UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant TROY A. PRIZER
United States Air Force

ACM 35975

22 December 2005

Sentence adjudged 18 May 2004 by GCM convened at McChord Air Force Base, Washington. Military Judge: Timothy D. Wilson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 4 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Sandra K. Whittington, and Captain David P. Bennett.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Major John C. Johnson, and Major C. Taylor Smith.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

OPINION OF THE COURT

MOODY, Senior Judge:

A general court-martial, consisting of a military judge sitting alone, convicted the appellant, in accordance with his pleas, of one specification of indecent acts with a child under 16, one specification of indecent acts with another, and one specification of communicating indecent language to a child under 16, all in violation of Article 134, UCMJ, 10 U.S.C. § 934. The judge sentenced the appellant to a dishonorable discharge, confinement for 4 years, and a reduction to E-1. The convening authority approved the sentence adjudged.

The appellant has submitted three assignments of error: (1) that Specifications 2 and 3 of the Charge are multiplicious; (2) that Specifications 2 and 3 of the Charge constitute an unreasonable multiplication of offenses; and (3) that the sentence is inappropriately severe. The appellant submitted this last assignment of error pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Finding error as to the first assignment, we order corrective action.

Background

The facts adduced during the *Care*[1] inquiry and contained in the stipulation of fact established that one evening between 1 December and 24 December 2001, the appellant was alone at home with his 11-year-old stepdaughter, KKH. The appellant discussed sexual matters with KKH and at some point touched her genitals with his fingers, moving his fingers and asking her how it felt. Subsequently, the appellant exposed himself to KKH, saying to her "Would you like to touch my penis" and "feel it," or words to that effect. In response to this, KKH briefly touched the appellant's penis.

The appellant was charged, inter alia, with taking indecent liberties with KKH by exposing his penis in her presence and encouraging the said KKH to touch his penis, with the intent to arouse his sexual desires (Specification 2), and with communicating indecent language to KKH by saying to her the words quoted above (Specification 3). Although he pled not guilty to indecent liberties under Specification 2, he pled guilty to the lesser-included offense of indecent acts with another. He pled guilty to Specification 3, as charged. It is these two specifications which the appellant contends are multiplicious.

Discussion

"A specification is multiplicious with another if it alleges the same offense, or an offense necessarily included in the other." Rule for Courts-Martial (R.C.M.) 907(b)(3), Discussion; *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000). An unconditional plea of guilty waives a multiplicity issue absent plain error. *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997). "An appellant may show plain error . . . by showing that the specifications are 'facially duplicative,' that is, factually the same." *Heryford*, 52 M.J. at 266.

The first question to be addressed, therefore, is whether the indecent language specification is facially duplicative with the specificaton alleging indecent acts with another. The appellant himself stated as much during the *Care* inquiry. When discussing Specification 2, he informed the military judge that he had asked KKH to touch his exposed penis, in response to which she did. In discussing the facts underlying the allegation of indecent language in Specification 3, he stated "When I exposed my penis to

[1] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

[her] that's when I was using the inappropriate language." Therefore, it is clear from the record that the same facts underlie both specifications. Indeed, the government's appellate brief concedes that the two specifications are facially duplicative. We conclude that the military judge committed plain error in finding the appellant guilty of both specifications. *See United States v. Powell*, 49 M.J. 460, 464 (C.A.A.F. 1998).

Having concluded that the two specifications in question are multiplicious we must now determine the appropriate remedy. Normally the remedy is dismissal of "the less serious" specification. R.C.M. 907(b)(3) Discussion; *United States v. McMillian*, 33 M.J. 257, 259 (C.M.A. 1991); *see also, United States v. Marko*, 60 M.J. 421 (C.A.A.F. 2004).

The government has urged us to remedy the error by excepting from Specification 2 the words "and encouraging the said KKH to touch his penis." However, were we to do so, the specification would state only that the appellant committed an indecent act with another "by exposing his penis to [KKH]." The facts which underlie such an allegation may well be inadequate to establish a factual basis for a plea to indecent acts with another. That is, if this Court excises the appellant's encouragement for KKH to touch his penis, along with her act of compliance, we may have removed that portion of the specification that constitutes the affirmative interaction between the appellant and the victim which is essential to the offense. *See United States v. Proctor*, 58 M.J. 792, 799 (A.F. Ct. Crim. App. 2003). We conclude that the interests both of the appellant and of the United States can be better served by applying the standard remedy. Therefore, Specification 3 of the Charge is dismissed.

Having found error as to multiplicity we have no need to address the allegation of unreasonable multiplication of charges. It remains for us to determine if we can reassess the sentence or order a rehearing. In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior court summarized the required analysis:

> In *United States v. Sales*, 22 M.J. 305 (CMA 1986), this Court set out the rules for sentence reassessment by a Court of Criminal Appeals. If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *Id*. at 307. A sentence of that magnitude or less "will be free of the prejudicial effects of error." *Id.* at 308.

We note that we are not required to discount the facts which underlie the dismissed specification, nor does that dismissal diminish the overall gravity of the appellant's offenses. We conclude that we are not required to return the case for a rehearing. Rather, we reassess the sentence as follows: dishonorable discharge,

confinement for 42 months, and reduction to E-1. We resolve the remaining assignment of error adversely to the appellant.

Conclusion

The approved findings, as modified, and sentence, as reassessed, 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). Accordingly, the approved findings, as modified, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court