UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JOHNNA L. IRBY
United States Air Force

ACM 35424

30 December 2004

Sentence adjudged 18 October 2002 by GCM convened at Dover Air Force Base, Delaware. Military Judge: Mary M. Boone (sitting alone).

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

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Andrew S. Williams, Major Maria A. Fried, and Major Kyle R. Jacobson.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Kevin P. Stiens.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

ORR, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to her pleas, of four specifications of wrongfully attempting to obtain credit services under false pretenses, and one specification each of larceny and wrongfully obtaining credit services under false pretenses, in violation of Articles 80, 121, and 134, UCMJ, 10 U.S.C. §§ 880, 921, 934. The military judge sentenced her to a bad-conduct discharge, confinement for 1 year, and reduction to E-1. The convening authority approved the findings and the sentence as adjudged.

The case is before this Court for review under Article 66, UCMJ, 10 U.S.C. § 866. On appeal, the appellant alleges three errors for our consideration. She requests that we set aside the finding of guilty to the greater offense of larceny under Charge II and substitute a finding of guilty to the lesser included offense of wrongful appropriation. Additionally, the appellant requests that we set aside the finding of guilty to wrongfully obtaining credit services under false pretenses (Specification 2 of Charge III) because it is multiplicious with the larceny charge. Further, she avers that the military judge used an incorrect maximum punishment when determining the sentence. She asks this Court to reassess the sentence to include no more than 6 months' confinement. We affirm the findings of Charges I and III and their specifications. We also affirm the findings of guilty to Charge II, and modify its Specification to reflect our determination that the appellant providently pled guilty only to the lesser included offense of wrongful appropriation. Given our holding, we have reassessed the sentence.

Background

The appellant, a loadmaster on a C-5 aircraft, found herself deep in debt and went to her bank in an effort to get a loan. When the bank refused to give her a loan, she returned to her office to complete some paperwork. As she was sitting at her work computer, she came across an advertisement from Capital One Credit Card Company (Capital One) that permitted her to apply for a credit card online. The advertisement promised to give her a decision on whether she could have a credit card in 30 seconds. She initially used her own personal information on the credit application and her request was promptly denied. She then began using her name on the credit application, but mixing up the numbers of her own social security number. Coincidentally, she used the social security number of Ms. ML, a civilian she had never met. The appellant submitted the credit application with Ms. ML's social security number and it was also disapproved.

The appellant then filled out other credit applications using fictitious names and personal information of three of the members of her C-5 crew. As the loadmaster, she had access to the crew's flight records that contained their social security numbers. After the appellant submitted several credit applications, Capital One approved a credit application using Senior Master Sergeant BQ's personal information. Capital One subsequently notified the appellant that they would be sending a credit card to the appellant's home address. The appellant received a credit card from Capital One in the mail, activated the card, and charged a total of $4,984 on the credit card for merchandise and financial transfers to pay off her other credit card debt. The appellant now asserts that her plea of guilty to larceny was improvident because she intended to repay Capital One their money under the terms of the credit agreement.

Providency of the Plea of Guilty to Larceny

We must determine whether the appellant's guilty plea to larceny was provident. The test is whether there is a "'substantial basis' in law and fact for questioning the guilty plea." *United States v. Milton*, 46 M.J. 317, 318 (C.A.A.F. 1997) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). If "the factual circumstances as revealed by the accused himself objectively support that plea," the factual predicate is established. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374 (C.A.A.F. 1996).

During the providence inquiry, the appellant admitted to deceiving Capital One and owing them $4,984. In response, the military judge stated:

> MJ: And you've gone through the value, and you've already told me about the value. Now, the fourth element, though, is that the taking by you was with the intent to defraud Capital One Credit Card Company of the use and benefit of this property, the money, or permanently to appropriate the property to your own use or the use of someone other than you. So you agree, your intent was to defraud Capital One Credit Card Company?
>
> ACC: Not at first, Your Honor.
>
> MJ: Well, you may have wanted to pay them back, but your intent was to defraud them, wasn't it?
>
> ACC: Yes, Your Honor.
>
> MJ: Okay. You did want to appropriate this property permanently to your own use, right?
>
> ACC: Yes, Your Honor.
>
> MJ: But you're telling me, at some point, you wanted to pay it back, but you did not pay them back.
>
> ACC: Yes, Your Honor.
>
> MJ: Okay. But you agree your intent was to defraud them of the use and benefit of this money or property.
>
> ACC: Yes, Your Honor.

> MJ: And again, your intent was permanently to appropriate this property, the goods that you received from these credit card purchases, to your own use or the use of someone other than them.
>
> ACC: Yes, Your Honor.

Based on the colloquy above, we find a substantial basis to question the appellant's guilty plea. In order to find the appellant guilty of the larceny charged in the Specification of Charge II, the military judge must find that the appellant intended to permanently deprive Capital One of their money. The appellant clearly stated that she had intended to keep the merchandise she obtained using the credit card. However, she consistently insisted that she intended to pay Capital One their money back. Specifically, she told the military judge, "I did have an intention to pay [the credit card] off, but due to circumstances beyond my control, I did not."

