

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

**Before
J.K. CARBERRY, L.T. BOOKER, E.C. PRICE
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JAMES R. BISHOP II
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201000464
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 22 April 2010.

Military Judge: CAPT D.J. Smith, JAGC, USN.

Convening Authority: Commanding Officer, Instructor
Battalion, The Basic School, Training Command, Quantico,
VA.

Staff Judge Advocate's Recommendation: LtCol J. Gruter,
USMC.

For Appellant: Capt Bow Bottomly, USMC.

For Appellee: LT Ritesh Srivastava, JAGC, USN.

28 June 2011

OPINION OF THE COURT

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

BOOKER, Senior Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of conspiracy to sell stolen property, larceny, and housebreaking, in violation of Articles 81, 121, and 130, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 921, and 930. The convening authority (CA) approved the adjudged sentence of "time served,"¹ reduction to pay grade E-1, and a bad-conduct discharge from the service.

¹ While the appellant has not asserted error, and we find no prejudice, we question the form of the sentence announcement of "time served". We believe the better practice, consistent with instructions in a members case, is to

The appellant initially raised one assignment of error: that the military judge accepted his guilty plea to Charge I and its specification without ensuring that the appellant understood the offense to which he was pleading guilty. We subsequently specified an issue with regard to Charge I and its specification: whether the specification, which alleges a conspiracy to sell stolen property, states an offense. We have carefully considered the record of trial and the briefs submitted by counsel on the assigned error and specified issue. We conclude that the appellant's conviction of Charge I and its specification must be set aside because the specification fails to state an offense; accordingly, we need not address the appellant's assigned error. Following our corrective action, we conclude that there are no remaining errors that are materially prejudicial to the appellant's substantial rights. Arts. 59(a) and 66(c), UCMJ.

Failure to State an Offense

There are two elements to conspiracy: an agreement to "commit an offense under this chapter" and an overt act to effect the object of the conspiracy. Art. 81, UCMJ; MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 5b. For purposes of this appeal, we consider offenses under clauses 1 and 2 of the General Article, Article 134, to be offenses under the Code.

The General Article has a paragraph devoted to disposition of stolen property. The President, exercising his "ability to suggest ways in which Article 134 might be charged," see *United States v. Jones*, 68 M.J. 465, 2010 CAAF LEXIS 393, at *20 (Apr. 19, 2010), has determined that receiving, buying, and concealing, but not selling,² known stolen property are ways in which the Article is violated. MCM, Part IV, ¶ 106. Consistent with long-standing practice, a specification alleging receipt, purchase, or concealment of known stolen property is sufficient, even if it does not allege that the act was prejudicial to good order and discipline or was of a nature to bring to discredit upon the armed forces. Compare *United States v. Herndon*, 4 C.M.R. 53, 55-57 (C.M.A. 1952) with *United States v. Marker*, 3 C.M.R. 127, 134 (C.M.A. 1952). Furthermore, when such an offense is the target offense of a conspiracy, it is not necessary to allege all the elements of the target offense in the conspiracy specification; citation to the general offense is sufficient. Cf. *United States v. Feola*, 420 U.S. 671, 694 (1975) (law generally makes criminal only antisocial conduct, and conspiracy addresses agreement to engage in a criminal venture).

state a period of restraint in terms of days, months, or years. See MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), App. 11.

² Noting that sale of stolen property is evidence of the intent permanently to deprive the owner of the use and benefit of the property, MCM, Part IV, ¶ 46c(1)(f)(ii), we leave for another day the question whether the policy that shields the actual thief from a prosecution for receipt of stolen property should extend as well to the sale of stolen property.

On the other hand, when the specification alleges a "novel" offense under the General Article, the specific theory of prosecution (prejudice or discredit) must be alleged. See generally *United States v. Davis*, 26 M.J. 445, 448-49 (C.M.A. 1988). See also *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008). Extending the rationale of *Davis* and *Medina*, we hold that a specification alleging a conspiracy to commit a novel Article 134 offense must set out all the elements of the target offense to provide an accused sufficient notice.

Accordingly, the conviction of conspiracy to sell stolen property, Charge I and its underlying specification, is set aside, and the charge and its specification are dismissed.

