UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MONIQUE M. YARBROUGH
United States Air Force

ACM 37789

15 May 2012

Sentence adjudged 22 September 2010 by GCM convened at Goodfellow Air Force Base, Texas. Military Judge: William E. Orr, Jr.

Approved sentence: Bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Darrin K. Johns and Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; and Gerald R. Bruce, Esquire.

Before

WEISS, GREGORY, and ROAN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

GREGORY, Senior Judge:

A general court-martial composed of officer members convicted the appellant in accordance with her pleas of use and distribution of methamphetamine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, and breaking restriction, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The court sentenced her to a bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances, and reduction to E-1. A pretrial agreement capped confinement at 16 months and limited approval of any adjudged punitive discharge to a bad-conduct discharge. The convening authority approved the sentence adjudged. The appellant assigns two errors: (1) that the court-

martial panel was improperly constituted, and (2) that the Article 134, UCMJ, charge fails to state an offense by omitting the terminal element.

The Court-Martial Panel

Before bringing in the panel, the military judge reviewed the three convening orders with the parties to "make sure that we have the court members present who are the ones that the convening authority intended to detail to this court-martial." The first convening order, Special Order A-03, dated 20 May 2010, detailed nine primary members and three alternates who would serve if the panel fell below nine. The second order, Special Order A-09, dated 9 July 2010, relieved one primary and two alternate members and detailed three new alternate members. Therefore, as explained by the judge and as agreed to by both counsel, the net effect of the second order was: (1) to elevate the remaining alternate, Lieutenant N, to replace the excused primary member; and (2) detail three new alternates.

The third order, Special Order A-21, dated 17 September 2010, again changed the composition of the panel by: (1) relieving five primary members (four from the first order plus Lieutenant N); (2) noting the automatic appointment of the three alternates from the previous order as primary members because the number had fallen below nine, (3) detailing two additional primary members to bring the total back up to nine, and (4) appointing three new alternate members to serve if the number of members again fell below nine. The military judge noted that this last order listed the two new primary members as "members" without expressly stating that they were detailed to the court, but the judge explained that the logical conclusion is that they were detailed to the court as members: "But, I think the clear import, reading the document as a whole and the convening authority's intent as manifested through the course of the three special orders, is that these two members were detailed as primary members to bring the court composition up to nine again, and again detailing three new alternate members."

Both counsel agreed with the military judge that the convening authority intended to appoint Lieutenant Colonel (Lt Col) S and Lt Col R as primary members to the court, and the members were brought into the courtroom. Despite agreeing with the military judge's interpretation of the convening authority's intent and despite raising no objection to the composition of the court either at trial or in matters submitted to the convening authority after trial, the appellant now asserts that the two additional primary members named in the third convening order, Special Order A-21, were not detailed to her court, rendering the sentencing proceedings a jurisdictional nullity. She argues that "[t]here is no language within Special Order A-21 that purports to appoint Lt Col [S] or Lt Col [R] as members . . . ." We disagree.

Court-martial jurisdiction requires that qualified members be detailed to the court by order of the convening authority, but administrative errors in the drafting of such

convening orders are not necessarily fatal. *United States v. Adams*, 66 M.J. 255 (C.A.A.F. 2008). A convening order records a convening authority's intent, and administrative errors in the document do not override that intent where the parties at trial have a clear and correct understanding of the convening authority's intent and act accordingly. *United States v. Glover*, 15 M.J. 419 (C.M.A. 1983). Such is the case here. As stated by the military judge and agreed to by all parties, the convening authority clearly intended to detail Lt Col S and Lt Col R to the appellant's court. While not expressly stating that they are detailed, Special Order A-21 identifies both by rank, name, and unit beneath the word "members" in all capital letters.

When such administrative or clerical errors occur in convening orders, we test for prejudice. *Glover*, 15 M.J. at 422; *Adams*, 66 M.J. at 259. In *Glover*, the convening order erroneously convened a special court-martial where all parties believed the trial was by general-martial and acted accordingly. The Court found no prejudice because all parties understood the intent of the convening authority and the appellant was not misled by the error. *Id*. at 422. In *Adams*, the Court considered the substantive effect of a series of convening orders to determine the convening authority's intent and found no prejudice from an administrative error in a later order's failure to expressly detail members listed in a previous order. *Id*. at 259. The interpretation of an ambiguous order by the parties at trial to determine a convening authority's intent controls in the absence of evidence showing a contrary intent. *United States v. Mack*, 58 M.J. 413, 416 (C.A.A.F. 2003) (citing *United States v. Gebhart*, 34 M.J. 189, 193 (C.M.A. 1992)). Similar to the situation in *Adams*, where the series of orders showed an intent to bring the number of members up to a quorum, the two disputed members listed in Special Order A-21 clearly show an intent to bring the number of detailed members up to nine. All parties agreed that this was the convening authority's intent and acted accordingly. Under these circumstances, we find neither jurisdictional nor prejudicial error.

The Sufficiency of the Article 134, UCMJ, Specification

The appellant argues that the finding of guilt of breaking restriction, in violation of Article 134, UCMJ, should be set aside because the specification fails to allege the terminal element of the offense. The appellant did not challenge the sufficiency of the specification at trial and entered pleas of guilty to the charge and specification. The military judge conducted a thorough plea inquiry which included advising the appellant of the elements of each offense, to include the terminal elements of the Article 134, UCMJ, charge. The appellant acknowledged understanding all the elements and explained to the military judge how her 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 she was pleading

guilty. *United States v. Ballan*, 70 M.J. 28, 34-36 (C.A.A.F. 2012). As in *Ballan*, the appellant here suffered no prejudice to a substantial right: she knew under what clause she was pleading guilty and clearly understood how her conduct violated the terminal element of Article 134, UCMJ.

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 the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court