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

Before
J.A. MAKSYM, B.L. PAYTON-O'BRIEN, R.Q. WARD
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ZACHARY T. SALTER
CORPORAL (E-4), U.S. MARINE CORPS

NMCCA 201100522
SPECIAL COURT-MARTIAL

Sentence Adjudged: 20 July 2011.
Military Judge: Col G.W. Riggs, USMC.
Convening Authority: Commanding Officer, 2d Assault Amphibian Battalion, 2d Marine Division, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: Col T.M. Dunn, USMCR.
For Appellant: CAPT Johnathan Bryan, JAGC, USN.
For Appellee: Maj William Kirby, USMC.

29 March 2012

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 special court-martial convicted the appellant, pursuant to his pleas, of conspiracy, malingering, and willful discharge of a firearm in violation of Articles 81, 115, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 915, and 934, respectively. The military judge sentenced him to eleven months confinement, forfeiture of $904.00 pay per month for eleven months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA)

approved the sentence as adjudged; however, pursuant to a pretrial agreement (PTA), he suspended all confinement in excess of ninety days. The appellant now submits one assignment of error; that the Article 134 specification for willful discharge of a firearm fails to state an offense pursuant to *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) for lack of pleading the terminal element.

We review *de novo* whether a specification states an offense. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). A specification must allege every element of the offense "either expressly or by necessary implication, so as to give the accused notice and protect him against double jeopardy." *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994) (citations and internal quotation marks omitted). Specifications alleging violations of Article 134 must therefore include the terminal element either explicitly or by necessary implication. *Fosler*, 70 M.J. at 229. Key to this analysis is the timing of the challenge as it determines the "analytical lens" we use to determine the sufficiency of the specification. *United States v. Hackler*, 70 M.J. 624, 626 (N.M.Ct.Crim.App. 2011). Although we view specifications unchallenged at trial with a wider lens and maximum liberality, *id.,* we cannot "'necessarily imply' [the terminal element] from nothing beyond allegations of the act or failure to act itself." *United States v. Ballan*, __ M.J. __, 2012 CAAF LEXIS 238 at *14 (C.A.A.F. Mar. 1, 2012). Thus, regardless of the "lens" utilized, it is still error to omit the terminal element when charging an Article 134 offense.

However, our analysis does not end there. As articulated in *Ballan*, in the guilty plea context we apply a plain error analysis to allegations of defective specifications first raised on appeal. *Id*. at *16. Whereas the appellant, similar to Ballan, pleaded guilty to the offense, the military judge ensured he understood the terminal element, and the appellant provided a factual basis to establish that his conduct was prejudicial to good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces (Record at 36-37), we find that the error in omitting the terminal element, although plain, did not prejudice a substantial right of the appellant. *Ballan*, 2012 CAAF LEXIS 238 at *18-22. We have no doubt 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*, 70 M.J. at 229 (quoting *Cole v. Arkansas*, 333 U.S. 196, 201 (1948)). Consequently, we decline to grant relief.

After careful consideration of the record of trial and the parties' pleadings, we conclude that the findings and approved 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. We affirm the findings and sentence as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court