

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Senior Airman WILLIAM J. MIXON
United States Air Force**

ACM 35363

28 January 2005

Sentence adjudged 17 August 2002 by GCM convened at Kunsan Air Base, Republic of Korea. Military Judge: David F. Brash (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

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

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Michelle M. Lindo.

Before

STONE, GENT, and SMITH
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

SMITH, Judge:

The appellant was tried at Kunsan Air Base, Republic of Korea, by a military judge sitting as a general court-martial. In accordance with his pleas, the appellant was convicted of making and uttering 30 checks with the intent to defraud, knowing that he did not or would not have sufficient funds in his account for the payment of the checks upon presentment, in violation of Article 123a, UCMJ, 10 U.S.C. § 923a. In addition, in accordance with his pleas, he was also convicted of writing eight checks and dishonorably failing to maintain sufficient funds for payment of those checks, in violation

of Article 134, UCMJ, 10 U.S.C. § 934. The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for 6 months, and reduction to E-1.

On appeal, the appellant asserts two errors: (1) His pleas to the Article 134, UCMJ, offenses were improvident because the military judge failed to elicit a sufficient factual basis to establish that the appellant's conduct was "dishonorable"; and (2) The promulgating order inaccurately reflects the pleas and findings. We agree as to both issues, affirm the findings as modified below, and reassess the sentence.

Dishonorable Failure to Maintain Funds

We start with the recognition that pleas of guilty should not be set aside on appeal unless there is "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). "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.'" *United States v. Bullman*, 56 M.J. 377, 381 (C.A.A.F. 2002) (quoting *United States v. Higgins*, 40 M.J. 67, 68 (C.M.A. 1994)). A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996).

In the appellant's case, the record is clear that he wanted to plead guilty to the Article 134, UCMJ, offenses involving the eight checks in question. He admitted, primarily through affirmative answers to leading and conclusory questions, all the elements of the offense. Despite that, we find that portion of the appellant's pleas improvident. Our concerns are with the few, very brief narrative explanations offered by the appellant, and with portions of the stipulation of fact that appear to be in substantial conflict with some of the conclusions he was asked to make.

Three of the eight checks in question were written to the Army and Air Force Exchange Service (AAFES). The following exchange occurred during the plea as to those checks:

MJ: All right. Tell me about this dishonorable failure, what was going on there?

ACC: Sir, at the time these checks were written I just failed to maintain my check balance, my checkbook correctly.

MJ: It looks like these checks were the earlier ones written over at AAFES, is that right?

ACC: Yes, Sir.

MJ: Ok. So what was going on is, apparently, at some point, you just didn't really care about your checking account that's these checks. But, it got to the point where you full well knew that these checks were going to bounce, that's the other specification we talked about [referring to the checks under the Article 123a, UCMJ, offense], is that right?

ACC: Yes, Sir.

MJ: Ok. During this period of time, 27 September and 7 October, what steps if any were you taking to see what was in your bank account, how were you keeping up with it?

ACC: I would check the on-line service, they have an on-line service you can check on-line or at the ATM machine.

MJ: Were you actually balancing your checkbook though?

ACC: No, Sir.

MJ: Although, for these three checks you may not have known whether or not they were going to get paid. Would you agree with me, at least, that your care toward that bank account was more than negligent, it was grossly indifferent, as I have defined it?¹

ACC: Yes, Sir.

MJ: You didn't take the steps, first of all, that a reasonably prudent person would take did you, didn't even balance your checking account right?

ACC: No, Sir.

MJ: More than that, you were grossly indifferent, you almost just didn't care about it. Would you agree with that as well?

ACC: Yes, Sir.

The providency of a plea rests on what the appellant actually admits on the record. *United States v. Eddy*, 41 M.J. 786, 791 (A.F. Ct. Crim. App. 1995). *See also United*

¹ The term "grossly indifferent" was not previously defined. The term was included as part of the military judge's standard definition of what constitutes a dishonorable failure to maintain sufficient funds in an account with the drawee bank: "Your conduct in maintaining your bank account must have been dishonorable. That is, a failure, which is deceitful, a willful evasion made in bad faith, deliberate, based upon false promises or indicates a grossly indifferent attitude toward the status of one's bank account and just obligations."

