

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Benny Norwood, Jr.
First Sergeant (E-8)
U.S. Marine Corps,

Appellant

BRIEF ON BEHALF OF APPELLANT

Crim.App. No. 201000495

USCA Dkt. No. 11-0515/MC

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

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Issues Presented

I

WHETHER, IN LIGHT OF *UNITED STATES v. FOSLER*, 70 M.J. 225 (C.A.A.F. 2011), THE SPECIFICATIONS ALLEGING ATTEMPTED ADULTERY AND CONSPIRACY TO OBSTRUCT JUSTICE STATE OFFENSES.

II

WHETHER, IN ORDER TO STATE AN OFFENSE OF ATTEMPT OR CONSPIRACY UNDER ARTICLES 80 AND 81, THE SPECIFICATION IS REQUIRED TO EXPRESSLY ALLEGE EACH ELEMENT OF THE PREDICATE OFFENSE.

Statement of Statutory Jurisdiction

The lower court reviewed First Sergeant Norwood's case under Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1). The statutory basis for this Court's exercise of jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

A general court-martial consisting of a military judge alone tried First Sergeant Norwood on various dates between December 28, 2009 and April 30, 2010. Consistent with his pleas, he was found guilty of violating Articles 80, 81, and 107, UCMJ, and not guilty of one specification of Article 120, UCMJ. Contrary to his pleas, he was found guilty of one specification of Articles 81 and 120, UCMJ.¹ He was sentenced to 14 months confinement, reduction to E-5, and a bad-conduct discharge.² The convening

¹ JA at 8-12, 84-85.

² JA at 99.

... approved the sentence as adjudged and, except for the bad-conduct discharge, ordered the sentence executed.³

NMCCA affirmed the findings and the sentence in its May 5, 2011 opinion.⁴ This Court granted First Sergeant Norwood's petition for review on February 29, 2012.

Statement of Facts

1. Charges and instructions on the elements

First Sergeant Norwood was charged with attempted adultery and conspiracy to obstruct justice as follows:

Charge I: Violation of the UCMJ, Article 80

Specification: In that First Sergeant Benny Norwood Jr., U.S. Marine Corps, a married man, did . . . attempt to commit adultery with PFC [B], U.S. Marine Corps, a woman not his wife, by trying to place his penis inside of her vagina and have sexual intercourse with her.

Charge II: Violation of the UCMJ, Article 81

Specification 1: In that First Sergeant Benny Norwood Jr. . . . on active duty, did . . . conspire with Staff Sergeant Griffin A. Keys . . . and Corporal Marchello K. Hancock . . . to commit an offense under the [UCMJ], to wit: obstruction of justice in the investigation into the alleged sexual assault of [PFC B] and in order to effect the object of the conspiracy, First Sergeant Norwood did make false statements to Special Agent Joe Garcia . . . concerning his involvement and knowledge of the sexual assault of [PFC B].⁵

³ JA at 11.

⁴ *United States v. Norwood*, No. 201000495, 2011 CCA LEXIS 85 (N.M. Ct. Crim. App. May 5, 2011) (unpublished).

⁵ JA at 5-7.

At trial, the military judge first explained the elements of an attempt offense⁶ and a conspiracy offense⁷ to First Sergeant Norwood. He then explained that the offenses underlying the attempt and conspiracy charges were adultery and obstruction of justice, respectively, and that both included the element that "under the circumstances, [the] 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,"⁸ language not expressly alleged in either specification.

2. Providence Inquiry

The salient aspects of the providence inquiry regarding the allegations of attempt to engage in adultery and conspiracy to obstruct justice that, under the circumstances, would have been prejudicial to good order and discipline or service discrediting, amounted to the following:

[MJ]: Do you agree when I listed all those elements for adultery, do you agree that you intended each one of those elements in your actions when you were about to, basically, have sex with PFC [B]?

[Appellant]: Yes, Your honor.⁹

. . . .

[MJ]: Do you believe you had the intent to violate all of the elements that I just listed, that you are guilty of all of those in your conspiracy?

[Appellant]: Yes, Your honor.

⁶ JA at 29-31.

