UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman TRACY F. HILL
United States Air Force

ACM 38161

17 October 2013

Sentence adjudged 6 June 2012 by GCM convened at McConnell Air Force Base, Kansas. Military Judge: Matthew D. van Dalen.

Approved Sentence: Bad-conduct discharge, confinement for 4 months, forfeiture of $1,491.00 pay per month for 4 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Nicholas D. Carter and Captain Christopher D. James.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and WIEDIE
Appellate Military Judges

OPINION OF THE COURT

WIEDIE, Judge:

At a general court-martial the appellant was convicted, consistent with his pleas, of false official statement and larceny of military property of a value of more than $500, in violation of Articles 107 and 121, UCMJ, 10 U.S.C. §§ 907, 921. A panel of officer members adjudged a sentence of a bad-conduct discharge, confinement for 4 months, restriction for 2 months, hard labor without confinement for 2 months, forfeiture of $1,491.00 pay per month for 4 months, and reduction to E-1. The convening authority approved only so much of the sentence as called for a bad-conduct discharge,

confinement for 4 months, forfeiture of $1,491.00 pay per month for 4 months, and reduction to E-1.

On appeal the appellant asserts the charge and specification alleging a false official statement must be dismissed because it failed to state an offense. We have reviewed the record of trial, the assignment of error, and the Government's answer thereto. Finding no error that prejudiced a substantial right of the appellant, we affirm.

Background

The appellant deployed to Al Udeid Air Base, Qatar in August of 2010 for six months. Approximately two months after arriving, the appellant filed an accrual travel voucher with his home station finance office, the 22nd Comptroller Squadron (22 CPTS), McConnell Air Force Base (AFB), Kansas. Because the appellant's initial voucher contained an inadvertent error, he was required to file an amended voucher. While processing the appellant's amended voucher, the 22 CPTS erroneously reset the per diem to which the appellant was entitled from $3.50 a day to the full per diem rate of $341.00 per day. As a result of this error, over $20,000 was deposited in the appellant's personal bank account and over $40,000 was paid to his Citibank Government Controlled Spend Account (CSA). After correcting for the amount the appellant was entitled, the appellant was overpaid $59,371.40. Finance officials did not notice the error at this time.

When the appellant returned to McConnell AFB in February 2011, he filed a final settlement voucher. While processing the voucher, the 22 CPTS discovered he had been overpaid. The appellant was notified of the overpayment and met with Master Sergeant (MSgt) BW, 22 CPTS, to discuss the situation. During the course of the conversation, MSgt BW asked if he would be able to pay back the approximately $20,000 mistakenly paid into his personal checking account. The appellant said he could not, as he had already spent the entire amount. MSgt BW then discussed with him the process of retrieving the money from his CSA so that it could be repaid. MSgt BW explained he would have to request a check from Citibank and deposit it into his personal account. After allowing enough time for the check to clear, the appellant would then need to write a personal check for the $40,103.16 incorrectly paid to his CSA to Defense Finance and Accounting Service (DFAS). Together, the appellant and MSgt BW called Citibank and requested that they send the appellant a check for the $40,103.16.

On 8 March 2011, Citibank sent the appellant a check for $40,103.16 and he deposited the check into his personal checking account. Rather than reimbursing DFAS, he proceeded to spend the entire amount within two months. The appellant never sent a check to DFAS for the amount of the overpayment.

In June 2011, the appellant encountered MSgt BW who reminded him that he needed to repay the overpayment he had received. He told MSgt BW he had received the

check from Citibank and deposited it in his checking account, but was waiting for the check to clear. Later that same month, the appellant and MSgt BW had another conversation, during which he falsely told MSgt BW that he had mailed a check to DFAS for the money he received from Citibank.

The appellant was charged with larceny of military property. He was also charged with making a false official statement for telling MSgt BW he had mailed the check to DFAS. The false official statement specification did not contain an allegation that the false statement was made "with the intent to deceive."

Failure of the False Official Statement Specification to State an Offense

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). "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.* (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)); *See also* Rule for Courts-Martial (R.C.M.) 307(c)(3). With respect to the offense of making a false official statement, the intent to deceive is an essential element. *United States v. Spicer*, 71 M.J. 470, 472-73 (C.A.A.F. 2013). A specification that fails to allege the intent to deceive fails to state an offense. *See United States v. Watson*, 5 C.M.R. 476 (A.F.B.R. 1952); *United States v. Wright*, 34 C.M.R. 518 (A.B.R. 1963).

In *United States v. Humphries*, 71 M.J. 209, 212 (C.A.A.F. 2012), our superior court noted that "[t]he existence of error alone does not dictate that relief in the form of a dismissal is available" in the absence of a structural error and that a defective specification does not constitute structural error. The Court also stated that even though R.C.M. 907(b)(1)(B) appears to require dismissal when a specification fails to state an offense, a defective specification does not necessarily warrant automatic dismissal. While an appellant can challenge the fact that a charge fails to allege an essential element at any time in the proceedings,[1] a specification will only be dismissed where there is plain error when the issue is first raised on appeal. *Humphries*, 71 M.J. at 213.

In applying a plain error analysis to a case involving whether a specification fails to state an offense, "[the] [a]ppellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011) (citing *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998)); *See also United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005); *United States v. Carpenter*, 51 M.J. 393, 396 (C.A.A.F. 1999). As stated by our superior court, the standard to be applied is the constitutional

[1] *See* Rule for Courts-Martial 907(b)(1)(B).

error standard in *Powell*, 49 M.J. at 465. *United States v. Paige*, 67 M.J. 442, 449 n. 7 (C.A.A.F. 2009) (citing, as examples, *United States v. Harcrow*, 66 M.J. 154, 160 (C.A.A.F. 2008); *United States v. Brewer*, 61 M.J. 425, 432 (C.A.A.F. 2005); *Carpenter*, 51 M.J. at 396).

While failure to allege an essential element of an offense is error, 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 plea inquiry shows the appellant understood what offense and under what legal theory he was pleading guilty. *See United States v. Ballan*, 71 M.J. 28, 34-36 (C.A.A.F. 2012). The appellant entered a plea of guilty to the specification in question pursuant to a pretrial agreement. When the military judge advised him of the elements of false official statement, he correctly informed the appellant that the fourth element was that "you made the false statement with the intent to deceive." The military judge then defined "intent to deceive." The appellant stated he understood the elements and definition taken together as the military judge explained them to him. After being advised of the element, having the term defined for him, and stating that he understood the element and definition, the appellant admitted that he had intended to deceive MSgt BW when he made the false statement. He also entered into a stipulation of fact with the Government in which he admitted the statement was made with the intent to deceive. Accordingly, we find the appellant was not prejudiced by the failure to allege "with the intent to deceive" in the specification.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court