**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman CRAIG W. MACEY**
**United States Air Force**

**ACM 34821**

**14 January 2004**

Sentence adjudged 31 August 2001 by GCM convened at Aviano Air Base, Italy. Military Judge: Thomas W. Pittman.

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-1.

Appellate Counsel for Appellant: Major Terry L. McElyea and Major Kyle R. Jacobson.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Peter J. Camp.

Before

BRESLIN, MOODY, and GRANT
Appellate Military Judges

PER CURIAM:

A military judge found the appellant guilty, pursuant to his pleas, of two specifications of larceny, one specification of wrongful appropriation, and seven specifications of forgery, in violation of Articles 121 and 123, UCMJ, 10 U.S.C. §§ 921, 923. A general court-martial comprised of officer members sentenced the appellant to a bad-conduct discharge, confinement for 3 months, and reduction to E-1. The convening authority approved the sentence adjudged.

The appellant alleges that his guilty pleas to Specifications 3 and 4 of Charge II are improvident. Finding error, we take corrective action and affirm.

## *I. Background*

Between 5 November 2000 and 12 February 2001, the appellant stole nine blank checks[1] from his roommate Airman First Class (A1C) Eric S. Linder. During the first week of February 2001, the appellant also stole one blank check from A1C Linder's girlfriend, A1C Llesaida L. Rios. After stealing the checks, the appellant forged either A1C Linder's or A1C Rios' name to the checks, made the checks payable to himself, and presented the checks at the Global Credit Union for payment.

In Article 123, UCMJ, Congress defined the offense of forgery in two ways: forgery-by-making and forgery-by-uttering. The elements for forgery-by-making are:

> (1) That the accused falsely made or altered a certain signature or writing;
> (2) That the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another's legal rights or liabilities to that person's prejudice; and
> (3) That the false making or altering was with the intent to defraud.

*Manual for Courts-Martial, United States (MCM),* Part IV, ¶ 48b(1) (2000 ed.).

The elements for forgery-by-uttering are:

> (1) That a certain signature or writing was falsely made or altered;
> (2) That the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another's legal rights or liabilities to that person's prejudice;
> (3) That the accused uttered, offered, issued, or transferred the signature or writing;
> (4) That at such time the accused knew that the signature or writing had been falsely made or altered; and
> (5) That the uttering, offering, issuing or transferring was with the intent to defraud.

*MCM,* Part IV, ¶ 48b(2).

Charge II alleges the appellant committed forgery, in violation of Article 123, UCMJ. We note that Charge II and its specifications are duplicitous in that each specification of the charge alleges forgery both by making and uttering. *See United*

[1] We recognize that such instruments drawn upon a credit union are "drafts." We will use the popular term "checks" to remain consistent with the charge sheet and the language used by the parties at trial.

*States v. Albrecht*, 43 M.J. 65, 68 (C.A.A.F. 1995) (Article 123, UCMJ, "specifies two conceptually distinct and different ways to commit forgery").[2]

Apparently recognizing that the specifications of Charge II were duplicitous, the military judge blended the elements of forgery-by-making and forgery-by-uttering in advising the appellant of the elements of the charged offenses during the providence inquiry. For example, the elements of Specification 1, Charge II, recited by the military judge were:

> First, that at or near Aviano Air Base, Italy, you falsely made a certain signature to a check, that being check number 224, dated 10 November 2000, in the amount of $70.00, payable to yourself, Craig W. Macey, and signed using the name of Eric S. Linder;
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> Second, that the check would, if genuine, apparently impose a legal liability on another or change his or her legal right or duty to his or her harm. In this case it would operate to the legal harm of Airman First Class Eric S. Linder, in that an equal amount of the amount of the check, $70.00, was indebted from his checking account;
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> Third, that the false making of the check was with the intent to defraud;
>
> Fourth, that you uttered the check, and that at the time that you did that you knew that the check was falsely made;
>
> And fifth, that the uttering of the check was also with the intent to defraud.

