UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DONTAINE A. SWANN
United States Air Force

ACM 36260

15 December 2006

Sentence adjudged 2 February 2005 by GCM convened at Buckley Air Force Base, Colorado. Military Judge: Kurt D. Schuman (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 19 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, and Lieutenant Colonel Robert V. Combs.

Before

BROWN, FRANCIS, and SOYBEL
Appellate Military Judges

FRANCIS, Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of one specification of larceny and one specification of dishonorable failure to pay a just debt, in violation of Articles 121 and 134, UCMJ, 10 U.S.C. §§ 921, 934. Consistent with his pleas, the appellant was also convicted of one specification of making a false official statement, in violation of Article 107, UCMJ, 10 U.S.C. § 907. The adjudged and approved sentence consisted of a dishonorable discharge, 19 months confinement and reduction to E-1.

The appellant raises two allegations of error. He asserts: 1) the evidence is legally and factually insufficient to support his conviction for dishonorable failure to pay a just debt; and 2) his sentence is inappropriately severe. Finding no error, we affirm.

Background

In April 2004, the appellant asked Airman First Class (A1C) R if she would co-sign a loan with him for the purchase of a new motorcycle. She agreed, and on 1 May 2004, they proceeded to a local motorcycle dealership, where the appellant picked out the one he wanted. During the process of filling out the paperwork with the dealership to buy the motorcycle, the appellant left to go back to work, failing to sign the purchase agreement. As a result, when she left the dealership, A1C R was listed on the transaction document as the sole owner of a motorcycle she did not want, but had only purchased for the appellant, at his request, with the understanding he would be fully responsible for all costs. Nonetheless, the appellant took possession of the motorcycle shortly thereafter and began riding it, putting 1076 miles on the machine. In addition, the appellant during this time reimbursed A1C R for the cost of the down payment, $155.18, and picked up the cost of two installment payments owed to the dealership on the motorcycle in the amount of $235.00 each, for a total of $470.00.

A1C R and the appellant signed a number of documents over the next two months reflecting the appellant's responsibility to pay the full cost of the motorcycle. The first, executed 5 July 2004, was a sales agreement obligating the appellant to buy the motorcycle outright from A1C R. Unfortunately, the appellant was unable to get a loan to refinance the motorcycle in his own name. When it became clear the appellant was not going to be able to get financing, he and A1C R decided to sell it and apply the proceeds to the outstanding loan, with the appellant responsible for the remainder. To document that agreement, the appellant and A1C R, on 6 July 2004, signed a "Consumer Loan Agreement" obligating the appellant to pay an amount they believed would be due after the motorcycle was sold. Finally, on 13 July 2004, A1C R and the appellant signed a "Promissory Agreement" further detailing the obligation of the appellant to pay all excess costs after the motorcycle was sold. That document was intended to supercede the prior documents. The appellant also agreed to set up an allotment from his military pay to cover the cost of the installment payments to the dealership and submitted the paperwork to his accounting and finance office to do so.

Notwithstanding the above, the appellant ultimately made no further payments on the motorcycle and cancelled the allotment before it could go into effect. To protect herself, A1C R took possession of the motorcycle from the appellant in mid-July 2004. After taking the motorcycle back, she tried

unsuccessfully to sell it through newspaper and internet advertisements. She also tried on multiple occasions to get the appellant to repay the debt, but he did not return her telephone calls or her e-mails. Neither A1C R nor her husband ride motorcycles and they placed the machine in storage until it could be sold. The debt caused considerable strain on A1C R's family budget, forcing her to forgo amenities she would otherwise liked to have enjoyed. The debt to A1C R that the appellant was found guilty of dishonorably failing to pay at the time of trial amounted to $4,269.00.[1] This amount represents the amount of money financed for the purchase of the motorcycle ($9,400.00) and the accrued interest on the loan ($1,014.00), totaling $10,414.00, less the suggested retail value of the motorcycle, if A1C R were to sell it on her own ($5,675.00) and the two payments the appellant made to A1C R ($470.00), equaling $4,269.00.[2]

Between 27 August 2004 and 2 September 2004, the appellant stole his military roommate's Automated Teller Machine (ATM) card and, through multiple transactions, used it to withdraw $2,600.00 dollars from his roommate's account. The appellant used some of the money to pay a $100.00 phone bill and spent the rest on an array of personal goods and services for himself; including a video game system and games, DVDs, decorations for his dorm room, and a tattoo. When caught with the missing ATM card on his person, the appellant lied to investigators and said he found it near a dumpster. At the time of trial, the victim's bank had reimbursed him for only $1,900.00 of the stolen amount, leaving $700.00 unpaid. The appellant made no effort to repay the victim the remaining amount and there is no evidence the appellant ever reimbursed the bank.

