

UNITED STATES, Appellee,

v

SAMUEL L. GRIFFIN, Private,
U. S. Army, Appellant

13 USCMA 213, 32 CMR 213

Charges and specifications § 9 — absence of order of withdrawal from prior court.

1. In the absence of anything to contradict the presumption of regularity, a court-martial was not deprived a jurisdiction by reason of the absence of a formal order withdrawing the charges from a court-martial to which they had been previously referred.

Enlisted men § 57 — discharge — generally.

2. Separation from the service by way of discharge requires issuance of competent orders directing the discharge and delivery of the discharge certificate or other valid notice to the person discharged of the termination of his military status.

Courts-martial § 49 — jurisdiction — actual notice of discharge.

3. Assuming that a certificate of discharge, when issued pursuant to lawful order, creates a presumption that the notice required for discharge was given, the evidence supported the law officer's ruling that there was no actual notice of the accused's discharge so as to terminate his military status and deprive the court of jurisdiction where it appeared that, while the accused was being returned to the United States from overseas for discharge, the necessary discharge papers were prepared and forwarded to the station where he was to be discharged, but it was also shown that such advance preparation was in accordance with the policy of speeding up discharge proceedings and that the accused never went through the normal discharge proceedings nor did he receive his discharge certificate or notice of its preparation and the discharge was canceled upon notification that he had been arrested and placed in confinement immediately upon his arrival in the United States.

Courts-martial § 49 — jurisdiction — constructive notice of discharge.

4. Assuming that the accused, although in actual custody of military authorities, could be regarded as an absentee within the meaning of par 17, AR 635-200, 8 April 1959, making delivery of discharge orders to an absentee's organization constructive notice of discharge, there was no constructive notice sufficient to terminate the accused's military status and deprive the court of jurisdiction since, assuming delivery of the necessary papers to the accused's station, it is clear no immediate termination of the accused's military status was intended and that such delivery was intended as but one step in proceedings that were never completed.

Enlisted men § 57 — discharge — delivery.

5. Mere surrender of possession of an instrument does not establish delivery. The surrounding circumstances must show the physical transfer of the instrument was accompanied by an intention that the instrument take effect according to its legal tenure.

No. 15,848

July 27, 1962

On petition of the accused below. CM 406906, not reported below. Affirmed.

First Lieutenant David M. Gill argued the cause for Appellant, Accused.

First Lieutenant Peter J. McGinn argued the cause for Appellee, United States. With him on the brief was *Major Francis M. Cooper*.

Opinion of the Court

QUINN, Chief Judge:

Two questions relating to the jurisdiction of the general court-martial which convicted the accused, on his plea of guilty to larceny and wrongful possession of heroin, are presented for our consideration. The first relates to the absence of a formal order withdrawing the charges from a court-martial to which they had been previously referred.

In *United States v Emerson*, 1 USCMA 43, 1 CMR 43, we held that the absence of a formal Headnote 1 written order of reference does not deprive a properly constituted court-martial of jurisdiction to try the charges before it. We said that "an oral referral for trial" authorizes a court-martial to try the charges. *Supra*, page 45. In *United States v Lord*, 13 USCMA 78, 32 CMR 78, we held that in the absence of evidence to the contrary it will be presumed the convening authority has "a proper reason" to withdraw charges from a court-martial that had not yet convened to hear them, and to refer them to another court-martial. Since nothing in the record, or in the papers filed in this Court, contradicts the presumption of regularity, there is no foundation for this part of the accused's claim of lack of jurisdiction.

In the second part of his attack on the court-martial's jurisdiction, the accused contends he was not at the time of trial subject to military prosecution. The contention is based upon a claim that he was legally discharged from the service before court-martial proceedings were begun. A motion to dismiss on that ground was made at arraignment. After an extensive out-of-court

hearing, the law officer denied the motion. That ruling is correct.

The accused was returned from Korea to the United States by ship for the purpose of separation from the Army with an undesirable discharge under the provisions of AR 635-208. The order directing discharge and other necessary papers were forwarded to the Army Personnel Center, Oakland, California, which in turn routed them to Transfer Station, the sub-unit of the Center which processed personnel for separation. The Station was authorized to complete the records for discharge in advance of the arrival of persons transferred to it for discharge so that separation could be accomplished within twenty-four hours of actual arrival. Sometime between July 27, 1961, and August 9 or 10, a formal discharge certificate was prepared for the accused. It was dated August 11, in anticipation of compliance with the directive to accomplish discharge within twenty-four hours of arrival. On the afternoon of August 10, the accused's ship docked at San Francisco. The accused was arrested and placed in confinement at the Presidio in San Francisco, on sworn charges alleging the commission of the offenses on which he was later brought to trial. On the same afternoon, the commanding officer of Transfer Station was informed that the accused had been taken off the ship. The next morning, he was advised the accused would not be present for processing for discharge. Accordingly, the accused's name was stricken from the Processing Roster. On August 16, the order providing for accused's discharge was officially revoked. Later, the morning report records of Transfer Station were corrected to reduce by one the total number of

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persons picked up on its rolls as assigned to the unit for processing for discharge. At no time did the accused complete the normal discharge proceedings, which included, among other things, personal review of his records for the purpose of correcting errors or omissions; affixing his signature on required documents, such as the acknowledgment of notification of the right to later review of the undesirable discharge; and the receipt of final pay. Nor was the discharge certificate or notice of its preparation given to the accused. On August 14, he was interviewed in the stockade by Major Mary Conrad, the Article 32 investigating officer. She had with her the accused's official personnel file which contained the discharge papers. During the interview, the accused told Major Conrad he had been sent "home" for a discharge; and he asked whether, in light of the charges, he would be discharged. She told him it was "out of . . . [her] jurisdiction."

