

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,

REPLY TO APPELLEE'S BRIEF
AND ANSWER TO SPECIFIED
ISSUE

v.

Docket No. ARMY 20200590

Chief Warrant Officer (CW2),
Andre X. Tate
United States Army

Tried at Fort Bragg, North Carolina, on
27 August and 19-22 October 2020
before a general court-martial appointed
by Commander, Headquarters, 82nd
Airborne Division, Colonel John Cook,
Military judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS:

Comes now Appellant in reply to Appellee's Brief and in Answer to the
Specified Issue and respectfully submits the following:

I.

**THE EVIDENCE IS LEGALLY INSUFFICIENT AS
TO CHARGES I AND IV.**

The government cannot point to any crime which any OMC member ever
advocated, planned or committed.

The government was required to prove beyond a reasonable doubt that
Outcast Motorcycle Club [hereinafter OMC] was a criminal gang. When the
government charges violation of a lawful regulation, "the Government must allege
and prove the facts constituting the regulatory infraction." *United States v. United
States v. Bruce*, 14 M.J. 254, 258 (C.M.A. 1982)(internal citations omitted).

Therefore, when the government charges violation of a regulation prohibiting gang membership, it must prove that the group to which the accused belonged was within that regulation's definition of a gang.

A criminal gang in one "...that advocate[s] the planning or commission of one or more criminal offenses..." Army Regulation 600-20, *Army Command Policy*, para. 4-12(g)(1) (6 Nov 2014) (superseded) [hereinafter AR 600-20]. See also DODI 1325.06. The government was therefore required to provide evidence of OMC's "advocacy of the planning or commission" of some criminal offense. The government fails to identify anywhere in its brief which crime any OMC member ever committed or planned to commit, or how OMC members participated in the advocacy of this crime. Moreover, not only did the government not prove the existence of a criminal gang, but also it did not prove Mr. Tate acted recklessly to the possibility the gang was criminal during his membership. See *United States v. Gifford*, 75 M.J. 140 (C.A.A.F. 2016) and *United States v. Haverty*, 76 M.J. 199 (C.A.A.F. 2017).

The record is devoid of such evidence. The government proof that OMC is a criminal gang is therefore legally insufficient.

The government's reputation evidence concerning the OMC clubhouse in Fayetteville, North Carolina, of which Appellant was not a member, is irrelevant and insufficient.

The government points to Mr. [REDACTED] testimony that the OMC club in Fayetteville, North Carolina has a reputation for committing violent acts. Gov. Br. at 14; R. at 475. It argues that it renders Appellant's conviction for Charges I and IV legally sufficient. Gov. Br. at 14. It does not. The government mischaracterizes Mr. [REDACTED] testimony and claims that he opined about OMC in the whole of North Carolina. Gov. Br. at 14. He did not. Instead, he engaged in the following colloquy with Trial Counsel

Q. Does the Outcast Club **of Fayetteville, North Carolina**, recently validated in 2018 by FPD, do you (sic) they have a reputation for violent acts?
A. Yes.

(R. at 475)(emphasis added).

Testimony concerning the Fayetteville clubhouse is irrelevant because Appellant was not a member of the Fayetteville clubhouse. (R. at 578). Further, even if were, this testimony is insufficient to establish that OMC, in Fayetteville or elsewhere, "advocates" crimes. Assuming, *arguendo*, that the reputation is accurate, it does not establish the OMC "advocates the planning or commission" of crimes because violence is not necessarily criminal. Violence can be lawful employed. If violence were automatically unlawful, the United States Army would be a criminal gang. Therefore, this court should find the government's reputation

evidence insufficient to prove that OMC “advocated the planning or commission” of any crime, either in Fayetteville or elsewhere.

Evidence that Appellant wore OMC regalia does not establish that OMC advocates the planning or commission of any crime.

