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

Before
J.A. MAKSYM, J.R. PERLAK, R.Q. WARD
Appellate Military Judges

UNITED STATES OF AMERICA

v.

STEPHEN L. SCARINGELLO
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS

NMCCA 201100192
SPECIAL COURT-MARTIAL

Sentence Adjudged: 29 December 2010.
Military Judge: LtCol G.W. Riggs, USMC.
Convening Authority: Commanding Officer, 2d Battalion, 2d Marine Regiment, 2d Marine Division, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: Maj C.S. Ruwe, USMC.
For Appellant: CAPT Johnathan W. Bryan, JAGC, USN.
For Appellee: LT Benjamin J. Voce-Gardner, JAGC, USN.

20 Sep 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.

WARD, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of two specifications of unauthorized absence, one specification of insubordinate conduct, one specification of failure to obey a lawful order, one specification of assault and battery, and one specification of breaking restriction under Articles 86, 91, 92, 128 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 891, 892, 928 and 934. The military judge sentenced the appellant to confinement for 90 days, forfeiture of $964.00 pay per month for three months, reduction to pay-grade E-1, and a bad-conduct discharge. On 24 March 2011, the convening authority

(CA) approved the sentence as adjudged and, except for the punitive discharge, ordered it executed.[1]

The appellant assigns one error[2]: that the specification under Charge V[3] fails to state an offense because it does not allege the terminal element[4] of Article 134, UCMJ. At the time of the appellant's brief, the Court of Appeals for the Armed Forces (CAAF) had granted review of but had not yet completed its review of this court's decision in *United States v. Fosler*, 69 M.J. 669 (N.M.Ct.Crim.App. 2010). However, on 8 August 2011, CAAF decided *Fosler* and held that omitting the terminal element under the facts of that case failed to state an offense. *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011).

After taking corrective action, we conclude the findings and the sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Failure to State an Offense

The question of whether a specification states an offense is a question of law that this Court reviews *de novo*. *United States v. Sutton*, 68 M.J. 455, 457 (C.A.A.F. 2010). Prior to the CAAF decision in *Fosler*, Article 134 offenses were historically pled without inclusion of the terminal element. This reflected a long-held belief that such language was unnecessary. *Fosler*, 2011 CAAF LEXIS 661, at *4-8. This belief, over time, became embedded in the Manual for Courts-Martial,[5] as seen in paragraph 60c(6)(a), and in the sample specifications under Article 134, all of which, save one, omit the terminal element.[6] *Id*. *Fosler*,

---

[1] To the extent that the convening authority's action purported to order the bad-conduct discharge executed upon completion of appellate review, it was a nullity that does not require correction. *United States v. Tarniewicz,* __ M.J. __, No. 201100158, 2011 CCA LEXIS 150 (N.M.Ct.Crim.App. 30 Aug 2011).

[2] While not briefed, we also note that the military judge erroneously calculated the number of days that the appellant spent in pretrial confinement. One day of additional confinement credit is due, and we shall order it in our decretal paragraph.

[3] The sole specification under Charge V reads as follows:

> In that [the appellant], having been restricted to the limits of duty, billet, mess and place of worship, by a person authorized to do so, did, at or near Wilmington, North Carolina, on or about 22 October 2010, break said restriction.

[4] "Terminal element" as it appears herein refers to disorders or neglects to the prejudice of good order and discipline and conduct of a nature to bring discredit upon the armed forces.

[5] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

[6] Drunkenness and/or disorderly conduct specifically require an allegation of service discrediting conduct to authorize certain enhanced punishments. *See*

however, dramatically changed the landscape for both charging offenses and determining the sufficiency of pleading under Article 134.

