UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman RUDY A. BERTOLLI
United States Air Force

ACM S31875 (f rev)

29 November 2012

Sentence adjudged 16 September 2010 by SPCM convened at Francis E. Warren Air Force Base, Wyoming. Military Judge: Matthew D. Van Dalen (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 30 days, forfeiture of $100.00 pay per month for 1 month, and reduction to E-3.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; Captain Christopher D. James; and Captain Nathan A. White.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Brett D. Burton; Major Roberto Ramirez; and Gerald R. Bruce, Esquire.

Before

STONE, GREGORY, and HARNEY
Appellate Military Judges

UPON FURTHER REVIEW

PER CURIAM:

Our superior court remanded this case for further reconsideration in light of *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012), to determine whether the appellant "suffered material prejudice to a substantial right" by the omission of the terminal element in the charged Article 134, UCMJ, 10 U.S.C. § 934, offense of obstruction of justice. *United States v. Bertolli*, 71 M.J. 400 (C.A.A.F. 2012) (mem.). In September

2010, a special court-martial composed of military judge alone convicted the appellant, contrary to his pleas, of distribution of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, and obstruction of justice, in violation of Article 134, UCMJ. The court sentenced the appellant to a bad-conduct discharge, confinement for 30 days, forfeiture of $100 pay per month for one month, and reduction to the grade of E-3. The convening authority approved the sentence as adjudged. In a decision issued before *Humphries*, we affirmed after finding that the appellant suffered no material prejudice by the failure of the Article 134, UCMJ, specification to expressly allege the terminal element. *United States v. Bertolli*, ACM S31875 (A.F. Ct. Crim. App. 15 May 2012) (unpub. op.), *rev'd in part*, 71 M.J. at 400. As ordered by the remand, we reconsider that decision in light of *Humphries*.

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. The remedy, if any, depended on "whether the defective specification resulted in material prejudice to [the appellant]'s substantial right to notice." *Humphries*, 71 M.J. 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 trial counsel here did not mention the terminal element until closing argument when he paraphrased the generic definitions of the required terminal elements and equated the appellant's conduct with those elements. Although he referenced testimony, that testimony tended to prove the first three elements of the Article 134, UCMJ, offense without any reference by the witness to either the impact on good order and discipline or the tendency to discredit the service. Essentially, trial counsel argued that proof of the first three elements necessarily proved the fourth – an argument which prompted the military judge to ask what evidence showed prejudice to good order and discipline "other than . . . argument."

We find the argument here insufficient to provide the required notice of the terminal elements and that the testimony of the witness concerning the first three elements of obstructing justice insufficient to provide sufficient notice of the fourth. 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 Charge II and the specification thereunder is 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*, we reassess the sentence and approve only so much of the sentence as provides for a bad-conduct discharge, confinement for 30 days, and reduction to the grade of E-3.[*]

Conclusion

The Specification of Charge II is dismissed. The remaining findings 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 remaining findings and sentence, as reassessed, are

AFFIRMED

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OFFICIAL

STEVEN LUCAS
Clerk of the Court

[*] We note that, in this judge alone special court-martial, the distribution charge was sufficient by itself to reach the jurisdictional maximum of the court and proportionally carries a maximum term of confinement three times that of obstructing justice. Further, the military judge's questions during argument indicate the secondary importance he accorded this obstruction charge in relation to the far more serious distribution offense.