UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JOSEPH A. HAYES
United States Air Force

ACM 37588

15 August 2011

Sentence adjudged 25 September 2009 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: William M. Burd.

Approved sentence: Bad-conduct discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford and Lieutenant Colonel Darrin K. Johns.

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

Before

BRAND, ORR, and WEISS
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with his pleas, the appellant was convicted of one specification of divers wrongful use of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Contrary to his pleas, the appellant was convicted, by a panel of officers, of one specification of willful dereliction (underage drinking), six specifications of wrongful distribution[1] of marijuana, and one specification of wrongful distribution of cocaine, in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892, 912a. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1.

[1] One specification was on divers occasions.

The issue on appeal is whether the military judge erred in denying the appellant's motion to dismiss for failure to state an offense, where the specification omitted reference to a required element under state law for a finding of guilty for wrongful consumption of alcohol while under the age of 21. Finding no error, we affirm.

Background

The appellant was involved in a number of drug related offenses from May 2008 until February 2009. Generally, the appellant was with other active duty Airmen when he committed these offenses. Two of the Airmen were confidential informants and one wore a wire when some of the transactions transpired.

In July 2008, the appellant went to a party at Luxor Hotel and Casino in Las Vegas with Airman Basic (AB) DY. They met up with Airman MS for a farewell party. While at the Luxor, the appellant drank and gambled. In addition to being observed by AB DY, the appellant confessed to drinking while at the Luxor.

Failure to State an Offense

The issue on appeal is whether the specification of Charge I failed to state an offense. The specification alleged:

> That [the appellant] who knew of his duties at or near Las Vegas, Nevada from on or about 1 June 2008, to on or about 30 September 2008, was derelict in the performance of those duties in that he willfully failed to refrain from drinking alcohol while under the age of 21, as it was his duty to do.

The issue of whether this specification stated an offense was first discussed at the Article 32, UCMJ, 10 U.S.C. § 832 hearing. It was then raised at trial, where the defense made a motion to dismiss the specification for failure to state an offense. The government called AB DY to discuss the events that occurred at the Luxor on 11 July 2008. Trial defense counsel argued to the military judge that, for there to be a crime, Nevada law required the drinking to occur in a public place. The military judge queried the trial counsel on the source of the duty and the counsel responded it was Nevada law.

The military judge found that the specification did state an offense and that what the defense was really arguing was whether there was sufficient evidence to prove the allegation beyond a reasonable doubt. He further concluded the duty was specifically from Section 202.020 of Nevada law. NEV. REV. STAT. (N.R.S.) § 202.020 (2008). The military judge, upon request, took judicial notice of N.R.S. 202.020 and then made a copy of that section, Prosecution Exhibit 5, which was later presented to the members.

N.R.S. 202.020 states "Any person under 21 . . . who consumes any alcoholic beverage in any saloon, resort, or premises where spirituous, malt or fermented liquors or wines are sold is guilty of a misdemeanor."

At the conclusion of findings, the military judge gave the standard instructions for the offense of willful dereliction, instructions of circumstantial evidence to prove knowledge of the duty, and informed the members he had taken judicial notice of N.R.S. 202.020.

"The question of whether a specification states an offense is a question of law, which this Court reviews de novo." *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994); *United States v. Mayo*, 12 M.J. 286, 288 (C.M.A. 1982)). "A specification states an offense if it alleges, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *Crafter*, 64 M.J. at 211 (citing *Dear*, 40 M.J. at 197).

We find that the specification alleged includes, either expressly or by implication, every element of the offense, and gave the appellant proper notice of his criminal conduct. As stated by the military judge, the question was not whether the specification of the charge stated an offense, but whether the government had sufficient evidence to prove that the appellant was guilty of the charge. The appellant confessed to drinking while at the Luxor, a resort and establishment which sold alcoholic beverages, and he was underage. Additionally, he was observed by a witness, AB DY. The members found the government proved their case beyond a reasonable doubt and we agree. Accordingly, this assignment of error is without merit.

Assuming, arguendo, that the specification fails to state an offense, we would next analyze the case to determine whether we can reassess the sentence. *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002). Before reassessing a sentence, this Court must be confident "that, absent any error, the sentence adjudged would have been of at least a certain severity." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). A "dramatic change in the 'penalty landscape'" gravitates away from 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). In *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000), our superior court decided that if the appellate court "cannot determine that the sentence would have been at least of a certain magnitude," it must order a rehearing. *Id*. (citing *United States v. Poole*, 26 M.J. 272, 274 (C.M.A. 1988)).

Willful dereliction has a maximum punishment of confinement for 6 months and a bad-conduct discharge. The appellant was facing a maximum punishment of

confinement in excess of 107 years and a dishonorable discharge. The punishment landscape would be minimally changed if the specification failed to state an offense. In light of the all the remaining specifications and charges and their serious nature, we are confident the court would have adjudged a sentence of at least a bad-conduct discharge, confinement for 2 years, total forfeitures and reduction to E-1.

Appellate Delay

We note that the overall delay of over 18 months 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. *See 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. 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

The approved findings and sentence 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 approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court