UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant BRIAN D. BISHOP
United States Air Force

ACM 36456

17 December 2007

Sentence adjudged 23 June 2005 by GCM convened at Ramstein Air Base, Germany. Military Judge: William M. Burd (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 3 years, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Teresa L. Davis, and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Major Kimani R. Eason.

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

SCHOLZ, Senior Judge:

The appellant was convicted, in accordance with his pleas, of one specification of wrongfully attempting to induce or entice a child under 16 years of age to engage in sexual activity and one specification of wrongfully attempting to induce or entice a child under 16 years of age to pose for nude photographs in return for payment of money, in violation of Article 80, UCMJ, 10 U.S.C. § 880. A military judge sitting alone as a general court-martial sentenced the appellant to a bad-conduct discharge, confinement for 3 years, reduction to the grade of E-1, and forfeiture of all pay and allowances. The convening authority approved only so much of the sentence as provides for a bad-conduct discharge, confinement for 3 years, and reduction to E-1. The convening authority also

waived the mandatory forfeitures for 6 months and directed they be paid to the appellant's wife for the benefit of the appellant's wife and two children.

On appeal, the appellant asserts (1) the charge should be set aside because its two specifications fail to state an offense; (2) 18 U.S.C. § 2251, which proscribes using a minor to engage in sexually explicit conduct for the purpose of making visual depictions of that conduct, does not have extraterritorial application; (3) his guilty plea is improvident based on the military judge's failure to establish that the United States government had exclusive or concurrent federal jurisdiction over the situs of the alleged underlying offenses; (4) his guilty plea to wrongfully attempting to induce a child under 16 years of age to engage in sexual activity is improvident because the military judge did not identify the underlying offense, explain the elements of the underlying offense, define the term "sexual activity," or explain that the activity had to constitute a criminal offense; (5) his guilty plea to wrongfully attempting to induce a child under 16 years of age to pose for nude photographs is improvident because the military judge did not identify the underlying offense, explain the elements of the underlying offense, or explain what constituted nude photographs; (6) his statements, during the guilty plea inquiry, that his actions were prejudicial to good order and discipline and service discrediting, amounted to legal conclusions as opposed to admissions, and were therefore improvident; and (7) the military judge erred in admitting a Letter of Reprimand, that was issued after the arraignment, where the offense had originally been a specification that had been preferred and subsequently dropped.

For the reasons set out below, we find no merit in the appellant's assignments of error, and discuss only the first, sixth and seventh.

Background

The appellant testified during his *Care*[1] inquiry that he began communicating by email with a 13-year-old girl, E.M.H., who had posted her email on flyers in the Ramstein Air Base housing area advertising her babysitting services. The appellant's initial email asked E.M.H. if she would like another type of work, specifically to be photographed in return for payment. E.M.H.'s concerned parents turned this email over to the Air Force Office of Special Investigations (AFOSI) who then subsequently posed as E.M.H. and responded to the appellant. The appellant continued to send emails to someone he thought was a 13-year-old girl for over three weeks. The appellant admitted to the military judge that during the course of this electronic conversation the appellant confirmed E.M.H.'s age and the fact that she was a virgin. The appellant proceeded to ask if she would pose nude for photographs and whether she would be willing to "do anything sexual" with him, and he arranged a time and place to meet her. Of course,

[1] *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969).

when the appellant arrived at the meeting location, he was met by AFOSI agents and German law enforcement personnel.

Charge and Specifications State Offenses

The appellant now avers that the specifications of attempt under Article 80, UCMJ, to which he pled guilty fail to state offenses because they do not identify an underlying offense and if the underlying offenses were intended to be under Article 134, UCMJ, 10 U.S.C. § 934 the government failed to identify which clauses of Article 134, UCMJ, were being charged. Therefore, the appellant avers that the specifications failed to contain the essential elements of the offenses and failed to provide the appellant notice of the offenses with which he was charged. The appellant argues that this failure to provide notice of the charged offenses violated his due process rights.