States v. Davenport, 9 M.J. 364 (C.M.A. 1980). A providency inquiry that rests on conclusions of law alone does not satisfy Article 45, UCMJ, 10 U.S.C. § 845, and Rule for Courts-Martial (R.C.M.) 910(e). *United States v. Jordan*, 57 M.J. 236, 239 (C.A.A.F. 2002). Facts contained in a stipulation can be considered in determining whether a factual basis for a plea exists. *United States v. Sweet*, 42 M.J. 183 (C.A.A.F. 1995).

The excerpted inquiry above is representative of the nature of the military judge's questions on all eight checks, and the commingling of references to the earlier plea inquiry as to the 30 checks charged under Article 123a, UCMJ. Additionally, the appellant repeatedly characterized his conduct as negligent and referred to some efforts to pay off the checks. Apart from his explanation during the plea inquiry ("Sir, at the time these checks were written I just failed to maintain my check balance, my checkbook correctly"), in a 25 March 2002 statement appended to the stipulation of fact, he told agents of the Air Force Office of Special Investigations (AFOSI), "I think it was mid November when I got my first notice that I had a returned check. All I did was get a money order for the amount and send it in or I would just pay for it a[t] the BX [Base Exchange] or the enlisted club." This coincided with the timeframe when he wrote the eight checks in question. Moreover, in his written unsworn statement, the appellant explained that, "When I first received a notice, I simply paid the returned check. . . . I tried to pay for the checks that would bounce but soon it just got out of control." In his oral unsworn statement, the appellant said, "Overall I'd like to just apologize to the Air Force, as a whole, for my neglect on my financial status." His counsel followed up by asking: "Now, you said a couple seconds ago a thing about neglect. You do understand that *a lot of these checks* were more than just neglect on your part right?" (emphasis added), to which the appellant replied "Yes." Although counsel attempted to clarify the inconsistency, it was inadequate since her reference to "a lot of these checks" could have included the Article 123a, UCMJ, offenses. The recurring characterizations by the appellant that his conduct was negligent warranted further inquiry by the military judge, which never occurred.

The record reflects more fundamental questions about the "dishonorableness" of the appellant's conduct. Five of the eight checks were written to the Loring Club on Kunsan Air Base. The stipulation of fact indicates the appellant paid off three of those checks seven days after he received a dishonored check notice from the 8th Services Squadron Resource Management Flight, but there was no inquiry as to the "dishonorable" nature of the appellant's conduct with respect to any of those checks. Accordingly, we find the appellant's pleas improvident as to dishonorably failing to maintain sufficient funds to cover draft numbers 110, 111, and 113, written to AAFES, and numbers 124, 125, 127, 133, and 135, written to the Loring Club. Accordingly, we set aside and dismiss the guilty findings as to these drafts.

The Promulgating Order

The promulgating order needs to be corrected, apart from our amendment of the findings, in that the total dollar amounts shown, the aggregate number of checks, and the charged timeframe in the specifications related to the Article 123a, UCMJ, offense (referred to as “Charge I” on the promulgating order) should be changed. The final order will reflect the findings as we have amended them (see Appendix to this opinion), to include the deletion of “Charge II” reflected in the promulgating order. Despite the fact that the staff judge advocate’s recommendation, the Report of Result of Trial, and the promulgating order reflect the charges as divided, only one charge was referred to trial by the convening authority—the only officer with authority to refer charges and specifications to a court-martial. R.C.M. 601(b). The charges were not severed to “prevent manifest injustice,” as permitted by R.C.M. 906(b)(10). We view the military judge’s division of the offenses into two charges as a means to simplify a complicated plea.

