UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BURTON, DENNEY,[1] and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant First Class PATRICK H. HATFIELD, JR.
United States Army, Appellant

ARMY 20200410

Headquarters, Fort Bliss
Michael S. Devine, Military Judge (arraignment)
Steven C. Henricks, Military Judge (motions and trial)
Colonel Andrew M. McKee, Staff Judge Advocate

For Appellant: Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Captain Thomas J. Travers, JA; Captain Lauren M. Teel, JA (on brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Rachel P. Gordienko, JA; Captain Lauren M. Teel, JA (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Brett A. Cramer, JA; Captain R. Tristan C. de Vega, JA (on brief).

26 January 2022

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

DENNEY, Judge:

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of three specifications of child sexual abuse in violation of Article 120b, Uniform Code of Military Justice, 10 U.S.C. § 920b (2012) [UCMJ]. The panel sentenced appellant to a dishonorable discharge, confinement for eighteen months, forfeiture of all pay and allowances, and reduction to the grade of E-1.

On appeal, appellant raised three assignments of error, one of which merits discussion but no relief. The defense alleges the military judge gave an erroneous

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[1] Judge Denney decided this case while on active duty.

instruction to appellant on his forum rights (by not advising him that he could be sentenced by military judge alone instead of the panel members after he was found guilty by the panel at his court-martial). Appellant alleges this was jurisdictional error.[2]

BACKGROUND

Appellant was convicted of three specifications of child sexual abuse (Art. 120b, UCMJ) which occurred no later than 1 December 2013. The charges and specifications were preferred on 3 September 2019 and referred on 18 October 2019.

At the arraignment, the military judge advised the accused of his right to be tried by panel members and that the panel would sentence him. The accused acknowledged that he understood the difference between trial by members and military judge alone. On 13 November 2019, the accused submitted written notice of forum and pleas to the court. The accused elected to be tried by an enlisted panel. On 17 July 2020, the military judge reminded the accused of his right to elect trial by members or military judge alone. The accused confirmed that he understood his choices and elected to be tried by an enlisted panel.

Defense counsel confirmed that since all of the specifications of the alleged offenses were committed prior to 1 January 2019, the sentencing proceedings were to be governed by "option 1" in the electronic benchbook.[3] The military judge informed appellant that "if you are found guilty in a trial by members, you will also be sentenced by the members." Appellant never objected to the forum for sentencing before trial. After the panel returned findings of guilt for three specifications of child sexual abuse, appellant did not object to members sentencing. Nor did appellant object after the panel issued a sentence.

Now for the first time on appeal, the defense alleges the military judge should have advised appellant after he was convicted by the members that appellant could make an election to be sentenced by military judge alone.

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[2] We have given full and fair consideration to appellant's other assignments of error, as well as the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them to be without merit.

[3] Dep't. of the Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para 2-1-3 (22 Feb 2020), states "Option 1" is "[t]o be used if all specifications allege offenses committed prior to 1 January 2019."

LAW AND DISCUSSION

Standard of Review

We review jurisdictional questions de novo. *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000). "Jurisdiction over the person, as well as jurisdiction over the subject matter, may not be the subject of waiver." *United States v. Garcia*, 5 C.M.A. 88, 94, 17 C.M.R. 88, 94 (1954). A jurisdictional defect goes to the underlying authority of a court to hear a case. Thus, a jurisdictional error impacts the validity of the entire trial and mandates reversal. *United States v. Perkinson*, 16 M.J. 400, 402 (C.M.A. 1983). However, where an error is procedural rather than jurisdictional in nature we test for material prejudice to a substantial right to determine whether relief is warranted. Article 59(a), UCMJ; *United States v. Morgan*, 57 M.J. 119, 122 (C.A.A.F. 2002) (citing *United States v. Mayfield*, 45 M.J. 176, 178 (C.A.A.F. 1996)).

Law and Analysis

Section 10 of Executive Order (EO) 13,825 provides the Military Justice Act of 2016 (MJA)[4] amendments to sentencing procedures in Articles 25 and 53 of the UCMJ, apply "only to cases in which all specifications allege offenses committed on or after January 1, 2019."

Article 25(d)(1), UCMJ, states: "Except as provided in paragraph (2) for capital offenses, the accused in a court-martial with a military judge and members may, after the findings are announced and before any matter is presented in the sentencing phase, request, orally on the record or in writing, sentencing by members."

