UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
TOZZI, CELTNIEKS, and BURTON
Appellate Military Judges

UNITED STATES, Appellant
v.
Sergeant First Class ERIK P. JACOBSEN
United States Army, Appellee

ARMY MISC 20160768

ORDER

WHEREAS:

On 20 December 2016, appellant filed an interlocutory appeal with this Court pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862 (2012) [hereinafter UCMJ]. Appellant appealed the decision of a military judge, which it certified excluded evidence that is substantial proof of a fact material in the proceedings.

On 6 February 2017, this Court dismissed appellant's appeal for lack of jurisdiction. *United States v. Jacobsen*, ARMY MISC 20160768 (Army Ct. Crim. App. 6 Feb. 2017) (order).

On 27 February 2017, appellant filed a Motion to Reconsider Dismissal of Appeal and Suggestion for Reconsideration En Banc. On 28 February 2017, appellant filed a Motion for Oral Argument.

NOW, THEREFORE, IT IS ORDERED:

On consideration of appellant's Motion for Oral Argument, filed 28 February 2017, the request for oral argument is DENIED.

On consideration of appellant's Motion to Reconsider Dismissal of Appeal and Suggestion for Reconsideration En Banc, filed 27 February 2017, the suggestion for en banc reconsideration was not adopted by the Court. Appellant's request for reconsideration is GRANTED.

Upon reconsideration of appellant's interlocutory appeal pursuant to Article 62, UCMJ, filed 20 December 2016, this Court lacks jurisdiction to consider the substance of the appeal. Contrary to appellant's claim, the military judge did not issue "[a]n order or ruling which excludes evidence that is *substantial* proof of a fact *material* in the proceeding." UCMJ art. 62(a)(1)(B) (emphasis added).

As an initial matter, we are reminded that "[f]ederal courts, including courts in the military justice system established under Article I of the Constitution, are courts of limited jurisdiction." *United States v. Wuterich*, 67 M.J. 63, 70 (C.A.A.F. 2008) (citing *United States v. Lopez de Victoria*, 66 M.J. 67, 69 (C.A.A.F. 2008)). However, this principle does not mean that we determine the limits of our jurisdiction "by teasing out a particular provision of a statute and reading it apart from the whole." *Lopez de Victoria*, 66 M.J. at 69. Instead, we "read the statutes governing our jurisdiction as an integrated whole, with the purpose of carrying out the intent of Congress in enacting them." *Id.*

In general terms, Congress intended to provide military prosecutors, to the extent practicable, with the same rights of appeal afforded to federal civilian prosecutors in 18 U.S.C. § 3731. S. Rep. No. 98-53, at 23 (1983); H.R. Rep. No. 98-549, at 19 (1983). *See Lopez de Victoria*, 66 M.J. at 68-71 (explaining the general intent of Congress in enacting Articles 62 and 67, UCMJ, and 18 U.S.C. § 3731). There are, however, important differences in language and structure between Article 62, UCMJ, and 18 U.S.C. § 3731. As a result, our superior court reminds us that "[f]ederal court decisions interpreting 18 U.S.C. § 3731 constitute guidance, not binding precedent, in the interpretation of Article 62, UCMJ." *Wuterich*, 67 M.J. at 71. Like our superior court, therefore, we must "take into account the structural differences between courts-martial and trials in federal district court, as well as the textual similarities and differences with respect to Article 62, UCMJ, and 18 U.S.C. § 3731." *Id.*

Under 18 U.S.C. § 3731, "the plain language of the statute shows that Congress intended that, as long as the other requirements of § 3731 are present, mere certification regarding the delay and materiality prerequisites is all the statute requires to invoke . . . appellate jurisdiction." *United States v. Grace*, 526 F.3d 499, 505 (9th Cir. 2008) (en banc).

> This [intent] is evident from [the statute's] phrasing, "An appeal by the United States *shall* lie to a court of appeals . . . *if* the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding."

Id. (quoting 18 U.S.C. § 3731).

In contrast, Article 62, UCMJ, confers appellate jurisdiction for orders or rulings that actually meet specified criteria. UCMJ art. 62(a)(1). Among the specified criteria is an "order or ruling which excludes evidence that *is* substantial proof of a fact material in the proceeding." UCMJ art. 62(a)(1)(B) (emphasis added). Article 62, UCMJ, also lacks the express mandate contained in 18 U.S.C. § 3731 to liberally construe the jurisdictional basis for appeal. *See* 18 U.S.C. § 3731

("The provisions of this section shall be liberally construed to effectuate its purposes."). Considering these textual differences, the plain meaning of Article 62, UCMJ, is the excluded evidence must actually be substantial proof of a material fact, not merely evidence that is certified as such.

Although Article 62, UCMJ, contains similar timeliness and certification requirements to 18 U.S.C. § 3731, these requirements are listed separate and apart from the jurisdictional basis. UCMJ art. 62(a)(2). This structural separation of jurisdictional basis from certification requirements is also significant; it is the manifestation of congressional intent. As the legislative history of Article 62, UCMJ, reveals, Congress intended the "decision to appeal [to] be made by the trial counsel or a superior as representative of the government[,]" but the "*determination as to whether the appeal meets the criteria* of Article 62, [UCMJ, to] . . . *be subject to review by appellate authorities*." S. Rep. No. 98-53, at 23 (1983) (emphasis added).

When Congress intends to confer the right to appeal based solely on the certification of a specified officer, it is perfectly capable of making that intention clear in statutory language and structure. *Compare* 18 U.S.C. § 3731, *and* UCMJ art. 67(a)(2), *with* UCMJ art. 62(a). Therefore, we will not abdicate our responsibility to ensure proper jurisdiction for interlocutory appeals unless Congress expressly confers that responsibility to another entity. Furthermore, we are reluctant to depart from the plain language of our statutory jurisdiction in an effort to effectuate the "intent" of Congress when that intent is contrary to the plain meaning, legislative history, and structure of the language Congress codified into law.

The appellant's appeal pursuant to Article 62, UCMJ, is DISMISSED.

DATE: 16 March 2017

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court

CF: JALS-DA
JALS-GA
JALS-CCR
JALS-CCZ
JALS-CR2
JALS-TJ