

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
ALDYKIEWICZ, EWING,¹ and WALKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Staff Sergeant ANGEL M. SANCHEZ
United States Army, Appellant

ARMY 20140735

Headquarters, U.S. Army Combined Arms Center and Fort Leavenworth
Jeffery R. Nance and S. Charles Neill, Military Judges
Colonel Alexander N. Pickands, Staff Judge Advocate

For Appellant: Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Major Christian E. DeLuke, JA; Captain Paul T. Shirk, JA (on brief and reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Craig J. Schapira, JA; Captain Karey B. Marren, JA (on brief).

19 February 2021

OPINION OF THE COURT

EWING, Judge:

When a defendant voluntarily pleads guilty to an offense at a court-martial, he is “not simply stating that he did the discrete acts described” in the specification, but also that he is guilty of the “substantive crime” set forth in the specification. *United States v. Hardy*, 77 M.J. 438, 442 (C.A.A.F. 2018) (internal quotation marks omitted) (quoting *United States v. Broce*, 488 U.S. 563, 570 (1989)). Based on the combination of this principle and a 2016 change to Rule for Courts-Martial [R.C.M.] 907, we hold that an unconditional guilty plea waives a later claim that the pleaded-to specification fails to state an offense.

¹ Judge Ewing decided this case while on active duty.

Appellant was a drill sergeant who sexually abused trainees and committed other offenses. His case is before us following a rehearing on several specifications we set aside in 2019 because of a *Hukill* error.² Appellant's sole claim is that one of the specifications to which he pleaded guilty at his rehearing failed to state an offense. We reject appellant's claim as both waived and meritless, and affirm.

BACKGROUND

At appellant's original trial, a military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of three specifications of violating a general regulation by engaging in conduct of a sexual nature with basic trainees, in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892 [UCMJ]. Contrary to his pleas, the military judge convicted appellant of an additional specification of violating a general order, four specifications of cruelty and maltreatment, and ten specifications of various sexual offenses, in violation of Articles 92, 93 and 120, UCMJ. The military judge acquitted appellant of one specification of violating a general regulation, four specifications of cruelty and maltreatment, two specifications of sexual assault, and two specifications of abusive sexual contact, charged in violation of Articles 92, 93 and 120, UCMJ. The military judge sentenced appellant to a dishonorable discharge, confinement for twenty years, forfeiture of all pay and allowances, and reduction to the grade of E-1.

We affirmed the findings and sentence in our first decision in this case. *United States v. Sanchez*, ARMY 20140735, 2017 CCA LEXIS 203 (Army Ct. Crim. App. 28 Mar. 2017) (mem. op.) (*Sanchez I*). As relevant here, one of the assignments of error we addressed in *Sanchez I* was an allegation that the military judge had impermissibly considered "propensity" evidence between charged offenses, in violation of our superior court's holding in *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016). We found no *Hills* error, and reasoned that because *Hills* was a panel case and appellant was tried by a military judge alone, there was "no risk that the military judge would apply an impermissibly low standard of proof concerning either the presumption of innocence or the requirement that the prosecution prove guilt beyond a reasonable doubt." *Sanchez I*, 2017 CCA LEXIS 203, at *12-13.

Shortly after our *Sanchez I* opinion, the Court of Appeals for the Armed Forces (CAAF) handed down its decision in *Hukill*, where it applied *Hills*' central holding to a case tried by a military judge alone. *Hukill*, 76 M.J. at 222. We granted appellant's motion for reconsideration in light of *Hukill*, and in a second decision following reconsideration, again affirmed the findings and sentence. *United States v. Sanchez*, ARMY 20140735, 2017 CCA LEXIS 470 (Army Ct. Crim.

² *United States v. Hukill*, 76 M.J. 219 (C.A.A.F. 2017).

App. 17 Jul. 2017) (mem. op. on recon.) (*Sanchez II*). Specifically, we found that, unlike in *Hukill*, the “presumption that the military judge knew and correctly followed the law was not rebutted” in appellant’s judge-alone case. *Sanchez II*, 2017 CCA LEXIS 479, at *12.

