IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER	**W.L. RITTER**	**D.A. WAGNER**

UNITED STATES

v.

Angelia M. KILLINGSWORTH
Lieutenant (O-3), U.S. Navy

NMCCA 200201785 Decided 6 May 2005

Sentence adjudged 24 September 2001. Military Judge: C. Gaasch. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, U.S. Naval Forces, Japan, Yokusuka, Japan.

Capt JAMES VALENTINE, USMC, Appellate Defense Counsel
CAPT THOMAS J. DEMAY, JAGC, USNR, Appellate Government Counsel
LT KATHLEEN HELMANN, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

RITTER, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to her pleas, of conduct unbecoming an officer, 31 specifications of making and uttering worthless checks by dishonorably failing to maintain sufficient funds, and two specifications of dishonorable failure to pay debts, in violation of Articles 133 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 933 and 934. The appellant was sentenced to confinement for 3 months and a dismissal. Pursuant to a pretrial agreement, the convening authority suspended the dismissal for 24 months.

Multiplicity

In her sole assignment of error, the appellant contends that 31 specifications of dishonorable failure to maintain sufficient funds are multiplicious with the charge and specification alleging conduct unbecoming an officer. We agree.

1. The only "dishonorable" conduct supporting the worthless check offenses was the same conduct found unbecoming an officer.

The making and uttering of a worthless check by dishonorably failing to maintain sufficient funds is punishable under Article 134, UCMJ. "The gist of the offense lies in the conduct of the accused after uttering the instrument." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 68c. The failure to pay must be characterized by deceit, evasion, false promises or other culpable circumstances such as deliberate nonpayment or gross indifference toward one's financial obligations. *Id.*, Part IV, ¶¶ 69c and 71c.; *see United States v. Hurko*, 36 M.J. 1176, 1178-79 (N.M.C.M.R. 1993).

The appellant's statements during the providence inquiry into the worthless check offenses established only that: (1) she failed to maintain sufficient funds upon presentment of the 31 checks; (2) she had no justification for failing to do so; and (3) that she agreed that her conduct was dishonorable, prejudicial to good order and discipline, and service discrediting. A stipulation of fact added that the appellant's conduct as to each of the 31 checks in failing to maintain sufficient funds in her account was dishonorable "in that it indicated a grossly indifferent attitude toward the status of her bank account and just obligations." Prosecution Exhibit 1. Although the military judge eventually reopened the providence inquiry, she did not inquire further into the appellant's conduct after uttering the checks to establish how her failure to pay was dishonorable, and thus criminal, rather than merely negligent. Record at 110-116.

Based only on the providence inquiry and the stipulated facts concerning the Article 134, UCMJ, worthless check offenses, we have nothing but the legal conclusion that the appellant's conduct was dishonorable to establish that a crime occurred each time the appellant failed to maintain sufficient funds to cover the checks. However, the stipulated facts addressing the Article 133, UCMJ, offense, alleging conduct unbecoming an officer, add crucial details concerning the appellant's conduct after uttering the 31 worthless checks. Specifically, the appellant stipulated that, at divers times during the period from July 1999 through July 2000, she wrote checks for cash knowing there were not sufficient funds in her account to cover them, and then deposited the cash received from these checks back into her account in order to create a false balance. This manipulation scheme was designed to temporarily cover checks previously written. Prosecution Exhibit 1 at 19.

Since this deceitful manipulation of her checking account balance was designed to deceive her credit union as to her ability to repay the 31 worthless checks (as well as any other checks she wrote during the time period from July 1999 through July 2000), we find the appellant's failure to repay the 31 worthless checks to have been characterized by bad faith. We therefore find her guilty pleas to the 31 worthless check specifications to be provident, but only because of the factual allegations that support the Article 133, UCMJ, offense. We must now consider whether the 31 worthless check offenses are lesser included offenses (LIOs) of the Article 133, UCMJ, offense.

2. The worthless check offenses are LIOs of, and factually the same as, the allegation of conduct unbecoming an officer.

The Discussion to RULE FOR COURTS-MARTIAL 907(b)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), states in part: "[a] specification is multiplicious with another if it alleges the same offense, or an offense necessarily included in the other." *See also United States v. Palagar*, 56 M.J. 294, 296 (C.A.A.F. 2002). Ordinarily, an unconditional guilty plea waives any multiplicity issue. *See United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997). However, an appellant may overcome waiver if the offenses are facially duplicative, and thus the multiple convictions constitute plain error. *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000)(citing *Lloyd*, 46 M.J. at 23, and *United States v. Britton*, 47 M.J. 195, 198 (C.A.A.F. 1997)). In deciding whether offenses are facially duplicative, we review the "language of the specifications and 'facts apparent on the face of the record'" to determine if the specifications are factually the same. *Id.*

The specification under Article 133, UCMJ, discusses a scheme involving 241 checks totaling $62,531.38 in value, occurring during the period from July 1999 through July 2000. In contrast, the specifications under Article 134, UCMJ, alleging the dishonorable failure to maintain sufficient funds refer to only 31 checks uttered over the period from August 1999 through January 2000, and do not describe how the appellant's failure was dishonorable. On their face, the worthless check offenses are not clearly included in the scheme charged as conduct unbecoming an officer.

