UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DONALD L. HOLLENBAUGH III
United States Air Force

ACM S31978

19 February 2013

Sentence adjudged 14 June 2011 by SPCM convened at Malmstrom Air Force Base, Montana. Military Judge: Christopher A. Santoro.

Approved sentence: Bad-conduct discharge, confinement for 12 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Ja Rai A. Williams.

Appellate Counsel for the United States: Colonel Don M. Christensen; Captain Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and CHERRY
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

On 13 June 2011, the appellant was tried by a special court-martial at Malmstrom Air Force Base, Montana. Consistent with his pleas, the appellant was convicted, by a military judge, of 22 specifications of making and uttering worthless checks by dishonorably failing to maintain sufficient funds, in violation of Article 134, UCMJ, 10 U.S.C. § 934. A panel of officer members sentenced the appellant to a bad-conduct discharge, confinement for 12 months, and reduction to E-1. The convening authority approved the sentence as adjudged. Before this Court, the appellant asserts that his sentence is inappropriately severe[1] and that the specifications fail to state an offense

[1] The appellant raises this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

because they do not to allege the terminal element of Article 134, UCMJ. Finding no error, we affirm.

Article 134, UCMJ, Terminal Element

The appellant was charged with making and uttering worthless checks by dishonorably failing to maintain sufficient funds, in violation of Article 134, UCMJ. None of the 22 specifications alleged the terminal element of Article 134, UCMJ.[2] The appellant pled guilty to all the specifications. At the beginning of the *Care*[3] inquiry, the military judge explained to the appellant that he was going to read and explain the elements of the offenses and the applicable definitions, and that the elements and definitions applied to each specification. The military judge told the appellant, "If you want me to repeat any of the elements, or repeat any of the definitions I am happy to do that. All you need to do is ask, okay?" The appellant replied that he understood. The military judge then set forth the elements and definitions, to include the terminal element of Article 134, UCMJ. The appellant acknowledged that he understood the elements and definitions and that those elements and definitions correctly described his conduct.

At the conclusion of the plea inquiry, the military judge again reviewed the elements of the offenses with the appellant. The appellant again acknowledged that he understood the elements and definitions and that those elements and definitions correctly described his conduct. The appellant further admitted that his conduct was prejudicial to good order and discipline and service discrediting, because he violated a military "code of honor." He explained that his conduct "made everyone no matter what rank they are look bad in the eyes of those who accepted the money, or accepted the checks." He agreed that civilians at local banks or at on-base institutions who saw his checks returned for insufficient funds would know they were written by a military member, which would be service discrediting conduct. The military judge accepted the appellant's guilty plea as provident and found him guilty of all 22 specifications.

Whether a charge and specification state an offense is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted). "A specification states an offense if it alleges, either expressly or by [necessary] implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *Id*. (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)); *see also* Rule for Courts-Martial 307(c)(3). In *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), our superior court invalidated a conviction of adultery under Article 134, UCMJ, because the military judge improperly denied a defense motion

[2] Under Article 134, UCMJ, 10 U.S.C. § 934, the Government must prove beyond a reasonable doubt that the accused engaged in certain conduct and that the conduct satisfied one of three criteria, often referred to as the "terminal element." Those criteria are that the accused's conduct was: (1) to the prejudice of good order and discipline, (2) of a nature to bring discredit upon the armed forces, or (3) a crime or offense not capital.
[3] *United States v. Care*, 40 M.J. 247 (C.M.A. 1969).

to dismiss the specification because it failed to allege the terminal element of either Clause 1 or 2. Although failure to allege the terminal element of an Article 134, UCMJ, offense is error, in the context of a guilty plea, the error is not prejudicial where the military judge correctly advises the appellant of all the elements and the plea inquiry "shows that the appellant understood 'to what offense and under what legal theory [he was] pleading guilty.'" *United States v. Ballan*, 71 M.J. 28, 34 (C.A.A.F. 2012) (quoting *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008)), *cert. denied* 133 S. Ct. 43 (2012) (mem.).[4] *See also United States v. Nealy*, 71 M.J. 73, 77 (C.A.A.F. 2012); *United States v. Watson*, 71 M.J. 54, 58-59 (C.A.A.F. 2012).

Here, the appellant pled guilty to the Charge and its Specifications of making and uttering worthless checks by dishonorably failing to maintain sufficient funds, in violation of Article 134, UCMJ. The military judge described and defined the Clause 1 and 2 terminal elements during the plea inquiry and asked the appellant whether he believed his conduct was either prejudicial to good order and discipline or service discrediting. The appellant acknowledged understanding all the elements, and explained to the military judge why he believed his conduct was both prejudicial to good order and discipline and service discrediting. Thus, "while the failure to allege the terminal elements in the specification[s] was error, under the facts of this case the error was insufficient to show prejudice to a substantial right." *Watson*, 71 M.J. at 59 (citing *Ballan*, 71 M.J. at 36); *see also Nealy*, 71 M.J. at 77.

Sentence Severity

The appellant next argues that his sentence is inappropriately severe. He asserts he should not have received a bad-conduct discharge *and* 12 months of confinement for his offenses. This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record

[4] In *United States v. Ballan*, 71 M.J. 28, 30 (C.A.A.F. 2012), the Court held that:

> [W]hile it is error to fail to allege the terminal element of Article 134, UCMJ, [10 U.S.C. § 934] expressly or by necessary implication, in the context of a guilty plea, where the error is alleged for the first time on appeal, whether there is a remedy for the error will depend on whether the error has prejudiced the substantial rights of the accused.

See also Article 59, UCMJ, 10 U.S.C. § 859. The *Ballan* Court further held that, where the military judge describes Clauses 1 and 2 of Article 134, UCMJ, for each specification during the plea inquiry and where the record "conspicuously reflect[s] that the accused 'clearly understood the nature of the prohibited conduct,'" as a violation of Clause 1 or 2 of Article 134, UCMJ, there is no prejudice to a substantial right. *Ballan*, 71 M.J. at 35 (citing *United States v. Medina*, 66 M.J. 21, 28 (C.A.A.F. 2008)).

of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

We have given individualized consideration to this particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all other matters contained in the record of trial. The appellant was convicted and sentenced on 22 specifications of writing checks while maintaining insufficient funds. In some cases, he implicated fellow Airmen whom he asked to cash checks drawn on insufficient funds for him and whose wages were garnished because of the appellant's actions. In addition, evidence was admitted of the appellant's prior disciplinary history, which included numerous letters of reprimand; the establishment of an unfavorable information file; placement on a control roster; nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, and subsequent vacation action; and a referral enlisted performance report.[5] We find that the approved sentence was clearly within the discretion of the convening authority, was appropriate in this case, and was not inappropriately severe.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[5] The appellant received letters of reprimand for failing to pay debts; failing his physical fitness test twice; writing a check for $1100.00 with insufficient funds; failing to report for mandatory training; failing a room inspection in violation of a lawful order; and having an arrest warrant for unpaid fines. The appellant received nonjudicial punishment for giving a check drawn on insufficient funds for $200.00 to another individual. The nonjudicial punishment was vacated when the appellant provided three false official statements.