UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ROBERT A. NICHOLSON
United States Air Force

ACM 37642 (rem)

29 March 2012

Sentence adjudged 14 January 2010 by GCM convened at Luke Air Force Base, Arizona. Military Judge: Carl L. Reed.

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

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; and Captain Shane A. McCammon.

Appellate Counsel for the United States: Colonel Don Christensen; Major Naomi N. Porterfield; 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, pursuant to his pleas, of: (1) wrongful use of Percocet, Vicodin, and cocaine; (2) wrongful introduction and distribution of Percocet and Vicodin; and (3) wrongful solicitation to distribute Percocet and Vicodin, in violation of Articles 112a and 134, UCMJ, 10 U.S.C. §§ 912a, 934. The court sentenced the appellant to a bad-conduct discharge, confinement for 1 year, and reduction to E-1. The convening authority approved the sentence adjudged and we affirmed the findings and sentence in an unpublished decision. *United States v. Nicholson*, ACM 37642 (A.F. Ct. Crim. App. 15

June 2011) (unpub. op.). After granting review of whether the three specifications of solicitation charged under Article 134, UCMJ, stated an offense where the terminal element was not expressly alleged, our superior court vacated our decision and remanded the case for our consideration of the granted issue in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). *United States v. Nicholson*, 70 M.J. 368 (C.A.A.F. 2011) (mem.).

In *Fosler*, the Court invalidated a conviction for 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 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 implied 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. 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).

Because the specifications at issue do not expressly allege the terminal element that the conduct is either service discrediting or prejudicial to good order and discipline, we will review de novo whether the three specifications alleging solicitation to distribute controlled substances under Article 134, UCMJ, survive in light of *Fosler*. *See United States v. Sutton*, 68 M.J. 455, 457 (C.A.A.F. 2010). Where an appellant 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. Thompson*, 356 F.2d 216, 226 (2d Cir. 1965) (citations omitted), quoted in *United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986).

The three solicitation specifications at issue allege that the appellant violated Article 134, UCMJ, by soliciting three different airmen to distribute Percocet to him.

The appellant entered pleas of guilty to the specifications,[*] and the military judge conducted a thorough plea inquiry which included advising the appellant of the elements of each offense, to include the terminal element. The appellant acknowledged understanding of all the elements and explained to the military judge how his conduct satisfied each element. Failure to allege the terminal element of an Article 134, UCMJ, offense is error but, 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 providence inquiry shows that the appellant understood to what offense and under what legal theory he was pleading guilty. *United States v. Ballan*, No. 11-0413/NA, slip op. at 14, 18-19 (C.A.A.F. 1 March 2012); *United States v. Watson*, 70 M.J. 54 (C.A.A.F. 20 March 2012). As in *Ballan*, the appellant here suffered no prejudice to a substantial right: he knew under what clause he was pleading guilty and clearly understood how his conduct violated the terminal element of Article 134, UCMJ.

Conclusion

Having considered the record in light of *Fosler* as directed by our superior court, we again find that no error that substantially prejudiced the rights of the appellant occurred and that the approved findings and the sentence are correct in law and fact. 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

[*] The appellant pled guilty by exceptions and substitutions to Specification 3 of Charge II by excepting the drug Percocet and substituting the drug Vicodin; the military judge found him guilty as pled.