Sentence Reassessment

Having set aside one of the offenses of which the appellant was convicted, we must now "assure that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed." *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985). The appellant admitted that he broke into his fellow Marines' barracks and stole their personal items which had a total value of approximately \$1,350. Record at 35-38. The appellant's prohibited conduct resulted in a significant suspicion within his platoon which directly affected the unit's and the individual Marines' morale. *Id.* at 113-14, 148, and 159. We balance this evidence against the defense submissions of medical records, testimony from the appellant's mother, letters of recommendation, and other mitigating matter, and we conclude that the sentencing authority would impose, and the CA would approve, a sentence of at least confinement for 99 days, reduction to pay grade E-1, and a bad-conduct discharge.

Convening Authority's Action

The CA approved the sentence, which included a bad-conduct discharge, and then stated, "[i]n accordance with the UCMJ, Rules of [sic] Courts-Martial, applicable regulations, the pretrial agreement, and this action, the sentence is ordered executed." While we do not read this provision to be anything more than a recognition of a CA's duty and authority, we do acknowledge that this formulation has been declared a "legal nullity". *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

Conclusion

We set aside the guilty finding of Charge I and its underlying specification, and that Charge and its specification are dismissed. The remaining findings of guilty and the sentence extending to confinement for 99 days, reduction to pay-grade E-1, and a bad-conduct discharge are affirmed.

Senior Judge CARBERRY concurs.

PRICE, Judge (concurring in part and dissenting in part):

I concur in the decision to affirm the sentence as approved by the convening authority. I respectfully dissent from my brethren's decision to set aside the appellant's conviction of conspiracy to sell stolen property based upon their conclusion "that a specification alleging a conspiracy to commit a novel Article 134 offense must set out all the elements of the target offense to provide an accused sufficient notice." Slip op. at 3.

That conclusion, though consistent with sound charging principles, is not required by current applicable law,¹ where each element is alleged either explicitly or by implication, and particularly where, as here, the conviction was derived from a voluntary, unconditional plea of guilty and the purported flaw was first raised on appeal. See *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006); *United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986); see also RULE FOR COURTS-MARTIAL 907(b)(1)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Finding no error materially prejudicial to the substantial rights of the appellant, I would affirm the conviction of conspiracy to sell stolen property, Charge I and its underlying specification. See Article 59(a), Uniform Code of Military Justice, 10 U.S.C. § 859(a).

Analysis

A specification states an offense if it alleges "either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *Crafter*, 64 M.J. at 211 (citations omitted). Although failure of a specification to state an offense is a fundamental defect which can be raised at any time, the United States Court of Appeals for the Armed Forces (CAAF) long ago chose to follow the rule of most federal courts of liberally construing specifications in favor of validity when they are challenged for the first time on appeal. *Watkins*, 21 M.J. at 209 (citing *United States v. Whyte*, 1 M.J. 163 (C.M.A. 1975); *United States v. Sell*, 11 C.M.R. 202, 206 (C.M.A. 1953)). "In addition to viewing post-trial challenges with maximum liberality, [CAAF views] standing to challenge a specification on appeal as considerably less where an accused knowingly and voluntarily pleads guilty to the offense." *Id.* at 210 (citation omitted).

¹ A closely related issue is subject of multiple challenges pending before the United States Court of Appeals for the Armed Forces. See generally, *United States v. Fosler*, 69 M.J. 669 (N.M.Ct.Crim.App. 2010) review granted ___ M.J. ___, 2011 CAAF LEXIS 131 (C.A.A.F., Feb. 9, 2011) ("Whether an Article 134 Clause 1 or 2 specification that fails to expressly allege either potential terminal element states an offense under the Supreme Court's holdings in *United States v. Resendiz-Ponce* and *Russell v. United States*, and this Court's recent opinions in *Medina*, *Miller*, and *Jones*.").

Here, the specification of Charge I, Conspiracy in violation of Article 81 UCMJ reads as follows:

In that [the appellant] did, on board Marine Corps Base Quantico, Virginia, between on or about August 2009 and November 2009, conspire with [Corporal (CPL) MacKay], to commit an offense under the [UCMJ], to wit: the sale of stolen property, and in order to effect the object of the conspiracy the [appellant and Cpl MacKay], did sell stolen property.