The specifications now challenged by the appellant read as follows:

> Specification 1: In that STAFF SERGEANT BRIAN D. BISHOP, 86th Operations Support Squadron, Ramstein Air Base Germany, did, at or near Ramstein Air Base, Germany, between on or about 1 August 2004 and on or about 1 September 2004, wrongfully attempt to induce or entice [E.M.H.], a child under 16 years of age, to engage in sexual activity, in return for payment of money.[2]
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> Specification 2: In that STAFF SERGEANT BRIAN D. BISHOP, 86th Operations Support Squadron, Ramstein Air Base Germany, did, at or near Ramstein Air Base, Germany, between on or about 1 August 2004 and on or about 1 September 2004, wrongfully attempt to induce or entice [E.M.H.], a child under 16 years of age, to pose for nude photographs in return for payment of money.

The question of whether a specification states an offense is a question of law, which this Court reviews de novo. *See United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994); *United States v. Mayo*, 12 M.J. 286, 288 (C.M.A. 1982). In *United States v. Bailey*, 52 M.J. 786, 795 (A.F. Ct. Crim. App. 1999), this Court again recognized the military is a notice pleading jurisdiction. *See United States v. Sell*, 11 C.M.R. 202, 206 (C.M.A. 1953); *United States v. Calamita,* 48 M.J. 917, 920 n.1 (A.F. Ct. Crim. App. 1998). We have followed "the modern tendency . . . toward allowing the pleading of legal conclusions and the elimination of detailed factual allegations from counts charging misconduct." *Bailey*, 52 M.J. at 794 (quoting *United States v. Williams*, 31 C.M.R. 269, 271 (C.M.A. 1962)).

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[2] The appellant pled guilty to the specification except the words, "in return for payment of money," and was found guilty of the same.

A specification states an offense if it alleges, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy. *Dear*, 40 M.J. at 197 (citing Rule for Courts-Martial (R.C.M.) 307(c)(3)). "This is a three-prong test requiring (1) the essential elements of the offense, (2) notice of the charge, and (3) protection against double jeopardy." *Id.*; *Bailey*, 52 M.J. at 795. Failure to object does not waive the issue of a specification's legal sufficiency. R.C.M. 905(e). However, "[s]pecifications which are challenged immediately at trial will be viewed in a more critical light than those which are challenged for the first time on appeal." *United States v. French*, 31 M.J. 57, 59 (C.M.A. 1990); *see also United States v. Bryant*, 30 M.J. 72, 73 (C.M.A. 1990); *United States v. Watkins*, 21 M.J. 208, 209-10 (C.M.A. 1986).

If, however, a specification has not been challenged prior to findings and sentence, the sufficiency of the specification may be sustained "if the necessary facts appear in any form or by fair construction can be found within the terms of the specification." *Mayo*, 12 M.J. at 288. The question is whether the specification is so defective that it "cannot within reason be construed to charge a crime." *Watkins*, 21 M.J. at 210.

As our superior court pointed out in *United States v. Saunders*, 59 M.J. 1 (C.A.A.F. 2003), "[i]t is well settled that conduct that is not specifically listed in the [*Manual for Courts-Martial* (*MCM*)] may be prosecuted under Article 134." *Id.* at 6 (citing *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003)). A specification that alleges a violation of Article 134, UCMJ, 10 U.S.C. § 934, need not expressly allege that the conduct is a disorder or neglect, or that it is of a nature to bring discredit upon the armed forces. *MCM*, Part IV, ¶ 60c(6)(a). However, due process requires that a person have fair notice that an act is criminal before being prosecuted for it. *Vaughan*, 58 M.J. at 31.

