

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,)	Misc. Dkt. No. 2012-09
Respondent)	
)	
v.)	
)	ORDER
Airman First Class (E-3))	
GEORGE W. GATTO,)	
USAF,)	
Petitioner – <i>Pro se</i>)	Panel No. 1

On 18 June 2012, the petitioner filed a *pro se* petition for extraordinary relief in the nature of a writ of habeas corpus. As a basis for relief he argues that the eight specifications of Charge II and five specifications of Additional Charge II fail to state an offense because each fails to expressly allege the terminal element of Article 134, UCMJ. The petitioner requests that this Court set aside and dismiss, with prejudice, the findings with regard to Charge II and Additional Charge II, and modify or otherwise order a rehearing on the sentence.

Procedural History

A general court-martial composed of military judge alone convicted the appellant in accordance with his pleas of multiple acts of forcible sodomy and indecent assault in violation of Articles 125 and 134, UCMJ, 10 USC §§ 925 and 934.¹ The court-martial sentenced him to a dishonorable discharge, confinement for 40 years, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved the sentence adjudged.² We affirmed the findings and sentence. *United States v. Gatto*, ACM 37246 (A.F. Ct. Crim. App. 22 October 2010) (unpub. op.). The Court of Appeals for the Armed Forces denied a petition for review on 10 February 2011, and the General Court-Martial Convening Authority ordered the dishonorable discharge executed on 11 March 2011.

¹ The appellant pled guilty to the following charges and specifications: Charge I alleges forcible sodomy on BWE (Specification 1) and BEP (Specification 2); Charge II alleges indecent assault on BWE (Specification 1), CJC (Specification 2), BEP (Specification 3), DC (Specification 4), CBC (Specification 5), RSD (Specification 6), JSK (Specification 7), and PV (Specification 8); Additional Charge I alleges forcible sodomy on LJR; and Additional Charge II alleges indecent assault on LJR (Specification 1), JVG (Specification 2), MEP (Specification 3), GTK (Specification 4), and AD (Specification 5).

² A pretrial agreement capped confinement at 45 years.

Writ of Habeas Corpus Jurisdiction

The All Writs Act authorizes “all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions.” 28 U.S.C. § 1651. The Act requires two separate determinations: (1) whether the requested writ is “in aid of ‘its existing statutory jurisdiction;” and (2) whether the requested writ is “necessary or appropriate.” *Denedo v. United States*, 66 M.J. 114, 120 (C.A.A.F. 2008) (citations omitted), *aff’d*, 556 U.S. 904 (2009). A writ of habeas corpus is used to order the release of a person from confinement. *Moore v. Akins*, 30 M.J. 249, 254 (C.M.A. 1990). The standard of review for habeas corpus in military courts is whether the prior review: “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the [prior] proceeding.” *Loving v. United States*, 64 M.J. 132, 145 (C.A.A.F. 2006) (quoting 28 U.S.C. § 2254(d)).

The Error Alleged in the Petition

The petitioner argues that *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), which was decided after our decision affirming the findings and sentence in petitioner’s case, requires dismissal of Charge II and Additional Charge II. 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*, the 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. *Fosler*, 70 M.J. at 233.

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). During the plea inquiry in the present case, the military judge advised the petitioner of each element of the charged offenses. For the Article 134, UCMJ, offenses at issue in this petition, the military judge included the terminal element of each specification and the appellant explained how his misconduct met the requirements of the terminal element.³ Therefore, as in *Ballan*, the

³ The references in the trial record for the terminal elements and corresponding discussions for the specifications at issue are as follows:

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.

Conclusion

Having considered the matters submitted by the petitioner, we find that he has failed to demonstrate that extraordinary relief is warranted.

Accordingly, it is by the Court on this 17th day of July, 2012,

ORDERED:


That the Petition for Extraordinary Relief in the Nature of a Writ of Habeas Corpus is hereby **DENIED**.

Judges ORR, GREGORY, and HARNEY concur.

FOR THE COURT

OFFICIAL




STEVEN LUCAS
Clerk of the Court

Charge II: Specification 1 (R. at 74, 80); Specification 2 (R. at 89-90, 93); Specification 3 (R. at 147-48, 151); Specification 4 (R. at 111-12, 119); Specification 5 (R. at 168-69, 173); Specification 6 (R. at 97-98, 105); Specification 7 (R. at 188-89, 194); Specification 8 (R. at 198-99, 203)

Additional Charge II: Specification 1 (R. at 54-55, 60); Specification 2 (R. at 156-57, 163); Specification 3 (R. at 120-21, 135); Specification 4 (R. at 177-78, 184); Specification 5 (R. at 209-10, 214).