

UNITED STATES)
v.) MEMORANDUM: MOTION TO DISMISS
CHARLES E. HUTTO) FOR LACK OF JURISDICTION
SERGEANT E-5)
UNITED STATES ARMY)

IN the above-styled case, a General Court Martial convened by Court-Martial Convening Order 37, Headquarters, Third United States Army, Fort McPherson, Georgia 30330, dated 17 September 1970, come now the accused through counsel and in support of his motion to dismiss for lack of jurisdiction offers the following for consideration of the Court.

The argument will be limited to the second part of the Motion to Dismiss for Lack of Jurisdiction as refers to the preferring of the additional charge.

I
STATEMENT OF FACTS

ON 17 November 1969, Sergeant Hutto, while assigned to Fort Lewis, Washington, was approached by CID personnel and questioned concerning certain allegations against him as pertained to his participation in a combat assault on the village of My Lai (4) in March 1968. On that date he made the first of two related statements. On 18 November 1969, Sergeant Hutto made an additional statement about the same combat assault mission in March 1968. On 19 November 1969, the 1st Military Police Detachment (CI) Office of the PROVOST Marshal General, Washington, D.C. 20314 requested of the Commanding Officer 3rd AIT Brigade, Fort Lewis, Washington 98433, that Sergeant Hutto be flagged pursuant to AR600-31 (pending completion of the investigation of alleged murder and rape offenses). On 8 January 1970, Sergeant Hutto was charged with three original charges of murder, rape, and assault with intent to commit murder. At 2400 hours, 12 January 1970, Sergeant Hutto's term of enlistment expired. No action was initiated to release Sergeant Hutto by the Army. On 14 January 1970,

Sergeant Hutto demanded immediate release from active duty. (On 18 November 1970, this request was renewed.) On 27 February 1970, Sergeant Hutto arrived at Fort McPherson, Georgia, pursuant to PCS orders. On 9 March 1970, the additional charge of false swearing was added. The additional charge was based on the two statements given to CID personnel in November 1969.

BASIS FOR DISMISSAL

Once an accused has been charged before his ETS date and these charges are based on all available information, causing the accused to be subsequently held past his ETS date pursuant to these charges, the government should be barred from preferring an additional charge, the facts of which were known at the time of the referral of the original charge.

ARGUMENT

A search of available cases fails to produce a case similar in facts. "Enlistment in an armed force does not establish a contract relationship between the individual and the government, but a status." United States v. Blanton, 7 USCM 664, 665, 23 CMR 128 (1957). "As a result, passage of the date provided for release from the service in the terms of enlistment does not operate of its own force to affect a discharge." United States v. Klunk, 3 USCM 92, 11 CMR 92 (1953).

Article 2(1), UCMJ, states:

"The following persons are subject to this chapter:
(1) Members of a regular component of the armed forces, including those uniting discharge after expiration of their terms of enlistment..."

par. 11(d), MCM, 1969, Revised edition, states:

"Effect of termination of term of service.
Jurisdiction having attached by commencement of action with a view to trial -- as by apprehension, arrest, confinement, or filling of charges -- continues for all purposes of trial, sentence and punishment. If action is initiated with a view to trial because of an offense committed by an individual before his official discharge -- even though the term of enlistment may have expired -- he may be retained in the service for trial to be held after his period of service would otherwise have expired..."

Taking these two code provisions, it is the defense contention that once jurisdiction has attached by the filing of charges, jurisdiction extends as to those offenses until the judicial proceeding terminates. The cases in which the government relies on to substantiate its jurisdiction over the additional charge in this case are those in which an individual is under official investigation at the time of his ETS date. Therefore, the accused is not charged until after his ETS date, but most importantly not until after the investigation is completed. United States v. Hout, 19 USCMA 299, 41 CMR 299, United States v. Zatrikin, CM 421 456, 4 May 1970.

Continuation of jurisdiction merely provides for the logical conclusion of a possible judicial action once begun by official investigation, but not capable of completion and analysis of all possible offenses before the ETS date. At the expiration of enlistment, a serviceman is entitled to separation from active duty. "In a limited number of circumstances, however, he may be retained past the expiration date, despite his personal objection to continued service." United States v. Hout, *supra*, 19 USCMA 301, 41 CMR 301.

These limiting circumstances are enumerated by AR 635-200, para. 2-4 Change No. 3, 22 December 1967, 10 USC § 972 and MCM, para. 11(d) 1969, Revised edition.

In this case, the basis for retention past the ETS date is the preferral of charges. Sergeant Hutto's retention is then based on the finalization of the judicial action started and, subsequently, his status is that of one awaiting trial past his ETS date. Article 2(1), UCMJ, Paragraph 11(d) MCM, Revised edition. This jurisdiction pursuant to retention and extension of the ETS date should be limited to a preservation of the jurisdiction acquired by filing charges, and not opened to the "carte blanche" right of the government to charge the accused for offenses known, but not charged before his original ETS date. The recent Supreme Court and CMA cases following the O'Callahan v. Parker case limits Court-Martial jurisdiction

over both the person and the offense. The Army's action in this case seems to give it the right to hold a person on certain charges, take no action as to other known offenses, transfer the accused to a new command for a second determination as to the available evidence, and subsequently prefer additional charges known by the first command but not preferred either out of neglect or a previous determination not to charge. This situation creates an unlawful and unlimited extension of the concept of continuing jurisdiction past the ETS date. Certain cases reflect the opinion that a person who is held legally past his ETS date can subsequently be charged without the government losing jurisdiction. However, it should be noted that these cases reflect the need for the completion of an official investigation begun before the accused's ETS date.

Article 2(1), UCMJ, 1969, Revised edition, provides statutory authority for persons who are subject to jurisdiction of courts-martial. This provision is implemented by applicable AR, USC and MCW provisions. The applicable portion of UCMJ 2(1) that states in effect that a person awaiting official discharge is subject to the code should be interpreted in the following way:

- a. One who is awaiting discharge and has been legally held past the ETS date pursuant to 11(d) (MCW 1969, Rev. ed.), is subject to jurisdiction of the court-martial convened to dispose of the charges referred to it, and only those charges.
- b. While awaiting this termination of judicial proceedings the status so conferred on him by law makes him subject to military jurisdiction for breaches of military law after the ETS date and while awaiting the termination or dismissal of charges and his official discharge from the service. (Discharge meaning separation from active duty or official discharge in whole.)

CONCLUSION

Therefore, it is the defense's contention that in this case jurisdiction acquired and preserved by the filing of charges on Sergeant Hurto is limited to those charges filed before his ETS date. The government

should be barred from asserting jurisdiction over offenses that were known yet not preferred at the time of the original charges and consequently by this inaction the government has lost its right to assert jurisdiction over the additional charge.

Respectfully submitted,

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