UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain CHRISTOPHER P. HUIE
United States Air Force

ACM 37779

07 December 2012

Sentence adjudged 22 September 2010 by GCM convened at Travis Air Force Base, California. Military Judge: W. Shane Cohen (sitting alone).

Approved sentence: Dismissal and confinement for 7 months.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford and Captain Nathan A. White.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Scott C. Jansen; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and HARNEY
Appellate Military Judges

PER CURIAM:

On 22 September 2010, the appellant was tried by a general court-martial composed of a military judge sitting alone at Travis Air Force Base, California. Consistent with the appellant's pleas, the military judge convicted him of two specifications of false official statement, in violation of Article 107, UCMJ, 10 U.S.C. § 907; one specification of conduct unbecoming an officer and a gentleman, in violation of Article 133, UCMJ, 10 U.S.C. § 933; and one specification of obstruction of justice coupled with one specification of wrongfully possessing materials with the intent to make an explosive device, each in violation of Article 134, UCMJ, 10 U.S.C. § 934. The military judge sentenced the appellant to 15 months of confinement and a dismissal. The

convening authority approved 7 months of confinement and the dismissal.[1] Before this Court, the appellant asserts that the obstruction of justice specification fails to state an offense because it does not allege the terminal element of Article 134, UCMJ. We disagree and, finding no error that prejudiced a substantial right of the appellant, affirm.

The appellant was charged with obstruction of justice for asking another officer to destroy evidence relevant to an ongoing investigation against him. The specification did not allege the terminal element of Article 134, UCMJ.[2] At trial, the appellant pled guilty to this specification. During the *Care*[3] inquiry, the military judge described and defined each element of obstruction of justice, including the terminal element, in violation of Article 134, UCMJ. The appellant admitted that his conduct was prejudicial to good order and discipline "[b]ecause it was not truthful" and "[b]ecause it impeded the case." The appellant also stated that involving another military member in his criminal conduct impacted good order and discipline. The appellant likewise stated that his conduct was service discrediting because his actions impeded justice and "[his] criminal activity reflects negatively on [him] and therefore, the Air Force." The military judge accepted the appellant's guilty plea as provident and found him guilty of obstruction of justice.

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 of adultery under Article 134, UCMJ after the military judge improperly denied a defense motion to dismiss the specification because it failed to allege the terminal element of either Clause 1 or 2. *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). While failure to allege the terminal element of an Article 134, UCMJ, offense is error, 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 plea 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, 34-36

[1] The approved sentence complied with the terms of the pretrial agreement (PTA), in which the convening authority agreed not to approve any confinement in excess of 9 months. The PTA contained no additional restrictions on punishment.

[2] Under Article 134, UCMJ, 10 U.S.C. § 934, the Government must prove beyond a reasonable doubt that the accused engaged in certain conduct and that the conduct satisfied one of three criteria, often referred to as the "terminal element." Those criteria are that the accused's conduct was: (1) to the prejudice of good order and discipline, (2) of a nature to bring discredit upon the armed forces, or (3) a crime or offense not capital.

[3] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

(C.A.A.F.), *cert. denied*, 133 S. Ct. 43 (2012) (mem.).[4] *See also United States v. Nealy*, 71 M.J. 73 (C.A.A.F. 2012); *United States v. Watson*, 71 M.J. 54 (C.A.A.F. 2012).

Here, the appellant entered into a pretrial agreement and pled guilty to the charge and specification of obstruction of justice. The military judge described and defined the Clause 1 and 2 terminal elements during the plea inquiry and asked the appellant whether he believed his conduct was either prejudicial to good order and discipline or service discrediting. The appellant acknowledged understanding all the elements, and explained to the military judge why he believed his conduct was both prejudicial to good order and discipline and service discrediting. Thus, "while the failure to allege the terminal elements in the specification[s] was error, under the facts of this case the error was insufficient to show prejudice to a substantial right." *Watson*, 71 M.J. at 59. *See also Ballan*, 71 M.J. at 36; *Nealy*, 71 M.J. at 77.

Appellate Delay

We note that the overall delay of over 18 months between the time this 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 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.

[4] In *Ballan*, the Court held that:

> [W]hile it is error to fail to allege the terminal element of Article 134, UCMJ, expressly or by necessary implication, in the context of a guilty plea, where the error is alleged for the first time on appeal, whether there is a remedy for the error will depend on whether the error has prejudiced the substantial rights of the accused.

United States v. Ballan, 71 M.J. 28, 30 (C.A.A.F.), *cert. denied*, 133 S. Ct. 43 (2012) (mem.). The *Ballan* court further held that, where the military judge describes Clauses 1 and 2 of Article 134, UCMJ for each specification during the plea inquiry and "where the record conspicuously reflect[s] that the accused clearly understood the nature of the prohibited conduct" as a violation of Clause 1 or 2 of Article 134, UCMJ, there is no prejudice to a substantial right. *Id*. at 35 (citing *United States v. Medina*, 66 M.J. 21, 28 (C.A.A.F. 2008) (brackets in original).

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.

Chief Judge Orr participated in this decision prior to his retirement.

OFFICIAL

STEVEN LUCAS
Clerk of the Court