

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Technical Sergeant JASON W. TERWILLIGER
United States Air Force**

ACM S31840

08 November 2011

Sentence adjudged 9 June 2010 by SPCM convened at Sheppard Air Force Base, Texas. Military Judge: Amy M. Bechtold.

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; and Captain Nathan A. White.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

GREGORY, Senior Judge:

A special court-martial composed of officer members convicted the appellant in accordance with his pleas of two specifications of violating a lawful general regulation by engaging in inappropriate relationships with Air Force applicants, in violation of Article 92, UCMJ, 10 U.S.C. § 892, and one specification of adultery, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The court sentenced the appellant to a bad-conduct discharge and reduction to E-1, and the convening authority approved the sentence adjudged. The appellant assigned no specific errors, and we find no error that materially prejudiced a substantial right of the appellant. However, we will address the legality of

the guilty findings of adultery in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011).

Charge II alleges adultery in violation of Article 134, UCMJ. Although the specification does not expressly allege the terminal element under clause one or two, we do not find this omission fatal to the charge in this case. In *Fosler*, the Court 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 one or two. 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 implies 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.

Where an accused does not challenge a defective specification at trial, enters pleas of guilty to it, and acknowledges an understanding of all the elements after the military judge correctly explains those elements, the specification is sufficient to charge the crime. *United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986). Such is the case here. The appellant made no motion to dismiss the charge, pled guilty, acknowledged understanding *all* the elements, and explained to the military judge why he believed his conduct was service discrediting. Under this posture of this case, we do not find the charged adultery under Article 134, UCMJ, deficient for failing to expressly allege the terminal element.

Conclusion

We conclude 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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

* The Court notes that the Court-Martial Order (CMO), dated 26 July 2010 incorrectly spells the appellant’s last name as TERWILLGER, whereas the correct spelling of the appellant’s last name is TERWILLIGER. The Court orders the promulgation of a corrected CMO.

Accordingly, the findings and the sentence are

AFFIRMED.

OFFICIAL



A handwritten signature in blue ink, appearing to read "S. Lucas", is written over a faint, light blue circular stamp or watermark.

STEVEN LUCAS
Clerk of the Court