UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

First Lieutenant BRANDON W. MCCLANNAHAN
United States Air Force

ACM 37770

10 October 2012

Sentence adjudged 19 August 2010 by GCM convened at Hill Air Force Base, Utah. Military Judge: Jeffrey A. Ferguson (sitting alone).

Approved sentence: Dismissal and confinement for 30 days.

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

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Lauren N. Didomenico; Major Matthew F. Blue; Captain Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

ROAN, CHERRY, and SARAGOSA
Appellate Military Judges

PER CURIAM:

The appellant was tried by a military judge sitting as a general court-martial. Contrary to his pleas, he was found guilty of one specification of fraternization and one specification of indecent acts, in violation of Articles 134 and 120, UCMJ, 10 U.S.C. §§ 934, 920. The adjudged and approved sentence consisted of a dismissal and confinement for 30 days. On appeal the appellant asserts Charge III and its Specification

fails to state an offense because it does not allege any of the three terminal clauses under Article 134, UCMJ.[*]

Background

This case stems from a friendship that developed between the appellant's wife, who was a child care provider, and SSgt EMC, the mother of two children she watched. SSgt EMC had been intermittently staying at the appellant's house, at the invitation of his wife, while her husband was deployed. After the appellant returned home, SSgt EMC was invited to a family barbeque at the appellant's house. The appellant and SSgt EMC drank a large quantity of tequila by matching each other shot for shot until the bottle was empty. This left each of them highly intoxicated. After becoming sick, SSgt EMC shared a bed with the appellant and his wife. At some point during the early morning, the appellant and his wife had sex while SSgt EMC was in the bed with them. It appears she was passed out and did not have any memory of the event.

Article 134, UCMJ, Terminal Element

In *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012), our superior court dismissed a contested adultery specification that failed to expressly allege an Article 134, UCMJ, terminal element but which was not challenged at trial. *Id*. at 216-17. 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 215. But, whether a remedy was required depended on "whether the defective specification resulted in material prejudice to Appellee's substantial right to notice." *Id*. (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 (quoting *United States v. Cotton*, 535 U.S. 625, 631-32 (2002); citing *Puckett v. United States*, 556 U.S. 129, 142 (2009)). After a close review of the record, the Court found no such notice. *Id*. at 216.

[*] The Specification to Charge III reads: "[The appellant] did . . . knowingly fraternize with Staff Sergeant [EMC], an enlisted person, on terms of military equality, to wit: by drinking alcohol to excess with Staff Sergeant [EMC] at his residence, allowing Staff Sergeant [EMC] to stay overnight at his residence and sleep in his bed with him and his wife . . . and engaging in sexual acts with Staff Sergeant [EMC] while she was at his residence, in violation of the custom of the United States Air Force that officers shall not fraternize with enlisted persons on terms of military equality." By exceptions, the appellant was found guilty of the specification and charge, except the words "and engaging in sexual acts with Staff Sergeant [EMC] while she was at his residence."

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 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. *Humphries*, 71 M.J. 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.

We find that the case before us is distinguishable from *Humphries* and that the appellant was on notice of the missing terminal elements. Here, Captain SF, a member of the appellant's squadron at the time of the offense, testified about the squadron's work environment after the allegations against the appellant surfaced. He stated, "[t]he enlisted force, at least in the unit, would lose faith in their officers, and that can lead to a complete breakdown of the mission. I can't give orders and have somebody questioning whether or not I'm passing those out to my favorites." Capt SF went on to state that in his opinion, the reputation of the Air Force would be lowered if this were to become common knowledge. Not only were questions presented, but when trial defense counsel objected to their relevance, a lengthy argument on the evidentiary value of the answers as they relate to the elements of being prejudicial to good order and discipline and servicing discrediting conduct ensued. Further, during his closing argument, the trial counsel discussed how the appellant's conduct adversely impacted good order and discipline and was service discrediting.

As the Court reaffirmed in *Humphries*, it is the appellant's burden to prove material prejudice to a substantial right. *Humphries*, 71 M.J. at 214, 217 n. 10. After a full review, we are convinced the appellant was given sufficient notice regarding both Clause 1 and Clause 2 and was fully aware of the Government's theory of guilt. Having

considered our decision in light of *Humphries* and having closely reviewed the record, we find the appellant has failed to meet his burden.

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

The 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 findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court