Article 53(b)(1), UCMJ, states for sentencing:

> (A) SENTENCING BY MILITARY JUDGE. --- Except as provided in subparagraph (B), and in subsection (c) for capital offenses, if the accused is convicted of an offense in a trial the military judge shall sentence the accused.
> (B) SENTENCING BY MEMBERS. --- If the accused is convicted of an offense by general or special court-martial consisting of a military judge and members and the accused elects sentencing by members under section 825 of this title (article 25), the members shall sentence the accused.

[4] National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017), Pub. L. No. 114-328, §§ 5001-5542, 130 Stat. 2000, 2894-2968 (2016).

However, Section 10 of the EO was silent on when Article 25(d)(1), UCMJ, would go into effect.

The Court of Appeals for the Armed Forces (CAAF) recently held that "Exec. Order No. 13,825 was a valid exercise of the President's rulemaking authority." *United States v. Brubaker-Escobar*, __ M.J. ___, 2021 CAAF LEXIS 818, at *4 (C.A.A.F. 7 Sept 2021). The CAAF also confirmed:

> In the [MJA 16], Congress gave the President the authority to designate the effective date of its provisions, as well as the duty to 'prescribe in regulations whether, and to what extent, the amendments made by this [act] shall apply to a case in which *a specification alleges the commission, before the effective date of such amendments, of one or more offenses* or to a case in which one or more actions under [the UCMJ] have been taken before the effective date of such amendments.

Id. (quoting MJA § 5542(c)(1), 130 Stat. at 2967, as amended by NDAA 2018, § 531(n)(1), 131 Stat. at 1387) (emphasis in original).

Section 5542(a) of the 2017 NDAA states that unless otherwise noted, all of the MJA 2016 amendments go into effect on the date designated by the President, which was 1 January 2019.

Section 5532(c) (as amended by the 2018 NDAA) states that the President shall prescribe regulations to address cases in which the offense was committed, or actions were taken, before 1 January 2019.

The President did in fact prescribe such regulations, which are contained in EO 13,825.

Section 10 of the EO specifically says that Article 25(d)(2) and (3) and Article 53 apply only to cases in which all offenses were committed after 1 January 2019. Appellant focuses only on the omission of Article 25(d)(1) but ignores that fact that Article 53 (in its entirety) is expressly listed in Section 10 and that Article 53 only applies to cases in which all offenses were committed after 1 January 2019.

This is not a case in which Article 25(d)(1) should be considered in isolation to interpret its effective date. Section 10 of the EO discusses MJA 16 Amendments to sentencing procedures in both Articles 25 and 53. Therefore, Article 25(d)(1) needs to be read in conjunction with Article 53. Article 25 pertains to an accused's election after findings of sentencing by members, and Article 53 pertains to sentencing options by military judge alone or by members.

While Article 25(d)(1) refers to the accused's ability to request sentencing by members, there is nothing in that section that provides for the execution of that request. Rather, it is only in Article 53(b)(1) that allows such a request to be acted upon by providing that "the members shall sentence the accused." As a result, one cannot divorce the two articles with respect to sentencing procedures.

The present case does not conflict with *United States v. McPherson*, 81 M.J. 372 (C.A.A.F. 2021) in which the CAAF found that the statute of limitations for indecent acts with a child had expired and time barred the offenses of conviction. In *McPherson*, the CAAF found the plain language of the statute to be applied retroactively was unambiguous. *Id.* at 377.

Reading the plain language of Articles 25(d)(1) and 53(b)(1) leads to the same unambiguous result. Simply put, there is nothing in Article 25(d)(1) that actually authorizes the members to sentence appellant, so even if that provision is in effect to the offenses in question in this case, the most it can do is allow for appellant to make a request. The EO is clear, however, that Article 53(b)(1), which would allow the military judge to actually sentence the accused based on his Article 25(d)(1) request, does not apply to offenses committed before 1 January 2019.

To the extent the omission of Article 25(d)(1) from Section 10 of the EO creates any ambiguity, the ambiguity is resolved by the inclusion of the entire Article 53 in Section 10 of the EO, making it clear that the President did not wish to provide appellants who committed their offenses prior to 1 January 2019 with the right to request judge alone sentencing after a panel trial.

