

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
C.L. REISMEIER, J.K. CARBERRY, B.L. PAYTON O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**IAN T. GLOVER
MAJOR (O-4), U.S. MARINE CORPS**

**NMCCA 201100211
GENERAL COURT-MARTIAL**

Sentence Adjudged: 17 December 2010.

Military Judge: LtCol Thomas J. Sanzi, USMC.

Convening Authority: Commanding General, Marine Air Ground Task Force Training Command, Marine Corps Air Ground Combat Center, Twentynine Palms, CA.

Staff Judge Advocate's Recommendation: LtCol A.G. Peterson, USMC.

For Appellant: Maj Jeffrey R. Liebenguth, USMC.

For Appellee: Capt Paul M. Ervasti, USMC.

29 September 2011

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of one specification of conduct unbecoming an officer and a gentleman, one specification of adultery, and one specification of fraternization, violations of Articles 133 and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 933 and 934. The

appellant was sentenced to a dismissal from the United States Marine Corps and a fine in the amount of \$3,000. In accordance with the terms of the pretrial agreement, the convening authority disapproved the fine and approved the dismissal.

The appellant raises two assignments of error on appeal: (1) the specifications under Article 134 failed to state offenses because they omitted that Article's terminal element; and (2) the military judge erred by accepting guilty pleas to specifications that included the term "semi-nude."

We conclude that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Facts

Lance Corporal (LCpl) T, an enlisted Marine, worked as a driver in the motor transport section. In the course of her duties she often served as a driver for the appellant, a Marine Corps major. While on duty with LCpl T, the appellant asked her if she had ever modeled and whether she was interested in compiling a portfolio. LCpl T expressed interest and the appellant offered to photograph her.

Sometime later, the appellant drove to the home of one of LCpl T's friends, picked LCpl T up, and they drove to Joshua Tree National Park where he took numerous photographs of her. Forty-three of the photographs depict LCpl T in seductive poses clad in zipped-down jeans and no top, her bare breasts covered only by her arms or hands.

The appellant pled guilty to conduct unbecoming an officer and a gentleman, fraternization, and adultery. The specification arising under Article 133 states in relevant part, "[the appellant] did . . . on or about 31 July 2009 wrongfully take semi-nude photographs of [LCpl T] . . . conduct that was unbecoming an officer and a gentleman." The fraternization specification arising under Article 134 states in relevant part, "[the appellant] did . . . on or about 31 July 2009, knowingly fraternize with [LCpl T], an enlisted person, on terms of military equality, to wit: by taking semi-nude photographs of [LCpl T], in violation of the custom of the Naval Service of the United States that officers shall not fraternize with enlisted persons in terms of military equality."

As a separate matter, from May 2008 to January 2010, the appellant carried on an extramarital sexual affair with a woman who was not his wife. The appellant was charged with and pled guilty to adultery for this misconduct. Neither of the specifications under Article 134 contained the terminal element that the appellant's actions were prejudicial to good order and discipline in the armed forces, or were of a nature to bring discredit upon the armed forces.

Discussion

The Terminal Element of Article 134

The appellant claims that Charge III and its two specifications failed to state offenses because they did not include the terminal element of Article 134.

In *United States v. Fosler*, 70 M.J. 225, 2011 C.A.A.F. LEXIS 661 (C.A.A.F. 2011), the Court of Appeals for the Armed Forces held that in a contested case the "terminal element" in a General Article specification must be expressly alleged or necessarily implied by the language in the specification. In that case specifically, the court held that an adultery specification did not, either expressly or by necessary implication, contain the requisite due process notice.

We resolve this assignment adversely to the appellant notwithstanding *Fosler* for two reasons. First, the appellant pleaded guilty to the offenses laid under Article 134, and we note that *Fosler* was a contested case. "Where . . . the specification is not so defective that it 'cannot within reason be construed to charge a crime,' the accused does not challenge the specification at trial, pleads guilty, has a pretrial agreement, satisfactorily completes the providence inquiry, and has suffered no prejudice, the conviction will not be reversed on the basis of defects in the specification." *United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986). Here, the appellant entered into a pretrial agreement that contemplated guilty pleas to the General Article offenses; he received the correct statutory elements and definitions from the military judge; and he satisfactorily completed the providence inquiry.

Even if *Watkins* should for some reason be overruled or severely limited, we note that the military judge, in informing the appellant here of the elements, included the "prejudice" and "discredit" aspects of the two statutory elements of Article 134. The appellant did not object to what is arguably a major

change, see RULE FOR COURTS-MARTIAL 603(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), and thus waived the objection. He did not request repreferment, reinvestigation, rereferral, or the statutory delay afforded between referral and trial. See also Art. 35, UCMJ. We are satisfied, then, that the appellant enjoyed what has been described as the "clearly established" right of due process to "'notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge.'" *Fosler*, 2011 CAAF LEXIS 661 at *12-13 (quoting *Cole v. Arkansas*, 333 U.S. 196, 201 (1948)).

