UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JAMES L. FREDERICK
United States Air Force

ACM S30454

25 August 2005

Sentence adjudged 1 August 2003 by SPCM convened at Kunsan Air Base, Republic of Korea. Military Judge: Dawn R. Eflein (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 35 days, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Lieutenant Colonel Robin S. Wink, Major Terry L. McElyea, and Major Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Captain Stacey J. Vetter.

Before

MOODY, SMITH, and PETROW
Appellate Military Judges

OPINION OF THE COURT

PETROW, Judge:

The appellant was charged with six specifications of violating Article 123a, UCMJ, 10 U.S.C. § 923a, by uttering 60 checks over a six-month period for which there were insufficient funds in his account at the time of presentment with the intent to defraud. He entered a plea of guilty to the first specification as charged, but as to the remaining five specifications he pleaded guilty only to the lesser-included offense of making/uttering a worthless check by dishonorably failing to maintain funds in violation of Article 134, UCMJ, 10 U.S.C. § 934. Pursuant to the terms of a pretrial agreement, the

trial counsel did not offer evidence to support the greater offense under Article 123a, UCMJ, as to those five specifications. The appellant asserts that the facts elicited during the appellant's *Care*[1] inquiry and recited in the stipulation of fact were inconsistent with a plea of guilty to the Article 123a, UCMJ, offense contained in Specification 1 of the Charge, and that the plea was, therefore, improvident. We agree.

Background

The appellant was engaged in a check-kiting scheme consisting of cashing mostly $200 checks at the Loring Club, a combined officer/enlisted club at Kunsan Air Base, Korea, then depositing those funds into his USA Federal Credit Union account to cover previously written checks. Unfortunately, such a scheme requires exquisite timing, a talent which the appellant quite clearly lacked.

This case raises the classic dilemma of discerning whether passing bad paper constitutes nonfeasance (Article 134, UCMJ) or malfeasance (Article 123a, UCMJ). Regrettably, the military judge's *Care* inquiry failed to shed sufficient light to enable us to pierce the shadows separating the two offenses. While the appellant was, arguably, able to recite the legal conclusions necessary to minimally support a finding of guilty to an Article 123a, UCMJ, offense, the totality of the circumstances in this case tends to undermine the basis for that finding.

The anchor with which the government secures its Article 123a, UCMJ, charge is best reflected early on in the *Care* inquiry between the military judge and the appellant:

> MJ: At this time, I want you to tell me why you're guilty of the offense listed in Specification 1 of the Charge. Tell me what happened.
>
> ACC: Ma'am. I am guilty of Specification 1 because I wrote checks knowing that I had no funds in there to cover them unless I wrote other checks and received money in order to cover the first set of checks in there. That is why I believe I am guilty of the specification.

However, as the *Care* inquiry continued the following excerpt concerning Specification 1 leaves one with the sense that the government's anchor was set in rocky ground and slipping fast:

> MJ: At the time you did this [uttered the checks], you knew that you, as the maker of the checks, did not or would not have sufficient funds in your USA Federal Credit Union for payment in full at the time that it was presented?

[1] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

ACC: That's correct, ma'am.

MJ: How did you know?

ACC: Because of the certain dates on the checks. I would reflect back to my account balance at the time and I wouldn't have any money in there. So, I only relied on me writing another check in the future and depositing that money in order to try to clear the check out.

MJ: Okay. Were you maintaining a ledger of your account at the time you wrote these checks?

ACC: Yes, ma'am, but it wasn't very accurate at all.

MJ: So how was it at all you were keeping track of your balance?

ACC: Uh, I had a ledger – that I did keep track of my balances. But at times, my ledger might not have been correct, so I thought I might have been keeping track when at certain times, it wasn't correct at all, ma'am.

MJ: Okay. But with respect to these 17 checks, each time you wrote one, you didn't — you knew at that time when you wrote it and presented it, that you did not have money in there ----

ACC: Right. That's correct, ma'am.

