UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman ROBERT A. AURAND
United States Air Force

ACM S31863 (rem)

26 January 2012

Sentence adjudged 13 September 2010 by SPCM convened at Travis Air Force Base, California. Military Judge: Martin T. Mitchell (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 2 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford and Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

UPON REMAND

PER CURIAM:

The appellant was tried by a special court-martial composed of a military judge sitting alone. Consistent with his pleas, he was found guilty of two specifications of wrongful use of heroin, one specification of wrongful use of marijuana, and one specification of breaking restriction, in violation of Articles 112a, and 134, UCMJ, 10 U.S.C. §§ 912a, 934, respectively. The adjudged sentence consisted of a bad-conduct discharge, confinement for 5 months, and reduction to the grade of E-1. The convening authority approved the bad-conduct discharge and the reduction in grade, but reduced the confinement to 2 months in accordance with the pretrial agreement.

This Court previously affirmed the findings and sentence. *United States v. Aurand*, ACM S31863 (A.F. Ct. Crim. App. 15 June 2011) (unpub. op.), *rev'd*, 70 M.J. 361 (C.A.A.F. 2011) (mem.). The Court of Appeals for the Armed Forces (CAAF) granted review of whether a specification that does not expressly allege either potential terminal element in a Clause 1 or 2 specification under Article 134, UCMJ, is sufficient to state an offense. *Aurand*, 70 M.J. at 361. On 23 September 2011, the CAAF vacated our initial decision and remanded the appellant's case for consideration of the granted issue in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). *Aurand*, 70 M.J. at 361. Having considered the granted issue in light of *Fosler*, and again having reviewed the entire record, we affirm.

Background

At issue, the Specification of Additional Charge II alleges that the appellant broke restriction, in violation of Article 134, UCMJ, as follows:

> In that AIRMAN ROBERT A. AURAND . . . having been restricted to the limits of Travis Air Force Base, California, by a person authorized to do so, did, within the state of California, on or about 29 August 2010, break said restriction.

At trial, the appellant made no motions and did not object to the Article 134, UCMJ, charge and specification as failing to state an offense. He entered a plea of guilty to three of the charges and four specifications, in accordance with his pretrial agreement. Although the second element of proof under Article 134, UCMJ, is not expressly alleged on the Charge Sheet, during the providency inquiry, the military judge advised the appellant of the elements of the offense of breaking restriction, including Clauses 1 and 2 of the second element of Article 134, UCMJ. The military judge also defined these terms for the appellant.

The appellant admitted his guilt, affirmed that he understood the elements and definitions of this Article 134, UCMJ, offense, and agreed that, taken together, they correctly described what he did. In describing the breaking restriction offense, the appellant admitted that he was given a memorandum by his first sergeant signed by his commander placing him on base restriction. He expressly acknowledged in the stipulation of fact that his conduct was to the prejudice of good order and discipline in the armed services, and he explained to the military judge how his conduct was both prejudicial to good order and discipline as well as service discrediting. After reviewing the pretrial agreement with the appellant, the military judge found that the appellant's plea of guilty to Additional Charge II and its Specification was voluntarily and knowingly made, and he found the appellant guilty of Additional Charge II and its Specification.

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* Rules for Courts-Martial 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 where the charge and specification did not expressly allege 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 227, 233. In setting aside the conviction, *Fosler* did not foreclose the possibility that an 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. Thus, when given the particular circumstances contained in *Fosler*--a contested trial for adultery where the sufficiency of the charge and specification are first challenged at trial--the law will not find that the terminal element of Article 134, UCMJ, is necessarily implied. *Id*.

In guilty plea cases, however, where there is no objection at trial to the sufficiency of the charge and specification, our superior court has followed "the rule of most federal courts of liberally construing specifications in favor of validity when they are challenged for the first time on appeal." *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986). 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*. at 210 (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 crime of breaking restriction, including the terminal element of Article 134, UCMJ, and he explained to the military judge, in his own words, why his conduct was prejudicial to good order and discipline as well as 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 in this case. In doing so, we find that the terminal element was necessarily implied, and the appellant was thus on notice of what he needed to defend against and is protected against double jeopardy.

Therefore, we find that the charge and specification under Article 134, UCMJ, is not defective for failing to state an offense.

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

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