While the intent to repay is normally not a defense to larceny, the appellant was charged with stealing money. "If, however, the accused takes money or a negotiable instrument having no special value above its face value, with the intent to return an equivalent amount of money, the offense of larceny is not committed although wrongful appropriation may be." *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 46(c)(1)(f)(iii)(B) (2002 ed.). Even though we do not find the appellant's stated intent to repay Capital One credible, she made the statement during the course of her providence inquiry, thus setting up a possible defense to larceny.

This Court will not overturn a guilty plea based on the mere possibility of a defense. *Prater*, 32 M.J. at 436. However, in the instant case, the appellant stated a possible defense during her providence inquiry that was inconsistent with her plea. In *United States v. Bullman*, 56 M.J. 377, 381 (C.A.A.F. 2002), our superior court stated:

> On appeal, a guilty plea should be overturned only if the record fails to objectively support the plea or there is "evidence in 'substantial conflict' with the pleas of guilty." *See United States v. Higgins*, 40 MJ 67, 68 (CMA 1994). In deciding whether a plea is rendered improvident by statements inconsistent with the plea, the sole question is whether the statement was inconsistent, not whether it was credible or plausible. *United States v. Lee*, 16 MJ 278, 281 (CMA 1983).

Based on the providence inquiry, we have no question as to whether the appellant intended to keep the merchandise permanently. We are also convinced that the appellant wrongfully obtained the money from Capital One. However, her stated intent to repay Capital One during the providence inquiry is inconsistent with her plea of guilty to larceny of that money. The proper course of action would have been for the military

judge to ensure that the appellant understood the meaning and effect of her inconsistent statement, or proceed as if the appellant pleaded not guilty. *See* Article 45(a), UCMJ, 10 U.S.C. § 845(a). We find that the military judge erred by failing to resolve the differences between the appellant's inconsistent statement and her guilty plea. As a result, we cannot view the appellant's plea to larceny as provident. Accordingly, we find that the appellant's plea was provident, but only as to the lesser included offense of wrongful appropriation.

Multiplicity

The appellant asserts that the Specification of Charge II is multiplicious with Specification 2 of Charge III, because they are factually intertwined. In essence, the appellant avers that her actions to obtain credit were nothing more than the method she used to commit the larceny offense alleged in Charge II. Additionally, she asserts that the specifications are multiplicious because the military judge determined that the value of the merchandise and financial transfers charged in the larceny specification and the amount of available credit she wrongfully obtained were the same. Even though the appellant acknowledges that the Specification of Charge II alleges larceny, under Article 121, UCMJ, and Specification 2 of Charge III alleges obtaining credit card services under false pretenses, under Article 134, UCMJ, she believes that they were essentially the same offense. Therefore, the appellant argues that the military judge improperly punished her twice for the same offense.

We review questions of multiplicity de novo. *United States v. Palagar*, 56 M.J. 294, 296 (C.A.A.F. 2002). "Offenses are multiplicious if one is a lesser-included offense of the other." *Id*. *See also United States v. Cherukuri*, 53 M.J. 68, 72 (C.A.A.F. 2000). Because the appellant failed to raise this issue at trial, we review for plain error. *United States v. Powell*, 49 M.J. 460, 642. "There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction . . . and punishing also the completed transaction." *United States v. Britton*, 47 M.J. 195, 197 (C.A.A.F. 1997) (quoting *Albrecht v. United States*, 273 U.S. 1, 11 (1927)).

We conclude that Congress intended to permit separate punishment for the appellant's actions because the offenses have different elements of proof. *See United States v. Teters*, 37 M.J. 370 (C.M.A. 1993). We also conclude that obtaining credit services under false pretenses is not a lesser included offense of larceny or wrongful appropriation. The appellant's actions to obtain credit were punishable, even if she had never obtained any money from Capital One. As a result, even though the appellant wrongfully obtained credit in order to commit the larceny, the offenses are not multiplicious.

Because we do not find the two specifications multiplicious, we need not discuss the appellant's remaining assertion that the military judge used the incorrect maximum sentence to determine the appellant's sentence. However, based upon our determination that the appellant's plea of guilty was improvident as to larceny, we must take into account that wrongful appropriation has a lesser maximum punishment than larceny. *See MCM*, Part IV, ¶¶ 46(e)(1)(d), 46(e)(2)(b).

Having set aside a portion of the findings, we must either return the case for a rehearing or reassess the sentence. In *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986), our superior court held that we may reassess the sentence if we can reliably determine the sentence absent the error. Given the circumstances of this case, we are confident that we can determine the appropriate sentence without conducting a rehearing. Because we are not sending the case back for a rehearing, we except the word "steal" from the Specification of Charge II and substitute the words "wrongfully appropriate." Reassessing the sentence on the basis of the error noted, the entire record, and applying the principles set forth in *Sales*, this Court is convinced beyond a reasonable doubt that the military judge would have imposed no less than a bad-conduct discharge, confinement for 10 months, and reduction to the grade of E-1. *United States v. Doss*, 57 M.J. 182 (C.A.A.F. 2002).

The approved findings, as modified, and 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 sentence, as reassessed, are

AFFIRMED.

OFFICIAL

LAQUITTA J. SMITH
Documents Examiner