UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman GUSTAVO A. ABADIA
United States Air Force

ACM 37682

24 September 2012

Sentence adjudged 18 November 2009 by GCM convened at Ramstein Air Base, Germany. Military Judge: Jennifer L. Cline.

Approved sentence: Bad-conduct discharge, confinement for 33 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; Major Reggie D. Yager; Captain Travis K. Ausland; Captain Robert D. Stuart; and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Naomi N. Porterfield; Major Roberto Ramirez; Captain Matthew J. Neil; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and CHERRY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

GREGORY, Senior Judge:[1]

A general court-martial composed of officer and enlisted members convicted the appellant contrary to his pleas of abusive sexual contact, wrongful sexual contact, assault consummated by a battery, unlawful entry, and incapacitation for the performance of

[1] Lieutenant General Richard C. Harding, The Judge Advocate General of the Air Force, designated Senior Judge Gregory as the Chief Appellate Military Judge for this case only, pursuant to a memorandum dated 30 August 2012.

duty, in violation of Articles 120, 128 and 134, UCMJ, 10 U.S.C § 920, 928, 934. The court sentenced him to a bad-conduct discharge, confinement for three years, and reduction to the grade of E-1. The convening authority approved the bad-conduct discharge and reduction in grade but reduced the adjudged confinement by three months because of post-trial processing delay. The appellant assigns two errors: (1) whether the two Article 134, UCMJ, specifications fail to state offenses because neither alleges the terminal element and (2) whether an additional 13 days of credit should be awarded for post-trial processing delay.

Background

The appellant has a history of alcohol abuse which contributed to the crimes for which he was court-martialed. After an evening of drinking in local bars, he returned to the dormitories on base where he planned to visit a female acquaintance. He instead entered an adjacent room, which happened to be unlocked, and sexually molested the female Airman he found sleeping there. As the appellant acknowledged in his confession, "I knew I had made a big mistake and touched the wrong girl." A few months later, following another night of drinking, the appellant assaulted his wife. The morning after the assault, the appellant appeared intoxicated when he reported to work.

Article 134, UCMJ, Terminal Element

At the conclusion of the Government's case, trial defense counsel moved for a finding of not guilty of incapacitation for duty because, he argued, the proof failed to show that the appellant's conduct was prejudicial to good order and discipline. The military judge denied the motion. In closing argument, trial counsel argued that both unlawful entry and incapacitation for duty were prejudicial to good order and discipline. Defense counsel argued that the proof failed to show that either offense was prejudicial to good order and discipline.

In his assignment of errors, the appellant argues that neither Article 134, UCMJ, specification is sufficient to allege an offense because both omit the terminal element. In a later reply brief, the appellant appears to concede that the discussion of the terminal element during defense counsel's motion for a finding of not guilty is sufficient to demonstrate notice of the terminal element for the incapacitation for duty charge, but he maintains that the record fails to show any such notice for the unlawful entry charge. Relying primarily on the recently decided *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012), the appellant argues that the record is insufficient to show notice of which terminal element the unlawful entry violated.

In *Humphries*, the Court dismissed a contested adultery specification that failed to expressly allege an Article 134, UCMJ, terminal element but which was not challenged at trial. *Humphries*, 71 M.J. at 216-17. 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. *Id*. at 215. But, whether a remedy was required depended on "whether the defective specification resulted in material prejudice to Appellee's substantial right to notice." *Id*. 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. After a close review of the record, the Court found no such notice. *Id*. at 216.

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. *Humphries*, 71 M.J. 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*.

Further contributing to the lack of reasonable notice was the relatively minor nature of the adultery charge compared to the far more serious allegations of rape and forcible sodomy. Noting the impact of this disparity in charges on the prejudice analysis, the Court stated that "the material prejudice to the substantial right to constitutional notice in this case is blatantly obvious, in large part because it appears the charge was, as Appellee argued at trial, a 'throw away charge[ ].'" *Id*. at 217 n. 10. In its search of the record for notice, the Court found "not a single mention of the missing element, or of which theory of guilt the Government was pursuing, anywhere in the trial record." *Id*. at 217. As the Court reaffirmed in *Humphries*, it is the appellant's burden to prove material prejudice to a substantial right. *Id*. at 217 n. 10.

Turning first to the incapacitation for duty charge, the record shows that the appellant was not prejudiced by the defective specification. In his motion for finding of not guilty, the appellant expressly states the terminal element at issue in arguing a deficiency of proof: *"[W]hen you look at the elements that are required for this offense,* the government never introduced any evidence that his conduct was to the prejudice of good order and discipline." (Emphasis added.) Trial counsel argued that the evidence was sufficient to show that the appellant's conduct in showing up for duty intoxicated

was prejudicial to good order and discipline. Although not expressly alleged in the specification, this discussion shows sufficient notice of the terminal element in dispute and that the defective specification did not materially prejudice the appellant's substantial right to notice.

The unlawful entry specification is similarly defective, but it was not subject to a motion for a finding of not guilty. The military judge instructed on all the elements, including the terminal elements, but such instructions "came after the close of evidence and, again, did not alert [the appellant] to the Government's theory of guilt." *Humphries*, 71 M.J. at 216. Both sides argued the terminal element of conduct prejudicial to good order and discipline during closing. As trial counsel stated, to say that unlawfully entering the dormitory room of another military member is not prejudicial to good order and discipline is "offensive." But discussing the terminal element after the close of evidence was, according to our reading of *Humphries*, too late to provide adequate notice to the appellant of which terminal element or elements he should defend against. Therefore, we find that the defective specification materially prejudiced the appellant's substantial right to notice.

We must next determine whether reassessment of sentence or rehearing is required after dismissal of the unlawful entry 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 unlawful entry specification reduces the maximum confinement by six months – from nine years and three months to eight years and nine months. The Article 120, UCMJ, offenses provide eight years of this maximum, the assault provides six months, and the incapacitation for duty provides three months. Thus, the penalty landscape is not substantially changed by the dismissal of the unlawful entry specification. Further, the facts of the unlawful entry would have been admissible as part and parcel of the charged Article 120, UCMJ, offenses. Applying the criteria set forth in *Sales*, we conclude that the absence of the unlawful entry specification on the charge sheet would have had no effect on the sentence. *See Sales*, 22 M.J. at 308.

Post-Trial Processing Delay

We review de novo whether an appellant's due process right to a speedy post-trial review has been violated. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). A

presumption of unreasonable delay applies if (1) the convening authority does not act on a case within 120 days of trial, (2) a case is not docketed with the respective service court within 30 days of action, and (3) the respective service court does not decide the case within 18 months of docketing. *Id*. at 142. The appellant's case failed all three *Moreno* gates: (1) 180 days passed from trial to action, (2) 43 days passed from action to docketing, and (3) over 26 months passed from docketing to decision.

Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to timely review and appeal, and (4) prejudice. *Moreno*, 63 M.J. at 135-36. When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). In evaluating prejudice, we focus on three primary factors: (1) prevention of oppressive incarceration pending appeal, (2) minimization of anxiety and concern, and (3) limitation on the ability to present a defense at a retrial following a successful appeal. *Moreno*, 63 M.J. at 138-140.

Concerning the initial delay between trial and action, the convening authority awarded a credit of three months off the adjudged confinement, and the appellant does not seek an additional remedy. He does, however, ask for additional confinement credit of 13 days for the 43 days between the convening authority's action and docketing. Citing *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990), the appellant argues that this delay is "the least defensible of all" and that we should grant additional credit to send a clear message that a "lackadaisical attitude toward forwarding records" is unacceptable. While we agree that all involved in the military justice process should strive for efficiency, the 43 days in appellant's case is hardly comparable to the 2 ½ *years* from action to docketing in *Dunbar* – and even in that egregious case the Court found no prejudice. *Dunbar*, 31 M.J. at 73-74. Finally, we find no discernible prejudice in the overall delay of 26 months between docketing and decision. In fact, the delay permitted his counsel to use the recently decided *Humphries* case to successfully argue for the dismissal of the unlawful entry specification. And, as we state above, the dismissal of that specification has no impact on the sentence. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

Conclusion

The finding of guilty of Charge III, Specification 1, is set aside, and the specification is dismissed. The remaining findings and the 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 and the sentence are

AFFIRMED.

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