UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CHRISTOPHER R. MORGAN
United States Air Force

ACM 37763

13 July 2012

Sentence adjudged 18 August 2010 by GCM convened at RAF Lakenheath, United Kingdom. Military Judge: Dawn R. Eflein.

Approved sentence: Bad-conduct discharge, confinement for 1 year, and reduction to E-1.

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 Joseph Kubler; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

PER CURIAM:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of aggravated sexual assault of a child and adultery in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934, respectively.[1] The appellant was sentenced to a dishonorable discharge, confinement for 1 year, and reduction to the grade of E-1. The convening authority approved only so much of the sentence as provided for a

[1] The appellant was found not guilty of negligent dereliction of duty in violation of Article 92, UCMJ, 10 U.S.C. § 892.

bad-conduct discharge, confinement for 1 year, and reduction to the grade of E-1.[2] On appeal, the appellant asserts that the charge and specification of adultery under Article 134, UCMJ, fails to state an offense because the terminal element of Article 134, UMCJ, is not alleged.

Background

The appellant, a married, 21-year-old Airman, engaged in an act of sexual intercourse with RA in his dormitory room on RAF Lakenheath, United Kingdom. The appellant met RA, a 15-year-old girl, through his association with her step-father who was a non-commissioned officer in the appellant's squadron. The same act of sexual intercourse was charged as both an aggravated sexual assault of a child under Article 120, UCMJ, and as adultery under Article 134, UCMJ.[3] The adultery specification did not expressly allege that the appellant's conduct was to the prejudice of good order and discipline in the armed forces, or was of a nature to bring discredit upon the armed forces, the potential terminal elements of an adultery offense under the General Article.[4] Article 134, UCMJ, Clauses 1 and 2. The appellant contested his guilt but did not challenge the charge and specification at trial; however, he does so for the first time on appeal.

Discussion

Whether a charge and specification state an offense is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted). "A specification states an offense if it alleges, either expressly or by [necessary] implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *Id.* at 211 (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994); Rule for Courts-Martial 307(c)(3)).

In the appellant's case, the specification alleging adultery is defective because it does not expressly allege the terminal element of Article 134, UCMJ; nor do we find the terminal element is necessarily implied as alleged. *United States v. Fosler*, 70 M.J. 225, 230-31 (C.A.A.F. 2011); *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012). Because the appellant failed to object to the sufficiency of the specification at trial, we review for plain error and test for prejudice. *United States v. Humphries*, No. 10-5004/AF, slip op. at 11 (C.A.A.F. 15 June 2012) (citations omitted). Under plain error analysis the appellant has the burden of demonstrating there was error, that the error was

[2] The convening authority also waived the mandatory forfeitures for a period of six months for the benefit of the appellant's wife and child.

[3] In sentencing the military judge merged the two offenses and considered them as a single offense for sentencing purposes.

[4] The Specification of Charge III, a violation of Article 134, UCMJ, reads as follows: "In that Airman First Class Christopher R. Morgan, United States Air Force, 48th Security Forces Squadron, Royal Air Force Lakenheath, United Kingdom, a married man, did, at or near, Royal Air Force Lakenheath, United Kingdom, on or about 16 November 2009, wrongfully have sexual intercourse with [RA], a girl not his wife."

plain and obvious, and that the error materially prejudiced a substantial right. *Id*. at 12 (citing *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)). The failure of the specification to allege either clause of the terminal element applicable to the offense of adultery was plain and obvious error. *Id*. at 14. A finding of error, however, does not alone warrant dismissal. *Id*., slip op. at 10-11; *Ballan*, 71 M.J. at 34. "The question, then, is whether the defective specification resulted in material prejudice to the [appellant's] substantial right to notice." *Humphries* at 15. In making this prejudice determination in the context of a litigated case in which the defective specification is not objected to at trial, "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 17 (*citing United States v. Cotton*, 535 U.S. 625, 633 (2002); *Johnson v. United States*, 520 U.S. 461, 470 (1997)).

After considering the totality of circumstances in the record of trial and applying the rationale of our superior court in *Humphries*, we are not convinced that the few references to the adultery charge in the record provide sufficient notice of which clause of the terminal element of Article 134, UCMJ, the Government was pursuing. Consequently, we conclude the appellant suffered material prejudice to his substantial right to notice. We therefore set aside the finding of guilty of Charge III and its specification, and dismiss Charge III and its specification.

Speedy Post-Trial Review

Although not raised as an issue on appeal, 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. *See also United States v. Moreno*, 63 M.J. 129, 135-36, 142-43 (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 was harmless beyond a reasonable doubt.

Sentence Reassessment

Having set aside the findings of guilty and dismissed Charge III and its specification, we now reassess the sentence. 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, 307 (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). If we cannot determine that the sentence would have been at least of a certain magnitude, we must order a rehearing. *Doss*, 57 M.J. at 185 (citing *Sales*, 22 M.J. at 307).

On the basis of the error, the entire record, and applying the principles set forth above, we determine that we can discern the effect of the error and will reassess the sentence. In doing so we note that the same act of sexual intercourse was charged as both a violation of Article 120, UCMJ, and Article 134, UCMJ, and that the appellant remains convicted of the more serious offense of sexual assault of a child. Moreover, because the military judge merged the two offenses into one for sentencing purposes, the appellant was exposed to no additional punishment at trial as of result of his erroneous conviction of the adultery offense. Under these circumstances, absent the error, we are satisfied beyond a reasonable doubt that the panel members would have imposed a sentence no less severe than that approved by the convening authority, that is: a bad conduct discharge, confinement for 1 year, and reduction to the grade of E-1.

Conclusion

The finding of guilty of Charge III and its specification are set aside, and Charge III and its specification are dismissed. The remaining findings and sentence, following reassessment, 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 are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court