In *Fosler*, CAAF examined the issue of whether an adultery specification without the terminal element stated an offense. After reviewing the court's recent progression in the area of lesser included offenses and the terminal element,[7] the court reasoned that the same constitutional concerns underpinning lesser included offenses applied to sufficiency of pleading; that is "an accused's 'constitutional rights to notice and to not be convicted of a crime that is not an LIO of the [charged] offense'", or in this case an offense not charged. *Id*. at *9 (quoting *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011)). In applying this constitutional framework to the sufficiency of pleading in Article 134 offenses, CAAF found that the past precedent of omitting the terminal element (or finding it to be "necessarily implied") was no longer supportable. Every element must be alleged expressly or by necessary implication on a case-by-case basis. *Id*. at *12; RULE FOR COURTS-MARTIAL 307(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

In applying *Fosler* to the facts of this case, we must determine whether the terminal element is necessarily implied from the text of the specification, keeping in mind that "[w]hen an appellant challenges a specification for the first time on appeal, he must show substantial prejudice, demonstrating that the charge was so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had." *United States v. Daniels*, 57 M.J. 560, 561 (N.M.Ct.Crim.App. 2002)(citing *United States v. Bryant*, 30 M.J. 72, 73 (C.M.A. 1990)); *see also United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986)("[a] flawed specification first challenged after trial, however, is viewed with greater tolerance than one which was attacked before findings and sentence")(citation omitted).

We find that the facts of this case differ substantially from those of *Fosler*, and viewed through the lens articulated by *Watkins*, we find the terminal element necessarily implied in the sole specification of Charge V. First, the specification alleges the uniquely military offense of breaking restriction. It alleges that the appellant was restricted to the specified limits of duty, billet, mess and place of worship, by a person authorized to do so, and that he broke said restriction at or near Wilmington, North Carolina. Second, the allegation that the appellant "broke" said restriction at Wilmington, North Carolina

---

MCM, Part IV, ¶ 73c(3).

[7] *See United States v. McMurrin*, 70 M.J. 15 (C.A.A.F. 2011); *United States v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011); *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010); *United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009); *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2009).

reasonably implies that he exceeded the geographic boundaries imposed by lawful military authority. Third, the appellant also pled guilty to Charge III and its sole specification, which alleged that he violated a lawful order by drinking alcohol while on battalion restriction at or near Wilmington, North Carolina on 22 October 2010, the same date as alleged in the sole specification of Charge V. Thus, the charge sheet gave the appellant fair notice that his conduct alleged in the sole specification of Charge V was in direct defiance of the lawful authority of his military superiors, and therefore necessarily implied a disorder or neglect prejudicial to good order and discipline. *Fosler*, 2011 CAAF LEXIS 661, at *14-15; *see generally Parker v. Levy*, 417 U.S. 733, 752-53 (1974).

Other key distinctions from *Fosler* are that in this case the appellant, through counsel, negotiated an agreement to plead guilty to this offense; he voluntarily pled guilty to this offense at trial; the military judge defined for him the terminal element[8]; the appellant indicated he understood the military judge's definition and explained why he believed his conduct met the definition[9]; and he stipulated that his conduct was both to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces.[10]

Even if the text of the specification failed to reasonably inform the appellant of the terminal element, the remaining charges, the military judge's instructions, the providence inquiry and the stipulation of fact, all at a minimum put him on clear notice that the offense alleged under Charge V necessarily implied the terminal element. *See Watkins*, 21 M.J. at 210 ("[w]here, as here, 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"). Here the military judge explained, and the appellant clearly understood, the offense and the applicable theory of guilt under Article 134, UCMJ. *See United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010); *United States v. Miller*, 67 M.J. 385, 389 (C.A.A.F. 2009); *United States v. Medina*, 66 M.J. 21, 27-28 (C.A.A.F. 2009). Furthermore, the simple fact that the appellant pled guilty to this offense, which the military judge instructed him contained the missing terminal element, stands in stark contrast with *Fosler*, and leaves little doubt that this appellant received fair notice.

---

[8] The military judge advised the appellant that an element of this offense was that "under the circumstances [his] 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." Record at 20.

[9] Record at 20, 35-36.

[10] Stipulation of Fact, Prosecution Exhibit 1.

For these reasons, we find that the sole specification under Charge V necessarily implied the terminal element and provided the appellant with fair notice of the elements against which he needed to defend. The specification therefore sufficiently states an offense.

Conclusion

The findings and sentence as approved are affirmed. The appellant will be credited with an additional one day of confinement served.

Senior Judge MAKSYM and Judge PERLAK concur.

For the Court

R.H. TROIDL
Clerk of Court