UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JOHN P. FRAME
United States Air Force

ACM S31878

10 October 2012

Sentence adjudged 07 October 2010 by SPCM convened at Grand Forks Air Force Base, North Dakota. Military Judge: David S. Castro (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 8 months, forfeiture of $964.00 pay per month for 8 months, 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 Roberto Ramirez; and Gerald R. Bruce, Esquire.

Before

ROAN, CHERRY, and MARKSTEINER
Appellate Military Judges

PER CURIAM:

A special court-martial composed of a military judge convicted the appellant, in accordance with his pleas, of seven specifications of wrongful use, distribution and introduction of controlled substances onto a military installation, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a; and one specification of obstructing justice, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The appellant was sentenced to a bad-conduct discharge, confinement for 8 months, forfeiture of $964 pay per month for 9 months, restriction to base for one month and reduction to E-1. The convening authority disapproved the restriction to base, approved forfeitures of $964 pay per month for 8 months, and approved the remainder of the sentence adjudged. On appeal, the

appellant asserts that the Specification of Charge II fails to state an offense and the military judge erred by accepting an improvident plea to a vague specification.

Background

The Specification to Charge II alleges an obstruction of justice, in violation of Article 134, UCMJ. It reads as follows: "In that, AIRMAN FIRST CLASS JOHN P. FRAME . . . did . . . wrongfully endeavor to impede an investigation in the case of Airman First Class John P. Frame by requesting Senior Airman [JS] and Senior Airman [JG] to provide false information to Air Force investigators." For the first time, the appellant argues on appeal that the specification fails to state an offense because it does not allege the terminal element of Article 134, UCMJ; does not allege the element of intent; and does not allege that the investigation named in the specification was criminal in nature.

We review de novo whether a specification states an offense. *United States v. Crafter*, 64 M.J. 209 (C.A.A.F. 2006). Our superior court has reiterated that "the military is a notice pleading jurisdiction." *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011) (citing *United States v. Sell*, 3 C.M.R. 202, 206 (C.M.A. 1953). The charge and specification must "first, contain[ ] the elements of the offense charged and fairly inform[ ] a defendant of the charge against which he must defend, and, second, enable[ ] him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Id.* (internal quotation marks and citations omitted).

During the providence inquiry, the military judge fully delineated and defined each element of the Specification of Charge II. Specifically, the military judge explained that the appellant was guilty of obstruction of justice if he:

(1) Wrongfully did a certain act by requesting Senior Airman [JS] and Senior Airman [JG] to provide false information to Air Force investigators;

(2) Did so in a case that he had reason to believe there were or would be **criminal proceedings** pending against him;

(3) That the acts were done **with the intent to impede** the due administration of justice;

(4) That under the circumstances, his 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

(5) He had reason to believe that Senior Airman [JS] and Senior Airman [JG] would be called upon to provide evidence as witnesses.

(emphasis added).

The appellant told the military judge that he understood each element and explained why he believed he was guilty of the offense. In describing his culpability, the appellant stated that after using cocaine with Senior Airman [JS] and Senior Airman [JG] in Las Vegas, he was arrested by agents of the Air Force Office of Special Investigations (OSI). During an interview, he admitted to the agents he had used controlled substances and gave narcotics to various Airmen in the past, to include Senior Airman [JS] and Senior Airman [JG]. The appellant was instructed not to discuss the investigation with other individuals. Despite the directive, the appellant contacted Senior Airman [JS] and Senior Airman [JG] and "asked them to not be completely forthcoming with OSI with regard to how much cocaine we used in Las Vegas." While discussing the obstruction of justice charge, the appellant told the military judge the following:

> I knew my actions were wrongful, and that I was not supposed to talk to them about my statement or about the case with anybody . . . Sir, at the time, **I had reason to believe that a criminal investigation was underway against me** as I had just given a confession to OSI. I attempted to impede the investigation against me by asking both Senior Airman [JS] and Senior Airman [JG] to not tell OSI about exactly how much cocaine we did in Las Vegas in order to make all of us look less culpable.

(Emphasis added). In addition, in a signed Stipulation of Fact, the appellant stated that, after he spoke with the investigators, he met with the two Airmen named in the specification and told them to provide incorrect information to the agents. It is abundantly clear the appellant was on notice of the criminal nature of the investigation and was fully notified by the language contained within the specification that the Government alleged his actions were done with the intent to impede the due administration of justice.

At no time prior to or during the guilty plea inquiry did the appellant or his counsel object to the charge as being unclear or, in some way, indicate that he did not understand that he had to defend against an allegation of obstructing a criminal investigation. Further, the appellant did not seek relief by either moving for a bill of particulars or moving to dismiss the charge for failure to state an offense. The appellant and his military defense counsel had every opportunity to challenge the specification but chose not to.

Our superior court has held, where an appellant raises the validity of a specification for the first time on appeal, we will "view[] [the] specification[] with maximum liberality." *United States v. Bryant*, 30 M.J. 72, 73 (C.M.A. 1990); *United States v. Watkins*, 21 M.J. 209, 209 (C.M.A. 1986). Utilizing this standard and based on

the entire record, we have no doubt the accused clearly understood he was charged with obstructing justice, in violation of Article 134, UCMJ, and why his conduct was prohibited.

Failure to State the Terminal Element of Article 134, UCMJ

The Government did not allege either Clause 1 or Clause 2 of Article 134, UCMJ, in the Specification of Charge II. Our superior court recently held that failure to allege the terminal element of an Article 134, UCMJ, offense is error but, 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 providence 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, 35 (C.A.A.F. 2012), *cert. denied*, __ S. Ct. __ (U.S._____ 2012. Having fully reviewed the record of trial, we are convinced the appellant 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 elements of Article 134, UCMJ.

Appellate Delay

Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time this case was docketed with 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." *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 appellants 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.

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).

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court