Following *Sanchez II*, the CAAF summarily reversed and remanded to our court for a new Article 66 review, citing *Hukill*. *United States v. Sanchez*, 78 M.J. 166 (C.A.A.F. 2018). In our third opinion in this case following the CAAF’s remand, we found *Hukill* error, set aside the findings of guilty for ten Article 120 specifications, set aside appellant’s sentence, and authorized a rehearing. *United States v. Sanchez*, ARMY 20140735, 2019 CCA LEXIS 164 (Army Ct. Crim. App. 10 Apr. 2019) (summ. disp.) (*Sanchez III*).

At appellant’s rehearing held in September of 2019 and January of 2020, appellant pleaded guilty pursuant to a pretrial agreement to three specifications of wrongful sexual contact. Pursuant to the pretrial agreement, the government dismissed the remaining seven specifications. The military judge at appellant’s rehearing resentenced him on the three specifications to which he pleaded guilty, as well as the Articles 92 and 93 specifications that survived from appellant’s original trial, and handed down a sentence of a dishonorable discharge, confinement for fifty-four months, and reduction to the grade of E-1. The convening authority approved the adjudged sentence, credited appellant with 1,671 days of confinement credit, and noted that appellant’s “sentence to confinement ha[d] been served.”

Appellant’s case is back before us for Article 66, UCMJ, review following his combined rehearing on findings and sentence.

LAW AND DISCUSSION

After failing to raise his current claim of pure legal error that relies only on a bald reading of the original (and only) charge sheet to: (1) the military judge at his original trial; (2) our court on direct review of that original trial; (3) our court on reconsideration; or (4) the military judge at his rehearing, appellant now, for the first time and *after pleading guilty to the same specification at his rehearing*, asks us to dismiss the following specification (Specification 7 of Charge I) of abusive sexual contact for failure to state an offense:

In that Drill Sergeant (E-6) Angel M. Sanchez, U.S. Army, did, at or near Fort Leonard Wood, Missouri, between on or about 17 September 2013 and on or about 31 January 2014, commit [a] sexual contact upon Private [REDACTED] without her consent by causing bodily harm to her, to wit: by placing himself between Private [REDACTED] legs while in a closet, with the intent to gratify his own sexual desires.

Specifically, appellant contends that this specification fails to state an offense because the words “by placing himself between Private [REDACTED] legs while in a closet” do not allege a touching.

After considering appellant’s claim, we hold that by pleading guilty to Specification 7 of Charge I, consistent with the 2016 change to R.C.M. 907, appellant waived his ability to challenge the same specification on appeal for failing to state an offense. Even if appellant could escape waiver, we would find that his claim fails on the merits.

A. Waiver³

Before 2016, claims that a specification failed to state an offense were non-waivable, even via a guilty plea. *See, e.g., United States v. Schweitzer*, 68 M.J. 133, 136 (C.A.A.F. 2009) (internal quotation marks omitted) (a “guilty plea does not waive the defect of a specification that fails to state an offense” (quoting *United States v. Boyett*, 42 M.J. 150, 152 (C.A.A.F. 1995) (citing, in turn, the pre-2016 version of R.C.M. 907))).

However, in 2016, the President amended R.C.M. 907 to make clear that claims of failure to state an offense *were* non-jurisdictional, and therefore waivable. R.C.M. 907(b)(2)(E) (expressly listing failure to state an offense as non-jurisdictional and waivable). *See also United States v. Cotton*, 535 U.S. 625, 630 (2002) (clarifying the difference between jurisdictional challenges and failure to state an offense claims, and holding that “defects in an indictment do not deprive a court of its power to adjudicate a case”).

Appellant’s unconditional guilty plea at his rehearing waived his current claim, so long as the 2016 change applied at the rehearing. *See, e.g., United States v. Thomas*, ARMY 20150205, 2016 CCA LEXIS 551, at *2 (Army Ct. Crim. App. 9 Sep. 2016) (mem. op.) (“if the failure to state an offense is waivable, then a guilty plea waives the error on appeal”) (citing *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)). This approach makes sense, because when appellant pleaded guilty to the specification he was “not simply stating that he did the discrete acts described in the [specification]; he [was] *admitting guilt of a substantive crime.*” *Hardy*, 77 M.J. at 442 (internal quotation marks omitted and emphasis added)

³ We note that the government did not press a waiver claim in this court. We nonetheless discuss the question of waiver based on our obligation to determine whether the findings are correct in law, and because both our court and the other military appellate courts have, to date, largely failed to grapple with the 2016 change to R.C.M. 907 regarding failure to state an offense claims in the context of a guilty plea.

