UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class SHAWN P. HOLT
United States Air Force

ACM 34145 (f rev)

26 August 2003

Sentence adjudged 31 March 2000 by GCM convened at Minot Air Force Base, North Dakota. Military Judge: Kurt D. Schuman.

Approved sentence: Bad-conduct discharge, confinement for 1 year, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Jefferson B. Brown, and Captain James M. Winner.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Jennifer R. Rider.

Before

BRESLIN, STONE, and MOODY
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

BRESLIN, Senior Judge:

The government charged the appellant with 62 specifications alleging that he wrongfully uttered certain worthless checks with the intent to defraud, in violation of Article 123a, UCMJ, 10 U.S.C. § 923a. The appellant pled guilty, by exceptions and substitutions, to dishonorably failing to maintain sufficient funds, in violation of Article 134, UCMJ, 10 U.S.C. § 934, for 58 of the specifications.[1] The military judge accepted

[1] Three specifications were withdrawn before arraignment. Also, the appellant pled not guilty to Specification 57. Upon learning that the prosecution did not intend to present evidence to prove the offense, the military judge entered a finding of not guilty.

the appellant's pleas. A general court-martial comprised of officers sentenced the appellant to a bad-conduct discharge, confinement for 1 year, total forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence adjudged.

During this Court's initial review of the case, the appellant claimed the military judge erred in admitting certain evidence during sentencing and by giving an instruction on the appellant's averments in his unsworn statement. This Court affirmed the findings and sentence in an unpublished opinion. *United States v. Holt*, ACM 34145 (A.F. Ct. Crim. App. 15 Apr 2002). The Court of Appeals for the Armed Forces set aside that decision and remanded the case for further review. *United States v. Holt*, 58 M.J. 227, 233 (2003). On remand to this Court, the appellant declined to submit a brief alleging error.

The appellant was assigned to the 5th Security Forces Squadron at Minot Air Force Base, North Dakota. Supervisors at the squadron began receiving notices of dishonored checks written by the appellant, and counseled the appellant repeatedly on his financial obligations. They also referred the appellant for counseling on managing his checkbook. Nonetheless, the dishonored check notices continued to arrive, and squadron authorities allerted criminal investigators. Interviewed under advisement of rights, the appellant confessed to writing numerous worthless checks, including checks written on closed accounts. The appellant consented to a search of his automobile, which yielded incriminating documents. Finally, the investigators obtained a warrant to search the appellant's residence off-base, and recovered more documents related to the appellant's worthless checks, including receipts for items purchased by check and collection notices.

As indicated above, the appellant pled guilty to the lesser included offense of dishonorably failing to maintain funds in his account to pay the checks upon presentment. He admitted to the military judge that he first opened an account at Norwest Bank with a worthless check in the amount of $75.00, and made no further deposits to the account. Thereafter he wrote and uttered 34 worthless checks totaling $1,020.84 against the empty account. Finally, Norwest Bank closed the account.

Shortly thereafter, the appellant opened another account at Town and Country Credit Union with a deposit of $100.00 and his military pay for one-half of the month. He quickly exhausted those funds but continued to write drafts on the account–in all, six worthless drafts totaling $250.24.[2] The credit union soon closed that account.

The appellant then opened a new account at Gate City Federal Savings Bank. His initial deposit was soon spent but he continued to write worthless checks knowing he did

[2] For convenience, we will refer to these instruments generally as "checks."

not have the funds to cover them upon presentment. He wrote 39 worthless checks against his Gate City Federal Savings Bank account in the total amount of $4,400.00.

In sentencing, the prosecution offered a written stipulation of fact (Prosecution Exhibit 1) setting forth the facts and circumstances surrounding the offenses. Additionally, the prosecution offered another stipulation of fact (Prosecution Exhibit 14), setting forth the circumstances of the search of the appellant's off-base residence and his vehicle. The parties stipulated that Prosecution Exhibits 16 through 28, inclusive, were seized from the appellant's residence, and Prosecution Exhibits 29 through 36 were found in the appellant's vehicle.

The prosecution also offered Prosecution Exhibits 16 through 34 as evidence in aggravation during the sentencing proceedings. Prosecution Exhibit 16 is a letter from a cartoonist, Mr. Richardson, complaining about a worthless check that the appellant had written to him. Prosecution Exhibits 17 through 32 and 34 are copies of checks returned unpaid, bearing markings such as "NSF" (non-sufficient funds) or "Account Closed," and various notices of dishonored checks. Prosecution Exhibit 33 is a pawn ticket for a compact disc player; the parties stipulated that the appellant pawned the stereo, which was purchased with a worthless check included in Specification 58 of the Charge.