The military judge employed the same basic elements to describe the offenses set out in Specifications 2 and 7 of Charge II while inquiring into the providence of those pleas. However, the military judge did not use this format for the providence inquiry regarding Specifications 3 through 6 of Charge II, giving rise to the allegations of error now before this Court.[3]

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[2] The remedy for duplicitous specifications is to move for "severance of the specification into two or more specifications . . . " Rule for Courts-Martial (R.C.M.) 906(b)(5), Discussion. Failure to so move results in waiver. *United States v. Parker*, 13 C.M.R. 97, 104 (C.M.A. 1953).

[3] Traditionally, military judges advise an accused of the elements of a charged offense by referring to the Punitive Articles in Part IV of the *Manual for Courts-Martial* or the Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook* (1 April 2001). We do not advocate departing from these guides when advising the appellant of the elements of an offense, as they ensure adherence to the requirements of the *Manual for Courts-Martial.*

At trial, the appellant's counsel advised the military judge that the plea was provident. Before this Court, the appellate defense counsel alleges that the appellant's guilty pleas to Charge II, Specifications 3 and 4, are improvident. Specifically, the appellant alleges that the military judge failed to elicit from the appellant how his conduct met the elements of forgery, particularly whether the appellant had the intent to defraud.

*II. Law*

Article 45(a), UCMJ, 10 U.S.C. § 845(a), provides that a guilty plea shall not be accepted if it appears the accused "entered the plea of guilty improvidently or through lack of understanding of its meaning and effect." In the seminal case, *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969), our superior court ruled that, in order to assure that an accused's guilty plea is provident under Article 45, UCMJ, a military judge must: (1) advise an accused of his right against self-incrimination, his right to a trial of the facts, and his right to confront the witnesses against him and determine that he waives those rights; (2) advise the accused of the elements of the charged offense; and (3) question the accused about the facts to determine whether the accused's acts or omissions constitute the crimes charged. In the present case, we are concerned with the last two requirements.

Rule for Courts-Martial (R.C.M.) 910(c)(1)-(5) codifies the requirements established by the *Care* decision. R.C.M. 910(c)(1) provides that the military judge is required to advise the accused of the nature of the offense to which he is pleading guilty during the providence inquiry. Ordinarily this requires the military judge to explain the elements of the offense to the accused. *See* R.C.M. 910(c)(1), Discussion. However, "[t]he elements need not be [recited] . . . if it clearly appears that the accused was apprised of them in some manner and understood them and admits . . . that each element is true." *MCM*, A21-59.

In *Care*, the law officer did not advise the appellant of the elements of desertion or establish the factual components of the offense. Nonetheless, the court found the plea provident because the record demonstrated that the appellant was aware of the elements of the crime and the facts supported the plea. *Care*, 40 C.M.R. at 252-53. Subsequently, in *United States v. Brooks*, 41 C.M.R. 35, 36 (C.M.A. 1969), the court found a plea provident even though the president of the special court-martial "did not itemize the elements of every offense charged," where the record as a whole showed that "the accused knew what he was pleading guilty to and what acts constituted the offenses charged." Similarly, in *United States v. Kilgore*, 44 C.M.R. 89, 91 (C.M.A. 1971), the court found the plea provident even where the military judge did not advise the appellant of the elements of the offense, where the detailed inquiry into the facts "covered the essential requirements of proof for that offense." *Accord United States v. Jones*, 34 M.J. 270, 272 (C.M.A. 1992) (military judge's failure to explain the elements of the offense was not reversible error where it was "clear from the entire record that the accused knew

the elements, admitted them freely, and pleaded guilty because he was guilty."). *But see United States v. Pretlow*, 13 M.J. 85 (C.M.A. 1982) (declining to apply *Kilgore* for the compound offense of robbery). Most recently our superior court addressed this issue in *United States v. Redlinski*, 58 M.J. 117, 119 (C.A.A.F. 2003), holding that if a military judge fails to advise an accused of the elements of an offense, it is reversible error unless "the context of the entire record" shows that the accused was "aware of the elements, either explicitly or inferentially." Thus, if a military judge does not read the elements of an offense to an accused it is error, and we will find the plea improvident unless the factual inquiry demonstrates the accused's understanding of the nature of the charged offense.