Jurisdictional vs. Procedural Error

Even assuming arguendo that the ambiguity should be resolved in favor of appellant, the CAAF decision *United States v. Alexander*, 61 M.J. 266 (C.A.A.F. 2005) indicates the error is procedural and not jurisdictional. In *Alexander*, the military judge advised the accused of his forum options, and the accused deferred on forum selection. At a subsequent Art. 39(a), UCMJ, hearing, the military judge informed the accused that he was scheduling the case for an enlisted panel ("On Monday, I intend to impanel -- I believe I was told -- an enlisted panel in this case, and we're going to go forward with trial."). *Id.* at 268. At a subsequent Art. 39(a) hearing, the court discussed the charges and specifications and instructions for the panel members. *Id.* The accused never objected to the members until raising the issue for the first time on appeal. *Id.*

In ruling that the failure of making an election of forum was procedural, not jurisdictional, error, the CAAF stated in *Alexander*:

> The right being addressed and protected in Article 25 is the right of an accused servicemember to select the forum by which he or she will be tried. The underlying right is one of forum selection, not the ministerial nature of its recording. Of course, there is no better way to protect the right of selection than through compliance with the specific and straightforward recording requirements of Article 25. Nonetheless, *where the record reflects that the servicemember, in fact, elected the forum by which he was tried, the error in recording that selection is procedural and not jurisdictional.* Thus, we will not order relief absent a showing of prejudice.

Alexander, 61 M.J. at 270 (citing *United States v. Mayfield*, 45 M.J. 176, 178 (C.A.A.F. 1996)) (emphasis added)

Our superior court also rejected the defense claim of prejudice on lack of forum election.

> [The appellant] asserts prejudice on the ground that he was not given the opportunity to personally elect his forum, and therefore choose among trial by military judge alone, a panel of officer members, and a panel composed of one-third enlisted members. For the reasons stated above, the record reflects otherwise. The military judge presented Appellant with his options. Appellant acknowledged his options and deferred election. The military judge subsequently stated on the record that an election had been made for a panel including enlisted members, without comment or correction by counsel or Appellant. Appellant proceeded through voir dire and trial with a panel of one-third enlisted members, without objection. Indeed, Appellant did not raise the question of selection and prejudice either in his submissions under R.C.M. 1105 or before the court below. As a result, for the same reasons that *we find the error in this case procedural and not jurisdictional*, we conclude that he did not suffer material prejudice to a substantial right.

Alexander, 61 M.J. 270 (emphasis added).

In the present case, appellant alleges for the first time on appeal (similar to the accused in *Alexander*) that his substantial rights were materially prejudiced because he was deprived his right to select a different forum at sentencing.

Appellant alleges he would have elected sentencing by the military judge, if he had been informed of the forum option after being convicted by the panel members, in hopes of obtaining a more lenient sentence. This is entirely speculative and does not establish prejudice.

Waiver

Consequently, the issue was waived by appellant because it was not raised below at the trial level. Even under Article 66, UCMJ, this is not a case in which we would exercise our Article 66 "should be approved" discretion. *United States v. Tinsley*, 2021 CCA LEXIS 679, *45 n. 3 (Army Ct. Crim. App. 15 Dec. 2021); *United States v. Conley*, 78 M.J. 747, 750 (Army Ct. Crim. App. 2017).

Because appellant did not raise this issue below, we decline to consider this argument on appeal. *See United States v. Lloyd*, 69 M.J. 95, 100–01 ("We find that the military judge did not abuse her discretion by failing to adopt a theory that was not presented in the motion at the trial level."); *United States v. Carpenter*, 77 M.J. 285, 289 (C.A.A.F. 2018) ("[O]ur review for error is properly based on a military judge's disposition of the motion submitted to him or her—not on the motion that appellate defense counsel now wishes trial defense counsel had submitted.") (emphasis in original). We further recognize that under Article 66, UCMJ, this court retains discretion to "treat a waived or forfeited claim as if it had been preserved at trial" in order to determine if the findings "should be approved." *Conley*, 78 M.J. at 750 (citing *United States v. Britton*, 26 M.J. 24, 27 (C.M.A. 1988)); Article 66(d), UCMJ. For the reasons set forth above, we decline to exercise our discretion to grant relief under Article 66's "should be approved" test.

CONCLUSION

On consideration of the entire record the findings of guilty and sentence are AFFIRMED.

Senior Judge BURTON and Judge PARKER concur.

FOR THE COURT:

JOHN P. TAITT
Clerk of Court