UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CHADRICK L. CAPEL
United States Air Force

ACM S31819 (rem)

01 July 2013

Sentence adjudged 23 April 2010 by SPCM convened at Moody Air Force Base, Georgia. Military Judge: David S. Castro (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of $200.00 pay per month for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Major Matthew T. King; and Major Andrew J. Unsicker.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Brian C. Mason; Major Naomi N. Porterfield; Major Jason S. Osborne; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

ON REMAND

This opinion is subject to editorial correction before final release.

PER CURIAM:

This case is before this Court on remand from our superior court. On 23 April 2010, a special court-martial composed of a military judge sitting alone convicted the appellant of one specification of false official statement, two specifications of larceny, and three specifications of obtaining services under false pretenses, in violation of

Articles 107, 121, and 134, UCMJ, 10 USC §§ 907, 921, and 934.[1] The approved sentence consisted of a bad-conduct discharge, confinement for 6 months, forfeiture of $200.00 pay per month for 6 months, and reduction to E-1. We affirmed the findings and sentence in an unpublished decision. *United States v. Capel*, ACM S31819 (A.F. Ct. Crim. App. 16 December 2011) (unpub. op.).

The Court of Appeals for the Armed Forces granted review of the following issues: (1) whether this Court misapplied the law in finding that, despite failing to expressly allege the terminal element, the Article 134, UCMJ, specifications stated an offense; and (2) whether the evidence was legally sufficient to sustain the appellant's conviction for making a false official statement under Article 107, UCMJ. *United States v. Capel*, 71 M.J. 314 (C.A.A.F. 2012) (order granting review). In a published decision dated 14 February 2013, the Court: reversed our decision and dismissed Charge I and its Specification (false official statement); affirmed Charge II and its Specifications (larceny); and reversed and remanded Charge III and its Specifications (obtaining services under false pretenses) for further consideration in light of *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012). *United States v. Capel*, 71 M.J. 485 (C.A.A.F. 2013). As a result, we must now review whether the remaining charge and specifications of obtaining services under false pretenses fail to state an offense because the specifications do not allege the terminal element.

Background

The offenses at issue, as charged in the specifications of Charge III, allege that the appellant obtained services by false pretenses under Article 134, UCMJ, as follows:

> Specification 1: Did, at or near Valdosta, Georgia, on or about 24 August 2009, with intent to defraud, falsely pretend to the city of Valdosta that the debit card number used to provide payment belonged to the aforementioned SENIOR AIRMAN CHADRICK L. CAPEL as opposed to Staff Sergeant [TA], then knowing that the pretenses were false, and by means thereof did wrongfully obtain from the city of Valdosta services, of a value of about $147.41, to wit: water service.
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> Specification 2: Did, at or near Valdosta, Georgia, on or about 24 August 2009, with intent to defraud, falsely pretend to Mediacom Communications Corporation that the debit card number used to provide payment belonged to the aforementioned SENIOR AIRMAN CHADRICK L. CAPEL as opposed to Staff Sergeant [TA], then knowing that the pretenses were false, and by means thereof did wrongfully obtain from Mediacom

[1] The appellant was acquitted of a third specification of larceny, in violation of Article 121, UCMJ, 10 U.S.C. § 921.

Communications Corporation services, of a value of about $306.16, to wit: cable service.

Specification 3: Did, at or near Valdosta, Georgia, on or about 25 August 2009, with intent to defraud, falsely pretend to Verizon Wireless that the debit card number used to provide payment belonged to the aforementioned SENIOR AIRMAN CHADRICK L. CAPEL as opposed to Staff Sergeant [TA], then knowing that the pretenses were false, and by means thereof did wrongfully obtain from Verizon Wireless services, of a value of about $176.97, to wit: cellular telephone service.

Article 134, UCMJ, Specifications and Terminal Element

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*. (citations omitted); *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." *Humphries*, 71 M.J. at 215. To decide if the defective specification resulted in material prejudice to a substantial right, this Court "look[s] 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 (internal quotation marks and citations omitted).

We have reviewed the record of trial in this case, and in accordance with *Humphries*, we disapprove the findings of guilty to the three specifications of Charge III alleging false pretenses, in violation of Article 134, UCMJ. The specifications do not allege the terminal element. We find nothing in the record to satisfactorily establish notice of the need to defend against the terminal element, and there is no indication the evidence was uncontroverted as to the terminal element. The Government did not mention the terminal element during opening statement, nor did trial counsel call any witness or present any specific evidence showing how the appellant's conduct satisfied the terminal element. Trial counsel stated during closing argument that the appellant's conduct was prejudicial to good order and discipline and service discrediting. *Humphries*, however, instructs that, without more, a mention during closing argument does not provide the appellant sufficient notice of the Government's theory of criminality. *Id*. at 216.

Having considered the record in light of *Humphries*, as directed by our superior court, we are unable to find that the specifications, as written, notified the appellant of the terminal element, nor can we find notice of the missing element extant in the trial record or that the element is "essentially uncontroverted." *Id*. at 215-16 (internal quotation marks and citations omitted).

Therefore, we find that the defective specifications materially prejudiced the appellant's substantial right to notice. As a result, we must dismiss Specifications 1, 2, and 3 of Charge III. The findings of guilty to the Specifications of Charge III are set aside and dismissed.

Sentence Reassessment

Because the Specification of Charge I and Specifications 1, 2, and 3 of Charge III have been set aside, we must next determine whether reassessment of 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. Setting aside the specifications of Charge I and III does not change the maximum punishment the appellant faced, which is the jurisdictional limit of the special court-martial. Thus, the penalty landscape is not substantially changed by the dismissal of these specifications. Nevertheless, the dismissal of these three specifications 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 the specifications of Charge I and III, the panel would have imposed at least a bad-conduct discharge, 5 months of confinement, forfeiture of $200.00 pay per month for 5 months, and reduction to the grade of E-1. *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. 307-08.

Conclusion

Having considered the record in light of *Humphries* as directed by our superior court, the findings of guilty to Specifications 1, 2, and 3 of Charge III are set aside and the Specifications are dismissed. The remaining findings are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and the sentence, as reassessed are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court