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

Before
J.A. MAKSYM, L.T. BOOKER, J.R. PERLAK
Appellate Military Judges

UNITED STATES OF AMERICA

v.

MARK A. LEUBECKER
PRIVATE (E-1), U.S. MARINE CORPS

NMCCA 201100091
GENERAL COURT-MARTIAL

Sentence Adjudged: 15 October 2010.
Military Judge: LtCol David Jones, USMC.
Convening Authority: Commanding General, 1st Marine Aircraft Wing, Iwakuni, Japan.
Staff Judge Advocate's Recommendation: Col J.R. Woodworth, USMC.
For Appellant: LT Michael Hanzel, JAGC, USN.
For Appellee: LT Kevin Shea, JAGC, USN.

13 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.

BOOKER, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of conspiring to distribute ecstasy, willfully disobeying a lawful order from his superior commissioned officer, assaulting a superior noncommissioned officer, willfully disobeying a lawful order from a noncommissioned officer, wrongful distribution of ecstasy, wrongful use of ecstasy, drunk and disorderly conduct, breaking restriction, and communicating a threat, in violation of Articles 81, 90, 91, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 890, 891, 912a, and 934. The convening authority approved the adjudged sentence to confinement for 36 months,

forfeiture of all pay and allowances, and a dishonorable discharge from the United States Marine Corps.

The appellant has submitted one assignment of error, claiming that the specification of breaking restriction and the specification of communicating a threat fail to state offenses because they do not allege the terminal element of Article 134, UCMJ. We resolve this assignment adversely to the appellant.

Discussion

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, acknowledging that it was revising military jurisprudence, held in that contested case that a General Article specification that failed to allege a "terminal element" failed to state an offense. 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 re-preferral, re-investigation, re-referral, 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 (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, that the military judge explored possible defenses (e.g., a quasi abandonment of rank defense regarding the threat), 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 that the 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 had sufficient time to discuss the allegations and the elements of proof, militate against any substantial basis in law for setting aside the finding.

When we examine the specific offenses involved, moreover, we draw even further distinction from the adultery at issue in *Fosler*. As the Court of Appeals noted in *Fosler*, mere "adulterous conduct" probably is not criminal without the attendant impact on good order and discipline or the reputation of the service. *Fosler*, 2011 CAAF LEXIS 661 at *15. Communicating a threat, on the other hand, falls into the category of "that which is or generally has been recognized as illegal under the common law or under most statutory codes . . . ." *United States v. Davis*, 26 M.J. 445, 448 (C.M.A. 1988). *See, e.g.*, 18 U.S.C. § 876(d)(mailing threatening communications). We find that Specification 3 of Charge V sufficiently apprised the appellant of what he must be prepared to meet and erected an appropriate bar to subsequent prosecution; we hold that the specification therefore stated an offense. *See also United States v. Sell*, 11 C.M.R. 202, 206 (C.M.A. 1953).

We now focus on the allegation of breach of restriction. Restriction in this case was imposed as one of the lawful components of nonjudicial punishment. Art. 15, UCMJ; *see* Record at 108. Restriction is "moral rather than physical restraint," MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part V, ¶ 5c(2), and there is no question as to the commanding officer's authority to impose the restriction or the appellant's understanding of the limits placed upon him, including the prohibition against consuming alcohol. Record at 108-10.

Significantly, the MCM elements for breach of restriction emphasize the "order" underlying the offense. MCM, Part IV, ¶ 102b. Obedience to orders is the foundation of the armed services. *See Parker v. Levy*, 417 U.S. 733, 758 1974)(noting

"fundamental necessity of obedience" and correlative necessity for imposition of discipline). The service member's privileged status under the law of armed conflict depends on being subject to the orders of a commander. Further,

> an army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other.

In re Grimley, 137 U.S. 147, 153 (1890). An allegation of breach of restriction, therefore, by "necessary implication," *see United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006), alleges that the offense is prejudicial to good order and discipline and of a nature to bring discredit upon the armed forces, regardless whether those terms appear in the specification. Nothing could be more inimical to good order and discipline than failing to do that which has been told to do, or by doing that which one has been told not to do. We are mindful as well that "the military is, by necessity, a specialized society separate from civilian society. [T]he military has, again by necessity, developed laws and traditions of its own during its long history." *Parker v. Levy*, 417 U.S. at 743. It follows that not only would it repudiate decades of military jurisprudence, but it would undermine centuries of military training and culture, to declare that a specification alleging a breach of restriction does not state an offense unless the obvious – the effect on reputation and good order and discipline – be recited in the specification. We thus hold that Specification 2 of Charge V states an offense.

While we conclude that the appellant's assignment of error with respect to the Article 134 offenses does not warrant relief, we nonetheless must take corrective action in this case. We may not affirm a military judge's acceptance of a guilty plea if we find a substantial basis in law or fact for questioning the plea. *Inabinette*, 66 M.J. at 322. In Specification 1 of Charge IV, the appellant was charged with distributing drugs on divers occasions between July 2009 and February 2010, yet he quite clearly states that his only distributions occurred between December 2009 and February 2010. The military judge therefore abused his discretion in accepting a guilty plea to the entire date range.

Conclusion

With respect to Specification 1 of Charge IV, the finding of guilty is affirmed excepting the word "July" and

substituting therefor the word “December”. The findings of guilty for the remaining charges and specifications are affirmed. There being no dramatic change to the sentencing landscape, the approved sentence is affirmed. *See generally United States v. Buber*, 62 M.J. 476, 478 (C.A.A.F. 2006). No error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Senior Judge MAKSYM and Judge PERLAK concur.

For the Court

R.H. TROIDL
Clerk of Court

Senior Judge BOOKER participated in the decision of this case prior to detaching from the court.