Our superior court has also decreed that the military judge must develop a factual basis for the plea by questioning the accused to determine whether his acts or omissions constitute the offense charged. The record of trial must "make clear the basis for a determination by the military trial judge . . . whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty." *Care*, 40 C.M.R. at 253. The ruling was incorporated into R.C.M. 910(e), which provides that, "The military judge shall not accept a plea of guilty without making such inquiry of the accused that shall satisfy the military judge that there is a factual basis for the plea." "The military judge must elicit facts from the accused that 'objectively' support the plea." *United States v. Horton*, 55 M.J. 585, 586 (A.F. Ct. Crim. App. 2001) (citing *United States v. Shearer*, 44 M.J. 330, 334 (C.A.A.F. 1996)).

We review a military judge's acceptance of a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374 (C.A.A.F. 1996). In order to reject a guilty plea, we must find that the record of trial shows "'a substantial basis' in law and fact for questioning the guilty plea." *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

### *III. Analysis*

With respect to the specifications of Charge II, we must determine whether the military judge's inquiry demonstrates that the appellant was made aware of the nature of the offenses and whether there was a factual basis for the appellant's guilty pleas. We will consider the offenses as they were addressed by the military judge.

#### *A. Charge II, Specifications 3 and 4*

After reading the elements of Specifications 1 and 2 to the appellant and inquiring into the facts of each offense, the military judge and the appellant engaged in the following colloquy, addressing Specifications 3 and 4:

MJ: With regard to Specification 3, the elements are the same [as Specification 2], with the check number being 223, dated 17 December 2000. The amount is $40.00. It also involves you making the signature of Airman First Class Eric S. Linder. Airman Macey, was this another of those checks in the series of what you took, and then falsely signed, and used to obtain money for yourself?

ACC: Yes, sir.

MJ: Specification 4, check number 222, in the amount of $120.00, dated 2 February 2001, again, signing it, using the name of Eric S. Linder. Again, this was another one of the checks that you took to use for your own benefit, by signing Airman Linder's name?

ACC: Yes, sir.

MJ: I noticed some of these dates are a little spread out. They are 10 November, 18 November, 17 December, and 2 February 2001. These are representing the dates that you not only took the check, but then went and also used it? Did you always do it the same day?

ACC: No, sir.

MJ: So sometimes you'd take a check and you'd hold onto it for a couple days?

ACC: Yes, sir.

. . .

MJ: Sometimes you'd just take the check and keep it in your possession for a period of time until you got over to the credit union?

ACC: Yes, sir.

MJ: And the check in Specification 4, was that the same as with Specifications 1, 2, and 3, where you falsely made Airman Linder's signature on it?

ACC: Yes, sir.

MJ: And the purpose was to take money from him and use it for your own benefit?

ACC: Yes, sir.

MJ: And you realize that the signature you put on this check, as well as the other checks, if it was genuine, if it was really his signature, that it would impose an obligation on him?

ACC: Yes, sir.

MJ: And that would be a debit to his account?

ACC: Yes, sir.

With respect to Specification 3 of Charge II, the military judge advised the appellant of the nature of the offense by indicating that the elements were the same as for the previous specification. The military judge also established a factual basis for the forgery-by-making offense. The appellant admitted that he falsely made a certain signature or writing when he responded affirmatively to the following questions by the military judge: "[W]as this another of those checks in the series of what [sic] you took, and then falsely signed, and used to obtain money for yourself?" and "[W]as that the same as with Specification 1, 2, and 3, where you falsely made Airman Linder's signature on it?" *See MCM,* Part IV, ¶ 48b(1). The appellant also admitted that he knew that falsely signing the check would impose an obligation on A1C Linder. *Id.* Finally, the appellant presented facts showing the false making of the check was with the intent to defraud by admitting that he falsely made A1C Linder's signature and that the purpose for the false signature was to take money from A1C Linder and use it for the appellant's own benefit. *Id. See also* D.A. Pam. 27-9, ¶ 3-48-1.d. ("Intent to defraud" means an intent to obtain an article or thing of value through a misrepresentation and to apply it to one's own use and benefit . . . "). Therefore, we find the appellant's plea of guilty to forgery-by-making as alleged in Specification 3, Charge II, is provident.

