23 January 2012

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF APPELLEE
v.	)	
	)	USCA Dkt. No. 12-0090/AF
Airman First Class (E-3) JOSEPH A. HAYES, USAF, *Appellant.*	)	Crim. App. No. 37588

FINAL BRIEF ON BEHALF OF APPELLEE

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUE PRESENTED

WHETHER THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO DISMISS FOR FAILURE TO STATE AN OFFENSE, WHERE THE SPECIFICATION OMITTED REFERENCE TO A REQUIRED ELEMENT UNDER STATE LAW FOR A FINDING OF GUILTY FOR WRONGFUL CONSUMPTION OF ALCOHOL WHILE UNDER AGE 21.

STATEMENT OF THE CASE

Appellant's Statement of the Case is accepted.

STATEMENT OF FACTS

Appellant's Statement of Facts is accepted.

ARGUMENT

THE SPECIFICATION EITHER EXPRESSLY OR IMPLIEDLY INCLUDED EVERY ELEMENT OF THE OFFENSE, PROVIDED ADEQUATE NOTICE TO APPELLANT, AND SUFFICIENTLY PROTECTS APPELLANT FROM DOUBLE JEOPARDY.

Standard of Review

This Court reviews the sufficiency of a specification to state an offense *de novo*. *See* United States v. Dear, 40 M.J. 196, 197 (C.M.A. 1994).

Analysis

A. The specification meets constitutional requirements.

Appellant seeks for this Court to apply a strictly technical analysis to resolve this issue; one that is devoid of context. Appellant does so under guise of one who's Fifth and Sixth Amendment rights have been violated. Appellant does so despite the fact that he was plainly on notice of the alleged criminal conduct to which he needed to defend himself against. Appellant does so despite the fact that he faces no credible risk of double jeopardy. The specification under attack could have been more definite and certain, but that is not the standard to apply. The specification contained the necessary statutory elements of Article 92 dereliction of duty, and to the extent there existed any lack of certainty, such deficiency was resolved prior to trial. In the present instance, the constitutional principles at stake have been satisfied. The United States respectfully urges this Court to reject Appellant's call to celebrate form over substance.

Appellant relies on an overly literal application of the law to conclude that the Specification of Charge I fails to state an offense. In doing so, Appellant ultimately turns to United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011). In Fosler, this Court determined whether the terminal element of an Article 134 offense was necessarily implied within the relevant

charge and specification. Id. at 229. In doing so, this Court applied a well-established test of sufficiency. A test premised on the fact that the military "is a notice pleading jurisdiction." Id. *citing* United States v. Sell, 11 C.M.R. 202, 206 (C.M.A. 1953). With that in mind, this Court reiterated,

> A charge and specification will be found sufficient if they, "first, contain the elements of the offense charged and fairly inform a defendant of the charge against which he must defend, and, second, enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense."

Id. *quoting* Hamling v. United States, 418 U.S. 87, 117 (1974); and *citing* also to United States v. Resendiz-Ponce, 549 U.S. 102, 108 (2007); United States v. Sutton, 68 M.J. 455, 455 (C.A.A.F. 2010); United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006); United States v. Sell, 11 C.M.R. at 206. This Court in Fosler also explicitly recognized that the rules governing court-martial procedure hold that, "A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." Id. *citing* R.C.M. 307(c)(3).

There is no dispute between the Appellant and the United States over the test to be applied. However, disagreement abounds regarding application of the test to the specific facts of this case. The dereliction of duty specification at issue

charged Appellant with willful dereliction by virtue of having failed to refrain from drinking alcohol while under the age of 21. (J.A. at 8.) Appellant asserts that the specification fails to state a claim because it does not contain the duty in complete detail. (App. Br. at 10.) The source of the duty at issue within the specification is one which relates back to Nevada Revised Statute (N.R.S.) 202.020. (*See* J.A. at 65.) It is true that the specification does not explicitly refer to N.R.S. 202.020, nor does it include the entirety of each element from N.R.S. 202.020. (J.A. at 8, 65). However, the specification does include each element from Article 92 of the UCMJ and sufficiently implies the origination of the underlying duty.

The gist of Appellant's claim has been that the specification at issue fails to state an offense because the duty alleged to have been violated is drinking alcohol under the age of 21, but that is not illegal in the State of Nevada. Appellant avers that the specification should have included the full extent of the duties from N.R.S. 202.020, which is to refraining from drinking under the age of 21 "in any saloon, resort or premises where spirituous, malt or fermented liquors or wines are sold." (App. Br. at 11, referring to N.R.S. 202.020 located within the J.A. at 65.) Comparing this to the Fosler case, Appellant claims failure to state that the drinking

occurred in one of the prohibited locations is akin to failure to set forth the terminal element in an Article 134 specification. (App. Br. at 12.) That is not the case.

Here, the Specification of Charge I detailed the gravamen of the offense – which was failing to abide by a duty – and indicated how that duty had not been met. The elements of the offense of dereliction in the performance of duties under Article 92, are that 1) the accused had certain duties, 2) knew or reasonably should have known of those duties, and 3) was derelict in the performance of those duties through willfulness, negligence, or culpable inefficiency. (J.A. at 5.) Each of these elements were expressly included within the Specification of Charge I. Appellant has raised no claim that the specification failed to allege elements two and three. Therefore, turning to element one, the specification explicitly references "duties at or near Las Vegas, Nevada." (J.A. at 8.) This unmistakably places Appellant on notice that the duties at issue are those limited to this location. This is particularly relevant to the case at hand given that the duties arise from Nevada law. Moreover, the specification provides further information in that these Nevada related duties were violated by virtue of "drinking alcohol." (Id.) Also, the specification states that the dereliction of the Nevada related duties, violated by drinking alcohol, was done so "while under the age

of 21." (Id.) Finally, should there be any doubt as to which duties and when Appellant was derelict in their performance, the specification directs him to conduct between 1 June 2008 and 30 September 2008. (Id.)

Appellant's real complaint is not that an element of Art. 92 was missing, but that the element of the "certain duties" was not set out in complete detail so as to include all of the elements of the Nevada statute (i.e., the locations at which Appellant was not to have been drinking while under the age of 21). This is unlike Fosler. Fosler held that a charge and specification under Article 134 require proof of one or more of the terminal elements. Thus, notice – via the charge and specification - must include which terminal element the Government alleges. In Fosler, the specification completely failed to list a terminal element. To be similar to the present case, the facts in Fosler would have had a specification listing only a portion of the terminal element (e.g., only stating "prejudicial" rather than "prejudicial to good order and discipline"; or, "of a nature to bring discredit" without including the remainder of that phrase, "…upon the Armed Forces.").

Unlike Fosler, the statutory elements of Article 92 are present within the specification here even if the duties was not listed in complete detail. Appellant concedes that the

"proscribed duties may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service.'" (App. Br. at 10, citing M.C.M. Pt. IV, 16(c)(3)(a) (2008 ed.) Obviously, the duties to which the dereliction applies are important. However, requiring explicit detail is not the standard; rather, the entire point is to ensure that the level of detail is sufficient to accomplish notice and protection from double jeopardy. While this specification could have been more thoroughly stated by expressly referencing the Nevada statute, the duty referenced derives from the local law which military members are expected to know and abide by. As such, the specification of Charge I expressly included the statutory elements of Article 92 and impliedly included all elements of the duty as derived from local law.

Moreover, Appellant implies that this Court's review of the sufficiency of the specification should be limited to the four corners of the specification. (App. Br. at 14, 16 n.1.) Such an extreme view would grant Appellant the ability to make absurd claims *carte blanche* as the Government's ability to rebut such claims and the Court's ability to test them would be vitiated. Such an attempt at ignoring the entire context of events is exemplified in this case. Appellant, with some amount of hyperbole, asserts that "the Government essentially forced him

to flail at a moving target." (App. Br. at 17-18.) When reviewed within the entirety of events, such assertions lack persuasiveness.

