UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MICHAEL D. REED
United States Air Force

ACM 37775

07 December 2012

Sentence adjudged 10 September 2010 by GCM convened at Joint Base McGuire-Dix-Lakehurst, New Jersey. Military Judge: Michael J. Coco.

Approved sentence: Bad-conduct discharge and reduction to E-2.

Appellate Counsel for the Appellant: Major Michael S. Kerr and Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Lauren N. DiDomenico; Major Joseph Kubler; Major Roberto Ramirez; and Gerald R. Bruce, Esquire.

Before

ROAN, WEISS, and SARAGOSA
Appellate Military Judges

PER CURIAM:

The appellant was tried by a general court-martial composed of officer members. Contrary to his pleas, he was found guilty of one specification of assault consummated by a battery upon a child under 16 years, one specification of assault consummated by a battery upon his wife, and one specification of child endangerment, in violation of Articles 128 and 134, UCMJ, 10 U.S.C. §§ 928, 934. The adjudged and approved sentence consisted of a bad-conduct discharge and reduction to the grade of E-2. On appeal, the appellant asserts that the Specification of Charge II for child endangerment fails to state an offense because it does not allege any of the three terminal clauses under Article 134, UCMJ.

Background

On 20 October 2009, the appellant was responsible for the care of his six-month-old child, BR. While trying to feed the infant and play video games at the same time, he became frustrated, yelled at the child, and grabbed the child by the neck holding him suspended in the air. The appellant's wife had returned home from work and observed the infant being held in this manner. She instinctively grabbed the child away from the appellant. The appellant took the child back and laid him on the floor. He then pushed his wife back, got on top of her, and pinned her to the ground. After a struggle, she called the police. The child was examined at the hospital and reportedly had no injuries. During an interview with the Office of Special Investigations, the appellant revealed he had held the child in this same manner on 8-10 prior occasions. Ultimately, the members found the appellant guilty of only the 20 October 2009 incident and found him not guilty of the 8-10 prior incidents. The military judge found that this Specification of Charge II, charging child endangerment, and Specification 1 of Charge I, charging assault consummated by a battery upon a child under 16 years of age, were multiplicious for sentencing.

Failure to State an Offense

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. 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, our superior court stated 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 the terminal element, (3) the Government made no attempt to link evidence or witnesses to any 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.

A review of the record in the instant case reveals no reference to the terminal element for the Article 134, UCMJ, offense. In fact, during closing argument, trial counsel argued the elements of the offense to the members but left off any mention of the terminal element itself. The first time it is addressed outside of the military judge's instructions was during trial defense counsel's argument that there was no evidence to meet this element. Under the current state of the law, Charge II and its Specification is defective because it did not expressly allege the terminal element. *Id*. at 214. The appellant had no notice of the Government's theory as to whether the 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. As such, the appellant has met his burden and the findings with respect to Charge II and it's Specification 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 Specification 1 of Charge I (assault consummated

by a battery upon a child under 16 years) and Charge II and its Specification (child endangerment) 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 3 years and 6 months, total forfeitures, and reduction to E-1 to a dishonorable discharge, confinement for 2 years and 6 months, total forfeitures, and reduction to E-1. The military judge further instructed the members, "The offenses charged in Specification 1 of Charge I and the Specification of Charge II are multiplicious for sentencing. Therefore, in determining an appropriate sentence in this case, you must consider them as one offense." 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 this 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

Charge II and its Specification 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.

OFFICIAL

STEVEN LUCAS
Clerk of the Court