

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain VARUN K. NARULA
United States Air Force

ACM 37658 (rem)

9 January 2012

Sentence adjudged 11 December 2009 by GCM convened at Vandenberg Air Force Base, California. Military Judge: David S. Castro.

Approved sentence: Dismissal, confinement for 6 years, and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Stephen B. Pence, Esquire (argued); Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; Captain Nathan A. White; and J. Denis Ogburn, Esquire.

Appellate Counsel for the United States: Captain Michael T. Rakowski (argued); Colonel Don. M. Christensen; Major Naomi N. Porterfield; Captain Erika L. Sleger; 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.

PER CURIAM:

A general court-martial composed of officer members convicted the appellant contrary to his pleas of one specification of aggravated sexual assault, two specifications of conduct unbecoming, and one specification of wrongful sexual contact in violation of Articles 120 and 133, UCMJ, 10 U.S.C. §§ 920, 933. The military judge accepted his plea of guilty to an additional charge of fraternization in violation of Article 134, UCMJ, 10 U.S.C. § 934. The court-martial sentenced the appellant to a dismissal, confinement

for six years, and forfeiture of all pay and allowances. The convening authority approved the sentence adjudged.

We previously affirmed the findings and sentence in an unpublished decision. *United States v. Narula*, ACM 37658 (A.F. Ct. Crim. App. 27 July 2011), *rev'd*, No. 12-0044/AF (C.A.A.F. 30 November 2011). The Court of Appeals for the Armed Forces (CAAF) granted review of whether the specification alleging fraternization 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). *Narula*, slip op. at 1.

The specification of the additional charge alleges fraternization, in violation of Article 134, UCMJ, but does not explicitly allege the terminal element that the conduct was either prejudicial to good order and discipline or service discrediting. However, the military judge fully defined these terminal elements during the guilty plea inquiry, and the appellant acknowledged understanding each element and definition. He told the military judge that he formed an inappropriate sexual relationship with Airman First Class BR, an Airman assigned to the same base as the appellant. They cohabited for several months, and the relationship ended in August 2008. The appellant explained that his conduct was prejudicial to good order and discipline because not only did he cross the established boundary between officer and enlisted relationships but also he maintained this illegal relationship in the presence of his roommate who was a junior officer. He also stated that under the circumstances his conduct was service discrediting.

In *Fosler*, our superior 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 did not challenge the charge and entered pleas of guilty, after which the military judge thoroughly covered the elements of the offense to include 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 specification alleging fraternization in violation of Article 134, UCMJ, we find that it reasonably implies the terminal elements of both Clause 1 and Clause 2. A specification that alleges fraternization between an officer and a junior enlisted troop by cohabitating and engaging in a sexual relationship over a period of several months reasonably implies that such conduct is prejudicial to good order and discipline and service discrediting. A reasonable construction of the specification shows that it charges a violation of Article 134, UCMJ. *See Watkins*. Therefore, under the posture of this case, we find the specification of the additional charge 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



Angela E. Dixon
ANGELA E. DIXON, TSgt, USAF
Deputy Clerk of the Court