However, the assistant trial counsel's sentencing argument concerning the Article 133, UCMJ, offense clarifies that, of the 241 checks totaling $62,531.38 in value that the appellant made

and uttered from July 1999 through July 2000, "more than 30 of them, over $10,000 in value, were dishonored." Record at 96. We infer from this argument that the 31 specifications of worthless checks, totaling approximately $10,865.63 in value, refer to the same checks that were dishonored as a result of the appellant's account balance manipulation scheme. We therefore conclude, since the other 210 checks apparently had sufficient funds to cover them upon presentment, that the only evidence that proves there were not funds to support the "false balance" caused by the appellant's manipulation of her checking account is that 31 of the 241 checks mentioned were dishonored. This is precisely the same conduct upon which the worthless check offenses are based.

Since the dishonorable conduct is factually the same under both Articles, we find the combined 31 worthless check specifications facially duplicative of the misconduct charged as conduct unbecoming an officer. The issue of multiplicious charges was therefore not forfeited by the appellant's failure to assert it at trial. The worthless check offenses are lesser included offenses of the conduct unbecoming an officer, and the former must be dismissed. *United States v. Cherukuri*, 53 M.J. 68, 71 (C.A.A.F. 2000); *United States v. Harwood*, 46 M.J. 26, 28 (C.A.A.F. 1997). We will take appropriate action in our decretal paragraph below.

Dishonorable Failure to Pay Debts

The appellant was also charged with two specifications of dishonorable failure to pay debts, in that she failed to make any payments on two credit card account balances that were due and payable, for periods of approximately 6 and 8 months respectively. Although the appellant does not contend error, we find that her guilty pleas to these specifications were improvident.

A military judge shall not accept a plea of guilty without making sufficient inquiry of the accused to establish that there is a factual basis for the plea. *See* Art. 45(a), UCMJ; *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). Before accepting a guilty plea, the military judge must explain the elements of the offense and ensure that a factual basis for the plea exists. *See United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996); *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980). Mere conclusions of law recited by the accused are insufficient to provide a factual basis for a guilty plea. *See United States v. Jordan,* 57 M.J. 236, 239 (C.A.A.F. 2002)

(citing *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996)). "[T]he accused must be convinced of, and able to describe all the facts necessary to establish guilt." R.C.M. 910(e), Discussion.

The record does not provide a factual basis to support the two specifications under Article 134, UCMJ, alleging dishonorable failure to pay debts. Specification 36 of the Charge alleges that the appellant dishonorably failed to pay her debt on one credit card for approximately 6 months; the specification under Additional Charge II alleges dishonorable failure to pay the debt on another credit card for approximately 8 months. The appellant stated during the providence inquiry that: (1) she made some payments on the credit cards prior to the time periods listed in the specifications; and (2) she paid the full balance of both credit cards at the end of the periods specified. She admitted, however, that she failed to make any payments during the specified periods.

The military judge elicited these basic facts and also obtained the appellant's admissions that her temporary failure to make payments on these credit card balances was "dishonorable" and "indicated a grossly indifferent attitude." The appellant also admitted that she made a conscious decision not to make payments on these credit card balances during the periods described. However, there is no factual basis in the record to support a finding of deceit, evasion, or false promises with regard to these debts. Moreover, since she paid these debts at the end of the periods alleged, and the military judge did not question the appellant as to her **ability** to pay these debts during the periods of nonpayment, we cannot find the facts in the record demonstrate "a deliberate nonpayment or a grossly indifferent attitude toward one's just obligations." MCM, Part IV, ¶ 71c. We must therefore set aside the findings of guilty to Specification 36 of the Charge and to Additional Charge II and its specification, alleging the dishonorable failure to pay debts.

Conclusion

In light of the foregoing analysis, we set aside and dismiss the findings of guilty as to the Charge and Additional Charge II, and all the specifications thereunder. We affirm the findings of guilty to Additional Charge I and its specification. Upon reassessment of the sentence, we approve only the dismissal and confinement for 60 days. *See United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998); *United States v. Peoples*, 29 M.J. 426,

428 (C.M.A. 1990); *United States v. Sales*, 22 M.J. 305, 306 (C.M.A. 1986); *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985).

Senior Judge CARVER and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court