UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic DALTON S. DUGEN
United States Air Force

ACM 37708

07 December 2012

Sentence adjudged 21 May 2010 by GCM convened at Joint Base Lewis-McChord, McChord Field, Washington. Military Judge: Don M. Christensen.

Approved sentence: Bad-conduct discharge and confinement for 6 months.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford and Major Daniel E. Schoeni.

Appellate Counsel for the United States: Lieutenant Colonel Linell A. Letendre; Major Naomi N. Porterfield; Major Lauren N. DiDomenico; Major Joseph Kubler; Captain Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

ROAN, WEISS, and SARAGOSA
Appellate Military Judges

PER CURIUM:

The appellant was tried by a general court-martial composed of officer members. In accordance with his pleas, he was found guilty of one specification of wrongful use of marijuana on divers occasions and one specification of wrongful distribution of marijuana on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Contrary to his pleas, he was found guilty of one specification of provoking speech and gestures, one specification of communicating a threat, and one specification of obstructing justice, in violation of Articles 117 and 134, UCMJ, 10 U.S.C. §§ 917, 934. The adjudged and approved sentence consisted of a bad-conduct discharge and

confinement for 6 months. On appeal, the appellant asserts both Specifications 1 and 2 of Additional Charge II fail to state an offense because they do not allege any of the three terminal clauses under Article 134, UCMJ.

In *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012), 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. *Id.* at 211. But, whether a remedy was required depended on "whether the defective specification resulted in material prejudice to Appellee's substantial right to notice." *Id.* at 215 (citing Article 59(a), UCMJ, 10 U.S.C. § 859(a)). 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 (citations omitted). After a close review of the record, the Court found no such notice.

Concluding that "[n]either the specification nor the record provides notice of which terminal element or theory of criminality the Government pursued," the Court identified several salient weaknesses in the record to highlight where notice was missing: (1) the Government did not even mention the adultery charge in its opening statement let alone the terminal elements of the charge; (2) the Government presented no evidence or witnesses to show how the conduct satisfied either Clause 1, Clause 2, or both clauses of the terminal element; (3) the Government made no attempt to link evidence or witnesses to either clause of the terminal element; and (4) the Government made only a passing reference to the adultery charge in closing argument but again failed to mention either terminal element. *Id.* at 216. In sum, 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.*

Further contributing to the lack of reasonable notice was the relatively minor nature of the adultery charge compared to the far more serious allegations of rape and forcible sodomy. Noting the impact of this disparity in charges on the prejudice analysis, the Court stated that "the material prejudice to the substantial right to constitutional notice in this case is blatantly obvious, in large part because it appears the charge was, as Appellee argued at trial, a 'throw away charge[ ].'" *Id.* at 217 n.10 (alteration in original). In its search of the record for notice, the Court found "not a single mention of the missing element, or of which theory of guilt the Government was pursuing, anywhere in the trial record." *Id.* at 217.

After a full review of the record, we find the specifications of Additional Charge II are defective because they did not expressly allege the terminal element. *See id*. at 214. The appellant had no notice of the Government's theory as to whether the alleged conduct was service discrediting or prejudicial to good order and discipline. Because the appellant did not request a bill of particulars or move to dismiss the specification for failure to state an offense, we considered the defect under a plain error analysis and find prejudice to the appellant's substantial right to notice. *Id*. at 213-14.

As the Court reaffirmed in *Humphries*, it is the appellant's burden to prove material prejudice to a substantial right. *Id*. at 214, 217 n.10 (citations omitted). Having considered our decision in light of *Humphries* and having closely reviewed the record, we find no mention of the Government's theory on the terminal element in opening statement, the presentation of evidence, or in closing argument. The only place this element is addressed is during the military judge's instructions. As such, the appellant has met his burden and the finding of guilty for Additional Charge II and its specifications must be set aside.

Sentence Reassessment

Prior to proceeding to the sentencing phase of the court-martial, the military judge granted a defense motion to consider Specifications 1 and 2 of Additional Charge II (communicating and threat and obstruction of justice) and the Specification of Additional Charge III (provoking speech) multiplicious for purposes of sentencing. As such, the maximum punishment authorized for the crimes for which the appellant was convicted was reduced from a dishonorable discharge, confinement for 25 years and 6 months, and total forfeitures to a dishonorable discharge, confinement for 22 years, and total forfeitures. The military judge further instructed the members that, "The offenses charged in Additional Charge II and Additional Charge III are multiplicious for sentencing. Therefore, in determining an appropriate sentence in this case, you must consider them as one offense." Trial defense counsel reiterated this instruction in his sentencing argument and argued for six months of confinement, equating it to two months for each offense which he considered the use of marijuana, distribution of marijuana, and the one offense of conduct comprising the multiplicious charges. Given this posture of the sentencing phase of the case, we are assured that the members indeed already treated the appellant's conduct as one offense and no further sentencing relief is warranted.

Appellate Delay

We note that the overall delay of more than 540 days between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(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). When we assume error but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. The post-trial record contains no evidence that the delay has had any negative impact on the appellant. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

Conclusion

Specifications 1 and 2 of Additional Charge II and Additional Charge II are 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.

Judge Weiss participated in this decision prior to his retirement.

OFFICIAL

STEVEN LUCAS
Clerk of the Court