UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman STONEY B. OSBORNE
United States Air Force

ACM 37909

29 November 2012

Sentence adjudged 28 January 2011 by GCM convened at Tinker Air Force Base, Oklahoma. Military Judge: William C. Muldoon, Jr.

Approved sentence: Bad-conduct discharge, confinement for 9 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Robert D. Stuart.

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

STONE, GREGORY, and HARNEY
Appellate Military Judges

PER CURIAM:

Before a general court-martial, the appellant entered mixed pleas of: (1) not guilty to one specification of involuntary manslaughter, in violation of Article 119, UCMJ, 10 U.S.C. § 919, and (2) guilty to one specification of negligent homicide, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The military judge accepted the appellant's guilty plea to negligent homicide. A panel of officers found the appellant not guilty of involuntary manslaughter. The court sentenced the appellant to a bad-conduct discharge, nine months of confinement, forfeiture of all pay and allowances, and reduction to E-1 for the negligent homicide conviction. The convening authority approved the sentence adjudged.

The appellant assigns two errors before this court: (1) the negligent homicide specification charged under Article 134, UCMJ, fails to state an offense because it does not expressly allege the terminal element, and (2) his sentence was inappropriately severe. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Terminal Element

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)); s*ee also* Rule for Courts-Martial 307(c)(3). In *Fosler*, our superior 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. *United States v. Fosler*, 70 M.J. 225, 226 (C.A.A.F. 2011).

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 when 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), *cert. denied*, __ S. Ct. __ (U.S. 25 June 2012) (No. 11-1394). During the plea inquiry in the present case, the military judge advised the appellant of each element of the Article 134, UCMJ, offense at issue, including the terminal element. The military judge defined the terms "conduct prejudicial to good order and discipline" and "service discrediting" for the appellant. The appellant explained to the military judge how his misconduct was service discrediting. Therefore, as in *Ballan*, the appellant here suffered no prejudice to a substantial right, because he knew under what clause he was pleading guilty and clearly understood how his conduct violated the terminal element of Article 134, UCMJ.

Sentence Severity

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App.

2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The appellant asserts that his "one-time negligent act does not warrant a bad conduct discharge just because the outcome was tragic." We disagree. After considering the evidence in aggravation and mitigation, the members adjudged a sentence well below the maximum punishment of a dishonorable discharge, three years of confinement, forfeiture of all pay and allowances, and reduction to E-1. The convening authority considered the clemency submissions prior to approving the sentence as adjudged. We have given individualized consideration to this particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all other matters contained in the record of trial. We find that the approved sentence was clearly within the discretion of the convening authority, was appropriate in this case, and was not inappropriately severe.

Conclusion

The 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 findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court

[*] We find that the appellate delay in this case was harmless beyond a reasonable doubt. *United States v. Moreno*, 63 M.J. 129, 135–36 (C.A.A.F. 2006) (reviewing claims of post-trial and appellate delay using the four-factor analysis in *Barker v. Wingo*, 407 U.S. 514 (1972)).