UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic DAVID M. ATTARDO
United States Air Force

ACM S31853 (rem)

12 January 2012

Sentence adjudged 8 June 2010 by SPCM convened at Luke Air Force Base, Arizona. Military Judge: Jeffrey Ferguson (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 4 months.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford and Dwight H. Sullivan, Esquire.

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

Before

ORR, GREGORY, and WEISS
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 one specification of failure to go to his appointed place of duty; one specification each of use, distribution, and introduction of Oxycodone onto a military installation; and one specification of wrongful solicitation to use Oxycodone, in violation of Articles 86, 112a, and 134, UCMJ, 10 U.S.C. §§ 886, 912a, 934, respectively. The adjudged and approved sentence consists of a bad-conduct discharge and confinement for 4 months.

This Court previously affirmed the findings and sentence. *United States v. Attardo*, ACM S31853 (A.F. Ct. Crim. App. 31 January 2011) (unpub. op.), *rev'd*, 70 M.J. 355 (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 the terminal element in a Clause 1 or 2 specification under Article 134, UCMJ, is sufficient to state an offense. *United States v. Attardo*, 70 M.J. 91 (Daily Journal 20 April 2011). On 21 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). *Attardo*, 70 M.J. at 355. Having considered the granted issue in light of *Fosler*, and again having reviewed the entire record, we affirm.

Background

The offense at issue, the Specification of Charge III, alleges that the appellant wrongfully solicited Airman Basic NB to wrongfully use Oxycodone, in violation of Article 134, UCMJ, as follows:

> In that AIRMAN BASIC DAVID M. ATTARDO . . . did, at or near Luke Air Force Base, Arizona, on divers occasions . . . wrongfully solicit Airman Basic [NB] to wrongfully use some amount of Oxycodone, a schedule II controlled substance.

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 all the charges and 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 soliciting another to commit an offense, 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 solicitation offense, the appellant admitted to wrongfully asking Airman Basic AB, on more than one occasion, if she wanted him to purchase Oxycodone for her to use. He expressly acknowledged in the

[*] After the appellant entered his plea of guilty, the military judge sua sponte raised a question about the sufficiency of Charge III and its Specification because he noted that the charge and specification did not contain words or acts that the accused was alleged to have done in his solicitation of Airman Basic AB. However, none of the parties questioned or objected on the basis that the terminal element of Article 134, UCMJ, 10 U.S.C. § 934, was not expressly alleged. Both the trial counsel and defense counsel agreed that the specification, as alleged, was sufficient to provide notice to the appellant. The military judge specifically asked defense counsel, "And the defense still does not intend to raise any motions with regard to this particular specification and charge?" and the appellant's civilian defense counsel responded, "That is correct, Your Honor."

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 all the charges and specifications was voluntary and knowingly made, and he found the appellant guilty of all the charges and specifications.

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); R.C.M. 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. *Fosler*, 70 M.J. at 233. This is because the charge and specification did not expressly allege at least one of the three clauses that meet the second element of proof under Article 134, UCMJ, commonly known as the terminal element. *Id*. at 226. In setting aside the conviction, *Fosler* did not foreclose the possibility that a missing element could be implied, even the terminal element in an Article 134, UCMJ, offense; however, the 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." *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*. 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). 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 soliciting another to commit an offense, 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 in the solicitation charge is necessarily implied, the appellant was on notice of what he needed to defend against, and he 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

STEVEN LUCAS
Clerk of the Court