(quoting *Broce*, 488 U.S. at 570). Thus, an unconditional guilty plea is, by definition, an affirmative waiver of a “failure state an offense” claim for the pleaded-to offense. *See also, e.g., United States v. Urbina-Robles*, 817 F.3d 838, 842 (1st Cir. 2016) (“Urbina waived his right to bring this non-jurisdictional challenge [that the indictment failed to state an offense] when he pled guilty to the crime”) (citing, *inter alia*, *Cotton*, 535 U.S. at 630); *United States v. Munoz Miranda*, 780 F.3d 1185, 1188 (D.C. Cir. 2015) (appellants waived “all challenges amenable to waiver” by entering an unconditional guilty plea) (citation omitted); *United States v. Rubin*, 743 F.3d 31, 39 (2d Cir. 2014) (“in pleading guilty unconditionally, [appellant] waived his challenge that the Indictment failed to state an offense”); *United States v. DeV Vaughn*, 694 F.3d 1141, 1149 (10th Cir. 2012) (indictment defects are non-jurisdictional, and therefore waivable, including claims that the indictment fails to state an offense) (citing *Cotton*, 535 U.S. at 629–31); *United States v. Todd*, 521 F.3d 891, 895 (8th Cir. 2008) (guilty plea waived failure to state offense claim, because guilty pleas waive “all defects except those that are jurisdictional,” and a “defective indictment does not deprive a court of jurisdiction”) (citing *Cotton*, 535 U.S. at 632); *United States v. George*, 403 F.3d 470, 472 (7th Cir. 2005) (holding that guilty plea waived failure to state an offense claim, and explaining that “[b]y pleading guilty a defendant normally surrenders an opportunity to contest the merits, waiving (not just forfeiting) all arguments that could have been raised earlier”) (citing *Broce*, 488 U.S. at 563).

The 2016 change to R.C.M. 907, likely a belated recognition of *Cotton*, applied at appellant’s rehearing in 2019 and 2020. By its terms, the Executive Order that changed R.C.M. 907 went into effect on 20 May 2016. *See* Executive Order 13730, Sec. 2. We have previously said, when addressing this same change to R.C.M. 907, that the change applied “to stages [of the court-martial process] not begun by” 20 May 2016, including appeals. *Thomas*, 2016 CCA LEXIS 551, at *2 (citing, *inter alia*, *United States v. Nichols*, 2 U.S.C.M.A. 27, 6 C.M.R. 27, 32 (1952), and *United States v. Roberts*, 75 M.J. 696, 700 (N.M. Ct. Crim. App. 2016)); *see also United States v. Greaves*, 48 M.J. 885, 890–92 (A.F. Ct. Crim. App. 1998) (where R.C.M. 810 changed between the original trial and rehearing, affirming applicability of new version of R.C.M. at the rehearing). If *Thomas* applied the 2016 change to R.C.M. 907 to appeals (like this one), then the change *ipso facto* would have also applied at appellant’s rehearing on both findings and sentence, because that was a “stage [of the court-martial process] not begun” on 20 May 2016, and required, for example, the convening authority to refer anew the previously set-aside charges. Moreover, while applying certain substantive rule or statutory changes at a rehearing could implicate *ex post facto* concerns, the 2016 change to R.C.M. 907 is clearly a procedural change and not a substantive change, and, as such, does not implicate *ex post facto*. *See, e.g., Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (“A rule is substantive rather than procedural if it alters the range of conduct or the class or persons that the law punishes.”).

We pause to address our predecessor court's opinion in *United States v. Lilly*, where the court analyzed a change to R.C.M. 909, regarding mental capacity of the accused, that took place between Lilly's original trial and a rehearing. 34 M.J. 670, 675–76 (A.C.M.R. 1992). The court said the following about this interim R.C.M. change:

We need not determine whether the changes [in R.C.M. 909's] burden of proof and quantum of proof regarding mental capacity are substantive or procedural, because the result is the same in either case. If the changes are substantive, then the *ex post facto* clause of the Constitution would require that the appellant be given the advantage of the more favorable burden of proof which was in effect at the time of the offenses and his original trial. *If the changes are procedural, Rule for Courts–Martial 810 of the 1984 Manual provides that, at a rehearing, the procedures will be the same as at the original trial.*

Id. at 676 (emphasis added).