After reviewing the appellant's responses in the *Care* inquiry, the emails he admitted to writing and sending, and the confession he wrote on the day he was caught, we find his argument that he did not have notice of the offenses with which he was charged to be disingenuous. If there was any doubt as to the underlying offenses of these attempt specifications the military judge made it clear to the appellant during the providency inquiry that the appellant was pleading guilty to attempting to commit two offenses under Clause 1 of Article 134, UCMJ, conduct which is prejudicial to good order and discipline and Clause 2, service discrediting conduct. The underlying offenses were in fact highlighted when the military judge initially failed to explain the elements and definitions of conduct prejudicial to good order and discipline and service discrediting conduct after explaining and defining the elements of attempt in the first specification. The military judge realized this oversight as he was discussing the second specification, and made a point to ensure the appellant understood and admitted these elements as they applied to both the first and second specifications. There was no indication from the appellant or his trial defense counsel that he did not understand the

offenses with which he was charged. The appellant did not object to the specifications or move to make the specifications more definite and certain and did not seek a bill of particulars. This Court concludes that the appellant had fair notice that his actions of sending emails to a 13-year-old girl, and arranging to meet her and actually showing up to meet her, thereby attempting to entice her to have sex with him and to pose nude so he could take pictures of her in return for payment of money were criminal, wrong, and therefore both prejudicial to good order and discipline and service discrediting, in violation of Clauses 1 and 2, Article 134, UCMJ, and that he was charged with the same.

The appellant correctly points out that the specifications do not include all of the elements of the underlying Article 134, UCMJ, offenses in the Article 80, UCMJ, attempt charge. "Article 134 specifications do not require an allegation as to the character of the accused's conduct. . . . [T]he omission of this aspect of the offense has been judicially sanctioned." *Mayo*, 12 M.J. at 293. Furthermore, because the specifications allege the elements of an attempt under Article 80, UCMJ, to commit offenses which are not enumerated in the UCMJ and do not cite to a federal or other assimilated statute under Clause 3, Article 134,[3] the only reasonable underlying offense for the attempt specifications was a Clause 1 or Clause 2 Article 134, UCMJ, offense, of which the appellant had adequate notice. We also find no risk that the appellant will be put in double jeopardy as the record will protect the appellant against future prosecution for the same conduct. Thus, we find that while the specifications alleging attempts to commit offenses under Clauses 1 and 2, Article 134, UCMJ, could have been written to more clearly identify the underlying offenses, they are not so defective that they "cannot within reason be construed to charge a crime." *Watkins*, 21 M.J. at 210.

Finally, our superior court has held, "when an accused pleads guilty to the offense and only challenges the specification for the first time on appeal" then "a specification need not expressly allege all elements of an offense, but it must at least aver all elements by implication." *Bryant*, 30 M.J. at 73. Further, the appellant must show substantial prejudice. *Id.* The appellant in this case has not shown substantial prejudice, demonstrating that the charge was "so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had." *Id.*; *see also Watson*, 21 M.J. at 210.

Providency of Plea

The appellant also argues on appeal that his statements made during the guilty plea inquiry admitting that his actions were prejudicial to good order and discipline and service discrediting amounted to legal conclusions as opposed to admissions, and were therefore improvident.

[3] United States Code offenses (18 U.S.C. §§ 2422, 2423, 2251) were discussed during the providency inquiry, but only by way of analogy and for the purpose of determining the specific intent requirement and maximum punishment.

In determining whether a guilty plea is provident, the test is whether there is a "substantial basis in law and fact for questioning the guilty plea." *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). In order to establish an adequate factual basis for a guilty plea, the military judge must elicit "factual circumstances as revealed by the accused himself [that] objectively support that plea[.]" *Jordan*, 57 M.J. at 238 (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)).

The appellant clearly articulated in his testimony to the military judge that his actions of sending emails to E.M.H.[4] and arranging and showing up to meet her *were attempts* to induce and entice a 13-year-old girl to let him take nude photos of her in exchange for money and to have sex with him. The appellant said he knew his actions were wrong and both prejudicial to good order and discipline because E.M.H. was the dependent of another military member, and service discrediting in the eyes of the public because the appellant knew E.M.H. was a minor.

We have reviewed the plea colloquy, as well as the emails sent by the appellant and conclude that there is no "substantial basis" in law or fact to question the providence of the appellant's guilty pleas. *Prater*, 32 M.J. at 436. The appellant was correctly advised of the elements under Clauses 1 and 2 of Article 134, UCMJ, and the elements of attempt under Article 80, UCMJ, and admitted that his misconduct met those elements for both specifications under the charge. Therefore the military judge did not abuse his discretion when he found the appellant's pleas provident.

