UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ANDREW D. JACKSON
United States Air Force

ACM 37930

30 April 2012

Sentence adjudged 5 April 2011 by GCM convened at Hill Air Force Base, Utah. Military Judge: Michael J. Coco (sitting alone).

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

Appellate Counsel for the Appellant: Captain Ja Rai A. Williams.

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

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HARNEY, Judge:

On 5 April 2011, the appellant was tried by a special court-martial composed of a military judge sitting alone at Hill Air Force Base, Utah. Consistent with his pleas, the military judge convicted the appellant of three specifications of wrongful use and one specification of wrongful possession of controlled substances, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a; one specification of housebreaking, in violation of Article 130, UCMJ, 10 U.S.C. § 930; one specification of larceny, in violation of Article 121, UCMJ, 10 U.S.C. § 921; two specifications of absence without leave, in violation of Article 86, UCMJ, 10 U.S.C. § 886; one specification of obstruction of justice, in violation of Article 134, UCMJ, 10 U.S.C. § 934; and one specification of attempt to

escape from pre-trial confinement, in violation of Article 80, UCMJ, 10 U.S.C. § 880. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 14 months, forfeiture of all pay and allowances, and reduction to E-1. Pursuant to the terms of the pre-trial agreement,[1] the convening authority approved only so much of the sentence as provided for a bad-conduct discharge, confinement for 12 months, and reduction to E-1.

Before this Court, the appellant asserts that the Specification of Charge V, obstruction of justice, 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.

Background

In January 2011, the appellant was the subject of an ongoing investigation for theft and drug use at Hill Air Force Base, Utah. On 12 January 2011, the appellant failed to report for duty. After he was found, the appellant consented to a urinalysis and a search of his on-base residence. After the urinalysis, the appellant's supervisor ordered him to wait outside the supervisor's office while investigators searched the appellant's residence. In direct violation of this order, the appellant left the supervisor's office, borrowed another Airman's car, and sped to his house, where security forces investigators were parked outside waiting for the military working dog to arrive. Upon arrival, the appellant ran into the house with the investigators in pursuit. After about 15 to 20 seconds, the appellant came outside with his hands in his pockets. The investigators detained and searched him, finding four small balls of heroin in his pants pockets, two syringes in his socks, and a bent spoon with chemical residue in his boots. The appellant was apprehended and placed in pretrial confinement. Among the charges preferred and referred against the appellant, Charge V alleged one specification of obstruction of justice, in violation of Article 134, UCMJ. The specification did not allege the terminal element of Article 134, UCMJ.[2]

At trial, the appellant pled guilty to all charges and specifications, including Charge V and its Specification. During the plea inquiry, the military judge described and defined each of the elements, including the terminal element, of Charge V and its Specification of obstruction of justice, in violation of Article 134, UCMJ. The military judge then asked the appellant if he understood that his guilty plea admitted that these elements "accurately describe[d]" his conduct, to which the appellant answered in the

[1] The pre-trial agreement stated that the appellant would plead guilty to all charges and specifications, the convening authority would approve no confinement in excess of 12 months, and the convening authority would not approve a discharge more severe than a bad-conduct discharge.

[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.

affirmative. The military judge further verified that "these elements and definitions taken together correctly describe[d]" the appellant's conduct, and asked the appellant to describe the conduct in his own words, which he did. The military judge then engaged in the following colloquy with the appellant about the terminal elements:

> MJ: Now, you stated that you believed that putting this paraphernalia in your pocket was prejudicial to good order and discipline. Why do you believe that?
>
> ACC: Sir, because every airman simply cannot try to cover up criminal misconduct by hiding evidence, sir.
>
> MJ: Recall that I told you that prejudice to good order and discipline has to have some direct effect of good order and discipline. Do you believe that this had a direct effect?
>
> ACC: Yes, sir, it would have had a direct effect with me, sir.
>
> MJ: And also, you know, there's an alternative theory where it could be service discrediting. Do you recall the definition of that? Would you like me to read that to you again?
>
> ACC: Yes, sir, please.
>
> MJ: "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.
>
> So, how do you think that the general public would feel about the military if they knew that airmen were out there putting drug paraphernalia in their pockets to hide it from law enforcement?
>
> ACC: Just as it states, sir, it would discredit the armed forces, sir.
>
> MJ: So you would agree that it was both prejudice to good order – prejudicial to good order and discipline and service discrediting conduct?
>
> ACC: Yes, sir, I would.
>
> MJ: What might have been the consequences of you putting this paraphernalia in your pockets?
>
> ACC: Sir, the consequences was I was impeding in the investigation, sir.

The military judge accepted the appellant's guilty plea as provident and found him guilty of all charges and specifications, including the obstruction of justice specification alleged in Charge V.

Discussion

Whether a specification states an offense is a question of law we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). In *United States v. Fosler*, a contested case, our superior court held that, where the specification failed to allege the terminal element under Article 134, UCMJ, the specification failed to state an offense. 70 M.J. 225, 233 (C.A.A.F. 2011). The Court dismissed the specification as defective. *Id*. *Fosler*, however, did not involve a guilty plea. Recently, our superior court has addressed the failure to allege the terminal element in an Article 134, UCMJ, specification where the appellant was convicted on the basis of a guilty plea. *United States v. Ballan*, No. 11-0413/NA (C.A.A.F. 1 March 2012). *See also United States v. Nealy*, No. 11-0615/AR (C.A.A.F. 30 March 2012); *United States v. Watson*, 71 M.J. 54 (C.A.A.F. 2012). In *Ballan*, the Court held that:

> while 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.

Ballan, slip op. at 3-4 (citing Article 59, UCMJ, 10 U.S.C. § 859). 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 17 (quoting *United States v. Medina*, 66 M.J. 21, 28 (C.A.A.F. 2008)) (brackets in original) (internal quotation marks omitted).

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 was error, under the facts of this case the error was "insufficient to show prejudice to a substantial right." *Ballan*, slip op. at 19; *Nealy*, slip op. at 13; *Watson*, 71 M.J. at 59.

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