UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant STEVEN D. HARRIS, JR.
United States Air Force

ACM S31822 (rem)

27 June 2012

Sentence adjudged 4 May 2010 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: Grant L. Kratz (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 180 days, forfeiture of $964.00 pay per month for 12 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Bryan A. Bonner; Captain Shane A. McCammon; and Captain Andrew J. Unsicker.

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

Before

ORR, GREGORY, and HARNEY
Appellate Military Judges

OPINION OF THE COURT
UPON REMAND

GREGORY, Senior Judge:

A special court-martial composed of military judge alone convicted the appellant pursuant to his pleas of larceny and theft of mail in violation of Articles 121 and 134, UCMJ, 10 U.S.C. §§ 921, 934. The court sentenced him to a bad-conduct discharge, confinement for 12 months, forfeiture of $964 pay per month for 12 months, and reduction to E-1. In accordance with the terms of a pretrial agreement, the convening authority approved the bad-conduct discharge, confinement for 180 days, the forfeitures,

and the reduction in grade on 11 June 2010. The appellant submitted the case to us on the merits, and we affirmed the findings and sentence. *United States v. Harris*, ACM S31822 (A.F. Ct. Crim. App. 15 August 2011) (unpub. op.)

On 6 October 2011, the appellant petitioned the Court of Appeals for the Armed Forces (C.A.A.F.) for a grant of review. In his supplement to the petition, the appellant raised no specific errors and expressly waived any issue regarding the possible failure of the Article 134 specification to allege an offense in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), because he did not wish to delay the processing of his appeal. Nevertheless, on 15 November 2011, C.A.A.F. granted review, vacated our initial decision, and remanded the appellant's case for consideration of whether a specification that does not expressly allege the terminal element in a Clause 1 or 2, Article 134 charge is sufficient to state an offense in light of *Fosler*. *United States v. Harris*, No. 12-0082/AF (Daily Journal 11 November 2011).

Background

While assigned to Kunsan Air Base, Republic of Korea, the appellant received in his post office box a letter from Chase Bank addressed to a TSgt H who happened to have the same post office box number when he was at Kunsan several years earlier. The letter contained a credit card, and the appellant decided to keep it. Over the next three months the appellant charged multiple transactions on the card ranging from Amazon.com to the Cherry Boy Club, each time representing that he was TSgt H. The total amount of the thefts was well over $3000. TSgt H discovered the thefts when he received notice from a Chase Bank collection agency that he owed Chase over $4000. He contacted law enforcement, and they traced the problem to the appellant.

The appellant was charged with multiple thefts by fraudulently using the credit card to obtain property and merchandise. He was also charged with stealing mail matter (the credit card itself) under Article 134. The specification of this second charge did not expressly allege that his conduct was prejudicial to good order and discipline or service discrediting, the required terminal element of a Clause 1 or 2, Article 134 charge.

The appellant pled guilty to both charges and specifications in accordance with a pretrial agreement. He did not object that the Article 134 charge and specification failed to state an offense. Although not expressly alleged in the specification, the military judge properly advised the appellant of the terminal elements of the Article 134 charge. The appellant admitted his guilt, acknowledged understanding all the elements and definitions of each offense, and explained to the military judge why he believed stealing the mail of a fellow service member was prejudicial to good order and discipline and service discrediting.

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* R.C.M. 307(c)(3). In *Fosler*, C.A.A.F. invalidated a conviction of adultery under Article 134 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 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). 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.

Jurisdiction

In its answer to the appellant's assignment of error on remand, the Government argues that neither we nor our superior court have jurisdiction to hear this case because the appellant did not have an approved punitive discharge. We disagree. The original court-martial convening authority *approved* the appellant's punitive discharge on 11 June 2010. On 22 July 2010, the Air Force Clemency and Parole Board (AFCPB) entered the appellant into the Air Force Return to Duty Program (AFRTDP). On 15 December 2010, the AFCPB directed that the appellant be returned to duty and *suspended* the punitive discharge until 15 December 2011. Therefore, at the time of our initial review in August 2011 and our superior court's remand in November 2011, the appellant had an *approved*, albeit suspended, punitive discharge. That is sufficient for jurisdiction under Article 66(b), UCMJ, 10 U.S.C. § 866(b), which confers jurisdiction to the Service Courts of Criminal Appeals over all trials by court-martial "in which the sentence, *as approved*, extends to . . . bad-conduct discharge . . . ." Article 66(b)(1), UCMJ (emphasis added). Although the punitive discharge was ultimately remitted on 15 December 2011, jurisdiction attached before that date and continues based on the order of our superior court.

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