

**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.

**JACOB R. DAVIS
MACHINIST'S MATE FIRST CLASS (E-6), U.S. NAVY**

**NMCCA 201100489
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 13 July 2011.

Military Judge: CDR Sherry King, JAGC, USN.

Convening Authority: Commanding Officer, Naval Submarine Support Center, Silverdale, WA.

Staff Judge Advocate's Recommendation: LT B.W. Guy, JAGC, USN.

For Appellant: LtCol Richard Belliss, USMCR.

For Appellee: Capt James B. Melton, JAGC, USN; LT Benjamin J. Voce-Gardner, JAGC, USN.

15 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 aggravated assault, assault consummated by a battery, and child endangerment in violation of Articles 128 and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 928 and 934, respectively. The military judge sentenced him to six months

confinement and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged; however, pursuant to a pretrial agreement (PTA), the CA suspended both confinement in excess of four months and the bad-conduct discharge.

The appellant submits two assignments of error. First, he avers that the child endangerment specification fails to state an offense pursuant to *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) for lack of the terminal element. Second, he contends that the PTA and the CA's action fail to remit the bad-conduct discharge upon conclusion of the suspension period and we should therefore exercise our Article 66(c) power and affirm a sentence that does not include a bad-conduct discharge.

Regarding the first assignment of error, 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 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*, No. 201000242, 2012 CAAF LEXIS 238 at *14 (C.A.A.F. Mar. 1, 2012). Thus, regardless of the "lens" utilized, it is error to omit the terminal element from 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. Where the appellant, similar to *Ballan*, pleaded guilty to the offense, the military judge ensured he understood the terminal element, the appellant provided a factual basis to establish that his conduct was of a nature to bring discredit upon the armed forces,¹ and he stipulated that

¹ Record at 58.

his conduct was prejudicial to good order and discipline of the Navy,² we find that the error in omitting the terminal element, although plain, did not materially prejudice a substantial right of the appellant. *Id.* at *16-20. 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.

We do, however, agree with the appellant's second assignment of error in that the CA's action fails to provide that the bad-conduct discharge will be remitted upon the successful completion of the suspension period. RULE FOR COURTS-MARTIAL 1108(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). However, as the Government correctly points out, this error is harmless as remission occurs by operation of law upon expiration of the suspension period. R.C.M. 1108(e). We can find no discernable prejudice from this error. We decline to grant the relief requested; however, we will order appropriate relief in our decretal paragraph.

After careful consideration of the record, we affirm the findings and sentence as approved by the CA. Art. 66(c), UCMJ. The supplemental court-martial order will specify that execution of the bad-conduct discharge is suspended for a period of twelve months from the date of the CA's action; upon which time, unless sooner vacated, it will be remitted without further action.

For the Court

R.H. TROIDL
Clerk of Court

² Stipulation of Fact, Prosecution Exhibit 1 at 3.