With regard to the forgery-by-uttering aspect of Specification 3 of Charge II, the appellant was apprised of the nature of the offense when the military judge advised him of the elements of the crime, incorporated by reference. The military judge also elicited from the appellant facts demonstrating that the appellant uttered the check. *See MCM*, Part IV, ¶ 48b(2). We note that earlier in the providence inquiry, the military judge defined the term "utter" as synonymous with "use." Specifically, the military judge advised the appellant, "The term 'utter' means to use a writing with the representation by words or actions that it is genuine. In other words, not to just make the false signature, but to actually then use that writing as though it were genuine." *See* D.A. Pam. 27-9, ¶ 3-48-2.d. Thereafter, the military judge sometimes employed the word "use" to refer to the appellant's uttering of the check. For example, during the inquiry into Specification 1, Charge II, the military judge asked, "After you took the check, you then wrote Airman

Linder's name on the check, took it to the credit union, and used the check as a means to get money for yourself?" and "And you realized at the time that you wrote Airman First Class Linder's name to the check, that if you were to take it over there and use it, that it would impose a legal liability on him, a debt that you created?" With regard to the providence inquiry for Specification 3 of Charge II, the military judge specifically asked the appellant, "[W]as this another of those checks in the series of what you took, and then falsely signed, and used to obtain money for yourself?" The appellant replied affirmatively. We find this sufficient to show a factual basis for the appellant's plea to uttering the check knowing it was falsely made. We find that the factual inquiry did provide a basis to support the guilty plea to the offense of forgery-by-uttering included within Specification 3 of Charge II.

With respect to Specification 4 of Charge II, the military judge did not advise the appellant of the elements of the offense, or incorporate his previous advice by reference. He did, however, elicit sufficient facts to support the appellant's plea to forgery-by-making. As a result of the military judge's inquiry, the appellant admitted that he falsely made A1C Linder's signature. The appellant admitted his intent to defraud A1C Linder when he concurred with the military judge that the purpose for making the false signature was to take money from A1C Linder and use it for the appellant's own benefit. The appellant also admitted that he knew the false making of the check (as well as the other checks) would impose a legal obligation on A1C Linder. We also note that this was a fairly straightforward offense, well understood by the appellant. *Care*, 40 C.M.R. at 252-53. Moreover, it was clear that this was another in a series of similar offenses, so that the appellant was aware of the nature of the offense. *See Brooks*, 41 C.M.R. at 36. Thus, we find the appellant's guilty plea to forgery-by-making as alleged in Charge II, Specification 4, is provident.

With respect to Specification 4, Charge II, the military judge did not elicit facts indicating the appellant uttered this specific check. We find that the factual inquiry did not support acceptance of the plea for the forgery-by-uttering allegation contained in Specification 4, Charge II. We will take corrective action on the findings for Specification 4 of Charge II in the decretal paragraph.

*B. Charge II, Specification 5*

Regarding Charge II, Specification 5, the military judge did not advise the appellant of the elements of the offense, or incorporate earlier advice by reference. The military judge elicited facts from the appellant showing that the appellant falsely made A1C Rios' signature to the check in question and that the false making was with the intent to defraud. During the earlier inquiry regarding Specification 4, the military judge asked the appellant if he realized that "the signature you put on this check, *as well as the other checks*, if it was genuine, if it was really [your] signature, that it would impose an obligation on [you]?" (Emphasis added.) The appellant agreed that he did. *See MCM*,

Part IV, ¶ 48b(1). Considering the military judge's advice about the earlier, related specifications (*Brooks*, 41 C.M.R. at 36), we find that the appellant understood the nature of the charged offense, and that the facts elicited by the military judge were sufficient to show that there was a factual basis for his plea. The appellant's guilty plea to forgery-by-making as alleged in Charge II, Specification 5, is provident.

The military judge's inquiry was minimally adequate to support the appellant's plea to forgery-by-uttering for Specification 5 of Charge II. As noted above, the military judge did not advise the appellant of the elements of the offense in this specification; therefore we must examine the facts elicited from the appellant to determine whether they demonstrate that the appellant was aware of the nature of the charged offense. The military judge determined that the appellant wrongfully made the check and uttered it with the intent to defraud A1C Rios. The fact that the appellant stole the check and forged it shows that he knew the check was falsely made when he uttered it.

