UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic TIMUR TIMERHANOV
United States Air Force

ACM 37685 (f rev)

29 November 2012

Sentence adjudged 21 April 2010 by GCM convened at Andersen Air Force Base, Guam. Military Judge: Mark L. Allred (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; Major Grover H. Baxley; and Captain Shane A. McCammon.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Christopher T. Smith; Major Scott C. Jansen; Major Christopher D. Cazares; Captain Tyson D. Kindness; and Gerald R. Bruce, Esquire.

Before

STONE, GREGORY, and HARNEY
Appellate Military Judges

UPON FURTHER REVIEW

PER CURIAM:

A general court-martial composed of military judge alone convicted the appellant contrary to his pleas of one specification of attempted robbery, in violation of Article 80, UCMJ, 10 U.S.C. § 880, and one specification of assault with intent to commit robbery, in violation of Article 134, UCMJ, 10 U.S.C. § 934. Additionally, the military judge found the appellant guilty in accordance with his pleas of communicating a threat, in

violation of Article 134, UCMJ. The court sentenced the appellant to a bad-conduct discharge, confinement for five months, and forfeiture of all pay and allowances. A pretrial agreement capped confinement at six months, and the convening authority approved the sentence adjudged. We affirmed the findings and sentence. *United States v. Timerhanov*, ACM 37685 (A.F. Ct. Crim. App. 28 November 2011) (unpub. op.), *rev'd in part*, 71 M.J. 354 (C.A.A.F. 2012) (mem.). Our superior court reversed that portion of our decision affirming the conviction of assault with intent to commit robbery, in violation of Article 134, UCMJ, as alleged in Specification 1 of Charge II; reversed the sentence; and remanded the case for further consideration in light of *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012). *Timerhanov*, 71 M.J. at 354.

In accordance with *Humphries*, we are compelled to disapprove the finding of guilty to Specification 1 of Charge II. This specification does not allege the terminal elements under Article 134, UCMJ. There is nothing in the record to satisfactorily establish notice of the need to defend against the terminal elements, and there is no indication the evidence was uncontroverted as to the terminal elements. *See Humphries*, 71 M.J. at 215–16 (holding that to assess prejudice, "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'" (citing *United States v. Cotton*, 535 U.S. 625, 633 (2002); *Johnson v. United States*, 520 U.S. 461, 470 (1997)).[1]

On consideration of the entire record and pursuant to *Humphries*, the findings of guilty to Specification 1 of Charge II are set aside and that specification is dismissed. Reassessing the sentence on the basis of the error noted, the entire record, and in accordance with the principles of *United States v. Sales*, 22 M.J. 305 (CM.A. 1986), and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), to include the factors identified by Judge Baker in his concurring opinion in *Moffeit*, this Court affirms the sentence as approved by the convening authority.[2]

Conclusion

Specification 1 of Charge II is 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*,

[1] The Government argues Judge Stucky's dissenting view that the hearing pursuant to Article 32, UCMJ, 10 U.S.C. § 832, provided fair and accurate notice of the terminal element. *United States v. Humphries*, 71 M.J. 209, 222 (C.A.A.F. 2012) (Stucky, J., dissenting). As compelling as that view may be, it did not persuade the three-judge majority.

[2] The facts and circumstances surrounding the dismissed specification were properly before the court as res gestae of the remaining charges and specifications which carried a combined maximum confinement of 13 years, and we are confident that the military judge would have imposed a sentence at least as severe as the one approved by the convening authority.

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