UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MATTHEW B. ALBRIGHT
United States Air Force

ACM 37961

6 August 2013

Sentence adjudged 23 March 2011 by GCM convened at Royal Air Force Lakenheath, United Kingdom. Military Judge: Jefferson B. Brown and Dawn R. Eflein (sitting alone).

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

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

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Megan E. Middleton; and Gerald R. Bruce, Esquire.

Before

STONE, HARNEY, and SOYBEL[1]
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

A general court-martial composed of a military judge alone convicted the appellant, in accordance with his pleas, of violating a lawful order, in violation of Article 92, UCMJ, 10 U.S.C. § 892. He was also convicted of receiving and possessing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. After trial on the merits of the remaining charges, the military judge also convicted him, contrary to his pleas, of making a false official statement, in violation of Article 107, UCMJ, 10 U.S.C.

[1] Upon our own motion, this Court vacates the previous decision in this case and has reconsidered it before a properly constituted panel. Our decision today reaffirms our earlier decision.

§ 907; indecent acts and wrongful sexual contact, in violation of Article 120, UCMJ, 10 U.S.C. § 920; and unlawful entry, in violation of Article 134, UCMJ. The court sentenced the appellant to a dishonorable discharge, confinement for four years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

Although not challenged at trial, the appellant now argues that two specifications alleging unlawful entry fail to state an offense because neither—expressly or by necessary implication—alleges the terminal elements required for an Article 134, UCMJ, offense.[2] Whether a charged specification states 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 the case of a litigated Article 134, UCMJ, specification that does not allege the terminal element but which was not challenged at trial, the failure to allege the terminal element is plain and obvious error, which is forfeited rather than waived. The remedy, if any, depends on "whether the defective specification resulted in material prejudice to Appellee's substantial right to notice." *United States v. Humphries*, 71 M.J. 209, 215 (C.A.A.F. 2012). The prejudice analysis of a defective specification under plain error requires a close review of the record. Indeed, we must be:

> 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).

In accordance with *Humphries*, we are compelled to disapprove the findings of guilty to the two unlawful entry specifications alleged under Charge IV as a violation of Article 134, UCMJ. Neither specification alleges the terminal elements and neither side mentioned the terminal elements during the trial. We find nothing in the record to satisfactorily establish notice of the need to defend against the terminal elements, and there is no indication the evidence was uncontroverted as to the terminal elements.[3]

[2] The appellant also raised an issue regarding the completeness of the record of trial because a computer disk labeled as Appellate Exhibit XI failed to open. A court paralegal successfully opened the disk and both sides had an opportunity to review it, and both sides agreed that the issue was moot.

[3] The Government argues Judge Stucky's dissenting view that the Article 32, UCMJ, 10 U.S.C. § 832, hearing provided fair and accurate notice of the terminal element. *United States v. Humphries*, 71 M.J. 209, 222 (C.A.A.F. 2012) (Stucky, J., dissenting). As compelling as that view may be, it did not persuade the three-judge majority.

Although the appellant pled guilty to two other unrelated Article 134, UCMJ, offenses, the advice on the terminal elements of those offenses is insufficient to provide notice on the litigated specifications. *See United States v. Ballan*, 71 M.J. 28, 34-36 (C.A.A.F.), *cert. denied*, 133 S. Ct. 43 (2012) (mem.) (While failure to allege the terminal element of an Article 134, UCMJ, offense is error, in the context of a guilty plea, the error is not prejudicial when the military judge correctly advises the appellant of all the elements and the plea inquiry shows that the appellant understood which offense and under what legal theory he was pleading guilty.).

On consideration of the entire record, and pursuant to *Humphries*, the findings of guilty to Specifications 3 and 4 of Charge IV are set aside and dismissed. Reassessing the sentence on the basis of the error noted, the entire record, and in accordance with the principles of *United States v. Sales*, 22 M.J. 305 (CM.A. 1986), 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*, this Court finds that the sentence, as approved by the convening authority, is appropriate for the remaining offenses.[4]

Conclusion

The findings of guilty of Specifications 3 and 4 of Charge IV are set aside, and the specifications are dismissed. The remaining findings and the sentence, as reassessed, is correct in law and fact, and no error prejudicial to the substantial rights of the appellant remains.[5] Article 66(c), UCMJ, 10 U.S.C. § 866(c).

[4] The facts and circumstances surrounding the dismissed specifications were properly before the court as res gestae of the charged Article 120, UCMJ, 10 U.S.C. § 920, offenses. Dismissing the two unlawful entry specifications does not substantially change the penalty landscape: the two unlawful entry specifications carried a combined maximum confinement of one year, so their dismissal reduces the maximum imposable confinement from 42 years and six months to 41 years and six months. Under the facts of this case, we are confident that the military judge would have imposed the same sentence.

[5] We note that the overall delay of more than 18 months between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). These include "(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." *See United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). 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). This approach is appropriate in the appellant's case. The post-trial record contains no evidence that the delay has had any negative impact on the appellant. 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.

Accordingly, the modified findings and reassessed sentence are

AFFIRMED.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist