UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman KEITRON J. CLARK
United States Air Force

ACM S31842 (rem)

08 February 2012

Sentence adjudged 18 June 2010 by SPCM convened at Barksdale Air Force Base, Louisiana. Military Judge: Don M. Christensen (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 8 months, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund, Major Michael S. Kerr, and Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Captain Brian C. Mason; 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 one specification of failure to obey a lawful order, one specification of making a false official statement, two specifications of damaging property, one specification of physically controlling a passenger car while the alcohol concentration in his breath exceeded the legal limit, two specifications of physically controlling a passenger car in a reckless manner while drunk, one specification of operating a vehicle with a suspended drivers license, one

specification of violating a Louisiana Abuse Prevention Protection Order, one specification of being drunk and disorderly, and one specification of being drunk, in violation of Articles, 92, 107, 109, 111, and 134, UCMJ, 10 U.S.C. §§ 892, 907, 909, 911, 934, respectively. The adjudged sentence consisted of a bad-conduct discharge, confinement for 250 days, reduction to the grade of E-1, and a reprimand. The convening authority approved the bad-conduct discharge, the reduction in grade to E-1, and the reprimand, but reduced the amount of confinement to eight months in accordance with the pretrial agreement.

This Court previously affirmed the findings and sentence. *United States v. Clark*, ACM S31842 (A.F. Ct. Crim. App. 7 June 2011) (unpub. op.), *rev'd*, 70 M.J. 356 (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. *United States v. Clark*, 70 M.J. 340 (C.A.A.F. 2011) (order granting petition for review). 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). *Clark*, 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 offense at issue, Specification 4 of Charge V, alleges that the appellant was drunk, in violation of Article 134, UCMJ, as follows:

> In that SENIOR AIRMAN KEITRON J. CLARK . . . was, at or near Barksdale AFB, Louisiana, on or about 10 February 2010, drunk.

At trial, the appellant made no motions and did not object to the Article 134, UCMJ, charge and its specification as failing to state an offense. He entered a plea of guilty to Charge V and each of its four specifications, in accordance with his pretrial agreement. Although Specification 4 did not expressly allege the second element of proof under Article 134, UCMJ, the military judge advised the appellant, during the providency inquiry, of the elements of the offense of being drunk, 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 and affirmed that he understood the elements and definitions of this Article 134, UCMJ, offense. The appellant also agreed that, taken together, they correctly described what he did. In describing the offense of being drunk, the appellant admitted that, after drinking numerous Bud Light Lime beers, he was drunk on station. As a result, he attempted to attend a scheduled appointment for alcohol abuse, but he mistakenly checked-in while in uniform at the Family Advocacy Clinic. His

public intoxication caused his first sergeant to spend part of her day dealing with him. He expressly acknowledged in the Stipulation of Fact that his conduct was to the prejudice of good order and discipline in the armed services. He also explained to the military judge how his conduct was prejudicial to good order and discipline and acknowledged that it was of a nature to bring discredit upon the armed forces. 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)); *see also* Rule for Courts-Martial (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 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 being drunk, including the terminal element, under 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 Specification 4 of Charge V 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