⁷ JA at 38-43.

⁸ JA at 31-34, 43-44 (emphasis added).

⁹ JA at 36.

[MJ]: You had the intent to do these things?

[Appellant]: Yes, Your Honor.¹⁰

. . . .

[MJ]: Do you agree - did you agree with the conspirators to commit the offense of obstruction of justice and that the conspiracy encompassed each and every element of obstructing justice?

[Appellant]: [Affirmative response].¹¹

Introduction

The two issues presented will be addressed in reverse order. Addressing issue II first, First Sergeant Norwood will show that a specification alleging an attempt or conspiracy crime must allege all of the elements of the predicate offense. Turning to issue I, he will then show why, under *Fosler*, the terminal element of the offense underlying the attempt and conspiracy specifications is not implied, and therefore the specifications are defective. Finally, First Sergeant Norwood will show that, under *United States v. Ballan*,¹² he was prejudiced by the defective specifications.

Standard of Review

Whether a specification states an offense is a question of law that this Court reviews *de novo*.¹³

¹⁰ JA at 48.

¹¹ JA at 52-53.

¹² *United States v. Ballan*, 2012 CAAF LEXIS 238 (C.A.A.F. 2012).

¹³ *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). (citations omitted).

Argument

II

ATTEMPT AND CONSPIRACY CHARGES MUST ALLEGE EVERY ELEMENT OF THE PREDICATE OFFENSE.

This issue is governed by *Wong Tai v. United States*.¹⁴

There the Supreme Court held that while a conspiracy charge is not required to allege the predicate-offense elements with the same technical precision required of a substantive offense, it must at least allege the basic elements of the offense underlying the alleged conspiracy:

It is well settled that in an indictment for conspiring to commit an offense -- in which the conspiracy is the gist of the crime -- it is not necessary to allege with technical precision all the elements essential to the Commission of the offense which is the object of the conspiracy, or to state such object with the detail which would be required in an indictment for committing the substantive offense[.] In charging such a conspiracy certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is necessary.¹⁵

The Fourth Circuit recently applied *Wong Tai* in the 2009 case of *United States v. Kingrea*.¹⁶

In *Kingrea*, the accused was charged with conspiring to sponsor or exhibit "an animal fighting venture" in violation of 7 U.S.C. § 2156(a)(1).¹⁷ But as the Fourth Circuit highlighted, Congress did not criminalize merely sponsoring or exhibiting "an animal fighting venture":

¹⁴ *Wong Tai v. United States*, 273 U.S. 77 (1927).

¹⁵ *Id.* at 81 (internal citations and quotations omitted).

¹⁶ *United States v. Kingrea*, 573 F.3d 186 (4th Cir. 2009).

¹⁷ *Id.* at 189.

The elements of a crime under 7 U.S.C. § 2156(a)(1) are: (1) knowingly, (2) sponsoring or exhibiting, (3) an animal in, (4) an animal fighting venture, (5) in which any animal was moved in interstate commerce. Thus, the act that Congress has determined to be an unlawful act is the sponsoring of "an animal in" an animal fighting venture, not simply sponsoring a fighting venture. Omission of the element of "an animal in" broadens the character of the crime beyond the scope of the crime as Congress has defined it in the applicable statute.¹⁸

The government argued that it was "required only" to set forth "the elements of a conspiracy, which it did," and was not required to allege the elements of the offense underlying the conspiracy.¹⁹ Rejecting this argument, the Fourth Circuit emphasized that under *Wong Tai* a conspiracy charge was constitutionally required to set out the basic elements of the predicate offense, it just didn't have to "flesh out" those elements with further particularity.²⁰

Thus, the Fourth Circuit found that the conspiracy charge was missing an essential element:

Put simply, the indictment against Kingrea failed to allege an essential element under § 2156(a)(1) of sponsoring or exhibiting "an animal in" an animal fighting event. In so doing, and contrary to the Government's assertion that it properly alleged the elements of a conspiracy to violate § 2156(a)(1), the indictment also failed to state an offense against the United States as the object of the conspiracy. This, of course, is a necessary and essential element of a conspiracy under 18 U.S.C. § 371, the conspiracy statute under which Kingrea was charged.

