UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

First Lieutenant DOUGLAS E. LONG
United States Air Force

ACM 37044 (rem)

04 June 2012

Sentence adjudged 2 May 2007 by GCM convened at Robins Air Force Base, Georgia. Military Judge: Gary M. Jackson (sitting alone) and W. Thomas Cumbie (*Dubay*[1] hearing).

Approved sentence: Dismissal and confinement for 77 days.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; Major Shannon A. Bennett; Major Michael S. Kerr; Major Tiffany M. Wagner; and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Colonel Douglas P. Cordova; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel Matthew S. Ward; Lieutenant Colonel Jeremy S. Weber; Major Jason M. Kellhofer; Major Joseph Kubler; Major G. Matt Osborn; Major Brendon K. Tukey; Major Charles G. Warren; Captain Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

UPON REMAND

This opinion is subject to editorial correction before final release.

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[1] *See United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

PER CURIAM:

The appellant was tried by a general court-martial composed of a military judge sitting alone. Contrary to his pleas, he was found guilty of one specification of assault consummated by a battery and one specification of committing indecent acts with a child under 16 years of age, in violation of Articles 128 and 134, UCMJ, 10 U.S.C. §§ 928, 934. The adjudged and approved sentence consisted of a dismissal and confinement for 77 days.

This Court previously affirmed the findings and sentence after initial remand. *United States v. Long*, ACM 37044 (rem) (A.F. Ct. Crim. App. 30 March 2011) (unpub. op.), *rev'd*, 70 M.J. 355 (C.A.A.F. 2011) (mem.). After the first remand, the Court of Appeals for the Armed Forces (CAAF) granted review of whether a specification that fails to expressly allege either terminal element in a Clause 1 or 2 specification under Article 134, UCMJ, is sufficient to state an offense. *United States v. Long*, 70 M.J. 269 No. 10-0265/AF (Daily Journal 19 July 2011). On 21 September 2011, the CAAF vacated our previous decision and remanded the appellant's case for consideration of the new granted issue in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). *Long*, 70 M.J. at 357. After we considered the granted issue in light of *Fosler*, we reviewed the entire record, and affirmed our previous decision. *United States v. Long*, ACM 37044 (rem) (A.F. Ct. Crim. App. 2 February 2012) (unpub. op.). On 5 March 2012, the appellant asked this Court to reconsider our 2 February 2012 decision based on the CAAF decision in *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012). After reconsidering the portions of our decision affirming the finding of guilty to the indecent acts with a child specification and the sentence, we again affirm the findings and the sentence.

Background

The specification at issue, the single Specification of Charge II, alleged that the appellant committed indecent acts upon the body of a child under 16 years of age, in violation of Article 134, UCMJ, as follows:

> In that FIRST LIEUTENANT DOUGLAS E. LONG . . . did, within the continental United States, on divers occasions . . . commit indecent acts upon the body of EAP, a female under 16 years of age, not the wife of the said FIRST LIEUTENANT DOUGLAS E. LONG, by fondling her and placing his hands upon her vaginal area, by spanking her buttocks with his hand, with a spoon and with his belt while she was unclothed, and by placing his finger in her anus, with the intent to gratify the sexual desires of the said FIRST LIEUTENANT DOUGLAS E. LONG.

At trial, the appellant made a motion to dismiss based on a violation of speedy trial and the Fifth Amendment,[2] but he did not object to the Specification of Charge II as failing to state an offense. After the military judge denied his motion, he entered a plea of not guilty to all the charges and specifications. Although the second element of proof under Article 134, UCMJ, is not expressly alleged on the Charge Sheet, the appellant's trial defense counsel argued that the Government did not present any evidence that the appellant's conduct had an effect on good order and discipline or was service discrediting. Additionally, he argued that such evidence was required because "that's a necessary element."

Discussion

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 (R.C.M.) 307(c)(3).

