UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman MICHAEL S. TUNSTALL
United States Air Force

ACM 37592 (rem)

8 October 2013

Sentence adjudged 19 November 2009 by GCM convened at Hurlburt Field, Florida. Military Judge: Michael J. O'Sullivan.

Approved sentence: Bad-conduct discharge, confinement for 6 months, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; Major Phillip T. Korman; Major Nicholas W. McCue; and Major Scott W. Medlyn.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Daniel J. Breen; Major Scott C. Jansen; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

OPINION OF THE COURT
UPON REMAND

PER CURIAM:

This case is before us on remand from our superior court. The appellant was tried from 16-19 November 2009, by a panel of officer members sitting as a general court-martial. The members convicted the appellant of one specification of aggravated sexual

assault;[1] one specification of indecent acts;[2] and one specification of adultery, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934. The members sentenced the appellant to a bad-conduct discharge, confinement for 6 months, reduction to E-1, and a reprimand. The convening authority approved the sentence as adjudged.

We affirmed the findings and sentence in an unpublished decision. *United States v. Tunstall*, ACM 37592 (A.F. Ct. Crim. App. 28 March 2012) (unpub. op.). In our decision, we held (1) The military judge did not err in instructing the members that indecent acts is a lesser included offense of the aggravated sexual assault specification charged under Article 120, UCMJ, and set forth in Specification 2 of Charge I; and (2) The failure to allege the terminal element for the adultery specification charged under Article 134, UCMJ, and set forth in Charge II, was error, but the error was insufficient to show prejudice to a substantial right of the appellant.

The Court of Appeals for the Armed Forces granted review of the following issues: (1) Whether the appellant's conviction for indecent acts must be set aside because the military judge erred in instructing the jury that indecent acts is a lesser included offense of aggravated sexual assault; and (2) Whether the finding of guilty for adultery must be dismissed in accordance with Rule for Courts-Martial 907(b)(1) because it fails to state an offense. *United States v. Tunstall*, 71 M.J. 379 (C.A.A.F. 2012) (order granting review). In a published decision dated 23 May 2013, the Court reversed our decision as to Specification 2 of Charge I, set aside the finding as to that specification, and dismissed the specification. The Court affirmed the remaining findings.[3] It set aside the sentence and remanded the case to us for further proceedings consistent with its decision. *United States v. Tunstall*, 72 M.J. 191 (C.A.A.F. 2013).

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[1] In Specification 1 of Charge I, the appellant was charged with aggravated sexual assault by engaging in sexual intercourse with A1C KS, who was substantially incapable of declining participation in the sexual act.

[2] The appellant pled not guilty to Specification 2 of Charge I, aggravated sexual assault by digitally penetrating the vagina of A1C KS, who was substantially incapable of declining participation in the sexual act. The members found the appellant not guilty of this specification, but guilty of indecent acts with another in violation of Article 120, UCMJ, 10 U.S.C. § 920. The appellant was acquitted of one specification of false official statement, in violation of Article 107, UCMJ, 10 U.S.C. § 907.

[3] Regarding the adultery charge, the Court of Appeals for the Armed Forces assessed the prejudice and concluded that the appellant was on notice of the terminal element and therefore suffered no prejudice:

> [W]here evidence in the trial record indicates that the defense introduced evidence for the specific purpose of negating both theories of the terminal element of Article 134, UCMJ, and further argued that the Government had not proven either terminal element during its closing argument, we conclude that the Appellant has not met his burden to demonstrate material prejudice to a substantial right, as he did defend himself, despite the Government's error.

United States v. Tunstall, 72 M.J. 191, 197 (C.A.A.F. 2013). The appellant has asked us to dismiss the adultery specification set forth in Charge II because it fails to state an offense. Because our superior court affirmed the findings on this issue, we decline to do so. Any decision changing the findings would be beyond the scope of the remand. *See United States v. Riley*, 55 M.J. 185, 188 (C.A.A.F. 2001).

Sentence Reassessment

In light of our superior court's decision to set aside and dismiss Specification 2 of Charge I, and to set aside the decision as to the sentence, we must determine whether reassessment of the sentence or rehearing is required. 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.

We are confident that we can reassess the sentence in accordance with the above authority. The appellant faced a maximum punishment of a dishonorable discharge, confinement for 36 years, total forfeiture of pay and allowances, and reduction to the grade of E-1. Setting aside Specification 2 of Charge I reduced the period of confinement from 36 years to 31 years. Thus, the penalty landscape is not substantially changed by the dismissal of this specification. Nevertheless, the dismissal of this specification could have some impact on the severity of the sentence adjudged.

Applying the criteria set forth in *Sales*, we are confident that, in the absence of Specification 2 of Charge I, the panel would have imposed at least a bad-conduct discharge, confinement for 4 months, reduction to E-1, and a reprimand. *See Sales*, 22 M.J. at 308. We reassess the sentence accordingly. We also find, after considering the appellant's character, the nature and seriousness of the offenses, and the entire record, that the reassessed sentence is appropriate. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *Sales*, 22 M.J. at 307-08.

Conclusion

The remaining findings and sentence, as reassessed, are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the remaining findings and sentence, as reassessed, are

AFFIRMED.

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court