The elements of this conspiracy are that:

1. During the period alleged that the appellant entered into an agreement with Cpl MacKay to commit an offense under the UCMJ (to sell stolen property);
2. While that agreement existed and while the appellant remained a party to that agreement, either he or Cpl MacKay performed one or more overt acts for the purpose of bringing about the subject of that agreement (sold stolen property).

Charge Sheet; Article 81, UCMJ; Record at 20.

The elements of the underlying novel 134 offense, as alleged and discussed at trial are:

1. that the appellant [during the charged time frame] wrongfully sold certain property;
2. that the property was not the appellant's;
3. that the appellant knew the property had been stolen,² and
4. that the appellant's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

² The military judge omitted the third element listed in the manual for the similar offense associated with disposition of stolen property "that the property had been stolen" and added an element not listed in the manual that the "property had a value of more than \$500." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 106b(3). The omission does not impact disposition of the assigned error, as the specification explicitly alleged that the appellant "did sell stolen property" and the sale of stolen property was an explicit element of the conspiracy. The value element at most constituted extraneous information that was otherwise subject of the providence inquiry relevant to Charge III - larceny of property of a value of \$500.00. Charge Sheet; Record at 34-40.

Record at 20-22.

Comparison of the specification with the elements of the offense reveals that the underlying offense of violation of Article 134, UCMJ, and two elements are not explicitly alleged: (1) that the appellant knew the property had been stolen, and (2) the terminal element of Article 134 clause (1) or (2).

To be clear, the offense of conspiracy is explicitly alleged as the charge, but the underlying offense, a violation of Article 134, UCMJ, is not explicitly alleged in either the charge or its specification. However, I agree with the Government's assertion that we can within reason, construe the specification to allege a crime because it lists either expressly or by implication each element of the charged and underlying offenses. Government's Answer on Court Specified Issue of 1 Feb 2011 at 8-11 (citations omitted).

The appellant's knowledge that the subject property was stolen is clearly implied in the plain language of the specification in that the appellant "did conspire with [Cpl MacKay], to commit an offense under the [UCMJ], to wit: the sale of stolen property . . . [and] did sell stolen property." Charge Sheet. Stated another way, the appellant could not conspire to "sell stolen property" without knowledge that the property subject of that agreement was, in fact stolen.

The most obvious omission in the specification is the absence of the terminal element of Article 134 clause (1) or (2). The majority cites the CAAF's recent decision in *Medina* as support for the proposition that the "specific theory of prosecution (prejudice or discredit) must be alleged" in the case of a novel offense under Article 134, UCMJ. Slip op. at 3. I agree that "it is important for the accused to know whether he . . . is pleading only to [an offense] under clause 3, a disorder or neglect under clause 1, or [service discrediting conduct] under clause 2, or all three." *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008) (internal quotation marks and citations omitted). However, I cannot agree that the absence of the terminal element renders the specification fatally defective where the conduct alleged - a conspiracy to sell stolen property is conduct that 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). This is particularly true where, as here, the appellant voluntarily and unconditionally entered pleas of guilty and the purported flaw was first raised on appeal. *Watkins*, 21 M.J. at 209-10.

It is entirely possible that the CAAF could issue a decision in *Fosler*, or a related case, that would essentially ratify the majority's conclusion in this case. However, under the law currently applicable, I conclude that the specification of the charge did allege, "either expressly or by implication, every element of the offense, so as to give the accused notice and

protection against double jeopardy." *Crafter*, 64 M.J. at 211 (citation omitted). Moreover, I find that the appellant's pleas were voluntary and knowing and after review of the entire record, including the pleadings of the parties, I conclude there is no substantial basis in law or fact to question that plea. Accordingly, I would affirm the findings, including the conviction of conspiracy to sell stolen property (Charge I and its underlying specification) and the sentence as approved by the convening authority. *United States v. Jones*, 69 M.J. 294 (C.A.A.F. 2011); see also Arts. 59(a) and 66(c), UCMJ.

For the Court

R.H. TROIDL
Clerk of Court