UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
B.L. PAYTON-O'BRIEN, R.G. KELLY, R.Q. WARD
Appellate Military Judges

UNITED STATES OF AMERICA

v.

BRANDON M. MAGNAN
CORPORAL (E-4), U.S. MARINE CORPS

NMCCA 201000414
GENERAL COURT-MARTIAL

Sentence Adjudged: 12 March 2010.
Military Judge: CDR David Berger, JAGC, USN.
Convening Authority: Commander, Marine Corps Base, Quantico, VA.
Staff Judge Advocate's Recommendation: Col Stephen C. Newman, USMC.
For Appellant: LT Ryan Mattina, JAGC, USN.
For Appellee: LT Philip Reutlinger, JAGC, USN.

6 December 2012

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

PER CURIAM:

A panel of members with enlisted representation sitting as a general court-martial convicted the appellant, contrary to his pleas, of orders violations (wrongfully providing alcohol to minors and fraternization), abusive sexual contact, wrongful sexual contact, forcible sodomy, assault consummated by a battery, and drunk and disorderly conduct in violation of Articles 92, 120, 125, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 920, 925, 928, and 934. The appellant

was sentenced to confinement for three years, reduction to pay grade E-1, total forfeitures, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged.[1]

On 21 July 2011, we affirmed the guilty findings and the sentence. *United States v. Magnan*, No. 201000414, 2011 CCA LEXIS 131, unpublished op. (N.M.Ct.Crim.App. 21 Jul 2011). On 5 January 2012, the Court of Appeals for the Armed Forces (CAAF) reversed our decision insofar as it affirmed the conviction for drunk and disorderly conduct and the sentence, and affirmed our decision in all other respects. CAAF remanded the case for our consideration of the Article 134 offense in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). *United States v. Magnan*, No. 12-0009/MC, 2012 CAAF LEXIS 9 (C.A.A.F. Jan. 5, 2012) (summary disposition).

On 29 February 2012, we affirmed the drunk and disorderly specification and the sentence. *United States v. Magnan,* No. 201000414, (N.M.Ct.Crim.App. 29 Feb 2012) (per curiam)). On 10 July 2012, CAAF again reversed our decision insofar as it affirmed the conviction for drunk and disorderly conduct and the sentence, and affirmed our judgment in all other respects. CAAF remanded for our further consideration in light of *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012). *United States v. Magnan*, No. 12-0009/MC, 2012 LEXIS 741 (C.A.A.F. Jul. 10, 2012).

In accordance with *Humphries*, we are compelled to disapprove the finding of guilty to the drunk and disorderly offense. The specification does not allege the terminal element under Article 134, UCMJ, there is nothing in the record to satisfactorily establish notice of the need to defend against the terminal element, and there is no indication the evidence was uncontroverted as to the terminal element. *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)). Therefore, we now set aside the appellant's conviction for drunk and disorderly conduct, and dismiss the defective specification.

Notwithstanding our action on Specification 3 of Charge V, we must assess the impact on the sentence and either return the

[1] To the extent that the CA's action purported to execute the dishonorable discharge, it was a nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

case for a sentence rehearing or reassess the sentence ourselves. We find that the sentencing landscape has not dramatically changed and we can reassess the sentence. *United States v. Buber,* 62 M.J. 476, 479 (C.A.A.F. 2006); and *United States v. Sales,* 22 M.J. 305, 307-08 (C.M.A. 1986).

The gravamen of the appellant's offenses has not changed. The appellant remains convicted of wrongfully providing alcohol to minors, fraternization, abusive sexual contact, wrongful sexual contact, forcible sodomy, and assault consummated by a battery. These charges carry a maximum confinement penalty of life imprisonment without parole. The appellant's drunk and disorderly conduct was essentially a collateral offense. We find the appellant suffered no prejudice as a result of the improper specification being considered by the members during sentencing. Accordingly, we are satisfied that absent the error the sentence from the panel would have been at least as severe as that adjudged. *Sales*, 22 M.J. at 308.

The findings of guilty of Charge V and Specification 3 thereunder are set aside. Charge V and Specification 3 thereunder are dismissed. All other findings of guilty having previously been affirmed, we affirm the sentence as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court