

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

**Before
J.R. PERLAK, B.L. PAYTON-O'BRIEN, R.Q. WARD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MARKALLE D. REDD
AVIATION ORDNANCEMAN AIRMAN (E-3), U.S. NAVY**

**NMCCA 201000682
GENERAL COURT-MARTIAL**

Sentence Adjudged: 30 September 2010.

Military Judge: LtCol Peter Rubin, USMC.

Convening Authority: Commander, Navy Region Northwest,
Silverdale, WA.

Staff Judge Advocate's Recommendation: CDR T.F. DeAlicante,
JAGC, USN.

For Appellant: Capt Michael Berry, USMC.

For Appellee: Col Stephen Newman, USMC.

24 October 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 military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of two specifications of violating a lawful order in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892. The general court-martial, then composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of

rape, aggravated sexual contact, indecent exposure, and adultery in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920 and 934. The members sentenced the appellant to five years confinement, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence.

Procedural History

On 29 December 2011, we issued an opinion in this case, affirming the findings of guilty and the sentence. *United States v. Redd*, No. 201000682, 2011 CCA LEXIS 413 (N.M.Ct.Crim.App. 29 Dec 2011). On 10 July 2012, the Court of Appeals for the Armed Forces (CAAF) reversed our decision as to Specifications 1 and 2 of Charge III (adultery), and as to the sentence. It affirmed our decision in all other respects, and returned the record of trial to The Judge Advocate General of the Navy for remand to this court for further consideration in light of *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012). *United States v. Redd*, ___ M.J. ___, 2012 CAAF LEXIS 764 (C.A.A.F. Jul. 10, 2012). Consequently, the appellant's case is again before this court for review. The appellant submitted an additional brief which addressed the issue remanded by CAAF as well as an additional issue claiming that this court is unable to review the legal and factual sufficiency of the adultery charges because the members returned a general verdict. In light of our decision with regard to the issue remanded by CAAF, the appellant's additional assignment of error is moot.

Discussion

Appellant's acts of adultery were charged as Article 134, UCMJ, offenses, but the specifications thereunder failed to allege the terminal element of prejudice to good order and discipline or service-discrediting conduct. Pursuant to *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), it was error to omit the terminal elements from these specifications. Although there was error, the appellant has the burden of demonstrating that "the Government's error in failing to plead the terminal element of Article 134, UCMJ, resulted in material prejudice to [the appellant's] substantial, constitutional right to notice." *Humphries*, 71 M.J. at 215 (footnote and citations omitted); see also Art. 59(a), UCMJ. 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.'" *Humphries* at 215-16 (citations omitted).

The appellant claims that he was denied sufficient notice of the terminal element. The record supports his claim. While the terminal element was mentioned in the Article 32 report, the pretrial proceedings lacked any mention of the terminal element. The Government did not reference the terminal element during opening statement and did not introduce any direct evidence that might satisfy the element. Although the military judge did instruct the panel on the terminal element and the trial counsel alluded to it during closing argument, these references came after the close of evidence.

The Government argues that the appellant's pleas to violating Article 92 before the beginning of the contested portion showed that he "underst[ood] the principles associated with good order and discipline."¹ The appellant pled guilty to two specifications of knowingly violating lawful orders by engaging in consensual sexual acts while underway on board USS JOHN C. STENNIS (CVN 74). During the plea colloquy, the military judge did not define the terminal element, and the appellant's answers do not indicate an awareness of the concept that could be imputed to the Article 134 adultery charges which he was contesting.² We are similarly unpersuaded by the Government's argument that the trial counsel's reference to the terminal element during the closing argument distinguishes this case from *Humphries* where only a "lay definition of adultery" was referenced in the closing argument. *Humphries*, 71 M.J. at 216. In *Humphries*, CAAF questioned whether such a reference made during a closing argument could ever be sufficient notice (*id.* at n.9), and then specifically rejected the proposition that argument about the element by trial defense counsel during closing argument constituted notice (*id.* at 217). Here, only one of the two theories of liability for the terminal element was mentioned by trial counsel in one sentence of a 10-page argument. This is not indicative of constitutionally required notice. In line with CAAF's reasoning in *Humphries*, we conclude that the appellant suffered prejudice. Accordingly, the findings of guilty of Charge III and the specifications thereunder are set aside and Charge III and both specifications are dismissed.

Sentence Reassessment

Having set aside Charge III and its two specifications, we must determine whether we are able to reassess the sentence, and

¹ Government's Answer of 5 Sep 2012 at 11.

² Record at 53-76.

we are confident we can. Applying the analysis set forth in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), *United States v. Buber*, 62 M.J. 476 (C.A.A.F. 2006), and carefully considering the entire record, we conclude that there has not been a dramatic change in the penalty landscape and that we are satisfied beyond a reasonable doubt that even if the two adultery specifications were dismissed at trial, the members would have adjudged a sentence no less than that approved by the CA in this case.

We note that dismissal of the two adultery specifications does not reduce the appellant's confinement exposure. The remaining Article 120 convictions carry a confinement maximum of life without the eligibility for parole, while the other categories of punishment also remain unchanged. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), Part IV, ¶ 45(f). Additionally, upon motion by the trial defense counsel, the military judge instructed the members that the appellant's conviction for Specification 1 under Charge III was multiplicious for sentencing with his conviction for rape.³ *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012). Thus, the dismissal of the two specifications in light of the remaining charges is essentially inconsequential. The five years of confinement awarded to the appellant is well below the maximum authorized confinement based upon the offenses of which he was properly found guilty.

Conclusion

For the reasons stated above, the findings of guilty to Charge III and the two specifications thereunder are set aside and Charge III and its specifications are dismissed. The remaining findings and the sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

³ Record at 588.