Legal and Factual Sufficiency

We review the appellant's claim of legal and factual insufficiency de novo, examining all the evidence properly admitted at trial. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we ourselves

[1] Appellant was originally charged with dishonorably failing to pay a just debt in the amount of $8,930.00. By exceptions and substitutions, the military judge found appellant guilty of the lesser amount of $4,269.00.

[2] This amount does not incorporate the $155.18 down payment made by A1C R and reimbursed to her by appellant, as this amount was not included in the amount financed.

are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. Both standards are met here.

The elements of the offense of dishonorable failure to pay a debt under Article 134, UCMJ, are: (1) that the accused was indebted to a particular person or entity in a certain sum; (2) that the debt became due and payable on or about a certain date; (3) that while the debt was still due and payable, the accused dishonorably failed to pay this debt; and, (4) that under the circumstances, the conduct of the accused 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. *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 71(b) (2002 ed.).[3] The appellant attacks two of these elements, asserting the evidence is insufficient to support a finding that he owed a legally enforceable debt to A1C R, or, if such a debt did exist, that his failure to pay the debt was not dishonorable. We do not agree.

A1C R's testimony and the agreements signed by her and the appellant, viewed in the light most favorable to the prosecution, provided a sufficient basis for a rational trier of fact to conclude that a valid debt existed in the amount of $4,269.00. That evidence was also bolstered by the evidence that the appellant acknowledged the validity of the debt prior to defaulting on it; both by taking steps to set up an allotment to A1C R and by making some initial payments on that debt. There is no evidence the appellant at any time during the charged time period disputed his obligation to pay or the amount of the debt owed.

The evidence is also sufficient for a rational trier of fact to conclude that the appellant's failure to pay his debt to A1C R was dishonorable. Mere failure to pay a debt is not "dishonorable" within the meaning of this offense. Rather, to be dishonorable, the failure to pay "must be characterized by deceit, evasion, false promises, or other distinctly culpable circumstances indicating a deliberate nonpayment or grossly indifferent attitude toward one's just obligations." *MCM*, Part IV, ¶ 71(c). In this case, the appellant refused to respond to A1C R's telephone calls and e-mail messages. Furthermore, although he agreed to start a monthly allotment to cover the debt, he cancelled that allotment without notice before any payments could be made. These actions, taken together, provide a sufficient basis from which a rational trier of fact could conclude beyond a reasonable doubt that the appellant's failure to pay his debt to A1C R was dishonorable.

[3] The 2002 edition of the MCM was in effect at the time of the appellant's court-martial. The 2005 edition of the MCM has a similar provision.

Finally, we ourselves are convinced beyond a reasonable doubt that the appellant is in fact guilty of dishonorably failing to pay a just debt. Mindful that we did not personally observe the witnesses, we find the testimony of the government witnesses both credible and convincing.

Sentence Appropriateness

The appellant contends his adjudged and approved sentence was inappropriately severe, arguing his conduct does not warrant a dishonorable discharge.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005); *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006). We make such determinations in light of the character of the offender and the nature and seriousness of his offenses. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Roukis*, 60 M.J. 925, 930-931 (A.F. Ct. Crim. App. 2005). Although we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Dodge*, 59 M.J. 821, 829 (A.F. Ct. Crim. App. 2004).

Turning to the facts of this case, we find no merit in the appellant's assertion. We note in particular the nature of the appellant's misconduct; the fact that he committed offenses against two fellow airmen; and the evidence presented at trial of the financial impact his offenses had on the victims. Taking these factors into account, we find nothing inappropriately severe in the appellant's punishment. The adjudged and approved sentence is fair, just, and appropriate. *See Baier*, 60 M.J. at 384.

Conclusion

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and the sentence are

AFFIRMED.

OFFICIAL

LAQUITTA J. SMITH
Documents Examiner