24 September 2024

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*	)	UNITED STATES' ANSWER TO SUPPLEMENT TO PETITITON FOR GRANT OF REVIEW
v.	)	
	)	Crim. App. No. 40372 (f rev)
Captain (O-3) **CARSON C. CONWAY** United States Air Force *Appellant.*	)	USCA Dkt. No. 24-0229/AF

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

ISSUES PRESENTED[1]

I.

WHETHER A PLEA AGREEMENT REQUIRING DISMISSAL RENDERS THE SENTENCING PROCEEDING AN "EMPTY RITUAL" AND THUS VIOLATES PUBLIC POLICY.

II.

WHETHER THE TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT WHEN HE ARGUED DISMISSED OFFENSES TO INCREASE CAPTAIN CONWAY'S SENTENCE.

[1] The United States responds to Issue III of Appellant's Supplement to Petition for Grant of Review in this Answer, and otherwise enters its general opposition to the other issues raise. The United States relies on its briefs filed with AFCCA on 8 November 2023 and 3 April 2024, unless requested to do otherwise by this Court.

III.

18 U.S.C. § 922 CANNOT CONSTITUTIONALLY APPLY TO CAPTAIN CONWAY, WHO STANDS CONVICTED OF A NONVIOLENT OFFENSE, WHERE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION.[2]"

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d), UCMJ, 10 U.S.C. § 866(d). Should this Court grant review, it would have jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

Appellant's statement of the case is correct.

STATEMENT OF THE FACTS

Appellant was sentenced on 22 February 2022. (*Entry of Judgment*, 22 August 2022, ROT, Vol. 1.) The maximum punishment for Distribution of Intimate Visual Images is forfeiture of all pay and allowances, confinement for two years, and a dismissal. Manual for Courts Martial, United States, [MCM], Pt. IV, ¶ 55a.d (2023 ed.) The maximum punishment for Knowingly Making a False

[2] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2022).

Written Statement in Connection with the Acquisition of a Firearm is forfeiture of all pay and allowances, confinement for one year, and a dismissal. MCM, pt. IV, ¶ 91.d (2023 ed.) The first indorsement to the Statement of Trial Results in Appellant's case contains the following statement: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes." (*Statement of Trial Results*, 28 February 2022, ROT, Vol. 1.) The Entry of Judgment contained a similar endorsement. (*Entry of Judgment*, 22 August 2022, ROT, Vol. 1.)

On appeal, Appellant alleged, inter alia, that Appellant's firearms prohibition pursuant to 18 U.S.C. § 922 was unconstitutional as applied to him. United States v. Conway, No. ACM 40372 (f rev), 2024 CCA LEXIS 242, at *2 (A.F. Ct. Crim. App. July 19, 2024). The Air Force Court of Criminal Appeals noted that they lacked jurisdiction to address Appellant's claim. Id. at *3 (citing United States v. Lepore, 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021) (recognizing CCAs lack the authority to direct modification of the 18 U.S.C. § 922(g) prohibition noted on the staff judge advocates indorsement); and United States v. Vanzant, 84 M.J. 671 (A.F. Ct. Crim. App. 2024) (concluding that "[t]he firearms prohibition remains a collateral consequence of the conviction, rather than an element of findings or sentence, and is thus beyond CCAs authority to review.))

ARGUMENT

III.

ARTICLE 67(C)(1)(B) DOES NOT GIVE THIS COURT ADDITIONAL AUTHORITY TO MODIFY AN ENTRY OF JUDGMENT. THEREFORE, ARTICLE 67(C)(1)(A) APPLIES, AND THIS COURT HAS NO AUTHORITY TO MODIFY THE FIREARMS ANNOTATION ON THE ENTRY OF JUDGMENT, BECAUSE THE FIREARMS ANNOTATION IS NOT PART OF THE FINDINGS OR SENTENCE OF THE COURT-MARTIAL.

Standard of Review

This Court has an independent obligation to satisfy itself of its own jurisdiction. M.W. v. United States, 83 M.J. 361, 363 (C.A.A.F. 2023). This Court reviews questions of jurisdiction de novo. United States v. Kuemmerle, 67 M.J. 141, 143 (C.A.A.F. 2023).