While the duty as implied by the Nevada statute was not listed within the specification, the record of trial (ROT) displays that to the extent any vagary may have existed, and it was clarified beyond any doubt. For a variety of reasons, the Article 32 procedures are extremely unique to military justice. From the standpoint of receiving notice, a defendant has the right to be present and is in a unique position to obtain greater detail regarding the charges laid against him. That occurred in this case on 28 April 2009. (J.A. at 98.) At the Article 32, Appellant was able to not only observe, but to cross-examine the witnesses related to the specification at hand. Moreover, the evidence received a legal review from a neutral and detached Investigating Officer (IO). Initially, the IO was provided no evidence of the duty referred to within the Specification of Charge I. (J.A. at 103). The IO allowed the Government additional opportunity to present such evidence and was then provided with N.R.S. 202.020. (Id.) After review of N.R.S. 202.020, the IO concluded that the evidence presented did not include instances of drinking under the age of 21 in any of the locations criminalized by N.R.S. 202.020. (Id.) The IO emphasized that the charge as drafted was for drinking not

possession, and thus evidence of the location was necessary. (Id.) Despite this, without any advised changes to the Article 92 specification in this regard, the IO recommended that all charges and specifications be referred to a general court-martial for trial. (Id. at 105.) Arguably, this is because there was no belief that Appellant was not sufficiently on notice, but only a concern that the evidence required for conviction may be lacking. Regardless of what else might be argued from the course of events, Appellant was without a doubt aware on 28 April 2009 that the duties at issue were those arising from N.R.S. 202.020.

Subsequently, on 17 July 2009, the defense presented a motion to dismiss for failure to state an offense. (J.A. at 21.) The motion asserted that the Government had erroneously read the statute to hold that consumption of alcohol by those under the age of 21 was a crime. (Id.) The Government supplied a motion in response on 21 July 2009. (J.A. at 34.) Within this response, the Government stated, "It was the intent of the Government to charge the Accused with dereliction of duty for his consumption of alcohol in a public place in violation of Nevada State Law." (Id.) In terms of the location, while the Government at this point may have put focus on the language of a "public" place as opposed to "any saloon, resort or premises where spirituous, malt, or fermented liquors or wines are sold,"

insofar as notice is concerned, this is a difference without a distinction.

It is difficult to comprehend how Appellant can claim that he lacked notice of what duties he needed to defend against. The duties at issue were those arising from N.R.S. 202.020. Whether the Government had a solid handle on its evidence or how to meet a showing that those duties were violated was a question of evidentiary sufficiency as the military judge and the Air Force Court concluded and is of no consequence when determining if the specification stated an offense. The theory of culpability was unambiguously premised on failing to abide by the local law, which was provided to Appellant. Moreover, the Government detailed the locations, to include "the casino floor of the Luxor Hotel in Las Vegas." This was exactly two months prior to trial, which began on 21 September 2009. Again, The duties in question were those referenced in the specification, they were further clarified by introduction of N.R.S. 202.020 at the Article 32 hearing, and again reiterated within the Government motion – all occurring well before trial.

At trial, prior to seating members, the defense was heard on the motion previously filed. (J.A. at 41-64.) At one point, the military judge queried trial counsel as to the source of the duty. Trial counsel responded, "The duty to refrain from dinking is the Nevada law which says that any person under the

age of 21 who consumes alcohol in a saloon, or resort, or place where alcohol is sold is guilty of a misdemeanor." (Id. at 57.) Indeed, N.R.S. 202.020 was later marked as a prosecution exhibit and provided to the members during deliberations. (J.A. at 65, 82.)

Notably, despite the fact that the motion was raised as one indicating failure to state an offense, the oral argument on the motion only further displays that all parties fully recognized that the duties at issue were those arising from N.R.S. 202.020. The only argument that took place was as to the sufficiency of the evidence to substantiate a violation of those duties. At no point was a bill of particulars requested pursuant to R.C.M. 906(b)(6). While it is true that a bill of particulars cannot cure a charge and specification that fails to state an offense, the failure to request one is at least indicative of a lack of need for any further particularity. Appellant also at no point claimed that the specification had misled him thus requiring a continuance under R.C.M. 906(b)(4). Appellant was prepared to proceed to trial because he had received adequate notice. This is precisely why both the trial judge as well as the Air Force Court of Appeals held that "the question was not whether the specification of the charge stated an offense, but whether the government had sufficient evidence to prove that the appellant was guilty of the charge." (J.A. at 3, 63).

