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

Before
J.K. CARBERRY, B.L. PAYTON-O'BRIEN, M. FLYNN
Appellate Military Judges

UNITED STATES OF AMERICA

v.

DANIEL R. THAXTON
CORPORAL (E-4), U.S. MARINE CORPS

NMCCA 201100261
SPECIAL COURT-MARTIAL

Sentence Adjudged: 7 March 2011.
Military Judge: LtCol Thomas Sanzi, USMC.
Convening Authority: Commanding Officer, 5th Marine Regiment, 1st Marine Division (Rein), MarForPac, Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: Col D.K. Margolin, USMC.
For Appellant: LCDR Ronald Hocevar, JAGC, USN.
For Appellee: CDR Brendan C. Curran, JAGC, USN; Maj William C. Kirby, USMC.

27 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.

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of two specifications of violating a lawful general order, three specifications of wrongfully using a controlled substance, two specifications of wrongfully possessing a controlled substance, and one specification of obstructing justice, in violation of Articles 92, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 912a, and 934. The appellant was sentenced to 10

months' confinement, reduction to pay grade E-1, forfeiture of $970.00 pay per month for ten months, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged and, pursuant to the terms of a pretrial agreement, suspended all confinement in excess of four months. After approving the sentence as adjudged, the CA stated, "In accordance with the Uniform Code of Military Justice, the Manual for Courts-Martial, applicable regulations, and this action, the sentence is ordered executed."

In the appellant's only assignment of error, he avers that the CA erred when taking action by ordering the approved sentence, including the bad-conduct discharge, executed in violation of Article 71, UCMJ. Appellant's Brief of 11 Jul 2011 at 1-2. Under Article 71(c)(1), UCMJ, a punitive discharge cannot be ordered executed until, after the completion of direct appellate review, there is a final judgment as to the legality of the proceedings. Thus, to the extent that the CA's action purported to execute the bad-conduct discharge, it was a nullity that does not require correction. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

Although not raised as error, we note that the specification under Charge III, alleging a violation of the General Article did not allege the terminal element.

In *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), the Court of Appeals for the Armed Forces, held in a 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 distinguish *Fosler* from the case at bar. First, the appellant pleaded guilty to the offense 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 offense; 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 repreferral, reinvestigation, rereferral, 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 that "[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, 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*, 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 sufficient time to discuss the allegations and the elements of proof, militate against any substantial basis in law for setting aside the finding.

We are convinced that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts.

59(a) and 66(c), UCMJ. The findings and the sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court