UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class PAUL A. TITCOMBE
United States Air Force

ACM 37618 (f rev)

30 November 2012

Sentence adjudged 3 December 2009 by GCM convened at Grand Forks Air Force Base, North Dakota. Military Judge: W. Thomas Cumbie (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 21 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; Lieutenant Colonel Frank R. Levi; Captain Nathan A. White; and Captain Scott W. Medlyn.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Deanna Daly; Major Joseph J. Kubler; Major Naomi N. Porterfield; Captain Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

STONE, GREGORY, and HARNEY
Appellate Military Judges

UPON FURTHER REVIEW

PER CURIAM:

A general court-martial composed of military judge alone convicted the appellant, contrary to his pleas, of abusive sexual contact, wrongful sexual contact, and two specifications of unlawful entry, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934, and sentenced the appellant to a bad-conduct discharge, confinement for 21 months, and reduction to E-1. The military judge acquitted the appellant of a charged

burglary but found him guilty of the lesser included offense of unlawful entry, in violation of Article 134, UCMJ. The convening authority approved the sentence adjudged.

In light of *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010), and its progeny, we previously set aside the conviction of unlawful entry as a lesser included offense but affirmed the remaining findings of guilty, including a separate unlawful entry alleged in Additional Charge II. We reassessed the sentence and approved the sentence adjudged, finding that the dismissed charge contributed only six months to the nine year maximum confinement and that the facts underlying it would have been admissible as part of the facts and circumstances of the charged sexual offense. *United States v. Titcombe*, ACM 37618 (A.F. Ct. Crim. App. 1 December 2011), *rev'd*, 71 M.J. 355 (C.A.A.F. 2012). Our superior court reversed that portion of our decision affirming the conviction of unlawful entry in Additional Charge II, reversed as to sentence, and remanded the case for further consideration in light of *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012). *Titcombe*, 71 M.J. at 355.

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. 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. *Humphries*, 71 M.J. at 211. The remedy, if any, depended on "whether the defective specification resulted in material prejudice to Appellee's substantial right to notice." *Id*. at 215. 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 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*. at 216.

As in *Humphries*, the charge at issue here does not allege the terminal element and the trial counsel did not mention the terminal element until closing argument when he simply stated, "Obviously, an added element on that, Your Honor, with regards to the conduct to the prejudice of good order and discipline – you can see the obvious and direct effect on good order and discipline. You can't have Airmen entering other Airmen's rooms. That's a problem."

Essentially, trial counsel argued that proof of unlawful entry necessarily proved the terminal element. We find the argument here insufficient to provide the required notice of the terminal elements. Therefore, after a close reading of the record and in accordance with *Humphries*, we find the appellant suffered material prejudice to his constitutional right to notice.[*] The finding of guilty of Additional Charge II and the specification thereunder is set aside, and that charge and specification are dismissed.

Unlike the previously dismissed unlawful entry charge, the facts and circumstances of this offense would not have been otherwise admissible as there was no corresponding sexual offense. 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*, we reassess the sentence and approve only so much of the sentence as provides for a bad-conduct discharge, confinement for 19 months, and reduction to E-1.

Conclusion

The findings, as modified, and 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 modified findings and reassessed sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court

[*] The Government argues Judge Stucky's dissenting view that the hearing pursuant to Article 32, UCMJ, 10 U.S.C. § 832, 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.