UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ALEJANDRO V. ARRIAGA
United States Air Force

ACM 37439 (rem 2)

18 March 2013

Sentence adjudged 28 August 2008 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: W. Thomas Cumbie.

Approved sentence: Dishonorable discharge, confinement for 4 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel James B. Roan; Lieutenant Colonel Jane E. Boomer; Major Michael S. Kerr; Major Shannon A. Bennett; and Major Andrew J. Unsicker.

Appellate Counsel for the United States: Colonel Don M. Christensen; Colonel Douglas P. Cordova; Lieutenant Colonel Jeremy S. Weber; and Gerald R. Bruce, Esquire.

Before

ORR, HARNEY, and HECKER
Appellate Military Judges

UPON FURTHER REVIEW

ORR, Senior Judge:

This case is before this Court on remand from our superior court for a second time. A panel of officer and enlisted members found the appellant guilty, contrary to his pleas, of one specification of housebreaking and one specification of indecent assault, in

violation of Articles 130 and 134, UCMJ, 10 U.S.C. §§ 930, 934.[1] The approved sentence consisted of a dishonorable discharge, confinement for 4 years, forfeiture of all pay and allowances, and reduction to E-1.[2] In an unpublished decision, this Court affirmed the findings, but found that the appellant's sentence was inappropriately severe. *United States v. Arriaga*, ACM 37439 (A.F. Ct. Crim. App. 7 May 2010) (unpub. op.), *rev'd*, 70 M.J. 51 (C.A.A.F. 2011). As a result, we determined that the appropriate sentence was a bad-conduct discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E–1. *Arriaga*, unpub. op. at 11.

The Court of Appeals for the Armed Forces (CAAF) granted review of the following issues: (1) whether the appellant's conviction for housebreaking must be set aside because housebreaking is not a lesser included offense of burglary under *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010); and (2) whether the appellant should be granted additional confinement credit as relief for being deprived of his right to timely appellate review. *United States v. Arriaga*, 69 M.J. 433 (C.A.A.F. 2010) (order granting petition for review). By its decision issued 29 April 2011, the CAAF ruled that housebreaking was a lesser included offense of burglary, but held that the appellant was denied his due process right to speedy appellate review. *Arriaga*, 70 M.J. at 54-55. As a result, our superior court set aside our decision and returned the case to this Court for further action consistent with their opinion. Having considered the issue of the appellant's right to timely appellate review in light of the CAAF's opinion, and again having reviewed the entire record, on 16 February 2012, we affirmed the approved findings and granted the appellant an additional 51 days of confinement credit. *United States v. Arriaga*, ACM 37349 (rem) (A.F. Ct. Crim. App. 16 February 2012).

On 16 April 2012, the appellant appealed our decision to the Court of Appeals for the Armed Forces (CAAF) on the sole issue of whether he was entitled to additional credit as a result of oppressive confinement, asserting that the Government deprived him of his due process right to a speedy trial review. In response, the CAAF ordered by summary disposition "that the portion of the decision of the United States Air Force Court of Criminal Appeals as to Charge III, Specification 2, and as to the sentence is reversed. . . . [T]he remaining charge and specification is affirmed." *United States v. Arriaga*, 71 M.J. 347 (C.A.A.F. 2012) (mem.). The CAAF remanded the

[1] Consistent with his pleas, the appellant was found not guilty of one specification of aggravated sexual assault, one specification of indecent assault, and one specification of assault consummated by a battery, in violation of Articles 120, 134, and 128, UCMJ, 10 U.S.C. §§ 920, 934, 928. The finding of guilty to housebreaking was a lesser included offense to the charged offense of burglary under Article 129, UCMJ, 10 U.S.C. § 929, for which the appellant was found not guilty. The appellant was also credited with 156 days of pretrial confinement.

[2] Pursuant to Articles 57(a)(2) and 58b(a)(1), UCMJ, 10 U.S.C. §§ 857(a)(2), 858b(a)(1), the convening authority deferred all of the adjudged and mandatory forfeitures commencing retroactively as of 14 days from the date of the adjudged sentence. Pursuant to Article 58b(b), UCMJ, the convening authority waived all of the mandatory forfeitures for the benefit of the appellant's dependent for a period of six months, release from confinement, or expiration of term of service, whichever is sooner, with the waiver commencing retroactively as of 14 days from the date of the adjudged sentence.

appellant's case to this Court for further consideration in light of *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012). As a result, we must now review whether the remaining charge and specification of indecent assault under Article 134, UCMJ, fails to state an offense because the specification does not expressly allege either terminal element. After reviewing the entire record and our previous decision in light of *Humphries*, we dismiss Specification 2 of Charge III.

Background

The offense at issue, charged in Specification 2 of Charge III, alleges that the appellant committed an indecent assault upon Senior Airman J.M.J., in violation of Article 134, UCMJ, as follows:

> In that SENIOR AIRMAN ALEJANDRO V. ARRIAGA . . . at or near Sumter, South Carolina, between on or about 1 March 2007 and on or about 30 April 2007, commit an indecent assault upon Senior Airman [J.M.J], a person not his wife by pressing his naked body against her body, touching her breast with his hand, placing his hand on her upper thigh underneath her skirt and attempting to kiss her, with intent to gratify his sexual desires.

Discussion

Whether a charge and specification state an offense is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted). "A specification states an offense if it alleges, either expressly or by [necessary] implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *Id.* at 211 (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)). *See also* Rule for Courts-Martial 307(c)(3).

In *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), our superior court invalidated a conviction for adultery under Article 134, UCMJ, because the military judge improperly denied a defense motion to dismiss for failure to state an offense. *Id*. at 233. This is because the charge and specification did not expressly allege at least one of the three clauses that meet the second element of proof under Article 134, UCMJ, commonly known as the "terminal element." *Id*. at 226.

Similarly, in *Humphries*, our superior court dismissed a contested adultery specification that failed to expressly allege an Article 134, UCMJ, terminal element but which was not challenged at trial. Applying a plain error analysis, the Court found that the failure to allege the terminal element was plain and obvious error which was forfeited rather than waived. But, whether a remedy was required depended on "whether the defective specification resulted in material prejudice to [the appellant]'s substantial right to notice." *Humphries*, 71 M.J. at 215 (citation omitted). Distinguishing notice issues in guilty plea cases and cases in which the defective specification is challenged at trial, the

Court explained that the prejudice analysis of a defective specification under plain error requires close review of the record: "Mindful that in the plain error context the defective specification alone is insufficient to constitute substantial prejudice to a material right . . . we look to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'" *Id*. at 215-16 (citations omitted). After a close review of the record, the court found no such notice.

Concluding that "[n]either the specification nor the record provides notice of which terminal element or theory of criminality the Government pursued," the Court identified several salient weaknesses in the record to highlight where notice was missing: (1) the Government did not even mention the adultery charge in its opening statement let alone the terminal elements of the charge; (2) the Government presented no evidence or witnesses to show how the conduct satisfied either Clause 1, Clause 2, or both clauses of the terminal element; (3) the Government made no attempt to link evidence or witnesses to either clause of the terminal element; and (4) the Government made only a passing reference to the adultery charge in closing argument but again failed to mention either terminal element. *Id*. at 216. In sum, the Court found nothing that reasonably placed the appellant "on notice of the Government's theory as to which clause(s) of the terminal element of Article 134, UCMJ, he had violated." *Id*.

Prior to our superior court's decisions in *Fosler* and *Humphries*, we would have easily concluded, as did the military judge and the litigants, that Specification 2 of Charge III stated an offense. First, the specification, as written, complied with the current state of the law at the time of the trial. It plainly described the acts that the appellant must defend against insofar as it alleged the time, place, and type of prohibited conduct. However when considering the case post-*Humphries*, the specification does not expressly allege any circumstantial impact specifically relating to one or both clauses of the terminal element.

When viewing this case in light of *Humphries*, we are hard-pressed to conclude that, on its face, the specification indicates that the alleged acts can be equated with the concepts of conduct prejudicial to good order and discipline or service discrediting. We are further compelled to disagree that the specification's allegations sufficiently narrowed down the realm of possible terminal elements the appellant could have been expected to defend against. Even if the terminal element(s) could be implied, nothing in the specification indicated which one(s) did. Clearly, the conduct described could be either conduct prejudicial or service discrediting, or both. The Government did not call any witness or present any specific evidence to show how the appellant's conduct satisfied either terminal clause of Article 134, UCMJ, nor did they mention the terminal elements during their opening statement. Although the trial counsel stated during his closing argument that the alleged sexual assaults were prejudicial to good order and discipline, the *Humphries* case indicates that mentioning the terminal elements during closing

argument after all the evidence has been admitted or during the military judge's instruction does not reasonably provide the appellant sufficient notice of the Government's theory of criminality. *Id*. at *216*. An inescapable point of *Fosler and Humphries* is that the appellant had a right to know which theory the Government was specifically alleging in order to build a defense to the charged crime. *Id*. at 217; *Fosler*, 70 M.J. at 230. Having considered the record in light of *Humphries,* as directed by our superior court, we are unable to find that the specification, as written, provided proper notice to the appellant and was not extant in the record of trial. Therefore, we find that the defective specification materially prejudiced the appellant's substantial right to notice. As a result, we must dismiss Specification 2 of Charge III.

After doing so, we must next determine whether reassessment of sentence or rehearing is required after dismissal of the indecent assault specification. Before reassessing a sentence, we must be confident "that, absent any error, the sentence adjudged would have been of at least a certain severity." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). A "dramatic change in the 'penalty landscape'" lessens our ability to reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). Ultimately, a sentence can be reassessed only if we "confidently can discern the extent of the error's effect on the sentencing authority's decision." *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991). If we cannot determine that the sentence would have been at least of a certain magnitude, we must order a rehearing.

Dismissal of the indecent assault specification reduces the maximum confinement by five years – from ten years to five years. The Article 130, UCMJ, offense provides five years of this maximum, the indecent assault provides five years. Thus, we believe the penalty landscape is substantially changed by the dismissal of the indecent assault specification. The housebreaking offense occurred in October of 2007, whereas the indecent assault occurred in March or April of 2007. As a result, the facts of the indecent assault would not have been admissible as part and parcel of the Article 130, UCMJ, offense. Applying the criteria set forth in *Sales*, we conclude that the absence of the indecent assault specification on the charge sheet would have had an effect on the sentence. *See Sales*, 22 M.J. at 308. Additionally, we cannot confidently determine that the sentence would have been of at least a certain severity absent the Article 134, UCMJ, offense.

Conclusion

The finding of guilty of Specification 2 of Charge, III, is set aside and the specification is dismissed. The remaining findings are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66 (c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

The record of trial will be returned to The Judge Advocate General for remand to the convening authority. A rehearing on the sentence is authorized.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court