UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant SEAN WALL
United States Air Force

ACM 37842

17 May 2013

Sentence adjudged 22 December 2010 by GCM convened at Scott Air Force Base, Illinois. Military Judge: Donald R. Eller.

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

Appellate Counsel for the appellant: Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Lauren N. DiDomenico; Major Scott C. Jansen; and Gerald R. Bruce, Esquire.

Before

ROAN, ORR, and HECKER
Appellate Military Judges

OPINION OF THE COURT

HECKER, Judge:

Contrary to his pleas, the appellant was convicted by officer members at a general court-martial of aggravated assault with a loaded firearm and willful discharge of a firearm under circumstances as to endanger human life, in violation of Articles 128 and 134, UCMJ, 10 U.S.C. §§ 928 and 934.[1] The adjudged and approved sentence consisted of a dishonorable discharge, confinement for 1 year and reduction to the grade of E-1.

[1] The appellant was acquitted of attempted unpremeditated murder and another specification of willful discharge of a firearm, in violation of Articles 80 and 134, UCMJ, 10 U.S.C. §§ 880, 934.

On appeal, the appellant contends his conviction for willful discharge of a firearm fails to state an offense because it does not allege the terminal element of Article 134, UCMJ, and that his sentence is inappropriately severe.[2]

Background

In mid-June 2010, Ms. RV moved into the house the appellant shared with his wife and young child. Ms. RV was good friends with the appellant's wife and they worked together. On the evening of 25 June 2010, Ms. RV went on a first date with a civilian acquaintance, Mr. BJ, whom she had met at her place of employment. The appellant met Mr. BJ for the first time when he arrived to pick up Ms. RV for their date, and the two talked about cars and guns. Mr. BJ also saw that the appellant's wife and small child lived in the house.

The two went to a local racetrack and then a carnival. While they were out, Mr. BJ drank a significant amount of alcohol and began to touch and grab Ms. RV inappropriately. After the two returned to the appellant's house at 0145, the appellant walked with them to a nearby bar. While there, Mr. BJ continued to drink alcohol and became very loud. After the bartender refused to serve him more alcohol, Mr. BJ became agitated, throwing money and pounding his fists on the bar.

Feeling uncomfortable, Ms. RV wanted to leave the bar. As she and the appellant walked together, Ms. RV was holding onto the appellant's arm as she had a sprained ankle. Seeing this, Mr. BJ became more confrontational, pulling her away from the appellant and trying to "chest bump" him. When they got back to the appellant's house, Mr. BJ began asking about sleeping arrangements because he was too intoxicated to drive home, though Ms. RV was encouraging him to leave. Mr. BJ kept grabbing her arms tightly and would not let her enter the house. Ms. RV testified that she feared for her physical safety based on how Mr. BJ was acting.

According to a statement he made to military investigators, the appellant thought he may get "whooped on" by Mr. BJ so he went to his closet to retrieve his "trump card," a .45 caliber handgun loaded with hollow point bullets. He did not think about calling 911 and instead walked out into the driveway, pointed the gun at Mr. BJ, and ordered him to leave (Mr. BJ testified that the appellant threatened to kill him if he did not leave.). With a gun pointed at his face, Mr. BJ dropped Ms. RV's arm. Impatient because Mr. BJ had not gotten into his vehicle, the appellant fired a shot into the air, pointed the gun at Mr. BJ again, and told him to get in the car and leave. When Mr. BJ did not leave immediately, the appellant fired a shot into the concrete driveway at Mr. BJ's feet.

[2] The second issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

At this point, Mr. BJ got into his vehicle and backed up into the street. The appellant told investigators he felt his life was in danger because the vehicle lurched at him, forcing him to jump out of the way. In contrast, Mr. BJ testified he was trying to leave the driveway as fast as possible and drove over some landscaping and a mailbox in his haste, while Ms. RV remembered Mr. BJ putting his truck into reverse and coming back towards them. The appellant aimed his weapon at the back of Mr. BJ's head through the rear window and fired again, missing Mr. BJ.

The appellant then called 911. Civilian law enforcement encountered Mr. BJ speeding out of the neighborhood and stopped him. After he refused to follow instructions and resisted arrest, Mr. BJ was "tased" and forced into a police car. The appellant and Ms. RV gave statements to civilian investigators.

The appellant was charged with two specifications of willful discharge of a firearm under such circumstances as to endanger human life. These specifications were based on him firing into the air and then into the driveway. The panel acquitted him of the first specification but convicted him of the second. He was also charged with attempted unpremeditated murder for firing at Mr. BJ as he drove away in his vehicle, and with aggravated assault for this same event. He was acquitted of the attempted murder charge, but convicted of aggravated assault.

