UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JOSHUA K. BARKSDALE
United States Air Force

ACM 37900

25 October 2012

Sentence adjudged 20 January 2011 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: David S. Castro (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of $1,250.00 pay per month for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Anthony D. Ortiz and Captain Robert D. Stuart.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Scott C. Jansen; Major Roberto Ramirez; and Gerald R. Bruce, Esquire.

Before

STONE, GREGORY, and HARNEY
Appellate Military Judges

PER CURIAM:

A general court-martial composed of military judge alone convicted the appellant in accordance with his pleas of one specification of desertion, one specification of adultery, and one specification of unlawful entry, in violation of Articles 85 and 134, UCMJ, 10 U.S.C. §§ 885, 934. The court sentenced him to a bad-conduct discharge, confinement for 6 months, forfeiture of $1,250.00 pay per month for 6 months, and reduction to E-1. The convening authority approved the sentence as adjudged. On appeal, the appellant argues that the specifications charged under Article 134, UCMJ, fail to state offenses because each fails to expressly allege the terminal element. We disagree and, finding no error that prejudiced a substantial right of the appellant, affirm.

Background

The appellant was charged, inter alia, with adultery for wrongfully having sexual intercourse with MH, a married woman not his wife, and with unlawfully entering the dwelling of Airman First Class JS. Neither specification alleged the terminal element of Article 134, UCMJ.[1] At trial, the appellant pled guilty to the charge and both specifications. During the *Care*[2] inquiry, the military judge described and defined for the appellant each element of adultery and unlawful entry, including the terminal element, in violation of Article 134, UCMJ. The appellant stated he understood the elements and definitions, and he also stated that his guilty plea admitted that these elements "accurately describe[d]" his conduct. For both specifications, the appellant admitted that his conduct was prejudicial to good order and discipline as well as service discrediting and explained why. The military judge accepted the appellant's guilty plea as provident and found him guilty of adultery.

Terminal Element

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)); *see also* Rule for Courts-Martial 307(c)(3). In *Fosler*, our superior court invalidated a conviction of adultery under Article 134, UCMJ, because the military judge improperly denied a defense motion to dismiss the specification on the basis that it failed to allege the terminal element of either Clause 1 or 2. *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011).

While failure to allege the terminal element of an Article 134, UCMJ, offense is error, in the context of a guilty plea, the error is not prejudicial where the military judge correctly advises the appellant of all the elements and the plea inquiry shows that the appellant understood to what offense and under what legal theory he was pleading guilty. *United States v. Ballan*, 71 M.J. 28, 34-36 (C.A.A.F. 2012), *cert. denied*, __ S. Ct. __ (U.S. 25 June 2012) (No. 11-1394).[3] *See also United States v. Nealy*, 71 M.J. 73 (C.A.A.F. 2012); *United States v. Watson*, 71 M.J. 54 (C.A.A.F. 2012).

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[1] Under Article 134, UCMJ, 10 U.S.C. § 934, the Government must prove beyond a reasonable doubt that the accused engaged in certain conduct and that the conduct satisfied one of three criteria, often referred to as the "terminal element." Those criteria are that the accused's conduct was: (1) to the prejudice of good order and discipline; (2) of a nature to bring discredit upon the armed forces; or (3) a crime or offense not capital. *Id.*

[2] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

[3] In *United States v. Ballan*, our superior court held that:

> [W]hile it is error to fail to allege the terminal element of Article 134, UCMJ, expressly or by necessary implication, in the context of a guilty plea, where the error is alleged for the first time on

During the plea inquiry in the present case, the military judge advised the appellant of each element of the charged offenses. For the Article 134, UCMJ, offenses at issue in this appeal, the military judge included the terminal element of each specification and the appellant explained how his misconduct met the requirements of the terminal element. Therefore, as in *Ballan*, the appellant here suffered no prejudice to a substantial right. He knew under what clause he was pleading guilty and clearly understood how his conduct violated the terminal element of Article 134, UCMJ.

Appellate Delay

We note that the overall delay of over 18 months 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. *See 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

The approved findings and sentence 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).

> appeal, whether there is a remedy for the error will depend on whether the error has prejudiced the substantial rights of the accused.

United States v. Ballan, 71 M.J. 28, 34-36 (C.A.A.F. 2012), *cert. denied*, __ S. Ct. __ (U.S. 25 June 2012) (No. 11-1394). The Court further held that, where the military judge describes Clauses 1 and 2 of Article 134, UCMJ, for each specification during the plea inquiry and "where the record conspicuously reflect[s] that the accused clearly understood the nature of the prohibited conduct" as a violation of Clause 1 or 2 of Article 134, UCMJ, there is no prejudice to a substantial right. *Id*. at 35 (brackets in original) (citing *United States v. Medina*, 66 M.J. 21, 28 (C.A.A.F. 2008)).

Accordingly, the findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court