

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellant

v.

Sergeant (E-5)
MICHAEL S. DELISFORT,
United States Army,
Appellee

MOTION IN OPPOSITION TO
DEFENSE MOTION TO DISMISS

Docket No. ARMY MISC 20240488

Tried at Fort Moore, Georgia on 14 May, 10 June, 21 June, 1 July, 13-14 July, and 23 August 24, before a general court-martial, convened by Commander, U.S. Army Maneuver Center of Excellence and Fort Moore, Lieutenant Colonel Pamela Jones, military judge, presiding.

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

COME NOW the undersigned government counsel, pursuant to Rule 23 of this court's Rules of Appellate Procedure and file this Reply to Appellee's Motion to Dismiss Appellant's Appeal and Brief filed pursuant to Article 62, Uniform Code of Military Justice (UCMJ). This court had jurisdiction because even though the government forwarded the record of trial outside of the 20-day period provided by this court's Rule's of Appellate Procedure, the government provided good cause for the delay.

Standard of Review

Jurisdiction of an appeal filed under Article 62, UCMJ is a legal question reviewed de novo. *United States v. Wolpert*, 75 M.J. 777, 779 (Army Ct. Crim.

App. 2016) (citing *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006)).

“The burden is on the government to prove jurisdiction by a preponderance of the evidence.” *Wolpert*, 75 M.J. at 779 (citing *United States v. Oliver*, 57 M.J. 170, 172 (C.A.A.F. 2002)).

Facts

The military judge granted a defense motion to dismiss this case with prejudice on 14 July 2024. (App. Ex. XXIII). On 29 July 2024, the military judge granted the government’s motion for reconsideration. On 11 September 2024, the military judge granted the defense motion in part, instead dismissing the cause without prejudice and only for the discovery violations. (App. Ex. XXVIII1).

On 13 September 2024, the government filed notice of appeal under Article 62, UCMJ, and Rule for Courts-Martial [R.C.M.] 908. (App. Ex. XXVII). The government mailed the record on 5 October 2024¹, violating Rule 20(c)(1)(A) of this court’s rules of Appellate Procedure. The Government Appellate Division received the appeal on 8 October 2024, and filed it with this court on 15 October 2024. (Filing of Record of Trial for Appeal under Article 62, UCMJ – *United States v. Sergeant Michael S. Delisfort*). The Government Appellate Division filed its brief in support of this appeal on 31 October 2024.

¹ The CoJ memo indicates it was mailed on 4 October.

In the Fort Moore Chief of Military Justice’s (COJ) memo, the government provided good cause for the delay, mainly that (1) “Hurricane Helene caused Fort Moore’s closure for in-person work on 26-27 September 2024, and telework was ordered.” (Memorandum of Good Cause for Late Filing of Record of Trial for Article 62 Appeal, *United States v. Sergeant Michael S. Delisfort*” (Memorandum for Good Cause)). The COJ further explained that this unexpected telework, caused by a natural disaster, undermined the “necessary synergy between the enlisted court reporter who uses Eclipse and Fort Moore’s Clerk of Court who does not.” (Memorandum for Good Cause). This was significant because “the Clerk of Court with the vastly superior knowledge of assembling the record of trial had to rely upon the enlisted Court Reporter's knowledge of Eclipse to link various digital files together at each stage.” (Memorandum for Good Cause). Additionally, during this period the enlisted court reporter assisted a suicidal Soldier. (Memorandum for Good Cause). These factors caused the late mailing of the record of trial.

Argument

a. There is good cause for the delay, and the Government therefore complied with Article 62, UCMJ, R.C.M. 908, and ACCA. R. 20.

As an initial matter, the government complied with the statutory requirements for an Article 62 appeal—mainly, the government “provide[d] the military judge with written notice of appeal from the order or ruling

within 72 hours of the order or ruling.” Article 62(a)(2)(A), UCMJ. The military judge issued her ruling on 11 September 2024 and the trial counsel provided written notice on 13 September 2024. This meets the statutory requirements for this appeal.