A plain reading of R.C.M. 810—identical today in relevant parts to the 1984 version—shows that we misquoted the rule in *Lilly*. Where *Lilly* said that R.C.M. 810 required that the procedures for rehearings be the “same as at *the* original trial,” the Rule actually required then, and still requires, that the procedures be the same as at “*an* original trial.” R.C.M. 810(a)(1)–(3). This difference between “the” and “an” is important, in that “the” would command a look-back to the rules applicable at the original trial, while “an” would denote starting afresh. Thus, our superior court’s “stages . . . not begun by” language in *Nichols*, which we followed as to this very R.C.M. change in *Thomas*, our sister courts’ published opinions in *Roberts* and *Greaves*, and the plain meaning of R.C.M. 810, all show that the new version of R.C.M. 907 applied at appellant’s rehearing. To the extent *Lilly* stands for a different proposition, we overrule that aspect of *Lilly*’s holding.⁴

⁴ *Lilly* was a “rehearing in full” on all findings and specifications based on a mental capacity/sanity issue. 34 M.J. at 675–77. As such, *Lilly* was governed by R.C.M. 810(a)(1) (in both the 1984 Manual and now). By contrast, appellant’s case was a “combined rehearing,” with some specifications remanded for a rehearing on both findings and sentence, and others for sentence only. “Combined rehearings” are governed by R.C.M. 810(a)(3), which states that the “*presentencing* . . . procedure shall be the same as at *an original trial*,” but does not address one way or the other the procedures regarding findings proceedings at a combined rehearing. However,

(continued . . .)

Rule for Courts-Martial 905(e)(2) is another potential roadblock to finding waiver here, but one that is fairly easily overcome. Curiously, even following the 2016 change to R.C.M. 907 making failure to state an offense waivable, R.C.M. 905(e)(2) still excepts such motions, along with jurisdictional motions, from those that must be made “before the court-martial is adjourned” on penalty of forfeiture absent affirmative waiver. R.C.M. 905(e)(2). Thus, R.C.M. 905(e)(2) mirrors the pre-2016 R.C.M. 907 by grouping “failure to state an offense” claims with jurisdictional claims, arguably in contravention of *Cotton*. Critically, however, while R.C.M. 905(e)(2) still allows appellants to raise “failure to state an offense” claims after adjournment, R.C.M. 905 does not speak one way or the other to the question of whether such claims are *waivable*. By way of example, if a defendant contested a specification at trial and was found guilty, his claim that the specification failed to state an offense would not be barred by R.C.M. 905(e)(2) or our holding above, even if raised after adjournment. The opposite is true with the appellant here who, for all the reasons discussed above, affirmatively waived such a claim by pleading guilty to the offense he now challenges.

Securing a favorable pretrial agreement via a guilty plea, and then on appeal attacking the facial legality of one of the specifications, is inconsistent with the fair and efficient administration of justice. This rationale undergirds the 2016 change to R.C.M. 907. We remind practitioners of the importance of raising and litigating claims—particularly purely legal claims—early in the court-martial process. In criminal litigation, the trial is the “main event,” and not “simply a tryout on the road to appellate review.” *Davila v. Davis*, 137 S. Ct. 2058, 2066 (2017) (internal quotation marks and citation omitted).

(. . . continued)

when read in conjunction with the rest of R.C.M. 810, which uses the “*an* original trial” language three times (including as to full rehearings on findings and sentence in R.C.M. 810(a)(1)), and does not use *Lilly’s* “*the* original trial” formulation at all, the natural reading of the Rule as a whole is that the “*an* original trial” language applies to *both* findings and sentencing proceedings in a combined rehearing. *See, e.g., United States v. Howard*, 968 F.3d 717, 722 (7th Cir. 2020) (“Laws dealing with a single subject, or *in pari materia*, should if possible be interpreted harmoniously.”) (internal quotation marks and citation omitted). Stated differently, it would be exceedingly odd for R.C.M. 810 to mean for the original procedural rules to apply to findings at a combined rehearing without saying so, while simultaneously using the phrase “*an* original trial” three times.

B. Merits of Appellant's Failure to State an Offense Claim

Even if appellant had not waived his claim, he would nonetheless be entitled to no relief because the specification he challenges states an offense.

