UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MICHAEL T. NERAD
United States Air Force

ACM 36994 (rem)

26 January 2012

Sentence adjudged 7 February 2007 by GCM convened at McGuire Air Force Base, New Jersey. Military Judge: Gary M. Jackson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 12 months, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford, Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Major Darrin K. Johns, Major Lance J. Wood, Major Reggie D. Yager, and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen, Lieutenant Colonel Matthew S. Ward, Lieutenant Colonel Jeremy S. Weber, Major Coretta E. Gray, and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

UPON REMAND

PER CURIAM:

Consistent with his pleas, the appellant was convicted by a military judge, sitting as a general court-martial, of one specification each of failure to obey a lawful order, wrongful disposition of military property, larceny of military property, sodomy, possession of child pornography, and adultery, in violation of Articles 92, 108, 121, 125, and 134, UCMJ, 10 U.S.C. §§ 892, 908, 921, 925, 934. The adjudged and approved

sentence consists of a dishonorable discharge, 12 months of confinement, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

This case is before this Court on remand for the second time. In a published decision, issued 29 May 2009, this Court set aside and dismissed the finding of guilty as to Specification 1 of Charge VI, regarding wrongful possession of child pornography, and approved the remaining findings and sentence as adjudged. *United States v. Nerad*, 67 M.J. 748, 752-53 (A.F. Ct. Crim. App. 2009), *rev'd*, 69 M.J. 138 (C.A.A.F. 2010), *cert. denied*, 131 S. Ct. 669 (2010). The Judge Advocate General of the Air Force certified the case to our superior court, asserting that this Court erred by nullifying the appellant's conviction for possession of child pornography. By decision issued 27 July 2010, the Court of Appeals for the Armed Forces (CAAF) found that we failed to disclose the legal basis for our decision to set aside the finding of guilty as to the child pornography offense. *Nerad*, 69 M.J. at 148. As a result, our superior court set aside our decision and returned the case to The Judge Advocate General of the Air Force for remand to this Court "for a new review under Article 66(c), UCMJ, 10 U.S.C. § 866(c)." *Id.* The record was thereafter returned to this Court on 19 August 2010. Upon further review and finding no material prejudice to the appellant, we affirmed the findings and the sentence. *United States v. Nerad*, ACM S31863 (A.F. Ct. Crim. App. 9 March 2011) (unpub. op.), *rev'd*, 70 M.J. 355, 356 (C.A.A.F. 2011) (mem.). The CAAF subsequently granted review of a new issue: 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. Nerad*, 70 M.J. 221 No. 11-0494/AF (Daily Journal 27 June 2011). On 21 September 2011, the CAAF vacated our decision and once again remanded the appellant's case for consideration of the granted issue in light of its intervening opinion issued in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). *Nerad*, 70 M.J. at 357. Having considered the granted issue in light of *Fosler*, and again having reviewed the entire record, we affirm.

The offense at issue, Specification 2 of Charge VI, alleges that the appellant committed adultery, in violation of Article 134, UCMJ, as follows:

> In that SENIOR AIRMAN MICHAEL T. NERAD . . . a married man, did, within the continental United States and Canada, between on or about 1 July 2005 and on or about 31 May 2006, wrongfully have sexual intercourse with GL, a person not his wife.

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 five of the charges, including six 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 adultery, 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 fact, the military judge told the appellant that not all adultery is proscribed by the military and listed nine factors to consider in determining whether the appellant's conduct was prejudicial to good order and discipline or service discrediting. In describing the adultery offense, the appellant admitted that he engaged in a sexual relationship with GL in Canada and in New York while he was married. He expressly acknowledged in the 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 Specification 2 of Charge VI was voluntary and knowingly made, and he found the appellant guilty of Specification 2 of Charge VI.

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 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 adultery, 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 adultery 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 alleging adultery under Article 134, UCMJ, is not defective for failing to state an offense.

C*onclusion*

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

Angela E. Dixon

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Deputy Clerk of the Court