*C. Charge II, Specification 6*

During the providence inquiry for Charge II, Specification 6, the military judge conducted an adequate inquiry to support the appellant's guilty plea to forgery-by-making. Again the military judge did not advise the appellant of the elements of the offense, nor did he incorporate previous advice by reference. However, during the factual inquiry the appellant admitted to each element of the offense of forgery-by-making for this specification. The appellant admitted that he signed the check alleged in the specification using A1C Linder's name. The appellant had previously admitted knowing that signing A1C Linder's signature would impose a legal obligation on A1C Linder. Finally, the appellant admitted that these actions were done with the intent to defraud when he admitted that he took the check "with the intent to defraud, using Airman Linder's signature."

The appellant was also clearly apprised of the nature of the offense of forgery-by-uttering for Specification 6 of Charge II. The appellant had previously admitted understanding that signing the check imposed a legal obligation on A1C Linder. The appellant admitted that he signed A1C Linder's name to the check and uttered the check to the Global Credit Union. The appellant agreed that he took the check with the intent to defraud and at the time he uttered the check, he knew that he was taking money that was rightfully A1C Linder's to benefit himself. We find the appellant's guilty plea to Charge II, Specification 6, is provident.

*D. Charge II, Specification 7*

For Specification 7 of Charge II, the military judge recited the allegations in the specification, including the check number, the date, the amount payable, that the appellant made the check, and that he uttered it for money at the credit union, and asked

if that was "right." The appellant replied affirmatively. The military judge then read the elements of the specification to the appellant. He next asked the appellant whether he "knew that the check was falsely made, and [that] it was done with the intent to take something from Airman Linder," for the appellant's benefit. The appellant responded affirmatively again. The military judge then asked counsel for both sides whether any further inquiry was needed. After some clarification regarding when certain checks were taken, counsel for both sides agreed that no further inquiry was required.

Advising the appellant of the elements of the offense was sufficient to apprise him of the nature of the offense, although it would be far better to have the appellant acknowledge and affirm his understanding of the elements on the record. The military judge conducted an adequate inquiry to establish a factual basis for both forgery-by-making and forgery-by-uttering. The appellant's affirmative responses to the military judge's questions establish the requisite facts to support the appellant's guilty plea to the charged offense. Therefore, we find the appellant's plea to Charge II, Specification 7, is provident.

*E. Sentence Reassessment*

After the military judge found the appellant guilty, pursuant to his pleas, of two specifications of larceny, one specification of wrongful appropriation, and seven specifications of forgery, a general court-martial consisting of officer members sentenced the appellant to a bad-conduct discharge, confinement for 3 months, and reduction to E-1. In light of our findings regarding Specification 4 of Charge II, we must next determine whether this Court can reassess the appellant's sentence.

We can reassess the appellant's sentence if we are "convinced that even if no error had occurred at trial, the [appellant's] sentence would have been at least of a certain magnitude." *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986). "No sentence higher than that which would have been adjudged absent error will be allowed to stand." *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000) (quoting *United States v. Jones*, 39 M.J. 315, 317 (citing *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990))). However, "even within this limit, . . . [we must] determine that a sentence [this Court] affirm[s] will be 'appropriate' as required by Article 66(c)." *Sales*, 22 M.J. at 308.

We are confident that even with the modified findings, the appellant would have received the same sentence as that which was adjudged. The modification of the findings does not change the maximum allowable punishment. The essential facts of the offenses upon which the original sentence was based remain the same. Additionally, there is no evidence in the record of trial that forgery-by-making and forgery-by-uttering were presented as separate offenses to the panel members to consider in determining a sentence for the appellant.

## *IV. Conclusion*

The approved findings are affirmed, excepting the following words in Specification 4 of Charge II: "and utter the same check, drawn upon the Global Credit Union," and "and which said check was used to the legal harm of Airman First Class Eric S. Linder, in that $120.00 was debited from the checking account of the said Airman First Class Eric S. Linder."

The approved findings, as modified, and the sentence, as reassessed, are correct in law and fact, and no error materially prejudicial to the appellant's substantial rights 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

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator