UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

First Lieutenant DOUGLAS E. LONG
United States Air Force

ACM 37044 (f rev)

17 August 2012

Sentence adjudged 2 May 2007 by GCM convened at Robins Air Force Base, Georgia. Military Judge: Gary M. Jackson (sitting alone) and W. Thomas Cumbie (*Dubay*[*] hearing).

Approved sentence: Dismissal and confinement for 77 days.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; Major Shannon A. Bennett; Major Michael S. Kerr; Major Daniel E. Schoeni; Major Tiffany M. Wagner; and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Colonel Douglas P. Cordova; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel Matthew S. Ward; Lieutenant Colonel Jeremy S. Weber; Major Jason M. Kellhofer; Major Joseph Kubler; Major G. Matt Osborn; Major Brendon K. Tukey; Major Charles G. Warren; Captain Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

This opinion is subject to editorial correction before final release.

---

[*] *See United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

GREGORY, Senior Judge:

The appellant was tried by a general court-martial composed of a military judge sitting alone. Contrary to his pleas, he was found guilty of one specification of assault consummated by a battery and one specification of committing indecent acts with a child under 16 years of age, in violation of Articles 128 and 134, UCMJ, 10 U.S.C. §§ 928, 934. The adjudged and approved sentence consisted of a dismissal and confinement for 77 days.

This Court previously affirmed the findings and sentence after initial remand. *United States v. Long*, ACM 37044 (rem) (A.F. Ct. Crim. App. 30 March 2011) (unpub. op.), *rev'd*, 70 M.J. 355 (C.A.A.F. 2011) (mem.). After the first remand, the Court of Appeals for the Armed Forces (CAAF) granted review of whether a specification that fails to expressly allege either terminal element in a Clause 1 or 2 specification under Article 134, UCMJ, is sufficient to state an offense. *United States v. Long*, 70 M.J. 269 (C.A.A.F. 2011) (order granting petition for review). On 21 September 2011, the CAAF vacated our previous decision and remanded the appellant's case for consideration of the new granted issue, in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). *Long*, 70 M.J. at 357. After we considered the granted issue in light of *Fosler,* we reviewed the entire record and again affirmed. *United States v. Long*, ACM 37044 (rem) (A.F. Ct. Crim. App. 2 February 2012) (unpub. op.).

On 5 March 2012, the appellant asked this Court to reconsider our 2 February 2012 decision based on the subsequent CAAF decision in *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012), *cert. denied*, __ S. Ct. __ (U.S. 25 June 2012) (No. 11-1394). After reconsidering the portions of our decision affirming the finding of guilty to the indecent acts with a child specification and the sentence, we again affirmed the findings and the sentence. *United States v. Long (Long IV)*, ACM 37044 (rem) (A.F. Ct. Crim. App. 4 June 2012) (unpub. op.). On 3 August 2012, we granted the appellant's motion to reconsider this decision, in light of *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012).

In *Humphries*, the Court dismissed a contested adultery specification that failed to expressly allege an Article 134, UCMJ, terminal element, 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. But, the right to a remedy depended on "whether the defective specification resulted in material prejudice to Appellee's substantial right to notice." *Id.* at 215. Distinguishing notice issues in guilty plea cases and litigated cases, 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 (quoting *Johnson v. United States*, 520 U.S. 461, 470 (2002)) (citations omitted). After a close review of the record, the court found no such notice.

The Court concluded that "[n]either the specification nor the record provides notice of which terminal element or theory of criminality the Government pursued." *Id.* at 216. 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 or 2; (3) the Government made no attempt to link any of their evidence or witnesses to the adultery charge; and (4) the Government made only a passing reference to the adultery charge in closing argument but again failed to mention either terminal element. 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. 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.

