UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class KEVIN M. BOOKS
United States Air Force

ACM 37938

05 February 2013

Sentence adjudged 20 March 2011 by GCM convened at Scott Air Force Base, Illinois. Military Judge: Donald R. Eller, Jr.

Approved sentence: Bad-conduct discharge, confinement for 1 year and 6 months, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

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

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Lauren DiDomenico; and Gerald R. Bruce, Esquire.

Before

STONE, ROAN, and HECKER
Appellate Military Judges

PER CURIAM:

A panel of officer members sitting as a general court-martial convicted the appellant, contrary to his pleas, of one specification of negligent homicide, in violation of Article 134, UCMJ, 10 U.S.C. § 934, and two specifications under Article 111, UCMJ, 10 U.S.C. § 911: one for operating a vehicle while drunk and the other for operating a vehicle in a reckless manner.[1] In accordance with his guilty plea, the appellant was also convicted of dereliction of duty for consuming alcohol while underage, in violation of Article 92, UCMJ, 10 U.S.C. § 892. The members sentenced him to a bad-conduct

[1] The appellant was acquitted of involuntary manslaughter, charged as a violation of Article 119, UCMJ, 10 U.S.C. § 919, arising out of the same incident.

discharge, 1 year and 6 months of confinement, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand. The convening authority approved the findings and sentence as adjudged. Six months after his trial, the Air Force Clemency and Parole Board (AFCPB) approved the appellant for placement in the Air Force Return to Duty program. After the appellant successfully completed that program, the AFCPB returned the appellant to duty on 19 January 2012 and directed suspension of the bad-conduct discharge for one year. After the appellant successfully served on active duty for a year, his bad-conduct discharge was remitted by the AFCPB, effective 18 January 2013.[2]

On appeal, the appellant asks this Court to: (1) overturn his negligent homicide conviction for failure to state an offense and (2) set aside all his contested convictions due to member misconduct. We agree in part and provide relief as described below.[3]

Background

The evidence at trial established that, on 23 June 2010, the appellant consumed alcohol while underage and then got behind the wheel of a vehicle, taking three of his Airmen friends as passengers. The appellant drove at an excessive rate of speed while intoxicated, and, when his attempt to exit the highway failed, he lost control of the speeding vehicle. This resulted in injuries to all three of the passengers. One of them was pronounced dead on the scene.

Inattentive Panel Member

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant requests a set aside of all the contested charges because he alleges, for the first time on appeal, that one of the members was sleeping during portions of the proceedings and the military judge failed to take appropriate action. In his post-trial affidavit, the appellant does not identify when during the proceedings the member allegedly slept, but he claims that he brought it to the attention of his trial defense counsel at the time and they deliberately chose not to raise the issue. While "[c]laims of inattentive court members . . . [should not] be whimsically dismissed," *United States v. Norment*, 34 M.J. 224, 227 n.2 (C.M.A. 1992), we find that the appellant waived this issue at trial.

[2] The actions of the Air Force Clemency and Parole Board are reflected on a General Court-Martial Order, dated 6 February 2012. We order the inclusion of this document in the official record of trial.

[3] We retain jurisdiction under Article 66(b), UCMJ, 10 U.S.C. § 866(b), by virtue of the approved sentence, which includes a bad-conduct discharge. *United States v. Johnson*, 45 M.J. 88, 90 (C.A.A.F. 1996); *United States v. Boudreaux*, 35 M.J. 291, 293 (C.M.A. 1992). The bad-conduct discharge remains part of the sentence approved by the convening authority. Suspension or remission of part of an approved sentence does not affect appellate court jurisdiction. *United States v. Pfleuger*, 65 M.J. 127, 129 (C.A.A.F. 2007) (citing *Steele v. Van Riper*, 50 M.J. 89, 92 (C.A.A.F. 1999)). However, once the bad-conduct discharge has been remitted, it cannot be executed under Article 71, UCMJ, 10 U.S.C. § 871. *Id.* at 131.

Even without the waiver, and assuming arguendo that all of the appellant's post-trial claims are correct, we find the lack of demonstrated prejudice to the appellant's case fatal to any plain error analysis. *See United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011). It is significant that the appellant does not allege ineffective assistance of counsel and we consider the longstanding "presumption that, under the circumstances, [counsel's] action 'might be considered sound trial strategy.'" *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (citation omitted), *as quoted in United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004). Based on the appellant's own assertion that his trial defense counsel were aware of the alleged inattention to this unidentified information, we are left to presume that their decision not to object was a tactical choice. There is no evidence of resulting prejudice so this issue is without merit.