The appellant objected to the admission of Prosecution Exhibits 16-19, 21, 24, 26, 29-32, and 34, arguing that the documents were hearsay, they were not properly authenticated, some were unrelated to the charges, and they were inadmissible in sentencing under Rule for Courts-Martial (R.C.M.) 1001. The prosecution argued that the documents were not hearsay because they were not offered to prove the truth of the matters therein, and that they were proper matters for consideration in aggravation because they revealed all the circumstances of the case, particularly the appellant's mental state during the period in question.

The military judge overruled the defense objections and admitted the documents. The military judge found that the documents were not hearsay because they were not offered for the truth of the matters asserted, and that they were admissible as evidence in aggravation because, "they're offered to provide the full picture–all of the facts and circumstances of this case." The military judge indicated that he had also conducted the balancing test required by Mil. R. Evid. 403.

The military judge instructed the members that they could consider Prosecution Exhibits 16 through 34 only for a limited purpose:

> These documents have been admitted for the purpose of showing you the complete set of circumstances surrounding the commission of the offenses, the state-of-mind of the accused at the time he commit [sic] the offenses,

and the impact of the offenses on the victim. You may not consider the documents as proof of the matters asserted therein.

We review the decision of the military judge to admit evidence for an abuse of discretion. *United States v. Becker*, 46 M.J. 141, 143 (1997). The military judge admitted the evidence for essentially two purposes: to show the circumstances of the crime (i.e., the appellant's knowledge and intent) and victim impact. For convenience, we will analyze these in turn.

The evidence was admissible in aggravation under R.C.M. 1001(b)(4) to show the circumstances of the crimes. The government is entitled to present evidence of the circumstances surrounding the commission of the offenses or their repercussions. *United States v. Gogas*, 58 M.J. 96, 98 (2003); *United States v. Vickers*, 13 M.J. 403, 406 (C.M.A. 1982). Specifically, the fact that the appellant had these documents in his possession demonstrated the appellant's knowledge that his accounts were closed and that others were demanding payment. This reflects on his knowledge and intent when he continued to write worthless checks on closed accounts and is relevant to the dishonorable nature of his failure to maintain sufficient funds. *Gogas*, 58 M.J. at 99. The evidence sheds light on the appellant's culpability and is highly relevant in aggravation of the crimes. Admitting the evidence in question for this purpose was consistent with R.C.M. 1001(b)(4).

Mil. R. Evid. 801(c) defines "hearsay" as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." Here, the trial counsel stated, in part, that he did not offer the documents for the truth of the matters contained therein but rather to show the appellant's mental state (i.e. knowledge and intent). The military judge admitted the documents as non-hearsay for this purpose and instructed the court members about the limited use for which the documents could be considered. To the extent that the documents were admitted for this limited purpose, they were not hearsay.

Because the evidence was admitted to show the appellant's state of mind (i.e., knowledge and intent), the documentary evidence in question did not require the same formal authentication as commercial paper offered as substantive evidence of guilt. Rather, the copies of the refused checks and the notices or dishonor found in the possession of the appellant were admissible as "real" evidence, i.e. "tangible evidence which has an historical connection to the case." Stephen A. Saltzburg, et al., *Military Rules of Evidence Manual* 1065 (4th ed. 1997). The parties stipulated to the fact that the documents were discovered in the appellant's home and vehicle. This provided a sufficient evidentiary foundation to admit the evidence for this limited purpose. Mil. R. Evid. 901(a).

The military judge also admitted the challenged evidence to show victim impact. Generally, evidence of "financial . . . impact on or cost to any person or entity who was

the victim of an offense committed by the accused" is admissible in sentencing under R.C.M. 1001(b)(4). However, in order for the evidence to be probative of victim impact, it would have to be considered for the truth of the matter contained in the documents. For example, we examine Prosecution Exhibit 16, the letter from Mr. Richardson complaining about the worthless check given in exchange for goods and services. As discussed above, the fact that the appellant possessed the letter shows that the appellant was aware of the status of his account when he wrote additional worthless checks, regardless of whether it was true. To that extent, the content of the letter is not offered for the truth of the matters asserted, therefore it is not hearsay. However, the letter is only probative of victim impact if the facts asserted therein are true, therefore it would be hearsay for this purpose. Thus, we conclude it was error to admit Prosecution Exhibit 16, as well as the remaining contested documents, for this purpose. We also find that the error was harmless. The appellant stipulated in detail about the numerous worthless checks he uttered, and that most remained unpaid. Thus, the victim impact evidence in question merely repeated facts already before the members. Any error in admitting this evidence to show victim impact did not materially prejudice the appellant's substantial rights. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

We conclude that the military judge properly admitted the challenged evidence in sentencing to show the circumstances surrounding the commission of the crimes. It was error to admit the evidence to show victim impact, but the error was harmless under all the circumstances. The allegations of error previously raised by the appellant are without merit.

The 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 (2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court