Letter of Reprimand was Proper Sentencing Evidence

The appellant argues on appeal that the military judge erred in admitting a Letter of Reprimand (LOR) that was issued after his arraignment for an offense that had originally been a specification that had been preferred and subsequently not referred.

We review a military judge's decision on admission of sentencing evidence for an abuse of discretion. *United States v. Gogas*, 58 M.J. 96, 99 (C.A.A.F. 2003). An administrative reprimand is a management tool for commanders to reprove and instruct subordinates for departing from acceptable norms of performance, conduct, or bearing. *United States v. Boles*, 11 M.J. 195, 198 (C.M.A. 1981). A LOR is a management tool and must perform a legitimate corrective or management tool purpose. *United States v. Williams*, 27 M.J. 529 (A.F.C.M.R. 1988). A LOR must have been issued for a legitimate corrective purpose and not merely to aggravate an appellant's punishment.

[4] The emails sent by the appellant to E.M.H. and the emails sent to the appellant by the OSI, posing as E.M.H. were admitted as evidence during the providency inquiry to assist the military judge.

Boles, 11 M.J. at 199. Use of reprimands in lieu of trial by court-martial or nonjudicial punishment inherently constitutes a corrective or management function. *United States v. Hood*, 16 M.J. 557, 560 (A.F.C.M.R. 1983).

Under the facts of this case, we find no evidence that the commander's intent in issuing the LOR was for an improper purpose.[5] We also find that the commander was not precluded from correcting the appellant's conduct via a LOR.

This Court previously held that we find no fault with a reprimand having a corrective and rehabilitative purpose after charges are preferred and prior to trial, if the reason for the action is to dissuade the individual from continuing to engage in such conduct. *Williams*, 27 M.J. at 529-30; *United States v. Beaver*, 26 M.J. 991, 993 (A.F.C.M.R. 1988). The appellant argues that the LOR was issued 10 days after arraignment and therefore, the timing of the LOR leads to the conclusion that the intent of the LOR was "punitive," rather than "corrective." However, we note that the appellant was arraigned on 13 May 2005, and deferred entering his pleas until 22 June 2005 when the court-martial was continued. Further, contrary to the appellant's position, the offense in the LOR is not the same offense which was originally preferred and ultimately not referred to trial. The government preferred a specification for a violation of Article 134, UCMJ, "indecent acts" with E.S., whereas the LOR was for adultery with E.S., without reference to the specific acts which the government mentioned in the original specification. Neither the timing nor the mere similarities of the offenses prove that the LOR was issued for an improper purpose. We conclude that military judge did not abuse his discretion in admitting the LOR.

Finally, even if we found that the LOR was improperly admitted, the next question we would have to answer is whether or not the appellant was "substantially prejudiced" by the erroneous admission of this evidence. *Boles*, 11 M.J. at 199. We find that the appellant was not substantially prejudiced, especially since the trial was by military judge alone, the LOR did not have any accompanying inflammatory documents, and the nature of the offense of adultery between two consenting adults may be considered less serious in comparison to the offenses for which the appellant was found guilty.[6] *See Id.*

Remaining Issues

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[5] In *Williams*, 27 M.J. at 529, the appellant's commander testified that his purpose in giving the LOR was because he wanted the court to know that the appellant's use of cocaine was "more than once" and he wanted to bring to "everyone's attention," that he believed the appellant was a cocaine addict, therefore, the commander's purpose in issuing the LOR went beyond a corrective or "management tool" purpose. *Id.* at 530.

[6] In *Boles*, 11 M.J. at 200, the LOR in question was for far more serious criminal misconduct (firebombing an individual's home by means of a Molotov cocktail in an act of revenge) than the misconduct that was charged at the court-martial (larceny).

We have considered the remaining assignments of error and resolve them adversely to the appellant. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Matias*, 25 M.J. 356 (C.M.A. 1987).

Conclusion

The findings 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 findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court