Negligent Homicide under Article 134, UCMJ

The Specification of Charge IV alleges that the appellant committed negligent homicide under Article 134, UCMJ, when he "did . . . unlawfully kill [AIC JB], by operating a motor vehicle in a negligent manner," but it does not allege the terminal element. In accordance with *Humphries*, we are compelled to disapprove the finding of guilty to this charge and specification. *See United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012). *See also United States v. Ballan*, 71 M.J. 28 (C.A.A.F.), *cert. denied*, 133 S. Ct. 43 (2012) (mem.) ("[I]t was plain and obvious error for the Government to fail to allege the terminal element of Article 134, UCMJ.").

There is nothing in the record to satisfactorily establish notice of the need to defend against any of the potential clauses that establish the terminal element. Further, there is no indication the evidence was uncontroverted as to the terminal elements. *See Humphries*, 71 M.J. at 215-16 (holding that, to assess prejudice, "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'" (citing *United States v. Cotton*, 535 U.S. 625, 633 (2002); *Johnson v. United States*, 520 U.S. 461, 470 (1997)).

On consideration of the entire record and pursuant to the holdings in *Humphries*, the findings of guilty to the Specification of Charge IV is set aside, and both the specification and charge are dismissed.

Sentence Reassessment

Having found error, we must assess the impact on the sentence and either return the case for a sentence rehearing or reassess the sentence ourselves. Before reassessing a sentence, we must be confident "that, absent the error, the sentence would have been of at least a certain magnitude." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *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), *aff'd*, 36 M.J. 43 (C.M.A. 1992) (mem.). Even within this limit, the Court must determine that a sentence it proposes to affirm is "appropriate," as required by Article 66(c), UCMJ, 10 U.S.C. § 866(c). In short, a reassessed sentence must be purged of prejudicial error and also must be "appropriate" for the offense involved. *Sales*, 22 M.J. at 307-08.

Prior to their deliberation, the military judge instructed the members that the maximum punishment was "reduction to E-1, forfeiture of all pay and allowances, five years and six months of confinement, and dishonorable discharge."[4] The maximum punishment for the modified findings is the same in all other aspects, except the maximum period of confinement is reduced to three years and six months. While this might appear to be a dramatic change in the penalty landscape, we find we are able to reassess the sentence in this case because the most substantial aspect of the sentence, the death of one of the passengers, would still be properly before the members. Through Specification 1 of Charge II, the appellant was convicted of operating a motor vehicle while drunk and causing injury to two persons, including the Airman who died. Therefore, the evidence of the Airman's injuries, which were fatal, would have been before the panel even if the appellant had never been charged with negligent homicide, as it constituted aggravation evidence relating to his drunk driving conviction[5]

On the basis of the error noted, considering the evidence of record, and applying the principles set forth above, we determine that we can discern the effect of the error and will reassess the sentence. Under the circumstances of this case and considering the evidence that would have been before the sentencing authority, we are confident that, even with no conviction for negligent homicide, the members would have imposed the same sentence and the convening authority would have approved the same. We further find the convening authority's approved sentence appropriate, as required by Article 66(c), UCMJ. Therefore, following our reassessment, we find a bad-conduct discharge, 1 year and 6 months of confinement, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand to be an appropriate sentence in his case.

Conclusion

Charge IV and its Specification are set aside and dismissed. The remaining findings and sentence, following reassessment, are correct in law and fact, and no error

[4] According to our calculations, with no argument for merger of specifications for purposes of sentencing, the maximum confinement period should have been six years and six months, but our focus is on the members' impressions at the time they imposed punishment. They were under the belief the maximum was five years and six months.

[5] Injury to a victim can be included as an aggravating element of drunk driving, used to increase the maximum authorized punishment. It is not a statutory element. *See* Articles 56 and 111, UCMJ, 10 U.S.C. §§ 856, 911; *Manual for Courts-Martial, United States*, Part IV, ¶¶ 35b and 35e (2008 ed.).

prejudicial to the substantial rights of the appellant occurred.[6] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[6] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).