

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class SETH A. COOPER
United States Air Force

ACM S31918

31 May 2012

Sentence adjudged 13 January 2011 by SPCM convened at Kadena Air Base, Okinawa, Japan. Military Judge: Vance H. Spath (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 210 days, forfeiture of \$700.00 pay per month for 8 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Shane A. McCammon.

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

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

Contrary to his pleas, a military judge sitting as a special court-martial convicted the appellant of one specification of violating a lawful general order for wrongful possession of spice and one specification of violating a lawful general order for wrongfully using spice, in violation of Article 92, UCMJ, 10 U.S.C. § 892. Consistent with his pleas, the military judge found the appellant guilty of larceny and obstruction of justice, in violation of Articles 121 and 134, UCMJ, 10 U.S.C. §§ 921, 934. The adjudged and approved sentence consisted of a bad-conduct discharge, confinement for 210 days, forfeiture of \$700.00 pay per month for 8 months, and reduction to the grade of E-1. The appellant raises two issues for our consideration: (1) whether the appellant is

entitled to relief because the Government violated the 30-day post-trial standard for forwarding the record of trial for appellate review, and (2) whether the specification for obstructing justice fails to state an offense because it alleges a violation of Article 134, UCMJ, but fails to allege any of the article's terminal elements.

Appellate Delay

In his first assignment of error, the appellant asks for some form of modest relief because the record of trial was docketed with this Court 45 days after the convening authority signed the Action. An overall delay of more than 30 days between the time the convening authority took action on the case and when it was docketed at the Air Force Court of Criminal Appeals for completion of review by the 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. *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. *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. 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.

Article 134, UCMJ, Offense

In his second assignment of error, the appellant asserts that the specification of Charge III fails to state an offense. Whether a specification states an offense is a question of law we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). In *United States v. Fosler*, 70 M.J. 225, 233 (C.A.A.F. 2011), a contested case, our superior court held that where the specification failed to allege the terminal element under Article 134, UCMJ, the specification failed to state an offense. The Court dismissed the specification as defective. *Id. Fosler*, however, did not involve a guilty plea. Recently, our superior court has addressed the failure to allege the terminal element in an Article 134, UCMJ, specification where the appellant was convicted on the basis of a guilty plea. *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012). 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). In *Ballan*, the 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 appeal, whether there is a remedy for the error will depend on whether the error has prejudiced the substantial rights of the accused.

Ballan, 71 M.J. at 30 (citing Article 59, UCMJ, 10 U.S.C. § 859). The *Ballan* 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 (alterations in original) (citing *United States v. Medina*, 66 M.J. 21, 28 (C.A.A.F. 2008)).

Here, the appellant did not challenge the sufficiency of the specification at trial and pled guilty to the charge and specification of obstruction of justice. The military judge conducted a thorough plea inquiry and described and defined the Clause 1 and 2 terminal elements of the Article 134, UCMJ, charge. He asked the appellant whether he believed his conduct was either prejudicial to good order and discipline or service discrediting. The appellant acknowledged understanding all the elements, and explained to the military judge why he believed his conduct was both prejudicial to good order and discipline and service discrediting. Thus, “while the failure to allege the terminal elements in the specification[s] was error, under the facts of this case the error was insufficient to show prejudice to a substantial right.” *Ballan*, 71 M.J. at 36; *Nealy*, 71 M.J. at 77-78; *Watson*, 71 M.J. at 58-59.

Conclusion

The approved findings and the 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). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL



A handwritten signature in black ink, appearing to read "Laela F. Sharrieff".

LAELA F. SHARRIEFF
Chief Commissioner