The crux of the matter is whether the specification did the job – the job of expressly or impliedly setting forth all elements, putting the individual on notice, and protecting that individual from double jeopardy. Applying this in an overly technical manner results in a situation akin to claiming your view of the forest is obstructed by all the trees. United States v. Durham, 21 M.J. 232, 232-33 (C.M.A. 1986), exhibits the value of looking beyond simply the wording of a specification to determine whether or not it sufficiently states an offense. The specification at issue in Durham failed to adequately describe the nature of what was stolen. Id. The Court nonetheless concluded that the specification was legally satisfactory. Id. This was accomplished by turning to the ROT wherein the providence inquiry contained evidence that the appellant had explicitly informed the military judge of the specific items he had stolen. Id. The Court held, "The important facts are that the record establishes positively that the accused was apprised with sufficient particularity of the crime against which he must defend and that the record of trial enables him to avoid a second prosecution for the same offense." Id. It is easy to get caught up in a technical limited view, but often stepping back in order to take the panoramic snapshot provides a more complete picture.

Despite broad sweeping statements, at no point has Appellant actually explained how he is at risk of double jeopardy. The real question is whether the elements of the offense are present within the specification such that they accomplish a specific purpose. That purpose is providing notice and protecting against double jeopardy. Regarding double jeopardy, while ensuring this protection within the specification itself "was important at common law…one may question its relevance today since the defendant may turn to the entire record of trial in raising double-jeopardy protection." Dear, 40 M.J. at 197; United States v. Williams, 21 M.J. 330, 332 (C.M.A. 1986). The Specification of Charge I sets forth all of the elements of Article 92, provided notice, and protects Appellant from any threat of double jeopardy.

B. *Assuming arguendo* that the Court was to dismiss Charge I and the Specification of Charge I, it has no effect to the sentencing landscape.

Even if this Court were to dismiss the Specification of Charge I and Charge I, this Court may easily conclude that it is of no effect to the adjudged sentence. A sentencing rehearing is not necessary simply because a specification is dismissed on appeal, but rather, only when there has been a "dramatic change in the penalty landscape." United States v. Riley, 58 M.J. 305, 312 (C.A.A.F. 2003). This Court has previously stated that an appellate court can purge the prejudicial impact of an error at

trial if it can determine that "the accused's sentence would have been at least of a certain magnitude." United States v. Harris, 53 M.J. 86, 88 (C.A.A.F. 2000) *citing* United States v. Jones, 39 M.J. 315, 317 (C.M.A. 1994) quoting United States v. Sales, 22 M.J. 305, 307 (C.M.A. 1986).

Here, high definition satellite imagery would be required to locate any change to the landscape if Charge I were dismissed. Appellant was found guilty of five separate specifications of distribution of marijuana to an Airman, one specification of distribution of cocaine to that same Airman, one specification of divers distribution of marijuana to another Airman, and Appellant plead guilty to one specification of divers use of marijuana. (R. at 115-18, 753.) As a result, Appellant faced a maximum punishment of dishonorable discharge and confinement for 107 years and 6 months. (R. at 775.) The facts constituting the basis for the dereliction of duty were *de minimus* in comparison to the body of evidence brought against Appellant. As the trial counsel argued at sentencing, “It’s been about dealing drugs.” (J.A. at 92.) In justifying the sentence sought, trial counsel argued, “It is a just and fair punishment for smoking marijuana, for dealing marijuana, for dealing cocaine.” (J.A. at 93.) Not one single mention of the dereliction of duty charge was made during either the government’s or defense counsel’s sentencing argument.

Appellant was sentenced to reduction to E-1, forfeiture of all pay and allowances, to be confined for two years, and a bad conduct discharge. (J.A. at 1.) Without citation to any authority, Appellant seems to claim that if the Court deems a due process violation to have occurred for failure to state an offense, then Appellant has *per se* been harmed thus requiring a sentencing rehearing. (App. Br. at 8, 19-21.) This is not the law, nor is it warranted within this case. Simply put, the Specification of Charge I can comfortably be determined as having no effect on the sentence adjudged and as such, even if it were dismissed, the sentence should remain unchanged.

The Air Force Court correctly concluded that, assuming arguendo that the specification failed to state an offense, the dereliction of duty offense did not change the sentencing landscape and that any reassessed sentence would be at the same level as adjudged by the members and approved by the convening authority.

CONCLUSION

Appellant's claim is without merit and the United States requests that this Court affirm the findings and sentence.

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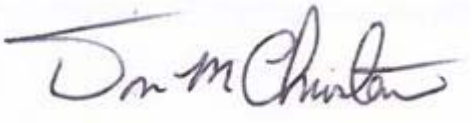

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 23 January 2012.

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