UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain EDWARD T. HUDSON
United States Air Force

ACM 37249 (rem)

03 February 2012

Sentence adjudged 4 December 2007 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Dawn R. Eflein.

Approved sentence: Dismissal and confinement for 4 years.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; Major Shannon A. Bennett; Major Jennifer J. Raab; Captain Nathan A. White; and Frank J. Spinner, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Colonel Douglas P. Cordova; Lieutenant Colonel Jeremy S. Weber; Major Charles G. Warren; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

UPON REMAND

PER CURIAM:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of two specifications of divers indecent acts with a child, in violation of Article 134, UCMJ, 10 U.S.C. § 934.[1] The court members sentenced the

[1] The charged offenses and the arraignment occurred before 1 October 2007, prior to the enactment of the new Article 120, UCMJ, 10 U.S.C. § 920. Thus, it was proper to charge the appellant under Article 134, UCMJ, 10 U.S.C. § 934, rather than under the new Article 120, UCMJ. *See* Drafter's Analysis, *Manual for Courts-Martial, United States*, A23-15 (2008 ed.).

appellant to a dismissal, 10 years of confinement, and forfeiture of all pay and allowances. Pursuant to a post-trial agreement, the convening authority set aside and dismissed the finding on Specification 1 of the Charge and approved only so much of the sentence that called for a dismissal and 4 years of confinement.[2]

We previously affirmed the findings and sentence in an unpublished decision. *United States v. Hudson*, ACM 37249 (rem) (A.F. Ct. Crim. App. 24 May 2011) (unpub. op.), *rev'd*, 70 M.J. 382 (C.A.A.F. 2011) (mem.). The Court of Appeals for the Armed Forces (CAAF) granted review of whether the specification fails to state an offense because it does not allege a terminal element under Article 134, UCMJ. The Court vacated our decision and remanded the case for consideration of the granted issue in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). *Hudson*, 70 M.J. at 382.

The specification alleges indecent acts with a child as a violation of Article 134, UCMJ. Article 134, UCMJ, criminalizes three categories of offenses not specifically covered in other articles of the UCMJ: Clause 1 offenses require proof that the conduct alleged be prejudicial to good order and discipline; Clause 2 offenses require proof that the conduct be service discrediting; Clause 3 offenses involve noncapital Federal crimes made applicable by the Federal Assimilative Crimes Act, 18 U.S.C. § 13. As the specification at issue does not reference the Assimilative Crimes Act, it necessarily involves Clause 1 or 2. The language of the specification complies with the model specification in effect at the time but does not expressly allege the terminal element that such conduct was either prejudicial to good order and discipline or service discrediting. Because the specification does not expressly allege the terminal element, we will review de novo whether a specification alleging indecent acts with a child under Article 134, UCMJ, survives in light of *Fosler*. *See United States v. Sutton*, 68 M.J. 455, 457 (C.A.A.F. 2010).

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. 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

[2] The convening authority took the aforementioned action in return for the appellant's promise to waive the following trial and appellate issues: (1) dismissal of Specification 1 of the Charge due to a statute of limitations violation; (2) consequent motion for a mistrial, as to findings and sentencing, based upon the dismissal of Specification 1 of the Charge; (3) consequent motion for a sentencing rehearing based upon the dismissal of Specification 1 of the Charge; (4) consequent petition for a new trial based upon the dismissal of Specification 1 of the Charge; (5) any challenge to the finding of guilty on Specification 2 of the Charge based upon the admission of underlying evidence supporting Specification 1 of the Charge under Mil. R. Evid. 414; (6) any challenge to the sentence based upon the admission of underlying evidence supporting Specification 1 of the Charge under Rule for Courts-Martial 1001(b)(4) and Mil. R. Evid. 403; and (7) any other issue raised in his 31 March 2008 motion for appropriate relief.

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. The Court reiterated, however, that the military is a notice-pleading jurisdiction: "A charge and specification will be found sufficient if they, '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*. at 229 (citations omitted). Failure to object to the legal sufficiency of a specification does not constitute waiver, but "[s]pecifications which are challenged immediately at trial will be viewed in a more critical light than those which are challenged for the first time on appeal." *United States v. French*, 31 M.J. 57, 59 (C.M.A. 1990). *See also United States v. Bryant*, 30 M.J. 72, 73 (C.M.A. 1990).

The appellant in the present case did not, at any stage of the proceedings prior to the second remand from our superior court, object to the specification on the basis that it failed to state an offense under Article 134, UCMJ. Where the sufficiency of a specification is challenged for the first time on appeal it will be liberally construed in favor of validity. *United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986). Unlike the adulterous conduct alleged in *Fosler*, we find that a specification alleging indecent acts with a child provides sufficient notice of criminality because it necessarily implies the concepts of prejudice to good order and discipline or conduct of a nature to bring discredit upon the armed forces. Few would argue that a specification charging an officer in the Armed Forces of the United States with touching an underage girl for the purpose of gratifying his sexual desires failed to notify him that such conduct is prejudicial to good order and discipline or of a nature to bring discredit on the armed forces. The appellant's lack of any previous challenge to this view or objection to the inclusion of the terminal elements in the findings instructions further confirms that he was under no mistaken impression as to the elements of the offense charged. As the Court stated in *Watkins*, we are confident that the appellant "was not misled." *Id.* at 210. We therefore conclude that the specification alleging indecent acts with a child for which the appellant was convicted is legally sufficient under *Fosler*: the specification fairly informs the appellant of the charge against him, enables him to prepare a defense, and protects him against double jeopardy.

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

STEVEN LUCAS
Clerk of the Court