345/AR, was electronically filed with the Court and Government Appellate Division on November 30, 2020.

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