**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman THOMAS L. BOURNE**
**United States Air Force**

**ACM 37866**

**05 February 2013**

Sentence adjudged 27 January 2011 by GCM convened at Joint Base Andrews Naval Air Facility Washington, Maryland. Military Judge: Donald R. Eller, Jr. (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 60 days, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges



PER CURIAM:

A general court-martial composed of a military judge convicted the appellant, consistent with his pleas, of attempted wrongful possession of Percocet, wrongful possession and use of Percocet, wrongful introduction of Percocet onto a military installation, wrongful appropriation of a dormitory key, larceny of Percocet, and solicitation of two other Airmen to distribute Percocet, in violation of Articles 80, 112a, 121 and 134, UCMJ, 10 U.S.C. §§ 880, 912a, 921, 934.[1] The adjudged sentence consisted of a bad-conduct discharge, confinement for 60 days, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the

[1] The appellant was acquitted of wrongful use of heroin.

sentence as adjudged. On appeal, the appellant asserts the specifications of solicitation fail to state offenses because they omit the required terminal element for Article 134, UCMJ, offenses. Finding no error that materially prejudices the appellant, we affirm.

*Sufficiency of the Article 134, UCMJ, Specifications*

Between May 2008 and September 2009, the appellant committed a variety of criminal offenses relating to Percocet. This included using the drug, possessing it, stealing it, and introducing it onto Joint Base Andrews, Maryland. The appellant was also charged with two specifications of soliciting other Airmen to distribute Percocet, by asking them to give him some of the Percocet they had been prescribed for various injuries. Both specifications omitted the terminal element for Article 134, UCMJ, offenses, which the appellant alleges is error.

Whether a charged specification states 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). The failure to allege the terminal element of an Article 134, UCMJ, offense is error. *United States v. Ballan*, 71 M.J. 28, 34 (C.A.A.F.), *cert. denied*, 133 S. Ct. 43 (2012) (mem.). In the context of a guilty plea, such an error is not prejudicial when 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. *Id.* at 34-36.

During the plea inquiry in the present case, the military judge advised the appellant of each element of the Article 134, UCMJ, offenses at issue, including the terminal element. The military judge defined the terms "conduct prejudicial to good order and discipline" and "service discrediting" for the appellant. The appellant explained to the military judge how his misconduct in asking two Airmen to commit criminal offenses was prejudicial to good order and discipline and also service discrediting. Therefore, as in *Ballan*, the appellant here suffered no prejudice to a substantial right, because he knew under what clause he was pleading guilty and clearly understood how his conduct violated the terminal element of Article 134, UCMJ.

*Conclusion*

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. [2] Articles 59(a) and 66(c),

[2] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).

UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court