Failure to State an Offense

On appeal, the appellant asserts that Specification 2 of Charge II failed to state an offense because it does not allege the terminal element of Article 134, UCMJ. It alleges violations of that Article, as follows:

> In that [the appellant] . . . did, at or near Collingville, Illinois, on or about 26 June 2010, wrongfully and willfully discharge a firearm, to wit: a loaded firearm, into the ground, under circumstances such as to endanger human life.

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.* (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. Humphries*, 71 M.J. 209 (C.A.A.F. 2012), our superior court dismissed a contested adultery specification whose failure to allege an Article 134, UCMJ, terminal element was not challenged at trial. Applying a plain error analysis, the Court found the failure to allege the terminal element was plain and obvious

error but only required a remedy if "the defective specification resulted in material prejudice to [the appellant's] substantial right to notice." *Id*. at 215 (citation omitted). 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 (citing *United States v. Puckett*, 556 U.S. 129, 142 (2009); *United States v. Cotton*, 535 U.S. 625, 633 (2002); *United States v. Johnson*, 520 U.S. 461, 470 (1997)).

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 such notice was missing: (1) the Government did not even mention the Article 134, UCMJ, specification in its opening statement let alone the terminal elements of the charge; (2) the Government presented no evidence or witnesses to show how the accused's 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 Article 134, UCMJ, 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*. (citation omitted).

Viewing this case in light of *Humphries* and following a close review of the record, we find the failure to allege the terminal element was plain and obvious error. In addressing the prejudice from this defective specification, we also find notice of the missing element was not extant in the record and the element was not essentially uncontroverted. Thus finding plain and obvious error in these defective specifications, we are further compelled to find material prejudice since the record does not indicate the appellant was otherwise on notice of those elements.

An inescapable point of *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 216. We note that the Government presented evidence that reasonably implied the appellant's actions were service discrediting. But, the Government did not present any specific evidence to show why the appellant's conduct satisfied either terminal clause of Article 134, UCMJ, nor did they mention the terminal elements during their opening statement. Even though the trial counsel stated during his closing argument that the appellant's willful discharge of a firearm in a civilian neighborhood was service discrediting, and the Article 32, UMCJ, 10 U.S.C. § 832, investigating officer referenced the evidence supporting the terminal element in his

report, *Humphries* indicates that more is required to provide the appellant sufficient notice of the Government's theory of criminality. *Humphries*, 71 M.J. at 216.

In sum, we can find nothing in the record 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. Given the mandate set out by our superior court in *Humphries*, we are compelled to set aside and dismiss Specification 2 of Charge III and Charge III.

Sentence Reassessment

Having found error regarding the discharge of a firearm specification, we must consider whether we can reassess the sentence or whether we must return the case for a rehearing on sentence. After dismissing a charge, our Court may reassess the sentence if we can determine to our satisfaction that, absent the error, the sentence adjudged would have been at least a certain severity, as a sentence of that severity or less will be free of the prejudicial effects of that error. *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1988). Even within this limit, the Court must determine that a sentence it proposes to affirm is "appropriate," as required by Article 66(c), UCMJ, 10 U.S.C. § 866(c). "In short, a reassessed sentence must be purged of prejudicial error and also must be 'appropriate' for the offense involved." *Id*. at 307-08. Under this standard, we have determined that we can discern the effect of the errors and will reassess the sentence on the basis of the errors noted, the entire record, and in accordance with the principles of *Sales* and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), to include the factors identified by Judge Baker in his concurring opinion in *Moffeit*.

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). Here, the court-martial panel was informed that the maximum sentence the appellant faced after being convicted of aggravated assault and willful discharge of a firearm was a dishonorable discharge, confinement for nine years, reduction to E-1, and total forfeitures of pay and allowances. The willful discharge specification accounted for one year of that maximum sentence. Our dismissal of the willful discharge specification does not result in a dramatic change to the overall penalty landscape.

Furthermore, even in the appellant had never been charged with willfully discharging a firearm, the fact that he fired the weapon into the ground at the feet of Mr. BJ just minutes before he fired another shot at the back of Mr. BJ's head as he drove away would still have been before the panel as part of the facts and circumstances of the aggravated assault specification and/or as proof of his opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident. Mil. R. Evid. 404(b).

Under the circumstances of this case, we are convinced that, absent this error, the panel would have imposed and the convening authority would have approved the same sentence. Additionally, we have given individualized consideration to this particular appellant, the nature and seriousness of the offenses of which he was convicted, his record of service, and all other matters properly before the panel in the sentencing phase of the court-martial. *See United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We find that the adjudged and approved sentence was appropriate in this case and was not inappropriately severe.

Conclusion

The finding of guilt as to Specification 2 of Charge III and Charge III are set aside and dismissed. The remaining findings and sentence, following reassessment, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[3] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the remaining findings and the sentence, as reassessed, are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[3] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).