UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant MICHAEL P. GRAFMULLER
United States Air Force

ACM 37524 (rem)

9 January 2012

Sentence adjudged 1 June 2009 by GCM convened at Langley Air Force Base, Virginia. Military Judge: Terry O'Brien (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 2 years, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; Major Shannon A. Bennett; Major David P. Bennett; and Major Michael S. Kerr.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Jeremy S. Weber; Major Lauren N. Didomenico; Major Coretta E. Gray; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

UPON REMAND

PER CURIAM:

A general court-martial composed of military judge alone convicted the appellant in accordance with his pleas of five specifications of maltreatment of subordinates, two specifications of indecent assault, and two specifications of using indecent language, in

violation of Articles 93 and 134, UCMJ, 10 U.S.C. §§ 893, 934.[1] The court-martial sentenced him to a dishonorable discharge, confinement for 2 years, and reduction to E-1. The convening authority approved the sentence adjudged. The appellant assigned six errors: (1) whether his pleas were improvident based on mental incompetence; (2) whether his counsel were ineffective; (3) whether two specifications of indecent language should be dismissed because each was the subject of civilian prosecution; (4) whether ex parte communications deprived him of a fair Article 32, UCMJ, 10 U.S.C. § 832, investigation; (5) whether the command improperly influenced potential witnesses; and (6) whether his sentence is inappropriately severe.[2]

We previously affirmed the findings and sentence in an unpublished decision. *United States v. Grafmuller*, ACM 37524 (A.F. Ct. Crim. App. 30 March 2011) (unpub. op.), *rev'd*, 70 M.J. 355 (C.A.A.F. 2011) (mem.). The Court of Appeals for the Armed Forces (CAAF) granted review of whether specifications that do not allege the terminal element in a Clause 1 or 2 offense under Article 134, UCMJ, are sufficient to state an offense. *United States v. Grafmuller*, 70 M.J. 219 (Daily Journal 22 June 2011). On 21 September 2011, CAAF vacated our decision and remanded for consideration of the granted issue in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). *Grafmuller*, 70 M.J. at 355.

The appellant, now proceeding pro se, argues that the findings of guilty on the four specifications alleging a violation of Article 134, UCMJ, as well as the sentence, should be set aside and a rehearing on sentence ordered. In reply, the Government argues that *Fosler* does not impact the appellant's case in that the appellant did not challenge the specifications at trial, entered pleas of guilty, was fully advised of the terminal elements of each by the military judge, and acknowledged both understanding and violating all the elements of each offense.

The four specifications under Charge II allege violations of Article 134, UCMJ, and none explicitly allege the terminal element that the conduct was either prejudicial to good order and discipline or service discrediting. However, the military judge fully covered these terminal elements during the guilty plea inquiry. Specifications 1 and 2 of Charge II allege indecent assaults on junior Airmen. Concerning the indecent assault on Airman First Class TF alleged in Specification 1, the appellant told the military judge that his conduct was prejudicial to good order and discipline because "[i]t was indecent, it was unlawful, and I was a supervisor, and instead of doing my job as a supervisor I hit on her." He provided a similar response concerning his indecent assault on a second junior Airman, telling the military judge that it was prejudicial to good order and discipline

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[1] Some minor language was excepted and substituted in the findings on the two indecent assault specifications under Charge II: (1) "shorts" instead of "underwear" in Specification 1 and (2) "leaning his body on her" instead of "jumping on top of her" in Specification 2. The Government did not attempt to prove the excepted language.

[2] Except for the issue concerning dismissal of the two indecent language specifications, all issues are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

because "[i]nstead of being a supervisor and being helpful and simply moving her in I took that opportunity to hit on her, and that was wrong." Turning to the remaining two specifications alleging a violation of Article 134, UCMJ, by using indecent language, the appellant explained to the military judge why engaging in explicit sexual conversations with a civilian police officer whom he believed to be a 14-year-old girl was service discrediting: "It was shocking, filthy, disgusting in nature, had a tendency to incite lustful thoughts, was vulgar—totally uncalled for, inappropriate, and embarrassing to anyone that would listen to it. . . . The Hampton Police Department, the general public seeing the news, anyone that sees this it discredits the Air Force that an Air Force member would be involved."

In *Fosler*, the 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 expressly allege the terminal element of either Clause 1 or 2. *Fosler*, 70 M.J. at 233. While recognizing "the possibility that an element could be implied," the Court stated that "in contested cases, when the charge and specification are first challenged at trial, we read the wording more narrowly and will only adopt interpretations that hew closely to the plain text." *Id.* at 230. The Court implies that the result would have been different had the appellant not challenged the specification: "Because Appellant made an R.C.M. 907 motion at trial, we review the language of the charge and specification more narrowly than we might at later stages." *Id.* at 232.

Where an accused does not challenge a defective specification at trial, enters pleas of guilty to it, and acknowledges understanding all the elements after the military judge correctly explains those elements, the specification is sufficient to charge the crime unless it is "so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had." *United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986) (quoting *United States v. Thompson*, 356 F.2d 216, 226 (2d Cir. 1965) (citations omitted), *cert. denied*, 384 U.S. 964 (1966)). Such is the case here: the appellant made no motion to dismiss the charge and entered pleas of guilty, after which the military judge thoroughly covered the elements of each offense, including the terminal elements of conduct prejudicial to good order and discipline and service discrediting conduct. The appellant acknowledged understanding *all* the elements and explained to the military judge why he believed his conduct violated those elements.

Applying a liberal construction to the four specifications alleging violations of Article 134, UCMJ, we find that each reasonably implies the terminal element. A specification that alleges an indecent assault on a subordinate reasonably implies that such conduct is prejudicial to good order and discipline. Likewise, a specification that alleges the use of sexually explicit indecent language to an undercover civilian police officer by a military member who believes that the officer is an underage girl reasonably implies that such conduct is service discrediting. A reasonable construction of the

specifications shows that each charges a Clause 1 or 2 violation of Article 134, UCMJ. *See Watkins*. Therefore, under the posture of this case, we find each specification under Charge II sufficient to state an offense under Article 134, UCMJ.

Conclusion

Having considered the record in light of *Fosler*, as directed by our superior court, we again find no error that substantially prejudiced the rights of the appellant. 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 approved findings and the sentence are

AFFIRMED.

OFFICIAL

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