Law & Analysis

Appellant correctly points out that this Court's holding in United States v. Williams, No. 24-0015, 2024 CAAF LEXIS 501 (C.A.A.F. Sep. 5, 2024) does not strictly govern the question he is raising on appeal. Nonetheless, the resolution of this issue against Appellant logically flows from Williams, and this Court should deny review.

Appellant contends that this Court's decision in Williams indicates that this Court has the authority under Article 67(c)(1)(B) to correct any part of an entry of

judgment – not just the findings and sentence (App. Pet. at 24.) Appellant is incorrect. Article 67(c)(1)(B), UCMJ, states that this Court may act with respect to "a decision, judgment, or order by a military judge, as affirmed or set aside as incorrect in law by the CCA." 10 U.S.C. 867(c)(1)(B). In Williams, this Court held that the Courts of Criminal Appeals (CCA) lack jurisdiction to modify the firearms prohibition annotation on the Statement of Trial Results (STR), based on the statutory language of Article 66, UCMJ, 10 U.S.C. §866. 2024 CAAF LEXIS 501 at *14-15. This Court reasoned that Article 66(d)(1) authorizes a CCA to act only with respect to the findings and sentence in the entry of judgment, and a firearms prohibition annotation on the STR is not part of the findings or sentence. Id. at *12-15. Appellant asserts that this Court's authority under Article 67, UCMJ, 10 U.S.C. § 867, is different than that of CCAs. While Appellant is correct that this Court's jurisdiction is different than that of CCAs, he misapprehends the importance of Williams.

In Williams, this Court found that it had jurisdiction under Article 67(c)(1)(B) to "vacate the ACCA's action" of modifying the firearms prohibition on the STR in the appellant's case. Id. at *10. This Court premised its authority to vacate the CCA's action on the basis that the STR was part of the trial court's "judgment." Id. And when the CCA modified the STR, it had "set aside as incorrect in law" the judgment of the military judge. Id. This Court concluded that

its authority to vacate the CCA's action hinged on its determination that the CCA "lacked the authority to engage in such action." Id. Here, the CCA did not modify the STR or the EOJ, therefore it did not "set aside as incorrect in law, the judgement of the military judge." The CCA also did not affirm the part of the EOJ that related to the firearms prohibition, because the CCA believed it had no authority to act on anything other than the findings and sentence. Since the CCA neither affirmed nor set aside the firearms prohibition annotation part of the EOJ, Article 67(c)(1)(B) does not give this Court independent authority to act on that part of the EOJ.

Appellant assertion that Article 67(c)(1)(B) endows this Court with the authority to independently correct all parts of an entry of judgment where a CCA cannot runs into another problem: the statutory canon of construction against surplusage. To adopt Appellant's wide-reaching interpretation of Article 67(c)(1)(B) would render Article 67(c)(1)(A) superfluous. Article 67(c)(1)(A) states this Court may act only with respect to "the findings and sentence set forth in the entry of judgment, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." If this Court were to find that Article 67(c)(1)(B) authorizes this Court to modify all parts of entries of judgment – and not just the findings and sentence – it would render the language in Article 67(c)(1)(A) mere surplusage. Stated another way, if this Court can already modify all parts of the entry of

judgment based on Article 67(c)(1)(B), then there would have been no need for Congress to say in Article 67(c)(1)(A) that this Court can only act with respect to "the findings and sentence set forth in the entry of judgment." Appellant's interpretation is therefore contrary to the canon against surplusage. *See* Marx v. General Revenue Corp, 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

The better interpretation of Article 67(c)(1)(B) was discussed in Fink v. Y.B., 83 M.J. 222, 225 (C.A.A.F. 2023). That case recognized that Congress amended Article 67(c), adding Article 67(c)(1)(B), in order to give this Court authority to "address a military judge's decision or order on interlocutory questions." Congress did not intend Article 67(c)(1)(B) to swallow Article 67(c)(1)(A).

This Court should decline Appellant's invitation to commit an ultra vires act, and should find that Article 67(c)(1)(B) does not grant this Court the authority to modify any part of the entry of judgment that does not relate to the findings and sentence – including the firearms prohibition provision on the STR.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's petition for grant of review.

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 37895

MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and the Air Force Appellate Defense Division on 24 September 2024.

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 37895

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because:

This brief contains 1529 words.

This brief complies with the typeface and type style requirements of Rule 37.

/s/ Tyler L. Washburn, Capt, USAF

Attorney for the United States (Appellee)

Dated: 24 September 2024