Reassessment

Because we found the appellant’s plea improvident as to the lesser included, Article 134, UCMJ, offense for the eight referenced checks, we next consider whether we can reassess the sentence. If we can determine that, “absent the error, the sentence would have been at least of a certain magnitude, then [we] may cure the error by reassessing the sentence instead of ordering a sentence rehearing.” *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). We are confident that we can reassess the sentence in accordance with the established criteria. The 30 bad checks that were the subject of the Article 123a, UCMJ, offense were the crux of the case; the other eight checks were at the preliminary (or early) stage of the appellant’s course of misconduct. From late September 2001 to early January 2002, the appellant made a concerted effort to forget problems “back home.” He described how he spent the money in three written statements to the AFOSI, explaining that the lion’s share was spent on partying, drinking, and prostitutes. The parties agreed that the maximum period of confinement was 19 years, which the pretrial agreement limited to 12 months. We are certain that, absent the error, the sentence would not have been less than a bad-conduct discharge, confinement for 5 months, and reduction to E-1. We also conclude the sentence, as reassessed, is appropriate. Article 66(c), UCMJ, 10 U.S.C. § 866(c).

Conclusion

The approved findings, as amended and reflected in the Appendix to this opinion, 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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings, as amended, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court

APPENDIX

Upon appellate review in the general court-martial case of SENIOR AIRMAN WILLIAM J. MIXON, United States Air Force, 8th Maintenance Squadron, Kunsan Air Base, Republic of Korea, to the extent the parties at trial and the promulgating order reporting the results of trial addressed lesser included offenses under a "Charge II" with attendant specifications, the findings of guilty to Charge II and its Specifications are set-aside and dismissed. The Charge and its Specifications, as referred by the convening authority, are amended as follows:

Charge, Specification 1, violation of Article 123a, UCMJ, is amended to read as follows:

In that SENIOR AIRMAN WILLIAM J. MIXON, United States Air Force, 8th Maintenance Squadron, did, at or near Kunsan Air Base, Republic of Korea, on divers occasions between on or about 11 December 2001 and on or about 9 January 2002, with intent to defraud and for the procurement of lawful currency, wrongfully and unlawfully make and utter to the Army and Air Force Exchange Service (AAFES), certain drafts upon the USA Federal Credit Union in words and figures as follows, to wit:

Date	Check #	Amount
11 Dec 01	0155	\$300.00
12 Dec 01	0157	\$300.00
13 Dec 01	0158	\$300.00
16 Dec 01	0162	\$300.00
17 Dec 01	0163	\$300.00
18 Dec 01	0164	\$300.00
19 Dec 01	0165	\$300.00
20 Dec 01	0166	\$300.00
21 Dec 01	0167	\$300.00
21 Dec 01	0168	\$303.49
22 Dec 01	0169	\$300.00
23 Dec 01	0170	\$300.00
24 Dec 01	0172	\$300.00
25 Dec 01	0173	\$300.00
28 Dec 01	0174	\$300.00
29 Dec 01	0176	\$300.00
30 Dec 01	0177	\$300.00
31 Dec 01	0178	\$300.00
2 Jan 02	0179	\$300.00
3 Jan 02	0180	\$300.00
4 Jan 02	0181	\$300.00
5 Jan 02	0182	\$300.00

6 Jan 02	0183	\$300.00
7 Jan 02	0184	\$403.84
7 Jan 02	0185	\$300.00
8 Jan 02	0188	\$300.00
9 Jan 02	0191	\$300.00

of a total amount of about \$8,207.33, then knowing that he, the maker thereof, did not or would not have sufficient funds in or credit with such depository for the payment of the said drafts in full upon their presentment.

Charge, Specification 2, violation of Article 123a, UCMJ, is amended to read as follows:

In that SENIOR AIRMAN WILLIAM J. MIXON, United States Air Force, 8th Maintenance Squadron, did, at or near Kunsan Air Base, Republic of Korea, on divers occasions between on or about 29 November 2001 and on or about 18 December 2001, with intent to defraud and for the procurement of lawful currency, wrongfully and unlawfully make and utter to the Kunsan Air Base Loring Club, certain drafts upon the USA Federal Credit Union in words and figures as follows, to wit:

Date	Check #	Amount
29 Nov 01*	0146	\$200.00
10 Dec 01	0153	\$200.00
18 Dec 01	0156	\$200.00

of a total amount of about \$600.00, then knowing that he, the maker thereof, did not or would not have sufficient funds in or credit with such depository for the payment of the said drafts in full upon their presentment.

* As referred, the charge sheet reflected the date of draft # 0146 to be 29 December 2001. That date was corrected on the record to be 29 November 2001, but the original charge sheet does not reflect the modification.