Separation from the service by way of discharge requires issuance of competent orders directing the

Headnote 2 discharge and "delivery . . . of the discharge certificate or other valid notice" to the person discharged of the termination of his military status. United States v Scott, 11 USCMA 646, 647, 29 CMR 462; United States v Brown, 12 USCMA 693, 31 CMR 279. There is ample evidence to support the law officer's ruling that no notice of discharge either actual or constructive was given so as to terminate accused's military status.

As to actual notice of discharge, we can assume, without deciding, that "a certificate [of discharge],
Headnote 3 when issued pursuant to lawful order, creates a presumption that the notice required for discharge was given (IV Bull JAG, 1945, Sec 466(1), p 283)." United States v Santiago, 1 CMR 365, 369. However, it is crystal clear that neither the accused, nor anyone acting in his behalf, received the discharge certificate itself or notification thereof. United States v Scott, supra; United States v Santiago, supra.

The contention of constructive notice equally lacks merit. It is predicated

on a misconception of
Headnote 4 the regulation dealing with discharge procedures.

Paragraph 17, AR 635-200, April 8, 1959, provides that a discharge is "effective at the time of notice to the enlisted person of discharge." It further provides that notice may be "actual" or "constructive." The provision on constructive delivery of a discharge reads as follows:

"(b) Constructive, when actual delivery of the discharge certificate cannot be accomplished owing to the absence of the individual to be discharged. For example, such a situation would arise if the individual were on leave or in the hands of civil authorities. Receipt by the individual's organization at his proper station of the order directing his discharge will be deemed sufficient notice. Except when the individual was on leave when discharged, the date of receipt of the order and the reason why actual notice thereof was not given will be entered, by indorsement, on the back of the discharge certificate."

The accused contends that his confinement in the stockade at the Presidio constituted an "absence" within the meaning of the quoted provision. Support for the argument is sought in paragraph 28b, AR 335-60, which, in part, provides that individuals "in arrest or confinement" are absent for the purpose of reporting the daily status of personnel of the command. Although there is persuasive authority to the contrary, we may assume, for the purpose of following appellant's argument, that one can be an absentee within the meaning of AR 635-200, although physically under actual control of the military authorities. Cf. United States v Milam, 22 CMR 862; JAGA 1956/6416, 6 Digest of Opinions, Courts-Martial § 49.2. We may also assume, for the purposes of this case, that qualified Personnel Center officials prepared the certificate of discharge and turned it over to Transfer Station. These assumptions, however, fall far short of overcoming the positive evidence of nondelivery.

Mere surrender of possession of an instrument does not establish delivery.

The surrounding circumstances must show the physical transfer of the instrument was accompanied by an intention that the instrument take effect according to its legal tenure. See *United States v Johnson*, 6 USCMA 320, 20 CMR 36. For example, a deed handed to the grantee for the sole purpose of permitting him to read it to determine the sufficiency of the description of the land does not operate as a transfer of title. 16 Am Jur, Deeds, § 124. Here, the evidence compellingly shows that when the certificate came into the possession of Transfer Station, the accused's assigned unit, there was no intention that it operate then and there to terminate accused's military status. On the contrary, it irrefutably appears that the Station had

possession of the certificate, only as one step, in a series of essential steps, in the discharge process. None of the other steps were taken. Indeed, Major Powers, the commanding officer of the Station, testified the command took affirmative measures to insure the accused's discharge would not take place as scheduled. On August 11, the date the accused was scheduled to be discharged, the Station officially struck his name from the Processing Roster; and a marker was placed in his file to show the presence of an impediment to discharge. We conclude, therefore, the law officer was correct in ruling there was no constructive delivery of the discharge certificate, or constructive notice of discharge to the accused.

The decision of the board of review is affirmed.

Judges FERGUSON and KILDAY concur.

UNITED STATES, Appellee,

v

RONALD D. CIESLAK, Airman Third Class,
U. S. Air Force, Appellant

13 USCMA 216, 32 CMR 216

Sentence and punishment § 3 — argument on sentence — removal of prejudice.

Assuming impropriety in the trial counsel's argument on the sentence, where his remarks were directed toward imposition of a punitive discharge, any possibility of prejudice was removed by the convening authority's action remitting the discharge imposed.

No. 15,888

July 27, 1962

On petition of the accused below. ACM S-20345, not reported below. Affirmed.

Major Quincey W. Tucker, Jr., argued the cause for Appellant, Accused. With him on the brief was *Colonel Joseph E. Krysakowski*.

Major James Taylor, Jr., argued the cause for Appellee, United States. With him on the brief was *Colonel Merlin W. Baker*.

Opinion of the Court

FERGUSON, Judge:

The issues on which we granted accused's petition for review in this case

concern themselves solely with trial counsel's argument on the sentence. In his summation, he suggested that im-