

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman Basic MATTHEW C. ROTH
United States Air Force**

ACM S31834 (rem)

13 February 2012

Sentence adjudged 25 May 2010 by SPCM convened at Sheppard Air Force Base, Texas. Military Judge: Jeffrey A. Ferguson.

Approved sentence: Bad-conduct discharge and confinement for 90 days.

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; Major Naomi N. Porterfield; Captain Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

UPON REMAND

This opinion is subject to editorial correction before final release.

PER CURIAM:

Pursuant to his pleas, the appellant was convicted at a general court-martial by officer members of three specifications of larceny, one specification of unlawfully entering a dorm with the intent to commit a criminal offense, and one specification of unlawfully entering another's dorm room, in violation of Articles 121, 130 and 134, UCMJ, 10 U.S.C. §§ 921, 930, 934. The adjudged sentence consisted of a bad-conduct discharge and confinement for 90 days. The convening authority approved the findings and sentence as adjudged.

This Court previously affirmed the findings and sentence. *United States v. Roth*, ACM 37697 (A.F. Ct. Crim. App. 31 March 2011) (unpub. op.), *rev'd*, 70 M.J. 356 (C.A.A.F. 2011) (mem.). The Court of Appeals for the Armed Forces (CAAF) subsequently granted review of whether a specification that does not expressly allege the terminal element under an Article 134, UCMJ, charge is sufficient to state an offense. *United States v. Roth*, 70 M.J. 142 (C.A.A.F. 2011) (order granting petition for review). On 21 September 2011, 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). *Roth*, 70 M.J. at 356. Having considered the granted issue in light of *Fosler*, and again having reviewed the entire record, we affirm.

Background

The specification at issue alleges the appellant unlawfully entered the dorm room of an Airman at Sheppard Air Force Base, Texas. The allegation did not expressly allege the terminal element of Article 134, UCMJ.

At trial, the appellant entered a plea of guilty to all charges and specifications in accordance with his pretrial agreement. He did not object to the Article 134, UCMJ, charge and specification as failing to state an offense. During the providency inquiry, the military judge addressed that charge and specification, and properly advised the appellant of each element of the offense, to include Clauses 1 and 2 of Article 134, UCMJ, and defined those terms for the appellant.

The appellant admitted his guilt, and affirmatively stated that he understood the elements and definitions of the offense and that, taken together, they correctly described what he did. In describing the unlawful entry allegations, he admitted to unlawfully going into another Airman's room. He expressly acknowledged in the Stipulation of Fact, and in response to the military judge's inquires, that his conduct was to the prejudice of good order and discipline in the armed services. The military judge found that the appellant's guilty plea to all the charges and specifications was voluntarily and knowingly made.

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, 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. *Id.* at 226-27, 233. In setting aside the conviction, *Fosler* did not foreclose the possibility that an element could be implied, even the terminal element in an Article 134, UCMJ, offense. However, CAAF 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.” *Fosler*, 70 M.J. at 230, 232. Thus, at least 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.* 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 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). “In 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 pled guilty and made no motion at trial to dismiss the charge and specification for failure to state an offense. During the guilty plea inquiry, the appellant acknowledged his understanding of all the elements of the alleged crimes, including the terminal elements of Article 134, UCMJ, and he explained to the military judge why his conduct was prejudicial to good order and discipline 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 in this case. In doing so, we find that the terminal element in the Specification of Charge III was necessarily implied and that the appellant was 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



A handwritten signature in blue ink, appearing to read "S. Lucas", is written over a faint, light blue circular stamp or watermark.

STEVEN LUCAS
Clerk of the Court