¹⁸ *Kingrea*, 573 F.3d at 192.

¹⁹ *Id.*

²⁰ *Id.* at 192-93 (quoting *Nelson v. United States*, 406 F.2d 1136 (10th Cir. 1969)).

The *Kingrea* Court therefore ruled that "[b]ecause the missing element . . . was essential, its complete absence . . . is a fatal defect" requiring the conviction to be vacated.²¹

This case is just like *Kingrea*. Here, as in *Kingrea*, the conspiracy specification does not allege the object of the conspiracy made criminal by Congress. Instead it alleges that Appellant conspired to commit one of the President's examples of conduct - obstruction of justice - that could be criminal.²² So similar to *Kingrea* (charge failed to allege that accused conspired to commit an offense against the United States), the specification here does not allege that Appellant conspired to commit an offense under the UCMJ, as required by Article 81.²³

Similarly, in *United States v. Wilson*, a 1989 case involving both a substantive and predicate offense, the Fifth Circuit found that although the charge did not expressly allege an element of the predicate offense, a liberal reading of the charge showed the element to be implied where the charge referenced the predicate-offense statute. The court highlighted that "citation to a

²¹ *Kingrea*, 573 F.3d at 193-94.

²² See *United States v. Jones*, 68 M.J. 465, at 471 (C.A.A.F. 2010) (President "is not defining offenses [under Article 134] but merely indicating various circumstances in which the elements of Article 134, UCMJ, could be met.").

²³ See 10 U.S.C. § 881 (2012) ("Any person subject to this chapter . . . who conspires with any other person to commit an offense under this chapter [10 USCS §§ 801 et seq.] shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.") (emphasis added).

statute in [an] indictment 'direct[s] the reader' to it."²⁴

But unlike in *Wilson*, here the specification makes no reference to Article 134, the criminal statute presumably intended to be the object of the alleged conspiracy.

Finally, in the 2008 case *United States v. Bedford*, the Tenth Circuit – using language nearly identical to the Fourth Circuit's in *Kingrea* – emphasized that "in a conspiracy prosecution, '[i]t is also necessary that the indictment contain the essential elements upon which the underlying offense rests.'"²⁵

And while these cases do not involve attempt crimes, out of logical necessity, the principle that they stand for applies with equal force to attempt charges because they too require an allegation of an attempt to commit an actual offense under the UCMJ.²⁶

I

UNDER FOSLER, THE TERMINAL ELEMENT IS NOT IMPLIED IN THE ATTEMPT OR CONSPIRACY SPECIFICATION. THE SPECIFICATIONS THEREFORE FAIL TO STATE AN OFFENSE.

In *Fosler* this Court found that "the mere allegation that an accused has engaged in adulterous conduct cannot imply the

²⁴ *United States v. Wilson*, 884 F.2d 174, 179-81 (5th Cir. 1989) (citation omitted).

²⁵ *United States v. Bedford*, 536 F.3d 1148, 1156 (10th Cir. 2008) (citation omitted).

²⁶ See MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 4b(2).

terminal element."²⁷ This is because the act alleged and the terminal element are distinct things with different meanings, which is why this Court highlighted in *Fosler* that:

An accused cannot be convicted under Article 134 if the trier of fact determines only that the accused committed adultery; the trier of fact must also determine beyond a reasonable doubt that the terminal element has been satisfied. Because adultery, standing alone, does not constitute an offense under Article 134, the mere allegation that an accused has engaged in adulterous conduct cannot imply the terminal element.²⁸

Here, because First Sergeant Norwood was charged with attempting to commit adultery, he was effectively charged with attempting to do something that "standing alone, does not constitute an offense under Article 134." And "the mere allegation" that he attempted to engage in adulterous conduct cannot, under *Fosler's* reasoning, imply the terminal element. This reasoning applies with equal force to conspiracy to obstruct justice, as First Sergeant Norwood could not have been so convicted if the terminal element was not satisfied.