Appellee’s brief argues that this court lacks jurisdiction because the government failed to forward the appeal within the 20-day period proscribed by this court’s rules. Appellee, by strictly interpreting one provision of this court’s rules, ignores provisions inconvenient with the defense position, and amplifies the government’s error. The government concedes that the trial counsel forwarded the record to the Government Appellate Division late. However, the COJ provided good cause, and this court’s rules contemplate such a situation; specifically Rule 20.3(b)(5) states that “the appeal shall be accompanied by a brief of the United States, which shall include . . . (5) a statement showing good cause why the appeal was not filed within the time prescribed by J.R.A.P. R. 20(c)(1), if applicable.” In this case, the COJ included a statement of good cause with the record, which is reiterated within the government’s brief supporting the Article 62 appeal. If this court finds that the government’s proffered good cause constitutes “good cause,” under the rules, it should determine it has jurisdiction to decide this case on the merits.

Additionally, Congress has added a liberal construction clause to Article 62—“the provisions of this Article shall be liberally construed to effect its purposes.” Article 62(e), UCMJ. This clause was enacted on 23 December 2016 and took effect on 1 January 2019. *See* 130 Stat. 2000, 2967 (2016). This post-dates the Court of Appeals for the Armed Forces’ (CAAF) decision in *United States v. Jacobson*, cited by the appellee for the proposition that “Prosecution appeals are disfavored and require specific statutory authorization.” (Appellee Br. at 4). To the extent that “Government appeals in criminal cases are disfavored and may only be brought pursuant to specific statutory authorization,” that statutory authorization directs this court to liberally construe Article 62. *United States v. Jacobson*, 77 M.J. 81, 84 (C.A.A.F. 2017).

This court should apply its own rules, in conjunction with Article 62 and R.C.M. 908, and find that the good cause proffered by the government justify the late forwarding of this record, and therefore find it has jurisdiction.

b. This court’s rules of appellate procedure are not jurisdictional.

Even if this court finds the government did not technically comply with its rules, this court may still consider this appeal in its discretion. The requirements to forward the appeal within twenty days and file the appeal within five days are found in this court’s rules—not in the statute. A.C.C.A. R. 20(c)(1). The Supreme Court has held that where a limitation is derived from a statute “the taking of an

appeal within the prescribed time is mandatory and jurisdictional.” *Bowles v. Russell*, 551 U.S. 205, 209 (2007) (internal quotations omitted). However, as the Court of Appeals for the Armed Forces (CAAF) recognized, “[i]n so holding, the Court distinguished between statute-based rules of limitation and those having their origin in court-created rules.” *United States v. Rodriguez*, 67 M.J. 110, 113 (C.A.A.F. 2009). Statute-based rules of limitation have jurisdictional significance “[b]ecause [o]nly Congress may determine a lower federal court’s subject-matter jurisdiction.” *Id.* (quoting *Bowles*, 551 U.S. at 209). On the contrary, procedural rules adopted by a court “for the orderly transaction of its business are not jurisdictional and can be relaxed by the [c]ourt in the exercise of its discretion.” *Bowles*, 551 U.S. at 209.

The only statute-based rule of jurisdiction is the requirement in Article 62 to “provide[] the military judge with written notice of appeal from the order or ruling within 72 hours of the order or ruling.” Article 62(a)(2)(A), UCMJ. The government indisputably complied with this requirement. The rules governing procedure in A.C.C.A. R. 20 are not jurisdictional and may be relaxed by this court in its discretion, if it finds the Government provided good cause for the delay. As discussed above, this court’s own rules acknowledge the possibility of a late filing for “good cause.” A.C.C.A. R. 20.3(b)(5). The Joint Rules of Appellate Procedure

authorize the service courts to “suspend the requirements or provisions of any of these rules” for good cause. J.R.A.P R. 32

