UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MICHELLE E. COURTNEY
United States Air Force

ACM 37694 (rem)

24 January 2012

Sentence adjudged 19 May 2010 by GCM convened at Little Rock Air Force Base, Arkansas. Military Judge: Amy M. Bechtold.

Approved sentence: Bad-conduct discharge, confinement for 9 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford and Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Brian C. Mason; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

UPON REMAND

PER CURIAM:

The appellant was tried by a general court-martial composed of officer members. Consistent with her pleas, she was found guilty of eight specifications of stealing mail in violation of Article 134, UCMJ, 10 U.S.C. § 934, and nine specifications of wrongful appropriation in violation of Article 121, UCMJ, 10 U.S.C. § 921.[1] The adjudged and

[1] Pursuant to her pretrial agreement, the appellant pled guilty to Specifications 1, 2, 6, 8, 9, 11, 23, and 25 of Charge I, stealing mail in violation of Article 134, UCMJ, 10 U.S.C. § 934, and pled not guilty to Specifications 4, 13, 15,

approved sentence consists of a bad-conduct discharge, confinement for 9 months, forfeiture of all pay and allowances, and reduction to E-1.

This Court previously affirmed the findings and sentence. *United States v. Courtney*, ACM 37694 (A.F. Ct. Crim. App. 15 June 2011) (unpub. op.), *rev'd*, 70 M.J. 361 (C.A.A.F. 2011) (mem.). On 23 September 2011, the Court of Appeals for the Armed Forces (CAAF) granted review of whether a specification that does not expressly allege the terminal element in a Clause 1 or 2 specification under Article 134, UCMJ, is sufficient to state an offense, and then vacated our initial decision and remanded the appellant's case for consideration of the granted issue in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). *Courtney*, 70 M.J. at 361. Having considered the granted issue in light of *Fosler*, and again having reviewed the entire record, we affirm.

Background

As part of her pretrial agreement, the appellant pled guilty to eight specifications of Charge I that alleged the appellant stole certain mail matter consisting of a letter and greeting cards addressed to eight different individuals, in violation of Article 134, UCMJ. She pled not guilty to nine other specifications of Charge I that alleged theft of mail consisting of Netflix DVDs and magazines addressed to nine individuals, in violation Article 134, UCMJ, but she pled guilty to the lesser included offense of wrongful appropriation of the DVDs and magazines under Article 121, UCMJ. The Charge Sheet did not expressly allege either potential terminal element of Article 134, UCMJ, that is, that the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

At trial, the appellant made no motions and did not object to the Article 134, UCMJ, charge and specifications as failing to state an offense. Although the potential terminal element of proof under Article 134, UCMJ, was not expressly alleged in any of the specifications, during the inquiry into her guilty plea to stealing mail, the military judge advised the appellant of the elements of stealing mail, including Clauses 1 and 2 of the second element of Article 134, UCMJ. The military judge also defined those terms for the appellant.

The appellant admitted guilt to stealing mail and affirmatively stated that she understood the elements and definitions of the Article 134, UCMJ, offense, and that taken together they correctly described what she did. In describing her offenses to the military judge, the appellant admitted that while working in the Little Rock Air Force Base Official Mail Center, where her duties consisted of receiving and delivering mail on base,

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17, 18,19, 20, 21, and 22, of Charge I, but guilty to the lesser included offense of wrongful appropriation in violation of Article 121, UCMJ, 10 U.S.C. § 921. Also, in accordance with her pretrial agreement, she pled not guilty to Specifications 3, 5, 7, 10, 12, 14, 16, 24, and 26 of Charge I, as well as the three specifications of Charge II and Charge II, all of which were withdrawn after arraignment.

she stole greeting cards and a letter that were addressed to named persons who lived on the base. She expressly acknowledged in the stipulation of fact that her conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces, and she explained to the military judge how her conduct was both prejudicial to good order and discipline as well as service discrediting.

In regard to her plea of guilty to the lesser included offense of wrongful appropriation of the DVDs and magazines under Article 121, UCMJ, the military judge did not discuss the elements of the greater Article 134, UCMJ, offense except to note the difference in the intent element between stealing and wrongful appropriation. The military judge explained the elements and definitions of wrongful appropriation under Article 121, UCMJ, and the appellant expressed her understanding. She stipulated to the facts and explained to the military judge how she was guilty of wrongful appropriation. After reviewing the pretrial agreement with her, the military judge found that the appellant's plea of guilty was knowingly and voluntarily made, and also found the appellant guilty in accordance with her pleas.

Discussion

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 for adultery under Article 134, UCMJ, because the military judge improperly denied a defense motion to dismiss for failure to state an offense, *Fosler*, 70 M.J. at 233, where the charge and specification did not expressly allege at least one of the three clauses of the second element of proof under Article 134, UCMJ, commonly known as the terminal element. *Id*. at 227. In setting aside the conviction, *Fosler* did not foreclose the possibility that an element could be implied, including the terminal element in an Article 134, UCMJ, offense; however, the Court held that, in contested cases where the sufficiency of the charge and specification are first challenged at trial, "we [will] review the language of the charge and specification more narrowly than we might at later stages" and "will only adopt interpretations that hew closely to the plain text." *Id*. at 230, 232. Thus, at least given the particular circumstances contained in *Fosler*--a contested trial for adultery where the sufficiency of the charge and specification are first challenged at trial--the law will not find that the terminal element of Article 134, UCMJ, is necessarily implied. *Id*.

In guilty plea cases, however, where there is no objection at trial to the sufficiency of the charge and specification, our superior court has followed "the rule of most federal

courts of liberally construing specifications in favor of validity when they are challenged for the first time on appeal." *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986). Moreover, "[i]n addition to viewing post-trial challenges with maximum liberality, we view standing to challenge a specification on appeal as considerably less where an accused knowingly and voluntarily pleads guilty to the offense." *Id.* at 210 (citations omitted).

In the case before us, unlike in *Fosler*, the appellant made no motion at trial to dismiss the charge and specifications for failure to state an offense and she pled guilty. During the guilty plea inquiry, the appellant acknowledged her understanding of all the elements of the crime of stealing mail, including the terminal element of Article 134, UCMJ. She explained to the military judge in her own words why her conduct was prejudicial to good order and discipline and service discrediting. In this context, consistent with the reasoning in both *Fosler* and *Watkins*, we apply a liberal construction in examining the text of the charge and specifications in this case. In doing so, we find that the terminal element is necessarily implied and that the appellant was on notice of what she needed to defend against and is protected against double jeopardy. Moreover, applying the liberal construction of *Watkins*, the specifications alleging theft of mail under Article 134, UCMJ, were sufficient to also provide the appellant notice of the lesser included offense of wrongful appropriation. Therefore, we find that the charge and specifications under Article 134, UCMJ, are not defective for failing to state an offense.

C*onclusion*

Having considered the record in light of *Fosler* as directed by our superior court, we again find that 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). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

Angela E. Dixon

ANGELA E. DIXON, TSgt, USAF
Deputy Clerk of the Court