And this application of *Fosler* is consistent with the constitutional notice principle highlighted in *Medina*,²⁹ *Miller*,³⁰ and *Jones*.³¹ In these cases, this Court stressed that "the due process principle of fair notice mandates that 'an accused has a right to know . . . under what legal theory' he will be

²⁷ *United States v. Fosler*, 70 M.J. 225, 230 (C.A.A.F. 2011).

²⁸ *Id.* at 230 (internal citation omitted).

²⁹ *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008).

³⁰ *United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009).

³¹ *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010).

convicted."³² Thus, because clauses 1 and 2 of Article 134 present alternate theories of liability contained in the terminal element, the specifications here failed to notify First Sergeant Norwood whether the Government's theory of liability was that he attempted and conspired to engage in prejudicial conduct or service discrediting conduct. And surely these two distinct theories cannot both be implied by the same language in a specification.

A. Per *United States v. Ballan*, Appellant was prejudiced by the defective specifications.

In *Ballan*, this Court held that "a charge that is defective because it fails to allege an element of an offense, if not raised at trial, is tested for plain error."³³ And citing to its holding in *Medina*, the Court further emphasized that, in the context of a guilty plea where a defective specification is unchallenged at trial, there is no prejudice "where the providence inquiry clearly delineates each element of the offense and shows that the appellant understood 'to what offense and under what legal theory [he was] pleading guilty[.]'"³⁴

Thus, in *Ballan* this Court ruled that (1) the omission of the terminal element from the specification there, although error, was not prejudicial because Ballan "was required to admit that his actions violated either clause 1 or 2 of the terminal

³² *Jones*, 68 M.J. at 468 (quoting *Medina*, 66 M.J. at 26-27); see *Miller*, 67 M.J. at 389.

³³ *Ballan*, 2012 CAAF LEXIS at *16 (citations omitted).

³⁴ *Id.* at *18 (quoting *Medina*, 66 M.J. at 26).

element of [Article 134], and he did in fact admit that his actions were service discrediting",³⁵ and (2) he therefore "'knew under what clause he was pleading guilty' and 'clearly understood the nature of the prohibited conduct as being in violation of . . . clause 2, Article 134'"³⁶

Here, unlike in *Ballan*, the military judge did not ask First Sergeant Norwood which type of prohibited conduct he attempted and conspired to engage in: prejudicial conduct or service discrediting conduct. So unlike in *Ballan*, there is prejudice here because First Sergeant Norwood did not know *under what clause he was pleading guilty*.

Further, because the lower court affirmed without knowing which clause formed the basis of First Sergeant Norwood's convictions, those convictions may "rest on one point and the affirmance of the conviction . . . on another"³⁷, the validity of which was rejected by the Supreme Court in *Russell v. United States*.

Conclusion

Attempt and conspiracy offenses require an accused to attempt or conspire to violate the UCMJ.³⁸ But this Court's precedent dictates that adultery and obstruction of justice are

³⁵ *Ballan*, 2012 CAAF LEXIS at *21.

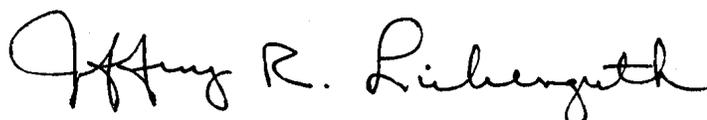
³⁶ *Id.* (quoting *Medina*, 66 M.J. at 28) (internal brackets omitted).

³⁷ *Russell v. United States*, 369 U.S. 749, 766 (1962).

³⁸ See MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 4b(2) and 5b(1).

not UCMJ offenses; they are examples of circumstances "in which the elements of Article 134, UCMJ, could be met."³⁹ Thus, because the subject specifications omit the terminal element required for adultery and obstruction of justice to be criminal, the specifications are defective because they do not allege that First Sergeant Norwood attempted or conspired to commit a crime under the UCMJ.

Finally, First Sergeant Norwood was prejudiced by the defective specifications because he was convicted without knowing which Article 134 clause he was being convicted under. This Court should therefore set aside the findings for the sole specification under Charge I and Specification 1 of Charge II.



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³⁹ Jones, 68 M.J. at 471 (emphasis added).