The government argues that Appellant violated AR 600-20, para. 4-12(g) by wearing “gang colors and clothing” because he wore OMC regalia. Gov. Br. at 15. This argument fails because the government did not prove that OMC is a criminal gang. According to the government, because OMC has regalia, it is therefore a criminal gang. *Id.* This is cart-before-the-horse circular reasoning. The wearing of regalia is prohibited only if the regalia is that of a criminal gang, as defined by AR 600-20. The government must prove that a group is a criminal gang in order to label its regalia as criminal gang regalia. The government’s expert, Mr. [REDACTED] testified that a person’s ability to wear a patch on his or her motorcycling regalia is not necessarily dependent upon the commission of any crime. (R. at 470). Motorcycle regalia is therefore not *ipso facto* proof that a motorcycle organization is a criminal gang. The government failed in its proof of OMC is a criminal gang because the government offered no proof of OMC’s advocacy of the commission of any crime. Therefore, it failed to prove that OMC regalia is criminal gang regalia.

OMC’s “validation” in a gang database is not competent evidence because it was testimonial hearsay. The Defense objected to the admission of this evidence. *Contra* Gov. Br. at 17.

The government incorrectly claims that the Defense limited its objection to Mr. [REDACTED] testimony on the grounds on improper opinion testimony. (Gov. Br. at 17). The record does not support this contention. Defense Counsel repeatedly objected to Mr. [REDACTED] testimony on the basis that its chief purpose was to introduce testimonial hearsay into the record. (See e.g. R. at 155-56). Even if that were not the case, Defense Counsel preserved the issue of the introduction of testimonial hearsay because the Defense Counsel objected to the Mr. [REDACTED] testimony as improper expert opinion. (R. at 146). As Trial Counsel conceded, expert testimony which merely reads testimonial hearsay into the record under the guise of opinion is improper opinion testimony. (R. at 148). Therefore, this court should find that the Defense more than adequately preserved the issue of the inadmissibility of Mr. [REDACTED] testimony concerning OMC's "validation" in a law enforcement database.

The government's brief does not attempt to rebut Appellant's claim that Mr. [REDACTED] testimony concerning OMC's validation was testimonial hearsay. This is because it **was**, in fact, clearly testimonial hearsay of the most basic variety. This court should therefore find that testimony concerning OMC's validation was not competent evidence, was admitted in violation of his confrontation clause rights, and cannot be considered now in this court's legal sufficiency review.

Conclusion

Trial Counsel correctly stated that “what is in issue with Charge I and really Charge IV is whether or not Outcast Motorcycle Club is a criminal gang. **That's the only issue.**” (R. at 635)(emphasis added). The government offered no evidence of any advocacy for any crime or any criminal scheme undertaken by any Outcast member. This court should therefore find that Charges I and IV are legally insufficient and set them aside.

II.

THIS COURT HAS JURISDICTION TO REVIEW APPELLANT’S CASE FOR FURTHER REVIEW UNDER ARTICLE 69(d). THE JUDGE ADVOCATE GENERAL OF THE ARMY’S FAILURE TO PROVIDE RELIEF IS AN ACTION UNDER ARTICLE 69(c).

Law and Argument

Appellant’s concurs with the government’s analysis as to this honorable court’s jurisdiction. This court has jurisdiction over cases following “the action taken by the Judge Advocate General under subsection (c).” Art. 69(d)(1), UCMJ. Here, the Judge Advocate General [hereinafter TJAG] declined to exercise any of his authorities under Art. 69(c). This was an action. “No action” constitutes an action by reviewing authorities. Even when undertaken in error, it does not deprive a service court of jurisdiction. *United States v. Brubaker-Escobar*, 81 M.J. 471, 475 (C.A.A.F. 2021). This court should apply the same reasoning to this case as

the *Brubaker-Escobar* court and hold that an action of no action does not deprive a service court of jurisdiction.

TJAG's viewed his denial of relief to Appellant as type of Action because he denominated the document by which he declined relief "Action pursuant to Article 69, Uniform Code of Military Justice." This court should follow TJAG's interpretation of the effect of his denial and hold that it may consider Appellant's case.

Respectfully submitted,

/s/ [REDACTED]
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Certificate of Filing and Service

I certify that copies of the foregoing were electronically submitted to the

Court and the Government Appellate Division on 16 April 2022.



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