UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MIGUEL A. GASTELUM
United States Air Force

ACM 37887

25 February 2013

Sentence adjudged 21 January 2011 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: J. Wesley Moore (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 12 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Nathan A. White.

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

Before

GREGORY, HARNEY, and CHERRY
Appellate Military Judges

PER CURIAM:

Before a general court-martial composed of military judge alone, the appellant entered mixed pleas of (1) guilty to one specification of conspiracy to distribute steroids, two specifications of steroid use, and one specification of adultery, in violation of Articles 81, 112a, and 134, UCMJ, 10 U.S.C. §§ 881, 912a, 934, and (2) not guilty to eight other specifications alleging violations of Article 112a, UCMJ. The military judge accepted the guilty pleas to conspiracy[1] and use of steroids but rejected the plea to adultery, based on the appellant's responses on the terminal element. After trial on the

[1] The military judge excepted the phrase "on divers occasions" from the conspiracy specification, to which he found the appellant not guilty.

merits on the remaining eight Article 112a, UCMJ, specifications as well as the adultery charge, the military judge found the appellant guilty of use of hashish, use of Adderall, and adultery but acquitted him of the other six Article 112a, UCMJ, specifications. He sentenced the appellant to a bad-conduct discharge, confinement for 12 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged. The appellant assigns three errors: (1) The military judge abused his discretion in denying a motion for a new Article 32, UCMJ, 10 U.S.C. § 832, investigation; (2) The military judge committed plain error by permitting sentencing evidence on the possible impact of the appellant's drug use; and (3) The adultery specification fails to state an offense under Article 134, UCMJ. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

The Article 32, UCMJ, Hearing

As he did at trial, the appellant argues that the Article 32, UCMJ, investigating officer (IO) erroneously considered—over defense objection—written statements of two witnesses, RB and SA, based on an incorrect determination of nonavailability. Of the litigated specifications under Charge II which resulted in findings of guilty, RB's statement provided evidence on Specification 3 while SA's statement provided evidence on Specification 7. Both witnesses testified at trial on the merits.

In detailed findings and conclusions, the military judge ruled that the IO correctly determined the civilian witness, SA, was unavailable but had incorrectly determined that RB was unavailable, based on a mistaken belief that he was a civilian rather than a military member on appellate leave. However, the military judge found no prejudice from the appellant's claimed inability to cross-examine RB at the Article 32, UCMJ, hearing because (1) RB's testimony at other related drug trials was available to the appellant's counsel and (2) RB was available to be interviewed before his testimony in the appellant's trial. He further found that RB's testimony would not have impacted the referral decision in the appellant's case.

We review a military judge's decision denying a new Article 32, UCMJ, hearing for an abuse of discretion. *United States v. Burfitt*, 43 M.J. 815 (A.F. Ct. Crim. App. 1996). The military judge did not abuse his discretion in denying the motion for a new Article 32, UCMJ, hearing. First, his findings of fact regarding SA are not clearly erroneous and support the conclusion that she was unavailable to testify at the Article 32, UCMJ, hearing. Second, his findings of fact regarding RB are not clearly erroneous and support the conclusion that the appellant suffered no prejudice from RB's absence at the Article 32, UCMJ, hearing. As noted by the military judge, the defense had access to RB's prior statements and trial testimony in related drug cases. Also, in addition to RB's statement, another witness testified at the Article 32, UCMJ, hearing that she heard the appellant admit the drug use alleged in Specification 3 of Charge II, so it is highly unlikely that RB's in-person testimony would have persuaded the convening authority

not to refer the specification to trial. As did the military judge, we find no prejudice in the IO's erroneous determination that RB was unavailable. *See United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007) (finding that defects in an Article 32, UCMJ, hearing are tested for prejudice on appeal).

Aggravation Evidence

In sentencing the Government called Special Agent AG to testify concerning the hashish drug trade in Afghanistan, the location of the drug offenses in this case. The defense did not object to the substance of the testimony and conducted an effective cross-examination that showed the agent's lack of personal knowledge regarding the appellant's case and reduced the agent's testimony to broad generalizations. Trial counsel made only a brief reference to this testimony during sentencing argument without objection.

The appellant contends it was error for the military judge to consider the pre-sentencing testimony offered by the federal agent. In the absence of objection at trial to the admission of sentencing evidence, an appellant must show (1) that error occurred, (2) that it was plain or obvious, and (3) that it materially prejudiced a substantial right. *United States v. Cary*, 62 M.J. 277 (C.A.A.F. 2006); *see also United States v. Finster*, 51 M.J. 185, 187 (C.A.A.F. 1999); *United States v. Powell*, 49 M.J. 460, 463, 465 (C.A.A.F. 1998)). Under the circumstances of this judge alone trial, we find no plain error and no material prejudice in the admission of the agent's testimony. *See Cary*, 62 M.J. at 278.

Sufficiency of the Article 134, UCMJ, Specification

The appellant argues that the specification of adultery, in violation of Article 134, UCMJ, fails to state an offense by omitting the terminal element. The appellant entered a plea of guilty to the specification, and the military judge advised him of all the elements to include the terminal element. The appellant acknowledged his understanding of the elements and explained why he believed he was guilty. The military judge refused to accept the plea based on the appellant's responses concerning the prejudicial impact of his adultery. During the findings portion of the trial, the Government called the appellant's first sergeant to describe the impact on good order and discipline of the appellant's sexual relationship with a noncommissioned officer's wife.

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). "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*. (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)); *see also* Rule for Courts-Martial 307(c)(3). In *United States v. Fosler*,

70 M.J. 225 (C.A.A.F. 2011), our superior court invalidated a conviction of adultery under Article 134, UCMJ, because the military judge improperly denied a defense motion to dismiss the specification on the basis that it failed to allege the terminal element of either Clause 1 or 2.

In the case of a litigated Article 134, UCMJ, specification that does not allege the terminal element but which was not challenged at trial, the failure to allege the terminal element is plain and obvious error which is forfeited rather than waived. The remedy, if any, depends on "whether the defective specification resulted in material prejudice to [the appellant's] substantial right to notice." *United States v. Humphries*, 71 M.J. 209, 215 (C.A.A.F. 2012) (citing Article 59a, UCMJ, 10 U.S.C. § 859a). The prejudice analysis of a defective specification under plain error requires close review of the record: "Mindful that in the plain error context the defective specification alone is insufficient to constitute substantial prejudice to a material right . . . we look to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'" *Id*. at 215-16 (citing *United States v. Cotton*, 535 U.S. 625, 633 (2002); *Johnson v. United States*, 520 U.S. 461, 470 (1997)) (internal citations omitted).

During the plea inquiry in the present case, the military judge advised the appellant of each element of the charged Article 134, UCMJ, specification, including the terminal element. The appellant acknowledged his understanding of the elements and explained how his misconduct violated the terminal element. Although the military judge ultimately rejected the plea, the plea inquiry certainly placed the appellant on notice of the terminal element of the adultery offense, and he suffered no prejudice from the element's omission in the specification. *See id*. at 216.

Conclusion

The approved findings and sentence are correct in law and fact,[2] and no error prejudicial to the substantial rights of the appellant occurred.[3] Article 66(c), UCMJ; 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

[2] We note that the court-martial order (CMO) erroneously omits the exception of the language "on divers occasions" from the findings in the Specification of Charge I and the military judge's entry of a plea of "not guilty" on behalf of the appellant to Charge III and its Specification. We order the promulgation of a corrected CMO, in accordance with Air Force Instruction 51-201, *Administration of Military Justice*, Fig. 10.3 (21 December 2007), and other relevant authorities.

[3] The overall delay of over 18 months between the time the case was docketed at 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." *See 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 appellant's case. The post-trial record contains no evidence that the delay has had any negative

Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist

impact on the appellant. 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.