UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class KEVIN W. WILEY
United States Air Force

ACM 37953

24 January 2012

Sentence adjudged 2 June 2011 by GCM convened at Ellsworth Air Force Base, South Dakota. Military Judge: Martin T. Mitchell (sitting alone).

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

Appellate Counsel for the Appellant: Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

The appellant was tried by a general court-martial composed of a military judge sitting alone. In accordance with his pleas, he was found guilty of five specifications in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, including wrongful use and distribution of marijuana and methamphetamine, and wrongful introduction of methamphetamine. Also, pursuant to his pleas, he was found guilty of one specification of conspiracy and one specification of willful dereliction of duty, in violation of Articles 81 and 92, UCMJ, 10 U.S.C. §§ 881, 892, respectively, as well as one specification of wrongfully soliciting another to commit an offense and one specification of manufacturing drug paraphernalia, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for 1 year, and reduction to the grade of E-1.

The appellant assigned no specific errors on appeal, however, in light of our superior court's decision in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), we address whether the allegation of wrongful solicitation of an Air Force member to wrongfully use marijuana, in violation of Article 134, UCMJ, fails to state an offense because the charge and specification did not expressly allege that the appellant's conduct was to the prejudice of good order and discipline in the armed forces, or of a nature to bring discredit upon the armed forces.[*] Finding no error that materially prejudices a substantial right of the appellant, we affirm.

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 307(c)(3).

In *Fosler*, our superior court invalidated a conviction for adultery under Article 134, UCMJ, for failure to state an offense because the charge and specification did not allege either expressly or by necessary implication at least one of the three clauses of the second element of proof under Article 134, UCMJ, commonly known as the terminal element. *Fosler*, 70 M.J. at 226. In setting aside the conviction, *Fosler* specifically did not foreclose the possibility that a missing element could be implied, including the terminal element in an Article 134, UCMJ, offense; however, the Court 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. In applying this construction to an allegation of adultery and a procedural posture where the charge and specification were challenged at trial and the case was contested, the *Fosler* Court refused to find that the terminal element of Article 134, UCMJ, was necessarily implied. *Id.* at 230.

In guilty plea cases, however, where there is no objection at trial to the sufficiency of the charge and specification, our superior court follows the rule of liberally construing specifications in favor of validity. *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986). That is, absent a showing of prejudice, "'a conviction will not be reversed where the indictment is challenged only after conviction unless the indictment cannot within reason be construed to charge a crime.'" *Id.* at 210 (quoting *United States v. Hart*,

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[*] Specification 1 of Charge V, a violation of Article 134, UCMJ, 10 U.S.C. § 934, was alleged on the Charge Sheet as follows: "In that AIRMAN FIRST CLASS KEVIN W. WILEY . . . did, at or near Rapid City, South Dakota, on divers occasions between on or about 1 April 2009 and on or about 2 October 2010, wrongfully solicit an Air Force member to wrongfully use marijuana."

640 F.2d 856, 857-58 (6th Cir.), *cert. denied*, 451 U.S. 992 (1981)). Moreover, "[i]n addition to viewing post-trial challenges with maximum liberality, we view standing to challenge a specification on appeal as considerably less where an accused knowingly and voluntarily pleads guilty to the offense." *Id.* (citations omitted).

In the case before us, unlike in *Fosler*, the appellant made no motion at trial to dismiss the charge and specification for failure to state an offense, and he pled guilty. During the guilty plea inquiry, the appellant acknowledged his understanding of all the elements of the offense of soliciting another to commit an offense, including the terminal element of Article 134, UCMJ, and he explained to the military judge in his own words why his conduct was both prejudicial to good order and discipline in the armed forces and service discrediting. In this context, consistent with the reasoning in both *Fosler* and *Watkins*, we apply a liberal construction in examining the text of the charge and specification, here alleging that the appellant wrongfully solicited another Air Force member to wrongfully use marijuana. In doing so, we find that under these circumstances the terminal element was necessarily implied. The appellant was on notice of what he needed to defend against, and he was protected against double jeopardy. We do not find that the charge and specification under Article 134, UCMJ, is defective for failing to state an offense.

C*onclusion*

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

Angela E. Dixon

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