

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
TOZZI, CELTNIIEKS, 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 review of appellant's interlocutory appeal pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862 (2012) [hereinafter UCMJ], filed 20 December 2016, this court lacks jurisdiction to consider the substance of appellant's 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). Although 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 (i.e., the right to appeal trial rulings dismissing charges or excluding substantive evidence), the jurisdictional language codified by Congress in Article 62, UCMJ, differs from 18 U.S.C. § 3731. *See United States v. Lopez de Victoria*, 66 M.J. 67, 68-71 (C.A.A.F. 2008) (explaining the general intent of Congress in enacting Article 62, UCMJ).

Specifically, the plain language of 18 U.S.C. § 3731 confers appellate jurisdiction over trial orders suppressing evidence, only conditioned upon timely certification from the United States attorney. *United States v. Grace*, 526 F.3d 499, 505-06 (9th Cir. 2008) (*en banc*). In contrast, the plain language of Article 62(a)(1), UCMJ, confers appellate jurisdiction for orders or rulings that actually meet specified criteria. Although Article 62(a)(2), UCMJ, contains similar timeliness and certification requirements to 18 U.S.C. § 3731, these requirements are listed separate and apart from the jurisdictional basis. Essentially, 18 U.S.C. § 3731 vests the determination of the materiality of the excluded evidence solely with the United States attorney; in this important respect, Article 62, UCMJ, is not analogous. 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. *Compare* 18 U.S.C. § 3731, *and* Article 67(a)(2), UCMJ, *with* Article 62(a), UCMJ.

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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 a dubious effort to effectuate the "intent" of Congress when that "intent" is contrary to the plain meaning and structure of the statutory language Congress actually codified into law.

NOW, THEREFORE, IT IS ORDERED:

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

DATE: 6 February 2017

FOR THE COURT:



MALCOLM H. SQUIRES, JR.
Clerk of Court

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