Unlike *Humphries*, the specification at issue here was anything but a "throw away." It alleged that the appellant committed indecent acts on his preteen step-daughter by fondling her and placing his hands on her vaginal area; by spanking her buttocks with his hand, with a spoon, and with his belt, while she was unclothed; and by placing his finger in her anus with the intent to gratify his sexual desires. While most would agree that an officer's sexual abuse of a pre-teen girl is obviously service discrediting, the specification is, under the current state of the law, defective because it does not expressly inform him of that. 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 found no prejudice to the appellant's substantial right to notice:

> In fact, the record shows a full awareness as to the offense alleged and the elements supporting this offense. The appellant did not request a bill of particulars and, given the fact that the appellant's trial defense counsel argued that the Government did not present any evidence that the appellant's conduct had an effect on good order and discipline or was service discrediting and that such evidence was required, we are confident that the appellant was not confused or misled by the defective specification.

Long IV, slip op. at 4. In his motion for reconsideration in light of *Humphries*, the appellant correctly notes that the court in *Humphries* found a similar argument by defense counsel insufficient to show notice in a defective Article 134, UCMJ, charge. But this case has much more.

The appellant's step-daughter, EAP, testified to repeated physical and sexual abuse at the hands of the appellant – abuse which the appellant clearly knew was wrong. She described the appellant's disciplinary routine of ordering her at least weekly to go to the garage and take off all her clothes so he could discipline her. The appellant would enter the garage, lock the door, and force her to stay while he hit her with belts, wooden spoons, and his hands. On one occasion while spanking her, the appellant bent her over his knee and inserted his finger into her anus. When she asked him why he did it, the appellant told her: "Don't say things like that. You can get me in a lot of trouble." The appellant also molested his step-daughter in the bathroom and in her bedroom. When his wife called him a "pervert" after catching him coming out of the bathroom where her daughter was showering, she testified that the appellant became enraged, threw furniture, and said, "Do you know what would happen if you told anybody that?" When his young victim finally told a school counselor what her step-father was doing to her, the counselor called the police.

The Government specifically argued that the appellant's conduct was service discrediting and linked the testimony of the victims to the terminal element:

> Your Honor, we do think that we've met the burden to prove that this incident meets the definition of "service discrediting"; it . . . has a tendency to bring the service in disrepute or which tends to lower it in public esteem. We believe this case meets the definition of "service discrediting," which can be proven by circumstantial evidence, not necessarily direct evidence. But again you have a young lady here who once was a member of the Air Force family, now no longer a part of that, who's undergoing this process, and we think circumstantially you could see that it would be service discrediting, at least in her eyes, if not other participants in this case.

One of those other participants was the appellant's now ex-wife, a former military member herself, who considered the appellant a pervert – fairly direct evidence that his

conduct brought discredit to the service. Defense counsel's only counter was that "the Government has not presented any evidence of an effect on good order and discipline or that there was service discrediting conduct." Notably absent from the defense response was any claim of lack of notice, a request for a bill of particulars, or a motion to dismiss for failure to state an offense.

Unlike the defective "throw away" adultery specification in *Humphries* that was barely mentioned by the Government, the Article 134, UCMJ, specification in the present case was the focus of the trial. The appellant's step-daughter and her mother both testified to facts which clearly show the conduct was service discrediting, and the Government expressly linked that testimony to the terminal element in its findings argument to the military judge. As the Court reaffirmed in *Humphries*, it is the appellant's burden to prove material prejudice to a substantial right. 71 M.J. at 217 n.10. Upon a close review of the records and the totality of the circumstances in this case, we find that the appellant has not met that burden.

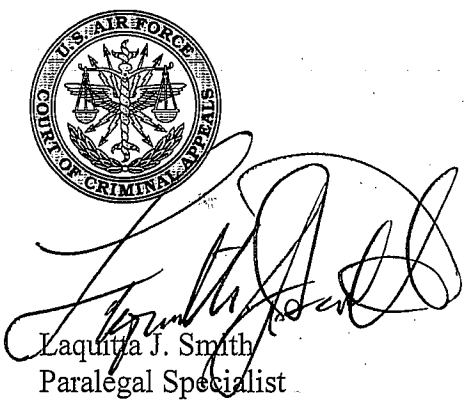
Conclusion

Having considered the record in light of *Fosler*, as directed by our superior court, then *Ballan* and now *Humphries*, we again find that 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.

FOR THE COURT

OFFICIAL



Laquitta J. Smith
Paralegal Specialist