

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

**Before
B.L. PAYTON-O'BRIEN, R.Q. WARD, J.R. MCFARLANE
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**CHRISTOPHER M. HARRIS
CHIEF WARRANT OFFICER 2 (W-2), U.S. MARINE CORPS**

**NMCCA 201000341
GENERAL COURT-MARTIAL**

Sentence Adjudged: 28 January 2010.

Military Judge: CAPT D. Jacques Smith, JAGC, USN.

Convening Authority: Commanding General, Training and Education Command, Quantico, VA.

Staff Judge Advocate's Recommendation: LtCol C.M. Greer, USMC.

For Appellant: LT Jared Hernandez, JAGC, USN.

For Appellee: LT Ian MacLean, JAGC, USN.

27 December 2012

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 general court-martial composed of members convicted the appellant, contrary to his pleas, of false official statement, conduct unbecoming an officer, and obstructing justice, in violation of Articles 107, 133, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 933, and 934. The members sentenced the appellant to dismissal from the naval service. The convening authority approved the sentence as adjudged.

Background

On 31 March 2011, we issued an opinion in this case affirming the findings and sentence. *United States v. Harris*, No. 201000341, 2011 CCA LEXIS 63, unpublished op. (N.M.Ct.Crim.App. 31 Mar 2011). On 23 September 2011, the Court of Appeals for the Armed Forces (CAAF) vacated our decision and returned the record of trial to The Judge Advocate General of the Navy for remand to this court for "consideration in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011)." On 19 January 2012, we issued our second opinion in this case, again affirming the findings and sentence. *United States v. Harris*, No. 201000341, unpublished op. (N.M.Ct.Crim.App. 31 Jan 2012) (per curiam). On 10 July 2012, the Court of Appeals for the Armed Forces (CAAF) reversed our decision as to the obstructing justice charge and the sentence, and returned the record of trial to The Judge Advocate General of the Navy for remand to this court for "consideration in light of *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012)." *United States v. Harris*, 71 M.J. 351 (C.A.A.F. 2012). Consequently, the appellant's case is again before this court for review, and the sole issue before us is whether the appellant suffered material prejudice to a substantial right due to the Government's failure to allege the terminal element for the Article 134 offense. A summary of the facts of the case is included in our 31 March 2011 opinion.

After reviewing the record of trial and the submissions of the parties, we conclude that the findings and sentence are correct in law and fact and there is no error materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Article 134 Terminal Element

The appellant's obstructing justice offense is charged under Article 134, UCMJ, and the specification thereunder fails to allege the terminal element of either conduct that is prejudicial to good order and discipline or service-discrediting. Pursuant to *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) and *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012), it was plain error for the Government to omit the terminal element from the specification. Nonetheless, in order to receive relief, the appellant has the burden to show that, "the Government's error in failing to plead the terminal element of Article 134, UCMJ, resulted in material prejudice to [appellant's] substantial, constitutional right to notice." *Humphries*, 71 M.J. at 215 (citations and footnote omitted). In

order to assess prejudice, this court must "look to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'" *Id.* at 215-16 (citations omitted).

A review of the record in this case indicates that the appellant was on notice of the terminal element well before his trial began, and therefore was not prejudiced by the Government's failure to set forth that element in the pleadings. The appellant filed a pretrial motion to dismiss an Article 133, UCMJ, conduct unbecoming an officer charge as being an unreasonable multiplication of charges with respect to the Article 134, UCMJ, obstructing justice charge. Record at 13-26; Appellate Exhibit II. In his pleading, the appellant stated that "Article 134 requires that a military accused . . . [d]id or failed to do certain acts [and that] under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces." AE II at 3. The appellant also echoed that language in his proposed findings of fact and conclusions of law. *Id.* at 7. These pleadings, filed by the appellant before trial, clearly show his knowledge and understanding of Article 134's terminal element. Additionally, the military judge set forth the terminal element for obstructing justice in the draft instructions that he provided to the appellant before trial.¹ AE XXII at 3. Given these facts, it is clear that the appellant was not prejudiced by the Government's failure to allege the terminal element in the pleadings, as he was well-aware of the element and the need to defend against it.

Conclusion

On consideration of the entire record and in light of *Humphries*, we hold that the findings and the sentence are

¹ The appellant was tried by members on Tuesday, 26 January and Wednesday, 27 January 2010. Record at 29, 347. When discussing the proposed findings instructions, the military judge noted he had provided the instructions to the parties on "Friday morning." Record at 211. We find that the military judge was referring to the previous Friday, 22 January 2010, as the date on which he provided both parties with his draft instructions.

correct in law and fact. Accordingly, the findings of guilty and the sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court