UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant PATRICK CARTER
United States Air Force

ACM 37715

04 January 2013

Sentence adjudged 26 February 2010 by GCM convened at Scott Air Force Base, Illinois. Military Judge: Grant L. Kratz and Michael J. O'Sullivan.

Approved sentence: Dishonorable discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; Captain Shane A. McCammon; and Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Lauren N. DiDomenico; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

OPINION OF THE COURT

ROAN, Senior Judge:

Contrary to his pleas, the appellant was convicted by a panel of officer members at a general court-martial of one specification of taking indecent liberties with a child under the age of 16, one specification of child endangerment, and one specification of committing indecent acts with a child under the age of 16, in violation of Articles 120

and 134, UCMJ, 10 U.S.C. §§ 920, 934.[1] The adjudged sentence consisted of a dishonorable discharge, confinement for 4 years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority disapproved the finding of guilty with respect to taking indecent liberties with a child under the age of 16, and approved the remaining findings. The approved sentence consisted of a dishonorable discharge, 3 years of confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1.

The appellant raises six issues for our consideration: (1) Whether the specifications under Charge III failed to state an offense, because they do not allege the terminal element; (2) Whether the military judge erred to the prejudice of the appellant, by failing to issue a mandatory instruction to the panel members to cure trial counsel's improper propensity argument; (3) Whether the appellant was deprived of his right to a public trial; (4) Whether the appellant was deprived of his right to speedy post-trial review by the convening authority; (5) Whether the evidence is legally and factually sufficient to sustain his conviction; and (6) Whether the appellant received ineffective assistance of counsel.[2]

Background

The appellant's 13-year old biological daughter, GC, told a social worker at her school that the appellant had been sexually molesting her since she was 10-years old. GC subsequently told authorities that over a two-year period, the appellant had raped, sodomized, and digitally penetrated her while in their home. Among other charges, the appellant was charged with three violations of Article 134, UCMJ.

In Specification 1 of Charge III, the appellant was charged with "endanger[ing] the mental health, physical health, safety and welfare of [GC, a child under the age of 16 years], by committing sexual acts with her and instructing her not to tell anyone about the said acts and that such conduct was by design," in violation of Article 134, UCMJ. Specification 2 of Charge III alleged that the appellant "commit[ed] indecent acts upon the body of [GC], a female under the age of 16 years . . . by rubbing and biting her breasts, rubbing her genitals with his hand, and digitally penetrating her vagina, with intent to gratify the sexual desires of [the appellant]," also in violation of Article 134, UCMJ.[3] Specification 3 of Charge III alleged that the appellant endangered GC's "health and welfare" on divers occasions to the prejudice of good order and discipline or was of a

[1] The appellant was acquitted of one specification of raping a child under the age of 12, one specification of raping a child between the ages of 12 and 16, one specification of aggravated sexual assault of a child between the ages of 12 and 16, one specification of sodomy with a child under the age of 12, and one specification of sodomy with a child between the ages of 12 and 16, in violation of Articles 120, and 125 UCMJ, 10 U.S.C. §§ 920, 925.
[2] Issues 4, 5, and 6 were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[3] The members found the appellant guilty of Specification 2 of Charge III, except the words "digitally penetrating her vagina."

nature to bring discredit upon the armed forces.[4] Specifications 1 and 2 did not allege an Article 134, UCMJ, terminal element.

Prior to entering pleas, the defense moved to dismiss specification 3 for failure to state an offense, contending its language did not provide notice of the specific conduct that formed the basis of the child endangerment allegation. The trial counsel argued that the specification, as drafted, adequately stated an offense because it "is an Article 134 offense, general article under either clause one or clause two," and that the appellant's alleged rape of his daughter, as described in Charge I, expressed the criminality of his actions with respect to Specification 3 of Charge III. The military judge granted the defense motion, finding the specification failed to readily identify the criminality of the appellant's behavior.

Failure to State an Offense

The appellant argues that his conviction for reckless endangerment of a child and indecent acts with a child, as alleged in Specifications 1 and 2 of Charge III, respectively, should be set aside and dismissed because neither specification alleges the Article 134, UCMJ, terminal element of being either prejudicial to good order and discipline (Clause 1) or service discrediting (Clause 2). We agree.

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)); Rule for Courts-Martial 307(c)(3). Because the appellant did not request a bill of particulars or move to dismiss the specifications for failure to state an offense, we analyze this case for plain error and in doing so find that the failure to allege the terminal element was "plain and obvious error which was forfeited rather than waived." *United States v. Humphries*, 71 M.J. 209, 215 (C.A.A.F. 2012). *See also United States v. Fosler*, 70 M.J. 225, 230-231 (C.A.A.F. 2011); *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F.), *cert denied*, 133 S. Ct. 43 (2012) (mem.).

