

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
J.K. CARBERRY, L.T. BOOKER, G.G. GERDING
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**GARY L. GIBSON
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201000669
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 5 August 2010.

Military Judge: LtCol David M. Jones, USMC.

Convening Authority: Commanding General, 3d Marine Division
(-)(Rein), Okinawa, Japan.

Staff Judge Advocate's Recommendation: LtCol K.J. Estes,
USMC.

For Appellant: CDR R.D. Evans, Jr., JAGC, USN.

For Appellee: LT Kevin D. Shea, JAGC, USN.

30 August 2011

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of four specifications of violating a lawful general order, three specifications of wrongfully making, forging or counterfeiting a military pass, two specifications of wrongfully selling a false or unauthorized military pass, and one specification of wrongfully using a false or unauthorized military pass with the

specific intent to deceive, in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. The approved sentence included 180 days confinement, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant has submitted one assignment of error, claiming that Charge III and the six specifications to which he pled guilty fail to state offenses because they do not allege the terminal element of Article 134, UCMJ.

In *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), the court held that the terminal element in an Article 134 offense must be expressly alleged or necessarily implied by the language in the specification. The appellant in *Fosler* was charged with adultery. The court found that merely using the word "wrongfully" in the specification and listing it under Article 134 were insufficient to necessarily imply the terminal element where the specification was challenged at trial and the appellant pled not guilty. "A flawed specification first challenged after trial, however, is viewed with greater tolerance than one which was attacked before findings and sentence. . . . Although failure of a specification to state an offense is a fundamental defect which can be raised at any time, we choose to follow the rule of most federal courts of liberally construing specifications in favor of validity when they are challenged for the first time on appeal." *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986)(internal citation and footnotes omitted). "[W]e view standing to challenge a specification on appeal as considerably less where an accused knowingly and voluntarily pleads guilty to the offense." *Id.* at 210 (citation omitted).

We examine the challenged specifications to determine whether the terminal element was necessarily implied. In addition to being charged under Article 134, the specifications alleged that the appellant was a lance corporal, on active duty, on board Camp Courtney, Okinawa, Japan. Thus, the specifications necessarily implied that he was subject to military orders, to include the orders of the Commanding General Marine Corps Bases, Japan. The specifications further alleged that the appellant either wrongfully made, forged or counterfeited; wrongfully sold; or wrongfully used "an official military pass, to wit "gold liberty card" as defined by Chapter 2, Marine Corps Base Japan/III Marine Expeditionary Force Order 1050.7 with change 2 dated 15 June 2009." Charge Sheet.

The purpose of the Marine Corps Order, which is incorporated into the specification by reference, is to maintain

positive relations with the host nation of Japan by reducing the number of off-base liberty incidents. As to liberty cards, the order authorizes commanders to issue Gold liberty cards to military members whose demonstrated conduct comports with proper military decorum. The Gold liberty card authorized greater liberty privileges to deserving service members. Cardholders were authorized overnight liberty and were not required to have a liberty buddy. In light of the significance of a liberty pass in a foreign country, it is hard to imagine activities that are more inimical to good order and discipline, or that could cast the services in a negative light, than the sorts of forgeries, deceptive misuses, and sales that usurped the commander's prerogative to issue military passes to deserving service members and frustrated the goals of a lawful military order.

Moreover, the facts in *Fosler* stand in stark contrast to the facts of the appellant's case. First, in this instance the appellant entered into a pretrial agreement in which he agreed to plead guilty to six specifications charged under Article 134 for making, selling or using a false pass. Second, he entered into a stipulation of fact, Prosecution Exhibit 1, in which he admitted that his actions relative to the six specifications were prejudicial to good order and discipline and service discrediting. Third, in listing the elements for the six specifications under Charge III, the military judge included the terminal elements. Furthermore, the military judge defined the terms. Fourth, the appellant expressed his understanding of the elements of the offenses and the definition for the terminal elements. Fifth, the appellant completed the providence inquiry in which he admitted that his conduct was prejudicial to good order and discipline and service discrediting. See *Watkins*, 21 M.J. at 210 ("Where . . . the specification is not so defective that it 'cannot within reason be construed to charge a crime,' the accused does not challenge the specification at trial, pleads guilty, has a pretrial agreement, satisfactorily completes the providence inquiry, and has suffered no prejudice, the conviction will not be reversed on the basis of defects in the specification.")

In light of the specifications' language, the facts of this case, and the principle found in *Watkins*, we find the terminal element is necessarily implied and the six specifications state an offense. Should *Watkins* for some reason be overruled or severely limited, we note that the military judge, in informing the appellant of the elements, included the "prejudice" and "discredit" aspects of the two statutory elements of Article 134. The appellant did not object to what is arguably a major

change, see RULE FOR COURTS-MARTIAL 603(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), and thus waived the objection.

The findings and the sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court