As clearly illustrated above, the appellant could reiterate the primary elements of the Article 123a, UCMJ, offense when he heard them recited by the military judge. Unfortunately, when it came to the actual facts necessary to support the conclusion, he stumbled fatally. If one is clueless as to how much he has in his account, how can one assert that he knew with any degree of certainty that there were insufficient funds available?

Both the *Care* inquiry and stipulation of fact provided the amount of monthly pay and allowances that were being deposited into the appellant's USA Federal Credit Union account for the six-month period during which the checks covered in all specifications were uttered. The total deposited in the appellant's account during that six-month period, amounted to $17,510. During the same period, he wrote a total of $11,195 in bad checks, with much of the funds being obtained from those checks also being deposited into his account in support of the check-kiting scheme. In addition, the appellant testified and stipulated to the fact that he also deposited an unspecified amount of proceeds from his e-Bay sales during this period.

Had the total of the bad checks significantly exceeded the amount being deposited into the account, there may have been circumstantial evidence to conclude that the appellant was uttering the checks *knowing* there would be insufficient funds in his account upon presentment. In the alternative, calculating the amount of funds withdrawn from the account during the period in issue, we could reach that same conclusion. However, the government did not introduce the appellant's account statements into evidence. The following refreshingly candid colloquy between the military judge and the appellant leaves us equally unconvinced:

> MJ: Very well. During that charged time period . . . did you receive regular notices of deposits to your account and statements from the bank indicating your transactions?
>
> ACC: Yes, ma'am.
>
> MJ: Did you rely on them?
>
> ACC: At times but not really, ma'am.

The stipulation of fact states that the appellant "received notice" of each bounced check through the assessment of a $25 fee. What is unclear is the proximity in time from when a check was uttered and when the appellant received actual notice of the $25 fee. If this was done through his monthly statement, based on the colloquy above the impact of such notice on the issue of intent would be questionable.

Also according to the stipulation, a check generating the $25 fee would clear upon second presentment. "Typically, a draft would bounce once, the [appellant] would be assessed the fee, and the draft would clear on the second time presented. It was not until a draft bounced two times that he received a letter notifying him of his dishonored drafts." The first such letter was not sent to the appellant until 15 January 2003, and was related to checks 203,[2] 207,[3] and 208.[4] Accordingly, no written notice of dishonorment was apparently sent to the appellant for check numbers 129, 135, 136, 137, 150, 151, 152, and 175.[5]

Analysis

If an accused, after entering a guilty plea, sets up matter inconsistent with the plea the court shall proceed as though he had pleaded not guilty. Article 45(a), UCMJ, 10

[2] This check was included in Specification 1.
[3] This check was included in Specification 2.
[4] This check was included in Specification 3.
[5] All of these checks were included in Specification 1.

U.S.C. § 845(a). On appeal, we review the military judge's acceptance of the plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). A providence inquiry into a guilty plea must establish "not only that the accused himself believes he is guilty but also that the factual circumstances as revealed by the accused himself objectively support that plea." *United States v. Higgins*, 40 M.J. 67, 68 (C.M.A. 1994) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). *See also United States v. Rothenberg*, 53 M.J. 661, 662 (A.F. Ct. Crim. App. 2000). Mere conclusions of law recited by an accused are insufficient to provide a factual basis for a guilty plea. *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996) (citing *United States v. Terry*, 45 C.M.R. 216 (C.M.A. 1972)).

The facts adduced at trial establish that the deposits to the appellant's account during the relevant six-month period during which the bad checks were uttered exceeded the total amount of the bad checks by an amount in excess of $6000. The testimony of the accused during the *Care* inquiry clearly indicated that the appellant's bookkeeping regimen was irregular at best. Furthermore, the appellant never received a written notice of dishonorment for check numbers 129, 135, 136, 137, 150, 151, 152, and 175. The absence of evidence in the form of bank account records makes it impossible to determine the status of the appellant's account at the time the checks listed in Specification 1 were uttered.