However, a finding of error does not alone warrant dismissal. *Ballan*, 71 M.J. at 34. Whether a remedy is required depends on "whether the defective specification resulted in material prejudice to [the appellant's] substantial right to notice." *Humphries*, 71 M.J. at 215. We test prejudice in the context of a contested case by looking at the trial record "to determine whether notice of the missing element is somewhere extant in the trial record or . . . is essentially uncontroverted." *Id*. at 215-16.

[4] Because the offense of "child endangerment" was not added as an offense to Article 134, UCMJ, 10 U.S.C. § 934, until 1 October 2007, the Government charged the appellant with a general offense under Article 134, UCMJ, for his conduct prior to that date.

After a close review of the trial record, we find no such notice "somewhere extant in the trial record," nor is there any indication that the evidence was unconverted as to the terminal elements. As in *Humphries*, salient weaknesses in the record highlight where notice was missing: (1) the Government presented no evidence or witnesses to testify as to why the appellant's conduct violated either Clause 1 or Clause 2 of Article 134, UCMJ, and (2) the Government did not reference the terminal element during its case-in-chief or make an attempt to link evidence or witnesses to Clause 1 or 2 in either its opening statement or closing argument. Although the military judge's instructions to the members properly delineated the terminal elements of Article 134, UCMJ, this took place "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.

Furthermore, we are unwilling to ascribe the trial counsel's discussion of the terminal elements with respect to Specification 3 of Charge III as providing adequate notice of the missing elements relative to the other two specifications. The discussion surrounding Specification 3 was not centered on the inclusion of the terminal elements; rather, it focused on whether the allegation described with sufficient specificity the particular conduct that was alleged to have constituted child endangerment. Indeed, the fact that the Government did not specifically allege the terminal element in Specifications 1 and 2, despite having done so in Specification 3, appears to be the product of a deliberate decision not to do so.

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 of the terminal element of Article 134, UCMJ, he had violated.[5] Given the mandate set out by our superior court in *Humphries*, we are compelled to set aside and dismiss Charge III and its specifications.[6]

Speedy Post-Trial Review

Because the overall delay of more than 540 days between the time this case was docketed with the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable, we examine and balance the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), to determine if the appellant's due process rights have been violated: "(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." *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006).

We will grant relief to an appellant who has been denied the due process right to speedy post-trial review and appeal unless we are "convinced beyond a reasonable doubt

[5] The Government argues that we should adopt Judge Stucky's dissenting view that the Article 32, UCMJ, 10 U.S.C. § 832, hearing provided the appellant with sufficient notice of the Article 134, UCMJ, terminal element. *United States v. Humphries*, 71 M.J. 209, 222 (C.A.A.F. 2012) (Stucky, J., dissenting). We note this rationale did not persuade the three-judge majority and decline to apply it to this case.

[6] Given our decision, it is unnecessary to discuss the remaining assignments of error.

that the constitutional error is harmless." *United States v. Toohey*, 63 M.J 353, 363 (C.A.A.F. 2006). In *Moreno*, the Court of Appeals for the Armed Forces provided a non-exhaustive list of the types of relief available for denial of speedy post-trial review, with the nature of any relief dependent on and tailored to the circumstances of the case. *Moreno*, 63 M.J. at 143. Such options include a reduction in confinement or forfeitures; setting aside some or all of a sentence; "a limitation upon the sentence that may be approved by a convening authority following a rehearing"; and dismissal of the charges, with or without prejudice. *Id*. However, even in instances where post-trial delay was not harmless beyond a reasonable doubt, this court cannot provide relief where "there is no reasonable, meaningful relief available." *United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006).

Having applied the *Barker* criteria in the case before us, we will assume, without deciding, that the appellant's due process rights were violated as a result of the post-trial review delay. Such a finding, however, does not entitle the appellant to relief unless it would be both reasonable and meaningful. *See Rodriguez-Rivera*. Considering the totality of the circumstances, including the serious nature of the alleged offenses, we find that any relief we might afford to the appellant at this time would not be reasonable and would be disproportionate to any harm the appellant experienced as a result of the delay.[7] Prospectively limiting the characterization of a potential punitive discharge, restricting the amount of confinement, or otherwise limiting the possible sentence the appellant might receive at a possible rehearing would amount to an undeserved windfall and is neither reasonable nor warranted under the circumstances of this case. Moreover, we find that the post-trial delay was not "so egregious that tolerating it would adversely affect the public's perception of fairness and integrity of the military justice system" and, therefore, decline to grant relief on those grounds. *United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006).

Conclusion

Having considered the record in light of *Humphries*, the findings of guilty to Charge III and its specifications and the sentence are set aside and dismissed. The record

[7] While we are mindful that the appellant remained incarcerated for a longer period than may have been required had his appeal been decided in a timelier manner following the June 2012 decision in *Humphries*, we note that the debatably oppressive nature of his confinement was dramatically tempered by the fact he chose to remain imprisoned beyond his minimum release date of 10 August 2012, because he refused to submit an acceptable mandatory supervised release plan.

of trial is returned to the Judge Advocate General for remand to an appropriate convening authority.

OFFICIAL

STEVEN LUCAS
Clerk of the Court