

**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Technical Sergeant MATTHEW D. JIMERSON  
United States Air Force**

**ACM 37979**

**21 March 2012**

Sentence adjudged 18 May 2011 by GCM convened at Kirtland Air Force Base, New Mexico. Military Judge: Martin T. Mitchell (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 94 days, and reduction to E-3.

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

Appellate Counsel for the United States: Colonel Don M. Christensen.

Before

ORR, ROAN, and HARNEY  
Appellate Military Judges

This opinion is subject to editorial correction before final release.

HARNEY, Judge:

On 18 May 2011, the appellant was tried by a general court-martial composed of a military judge sitting alone at Kirtland Air Force Base, New Mexico. Consistent with his pleas, the military judge convicted the appellant of two specifications of unlawfully making and uttering worthless checks by dishonorably failing to maintain sufficient funds, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 94 days, and reduction to E-3. The convening authority approved the findings and sentence as adjudged.<sup>1</sup> The appellant assigned no specific errors, and we find no error that materially prejudiced a substantial right of the appellant. We will address, however, the legality of the guilty findings of

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<sup>1</sup> The Pretrial Agreement (PTA) stated that the convening authority would not approve confinement in excess of 11 months.

unlawfully making and uttering worthless checks by dishonorably failing to maintain sufficient funds in light of our superior court's decision in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011).

Charge II and its specifications allege that the appellant unlawfully made and uttered worthless checks by dishonorably failing to maintain sufficient funds, in violation of Article 134, UCMJ. Although the specifications do not expressly allege the terminal element under either Clause 1 or 2,<sup>2</sup> we do not find this omission fatal to the charge in this case. In *Fosler*, the Court of Appeals for the Armed Forces (CAAF) invalidated a conviction of adultery under Article 134, UCMJ, because the military judge improperly denied a defense motion to dismiss the specification on the basis that it failed to expressly allege the terminal element of either Clause 1 or 2. *Fosler*, 70 M.J. at 233. While recognizing “the possibility that an element could be implied,” the Court stated that “in contested cases, when the charge and specification are first challenged at trial, we read the wording more narrowly and will only adopt interpretations that hew closely to the plain text.” *Id.* at 230. The Court implied that the result would have been different had the appellant not challenged the specification: “Because Appellant made an R.C.M. 907 motion at trial, we review the language of the charge and specification more narrowly than we might at later stages.” *Id.* at 232.

More recently, our superior court addressed the failure to allege the terminal element in an Article 134, UCMJ, specification where the appellant was convicted on the basis of his guilty pleas. *United States v. Watson*, No. 11-0523/NA (C.A.A.F. 20 March 2012); *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012). *Watson* relied on a key passage in the *Ballan* holding:

while it is error to fail to allege the terminal element of Article 134, UCMJ, 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.

*Watson*, slip op. at 11 (quoting *Ballan*, 71 M.J. at 30). CAAF further states 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. *Id.* (alterations in original) (quoting *Ballan*, 71 M.J. at 35).

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<sup>2</sup> 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.

Such is the case here. The appellant made no motion to dismiss the charge and specifications. He admitted in the stipulation of fact that his conduct was prejudicial to good order and discipline and service discrediting. He then entered into a pretrial agreement and pled guilty to the charge and specifications. The military judge described 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 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*, slip op. at 12 (citing *Ballan*, 71 M.J. at 36).

### *Conclusion*

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.<sup>3</sup> Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL



*Angela E. Dixon*

ANGELA E. DIXON, TSgt, USAF  
Deputy Clerk of the Court

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<sup>3</sup> The court-martial order (CMO) fails to include the pertinent details about each check identified on the Charge Sheet. Several of the specifications on the CMO reference an attached list, but no such list accompanies the CMO in the record. We order the promulgation of a new CMO, in which the check details alleged in the Charge Sheet specifications are contained within the language of the respective CMO specifications, not by reference to an attached/external document.