Finally, an offense under Article 123a, UCMJ, would lie only as to checks which the appellant, at the time he utters the check, knew there would be insufficient funds in his account "upon its presentment." The term "upon its presentment" refers to "the time the demand for payment is made upon presentation of the instrument to the bank or other depository on which it was drawn." *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 49c(13) (2002 ed.). As indicated in both the stipulation of fact and the appellant's testimony during the *Care* inquiry, the appellant had engaged in a check-kiting scheme, entailing the cashing of checks and depositing of the received funds into his bank account for the purpose of ensuring that there were adequate funds in his account to cover his checks "upon presentment" – with each check uttered to be covered by the issuance of a subsequent check. Accordingly, his declared *intent* at the time he uttered the checks, within the comprehensive context of the check-kiting scheme, was to *avoid* the very evil which would bring about an offense under Article 123a, UCMJ, that is, insufficient funds at the time of presentment. It was the appellant's inability to effectively manage his check-kiting scheme that led to the frustration of his intent. It might be reasonable to assume that not all 60 of the bad checks were uttered in furtherance of the check-kiting scheme, but the available evidence is insufficient to allow a determination to be made as to which checks were, and which were not.

We find that there existed a substantial conflict between the appellant's guilty plea to an offense under Article 123a, UCMJ, and the evidence adduced at trial, and that the military judge abused her discretion in accepting the plea of guilty to Specification 1 of

the Charge. Specification 1 of the Charge is, therefore, dismissed. Since the military judge did not discuss with the accused the elements of clauses 1 or 2 of Article 134, UCMJ, with regard to Specification 1 during the *Care* inquiry, we cannot affirm a finding of guilty to the lesser-included offense.

Sentence Reassessment

As a result of modifying the findings, we must reassess the sentence. In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior court provided guidelines for such a reassessment:

> In *United States v. Sales*, 22 MJ 305 (CMA 1986), this Court set out the rules for sentence reassessment by a Court of Criminal Appeals. If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *Id.* at 307. A sentence of that magnitude or less "will be free of the prejudicial effects of error." *Id.* at 308. If the error at trial was of constitutional magnitude, then the court must be satisfied beyond a reasonable doubt that its reassessment cured the error. *Id.* at 307. If the court "cannot reliably determine what sentence would have been imposed at the trial level if the error had not occurred," then a sentence rehearing is required. *Id.*

All six original specifications were charged under Article 123a, UCMJ. The vast majority of the 60 bad checks were charged under Specification 1 (17 checks) and Specification 2 (35 checks). These specifications also represented the majority of the total dollar amount of the bad checks issued.[6] In both specifications, the bad checks were uttered to the Loring Club. The primary disparity between the two specifications arose from the findings of the military judge in accordance with the appellant's pleas of guilty, a finding of guilty to Specification 1 under Article 123a, UCMJ, and a finding of guilty to Specification 2 under Article 134, UCMJ. In the instant case, since tried before a special court-martial, the maximum punishment included, inter alia, a bad-conduct discharge and confinement for one year. *See* Article 19, UCMJ, 10 U.S.C. § 819.

We have considered the facts and circumstances surrounding the offenses plead to under Article 134, UCMJ, as well as all other matters properly before the sentencing authority. We have paid particular attention to the amounts of money involved in these offenses and the circumstances which reflect on their dishonorable nature. We conclude that, even without the sole Article 123a, UCMJ, offense, the sentencing authority would have adjudged a sentence no less than the one which it originally imposed, a bad-conduct discharge, confinement for 35 days, and reduction to E-1.

[6] $3400 in Specification 1 and $6680 in Specification 2, out of a total of $11,195.

Conclusion

The approved findings, as modified, and the sentence, as reassessed, 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). Accordingly, the approved findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court