In *Fosler*, our superior court invalidated a conviction for adultery under Article 134, UCMJ, because the military judge improperly denied a defense motion to dismiss for failure to state an offense. *Fosler*, 70 M.J. at 233. This is because the charge and specification did not expressly allege at least one of the three clauses that meet the second element of proof under Article 134, UCMJ, commonly known as the terminal element. *Id*. at 226. In setting aside the conviction, the Court did not foreclose the possibility that a missing element could be implied, even the terminal element in an Article 134, UCMJ, offense; however, the CAAF held that, in contested cases where the sufficiency of the charge and specification are first challenged at trial, "we [will] review the language of the charge and specification more narrowly than we might at later stages" and "will only adopt interpretations that hew closely to the plain text." *Id.* at 230, 232. Thus, when given the particular circumstances contained in *Fosler*--a contested trial for adultery where the sufficiency of the charge and specification were first challenged at trial--the law will not find that the terminal element of Article 134, UCMJ, is necessarily implied. *Id*. at 230.

In the case before us, unlike in *Fosler*, the appellant made no motion at trial to dismiss Charge II and its specification for failure to state an offense. He pled not guilty to Charge II and its specification and his counsel asserted that the Government failed to present any evidence that his conduct was prejudicial to good order and discipline or service discrediting. Based upon this assertion, this Court is convinced that he was aware of all the elements of the crime of committing indecent acts upon a child under 16 years of age, including the terminal element of Article 134, UCMJ. As a result, in our previous

[2] U.S. CONST. amend V.

decision, we found that the terminal element in the charge and specification alleging that he committed indecent acts was necessarily implied, the appellant was on notice of what he needed to defend against, and he is protected against double jeopardy. Therefore, we found that the Specification of Charge II was not defective for failing to state an offense.

Approximately one month later, the CAAF held, in a case where the accused pled guilty to indecent acts with a child, that the specification did not necessarily imply any of Article 134, UCMJ, terminal elements. Stating "where the appellant raises the validity of a specification for the first time on appeal, the Court 'views[s] [the] specification[ ] with maximum liberality,' . . . such construction still does not permit us to 'necessarily imply' a separate and distinct element from nothing beyond allegations of the act or failure to act itself," the Court held that "regardless of context, it is error to fail to allege the terminal element of Article 134, UCMJ, expressly or by necessary implication." *Ballan*, 71 M.J. at 33-34 (citations omitted) (brackets in original). Because the failure to allege the terminal element of the Specification of Charge II is error, the appellant is only entitled to relief if the error prejudiced his substantial rights. *Id*. at 32. The appellant has the burden of demonstrating prejudice and has failed to do so.

In *Ballan*, the Court stated that "a defective specification and a proper plea inquiry, is distinguishable from a contested case involving a defective specification." *Id*. at 35. In essence, in a contested case the appellant may be at a disadvantage because he "could not know which theory of criminality he needed to defend against." *Id*. at 34 n.7. The appellant in this case was at no such disadvantage. In fact, the record shows a full awareness as to the offense alleged and the elements supporting this offense. The appellant did not request a bill of particulars and, given the fact that the appellant's trial defense counsel argued that the Government did not present any evidence that the appellant's conduct had an effect on good order and discipline or was service discrediting and that such evidence was required, we are confident that the appellant was not confused or misled by the defective specification.

In *Ballan*, our superior court held that:

> Error alone does not, however, warrant dismissal. While the rules state that a charge or specification that fails to state an offense should be dismissed pursuant to R.C.M. 907(b)(1)(B), a charge that is defective because it fails to allege an element of an offense, if not raised at trial, is tested for plain error.

Ballan, 71 M.J. at 34 (citations omitted). After reviewing the entire record of trial using a plain error analysis, we believe that the appellant has not met his burden of showing material prejudice to a substantial right caused by this defective specification.

Conclusion

Having considered the record in light of *Fosler*, as directed by our superior court, we again find that 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