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

Before
L.T. BOOKER, E.C. PRICE, D.R. LUTZ
Appellate Military Judges

UNITED STATES OF AMERICA

v.

DAMIEN J. AUTRY
CULINARY SPECIALIST SECOND CLASS (E-5), U.S. NAVY

NMCCA 201100105
SPECIAL COURT-MARTIAL

Sentence Adjudged: 7 December 2010.
Military Judge: CAPT Tierney Carlos, JAGC, USN.
Convening Authority: Commanding Officer, U.S. Naval Support Activity, Manama, Bahrain.
Staff Judge Advocate's Recommendation: LCDR Brian P. Powers, JAGC, USN.
For Appellant: Capt Michael D. Berry, USMC.
For Appellee: Capt Robert E. Eckert, Jr., USMC.

17 May 2011

OPINION OF THE COURT

IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of nine specifications of bribery and one specification of graft, violations of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The convening authority (CA) approved the adjudged sentence of confinement for 10 months, forfeiture of "two-thirds pay per month for 10 months" [sic], reduction to pay grade E-1, and a bad-conduct discharge from the Naval Service.

Before us, the appellant alleges that all the specifications to which he pleaded guilty fail to state offenses, as they omit the terminal element of prejudice to good order and discipline or conduct of a nature to bring discredit upon the armed forces. We find no error in this regard; however, there are errors in the court-martial's findings and in the CA's court-martial order. After correction of those errors, no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Failure to State an Offense

We review the sufficiency of a specification *de novo*. *United States v. Saunders*, 59 M.J. 1, 6 (C.A.A.F. 2003). When the challenge first occurs at the appellate level, we view such challenges with maximum liberality in favor of sufficiency, and an appellant's "standing to challenge a specification on appeal [is] considerably less where [he] knowingly and voluntarily pleads guilty to the offense." *United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986)(citations omitted).

A specification is sufficient if it includes every element expressly or by necessary implication, so as to give the accused notice and protection against double jeopardy. *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994). We reject the appellant's claims that the specifications alleging bribery and graft fail to state offenses because the specifications omit the allegation that the acts were either prejudicial to good order and discipline or were of a nature to bring discredit upon the armed forces. These two particular offenses fall into the category of "that which is or generally has been recognized as illegal under the common law or under most statutory criminal codes . . . ." *United States v. Davis*, 26 M.J. 445, 448 (C.M.A. 1988). *See, e.g.*, 18 U.S.C. § 201 (offering a thing of value to a public official to influence an action); 18 U.S.C. § 209 (acceptance of payment from source other than United States for performing governmental duties). We reach that determination as well because each is a specifically delineated offense within Article 134. *See United States v. Jones*, 68 M.J. 465, 471-72 (C.A.A.F. 2010)(noting that paragraphs 61 through 113 of Part IV of the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) are "various circumstances" under which the elements of Article 134 can be met). We observe that the appellant pleaded guilty to the offenses pursuant to a pretrial agreement that the parties concluded before he entered his pleas and that his stipulation of fact, Prosecution Exhibit 1, whose creation was a material term of the pretrial agreement, Appellate Exhibit I ¶ 16b, discussed both terminal elements with respect to the offenses. *See also* Record at 129. The military judge provided and explained the elements multiple times during the providence inquiry, and each time the appellant indicated his understanding and his guilt. We are satisfied that the appellant had sufficient notice of the terminal elements of bribery and graft. *See generally United*

States v. Medina, 66 M.J. 21, 27 (C.A.A.F. 2008)(discussion of fair notice).

We note also that all affected specifications contain language suggesting criminality – wrongfully accepting, asking for, or receiving sums of money for either future outcomes or past performance relating to the appellant's assigned duties – language which could be considered "surplusage" in the case of conduct which by its very unlawful nature is prejudicial or discrediting. *Davis*, 26 M.J. at 448. We find that Specifications 1 through 13 under Charge II sufficiently apprised the appellant of what he must be prepared to meet and erected an appropriate bar to subsequent prosecution; those specifications therefore stated offenses. *See also United States v. Sell*, 11 C.M.R. 202, 206 (C.M.A. 1953); *see generally United States v. Fosler*, 69 M.J. 669 (N.M.Ct.Crim.App. 2010), *rev. granted*, __ M.J. __, 2011 CAAF LEXIS 131 (C.A.A.F. Feb. 9, 2011).

Trial and Post-Trial Error

There is error in this case, however, and we will order the necessary corrective action. The appellant entered pleas of Not Guilty to Charge I and its sole specification and to Specifications 3, 9, 10, and 13 of Charge II. Record at 17-18. The military judge did not enter findings to those particular specifications, *id*. at 137-38, nor had the Government moved to withdraw them from his consideration before he entered his findings. *Id*. at 136. When the parties discovered the omission, the Government moved to withdraw the affected charges, a motion which the military judge granted. *Id*. at 140-41. Once the military judge had announced his findings, however, the CA, on whose behalf the trial counsel was speaking, lost the ability to withdraw the specifications and Charge to which the appellant pleaded Not Guilty. RULE FOR COURTS-MARTIAL 604(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

Additionally, the military judge announced a sentence that included forfeiture of "two-thirds pay per month for 10 months." Record at 188. The CA perpetuated this component of the sentence in his action and court-martial order of 13 February 2011. Sentences to forfeiture, however, must "state the exact amount in whole dollars to be forfeited each month . . . ." R.C.M. 1003(b)(2).

Conclusion

The supplemental court-martial order shall note not guilty findings for Charge I and its sole specification and for Specifications 3, 9, 10 and 13 of Charge II. We affirm the findings, as modified, and a sentence of confinement for 10

months, forfeiture of $964.00 pay per month for 10 months, reduction to pay grade E-1, and a bad-conduct discharge.

For the Court

R.H. TROIDL
Clerk of Court