

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain MATHEW W. SWINNEY
United States Air Force

ACM 37890

13 September 2012

Sentence adjudged 12 January 2011 by GCM convened at Maxwell Air Force Base, Alabama. Military Judge: Mark L. Allred (sitting alone).

Approved sentence: Dismissal, confinement for 7 months, and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Captain Robert D. Stuart.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Matthew F. Blue; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and HARNEY
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

A general court-martial composed of military judge alone convicted the appellant in accordance with his pleas of one specification of disobeying a superior commissioned officer, two specifications of assault, two specifications of adultery, two specifications of indecent acts, one specification of communicating a threat, and one specification of obstructing justice in violation of Articles 90, 128, and 134, UCMJ, 10 U.S.C. §§ 890, 928, 934. The court sentenced him to a dismissal, confinement for 7 months, and forfeiture of all pay and allowances.* The convening authority approved the sentence adjudged. The appellant assigns as error that the specifications charged under Article

* A pretrial agreement capped confinement at four years.

134, UCMJ, fail to state offenses because each fails to expressly allege the terminal element.

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 of adultery under Article 134, UCMJ, because the military judge improperly denied a defense motion to dismiss the specification on the basis that it failed to allege the terminal element of either Clause 1 or 2. *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011).

While failure to allege the terminal element of an Article 134, UCMJ, 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 that the appellant understood to what offense and under what legal theory he was pleading guilty. *United States v. Ballan*, 71 M.J. 28, 34-36 (C.A.A.F. 2012), *cert. denied*, ___ S. Ct. ___ (U.S. 25 June 2012) (No. 11-1394). During the plea inquiry in the present case, the military judge advised the appellant of each element of the charged offenses. For the Article 134, UCMJ, offenses at issue in this appeal, the military judge included the terminal element of each specification and the appellant explained how his misconduct met the requirements of the terminal element. Therefore, as in *Ballan*, the appellant here suffered no prejudice to a substantial right: he knew under what clause he was pleading guilty and clearly understood how his conduct violated the terminal element of Article 134, UCMJ.

Conclusion

The 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 findings and the sentence are

AFFIRMED.

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Deputy Clerk of the Court