The military is a “notice pleading jurisdiction.” *United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019) (citing *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011)). This means that the government must allege in each specification, “either expressly or by necessary implication every element of the offense, so as to give the accused notice of the charge against which he must defend and protect him against double jeopardy.” *United States v. Turner*, 79 M.J. 401, 403 (C.A.A.F. 2020) (internal quotation marks and citation omitted); *see also* R.C.M. 307(c)(3).

Where an appellant challenges a specification for the first time on appeal after having pleaded guilty to that same specification (again, assuming *arguendo* no waiver), we will view the specification with “maximum liberality” in favor of its validity. *See, e.g., United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986) (describing the “maximum liberality” standard and noting that appellate courts “view standing to challenge a specification on appeal as considerably less where an accused knowingly and voluntarily pleads guilty to the offense”); *Turner*, 79 M.J. at 405–06 (applying the *Watkins* “maximum liberality” standard to a post-trial challenge to an attempted murder specification, and upholding that specification despite the omission of the term “unlawfully”).

This specification easily passes the *Watkins/Turner* “maximum liberality” test. First, the specification alleged every element of the offense of abusive sexual contact, to include:

- (i) That the accused committed sexual contact upon another person by touching, or causing another person to touch, any body part of any person;
- (ii) That the accused did so by causing bodily harm to that other person; and
- (iii) That the accused did so with intent to arouse or gratify the sexual desire of any person.

Manual for Courts-Martial, United States (2019 ed.) [MCM], App'x 22-7;⁵ *see also* UCMJ art. 120(g)(2)(B) (2006 & Supp. V 2012).

While it is possible for a person to “place” themselves between another’s legs without touching that person, the more natural reading of this specification, even before incorporating the definition of “sexual contact” and “bodily harm,” is that when a person “places” themselves between another’s legs in a confined space such as a “closet” (as alleged here), a touching is implied. This implication becomes all the more concrete when read in concert with the terms “sexual contact” and “bodily harm,” both of which the government alleged in the specification, and both of which require a touching. *See* UCMJ art. 120(g)(2–3) (2006 & Supp. V 2012) (defining “sexual contact” and “bodily harm”). As the CAAF has explained,

A specification that is susceptible to multiple meanings is different from a specification that is facially deficient. Although a facially deficient specification cannot be saved by reference to proof at trial or to a rule referenced in the specification . . . it is appropriate to consider such matters in the case of a specification susceptible to multiple meanings.

United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted). To the extent the specification here is “susceptible to multiple meanings,” that ambiguity is clarified both by consideration of the definitions of “sexual contact” and “bodily harm,” and by the fact that appellant admitted to a touching both in his *Care*⁶ inquiry at the rehearing (“I closed the door behind us and at that point I led [PVT █████] to the desk and I sat her on top of the desk and at that point I placed myself in between her legs with my hips *touching* pretty much the furthest entry point of her thighs”), and in his stipulation of fact (“The Accused lifted up both of PTV █████ legs and stood in between them such that the Accused and PVT █████ bodies were chest to chest and *his groin was against hers.*”) (emphasis supplied).

Thus, because the specification at issue here alleged every required element either expressly or by implication, allowed the accused to defend himself, and protected him against double jeopardy, appellant’s claim fails on the merits. *Turner*, 79 M.J. at 408.

⁵ As Appendix 22 to the 2019 Manual for Courts-Martial explains, these elements apply to the specification here that was applicable under the 2012 Manual for Courts-Martial.

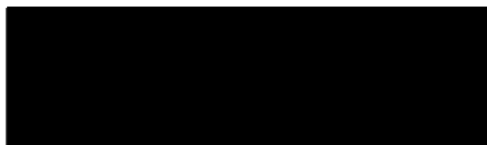
⁶ *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (C.M.A. 1969).

CONCLUSION

Upon consideration of the entire record, the findings of guilty and the sentence are AFFIRMED.⁷

Senior Judge ALDYKIEWICZ and Judge WALKER concur.

FOR THE COURT:



JOHN P. TAITT
Acting Clerk of Court

⁷ For clarity, Specifications 1, 2, 3, and 5 of Charge II, as well as Specifications 1, 3, 4, and 7 of Charge III were affirmed as part of this court's previous review of appellant's case. *See Sanchez III*, 2019 CCA LEXIS 164, at *7. Additionally, we affirm Specifications 7, 8, and 14 of Charge I as part of this review of appellant's case.