We emphasize as well that this was a guilty plea case, and we note that the appellant has only now challenged the legal effect of the specification. "A flawed specification first challenged after trial . . . is viewed with greater tolerance than one which was attacked before findings and sentence." *Watkins*, 21 M.J. at 209 (citations omitted). If we were to set aside a finding on a guilty plea, we would have to determine a substantial basis in law or fact to do so. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). We note specifically that the appellant here knowingly admitted facts that met all the elements of the offense and that the appellant never set up matters inconsistent with his guilty plea. See *id.*

The law at the time of the appellant's trial was well-settled: terminal elements need not be pleaded. Even with the changes wrought by *Fosler*, if they are as sweeping as the appellant argues, we are satisfied that the military judge's informing the appellant of the nature of the terminal elements, and the appellant's assurances that he and his counsel had sufficient time to discuss the allegations and the elements of proof, militate against any substantial basis in law for setting aside the finding.

As to Specification 2 under Charge III, we also find that the terminal element was necessarily implied by the language of the specification. There the specification alleged that "Major Glover, U.S. Marine Corps, did . . . knowingly fraternize with [LCpl T], U.S. Marine Corps, an enlisted person, on terms of military equality, to wit: by taking semi-nude photographs of [LCpl T] . . . in violation of the customs of the Naval Service . . . that officers shall not fraternize with enlisted persons on terms of military equality." The conclusion that the terminal element was necessarily implied is further supported by the military judge's explanation of "fraternization" to the appellant. The military judge informed, and the appellant acknowledged, that certain contacts or associations between

officers and enlisted persons that compromise the chain of command, result in an appearance of partiality, undermine good order, discipline, morale, or authority, or compromise the integrity and obligations of an officer are prejudicial to good order and discipline. Record at 61-62.

In a military society where immediate obedience to orders, military decorum, tradition, custom, usage, and conventions of the Naval Service are vital to success, conduct, e.g., fraternization, which jeopardizes success, is prejudicial to good order and discipline. The Naval Service prohibits fraternization between officers and enlisted persons because such relationships undermine the authority of military officers, embolden subordinates to question orders, and ultimately, degrade the effectiveness of a unit. We are satisfied that the specification necessarily implies the terminal element.

Definition of "Semi-Nude"

In his second assignment of error, the appellant claims that the military judge erred by accepting the appellant's guilty pleas to specifications which contained the term, "semi-nude," because the evidence does not comport with the term's common usage. We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007) (citing *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996)). A decision to accept a guilty plea will be set aside if there is a substantial basis in law or fact for questioning the plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

The appellant cites *Imaginary Images, Inc. v. Evans*, 612 F.3d 736, 750 (4th Cir. 2010) in support of his argument that the common understanding of the term, "semi-nude," requires "the partial exposure of the private parts." Since LCpl T's breasts were covered by her hands or arms, he argues that they were not exposed and he could not be found guilty of taking semi-nude photographs. We are not persuaded by the appellant's argument.

At the outset, we find that a woman who is topless and covering her breasts with only her hands or arms is semi-nude. Second, we are not bound by the Commonwealth of Virginia's statutory definition of partial nudity that the Fourth Circuit discussed in *Imaginary Images, Inc.*, a civil case involving a ban on alcohol in strip clubs. Third, the gravamen of the appellant's offenses is predicated not on the degree of LCpl T's nudity, but on his relationship with her and the circumstances

surrounding the photo-shoot. The appellant, a married field-grade officer, picked up a junior enlisted female Marine from her friend's house, drove her into the desert, and spent four hours taking provocative photographs of her. LCpl T was a fellow member of his unit, she was subject to his orders, and her military duties often required that she act as his driver. It is this collection of facts, taken together, that caused the appellant to be found guilty of conduct unbecoming an officer and a gentleman, and conduct that was service discrediting or prejudicial to good order and discipline. The photographs, alone, do not constitute the appellant's criminal behavior. Rather, they are some evidence of his unbecoming conduct and his improper relationship with an enlisted Marine on terms of military equality. See, e.g., *United States v. Rogers*, 54 M.J. 244, 257 (C.A.A.F. 2000). Accordingly, we hold that the providence inquiry adequately established the appellant's guilt to the charged offenses, and the military judge did not err in accepting the appellant's pleas.

Conclusion

The findings and the sentence, as approved by the convening authority, are affirmed.

For the Court

R.H. TROIDL
Clerk of Court