UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ALAN J. LINDGREN
United States Air Force

ACM 37928

16 April 2013

Sentence adjudged 6 April 2011 by GCM convened at Spangdahlem Air Base, Germany. Military Judge: Dawn R. Eflein (sitting alone).

Approved sentence: Confinement for 15 months, and reduction to E-2.

Appellate Counsel for the appellant: Major Ja Rai A. Williams.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Lauren N. DiDomenico; Major Tyson D. Kindness; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and MARKSTEINER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ORR, Senior Judge:

Contrary to his pleas, the appellant was convicted by a military judge sitting as a general court-martial of two specifications of negligent homicide, in violation of Article 134, UCMJ, 10 U.S.C. § 934.[1] The adjudged sentence consisted of confinement for 15 months and reduction to the grade of E-2. The convening authority approved the findings and sentence as adjudged.

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[1] The appellant was acquitted of two specifications of violating a lawful regulation and two specifications of involuntary manslaughter, in violation of Articles 92, and 119, UCMJ, 10 U.S.C. §§ 892, 919.

Background

On 11 July 2010, the appellant was driving his car at a speed in excess of 200 kilometers per hour on the Autobahn near Bitburg, Germany. This portion of the Autobahn did not have a posted speed limit and the weather was sunny and dry. The appellant lost control of his car as he approached a curve and the car crashed into a guard rail. The car flipped over several times causing blunt force injuries to the heads of Airman First Class (A1C) AJJ and A1C BSM who were passengers in the appellant's car. Both Airmen died on the scene. The appellant received relatively minor injuries.

Minutes before the accident, the appellant passed Technical Sergeant (TSgt) MS and his family who were driving from Spangdahlem Air Base to Bitburg, Germany. TSgt MS and his family were frightened as the appellant's car passed them at such a high rate of speed and were later horrified when they encountered the accident scene. German and American medical and law enforcement personnel responded to the scene of the accident and sections of the Autobahn were shut down in both directions. The accident also received significant media coverage.

On appeal the appellant asserts that the specifications under Charge III failed to state an offense, because they do not allege the terminal element of Article 134, UCMJ. Specifications 1 and 2 of Charge III allege violations of that Article, as follows:

> Specification 1: In that [the appellant] . . . did, at or near Fliessem, County of Bitburg-Pruem, Germany, on or about 11 July 2010, unlawfully kill [A1C AJJ], by driving a motor vehicle, in a negligent manner, thereby causing [the appellant] to crash the vehicle.
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> Specification 2: In that [the appellant] . . . did, at or near Fliessem, County of Bitburg-Pruem, Germany, on or about 11 July 2010, unlawfully kill [A1C BSM], by driving a motor vehicle, in a negligent manner, thereby causing [the appellant] to crash the vehicle.

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.* (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)). *See also* Rule for Courts-Martial 307(c)(3).

In *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), our superior court invalidated a conviction for adultery contested under Article 134, UCMJ, after finding the

military judge improperly denied a defense motion to dismiss for failure to state an offense. *Id*. 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.

Similarly, in *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012), our superior court dismissed a contested adultery specification that failed to expressly allege an Article 134, UCMJ, terminal element but which was not challenged at trial. Applying a plain error analysis, the Court found that the failure to allege the terminal element was plain and obvious error which was forfeited rather than waived. But, whether a remedy was required depended on "whether the defective specification resulted in material prejudice to [the appellant's] substantial right to notice." *Id*. at 215 (citation omitted). Distinguishing notice issues in guilty plea cases and cases in which the defective specification is challenged at trial, the Court explained that the prejudice analysis of a defective specification under plain error requires close review of the record: "Mindful that in the plain error context the defective specification alone is insufficient to constitute substantial prejudice to a material right . . . we look to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'" *Id*. at 215-16 (citing *United States v. Cotton*, 535 U.S. 625, 633 (2002); *United States v. Johnson*, 520 U.S. 461, 470 (1997)). After a close review of the record, the Court found no such notice.

Concluding that "[n]either the specification nor the record provides notice of which terminal element or theory of criminality the Government pursued," the Court identified several salient weaknesses in the record to highlight where notice was missing: (1) the Government did not even mention the adultery charge in its opening statement let alone the terminal elements of the charge; (2) the Government presented no evidence or witnesses to show how the conduct satisfied either Clause 1, Clause 2, or both clauses of the terminal element; (3) the Government made no attempt to link evidence or witnesses to either clause of the terminal element; and (4) the Government made only a passing reference to the adultery charge in closing argument but again failed to mention either terminal element. *Id*. at 216. In sum, the Court found nothing that reasonably placed the appellant "on notice of the Government's theory as to which clause(s) of the terminal element of Article 134, UCMJ, he had violated." *Id*. (citation omitted).

Prior to our superior court's decisions in *Fosler* and *Humphries*, we would have easily concluded, as did the military judge and the litigants, that Specifications 1 and 2 of Charge III stated an offense. The specification, as written, complied with the current state of the law at the time of the trial. It plainly described the acts that the appellant must defend against insofar as it alleged the time, place, and type of prohibited conduct. Clearly, the conduct described could be either conduct prejudicial or service discrediting, or both. In fact, there are very few acts more prejudicial or service discrediting than the unlawful killing of two fellow Airmen.

However, viewing this case in light of *Humphries*, we are hard-pressed to conclude that, on its face, the specification alleged one or more of the terminal elements. We are also compelled to disagree that the specification's allegations sufficiently narrowed down the realm of possible terminal elements the appellant could have been expected to defend against; even if the terminal element(s) could be implied, nothing in the specification indicated which one(s) did.

Thus finding plain and obvious error in these defective specifications, we are further compelled to find material prejudice since the record does not indicate the appellant was otherwise on notice of those elements. An inescapable point of *Fosler* and *Humphries* is that the appellant had a right to know which theory the Government was specifically alleging in order to build a defense to the charged crime. *Id*. at 216; *Fosler*, 70 M.J. at 230. We note that the Government presented evidence that reasonably implied the appellant's actions were prejudicial and service discrediting. But, the Government did not present any specific evidence to show why the appellant's conduct satisfied either terminal clause of Article 134, UCMJ, nor did they mention the terminal elements during their opening statement. Even though the trial counsel stated during his closing argument that both of the negligent homicides were prejudicial to good order and discipline, and the Article 32, UMCJ, 10 U.S.C. § 832, investigating officer spelled out the evidence supporting the terminal element in his report, *Humphries* indicates that more is required to provide the appellant sufficient notice of the Government's theory of criminality. *Humphries*, 71 M.J. at 216.

In sum, we can find nothing in the record that reasonably placed the appellant on notice of the Government's theory as to which clause(s) of the terminal element of Article 134, UCMJ, he had violated. Given the mandate set out by our superior court in *Humphries*, we are compelled to set aside and dismiss Charge III and its specifications.

Conclusion

Accordingly, the findings and sentence are set aside. Charge III and its specifications are

DISMISSED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court