This court has analyzed the timeliness requirements from its Rules of Appellate Procedure, finding both good cause and a lack of good cause. In *United States v. Crain*, this court determined it lacked jurisdiction because “No good cause has been shown as to why these rules should not be adhered to; therefore we lack jurisdiction to consider this appeal.” [*United States v. Crain*, 2018 CCA LEXIS 140](#), at *5 (Army Ct. Crim. App. 2017) (sum. disp.). In *Crain*, the military judge made the ruling in question on 19 October 2017. *Id.* at *4. The trial counsel mailed some documents on 8 November 2017, twenty dates from the date of notice. *Id.* at *4. However, the “documents required for the appeal (i.e. the original record of trial and the military judge’s ruling) were not mailed until 17 November 2017, twenty-nine days after the military judge’s ruling.” *Id.* at *5. As the government provided no good cause, the court found that it had no jurisdiction.

This case indicates that with good cause, the court may find jurisdiction. Moreover, this court decided *Crain* in 2017, prior to congress adding the requirement that the court liberally construe Article 62 to effect its purpose.

In [*United States v. Streeter*](#), this court found jurisdiction even though the government failed to attach the military judge’s ruling to the notice of appeal within the proscribed time. 2023 CCA LEXIS 43, at *6 (Army Ct. Crim. App. 26

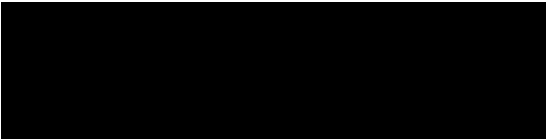
January 2023) (mem. op). There, the court noted that the court’s rules “allow for a showing of good cause for filing beyond the twenty-day deadline.” *Id.* at *9. The government acknowledges the differences appellee argues in their brief: in *Streeter* the government filed a summary of the evidence within the twenty-day suspense, and then supplemented the record after the twenty days. *Id.* at *8. This should not, as appellee argues, cause this court to determine it lacks jurisdiction. First, this court’s rules clearly contemplate a late filing—otherwise why have a rule requiring “a statement showing good cause why the appeal was not filed within the time prescribed by J.R.A.P. R. 20(c)(1), if applicable.” A.C.C.A. R. 20.3(b)(5). Second, the good cause here justifies the late submission. In *Streeter*, the government lacked the military judge’s ruling, but the record was otherwise complete and there were no issues compiling the record. *Id.* at *8. Under those facts, *failing* to submit the record within the 20 days would not be good cause. In this case, an unforeseen natural disaster caused the closure of the entire military base, forcing the court reporter and clerk of court to work at separate locations, using different software systems, to compile a 6-volume record, including 468 pages of transcript. In addition to the hurricane closing the base, a new Soldier became suicidal and the court reporter, his closest confidant, was required to assist him. This is good cause.

Finally, the government has expeditiously processed this case and there is no prejudice to the appellant. *Even if* the record were mailed earlier, due to the holiday

weekend on 12-14 October, the government likely would have still filed the record with this court on 15 October 2024. Moreover, the government completed and submitted its brief to this court within 16 calendar days. While the trial counsel—with good cause—missed the deadline to forward the appeal within 20 days—the government has completed its brief within the timeframe proscribed within the rules for the entirety of the government’s efforts on the appeal—compiling the record, forwarding, filing with the court, and completing its brief. As the government has expeditiously moved this appeal forward, and provided good cause for any delay, this court should deny the appellee’s motion and decide the appeal on the merits.

Conclusion

WHEREFORE, the United States prays this court deny the appellee’s motion.



MARC B. SAWYER
MAJ, JA
Branch Chief
Government Appellate Division

CERTIFICATE OF SERVICE
UNITED STATES v. MICHAEL S. DELISFORT, ARMY MISC 20240488

I hereby certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [REDACTED]
[REDACTED] on the 6th day of November, 2024.

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