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

BEFORE

Charles Wm. DORMAN **C.J. VILLEMEZ** **R.C. HARRIS**

UNITED STATES

v.

Amy R. WALLACE
Private (E-1), U.S. Marine Corps

NMCCA 200100296 Decided 30 April 2004

Sentence adjudged 22 November 1999. Military Judge: S.A. Folsom. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Marine Aircraft Group 11, 3d Marine Aircraft Wing, MarForPac, MCAS Miramar, San Diego, CA.

Maj ANTHONY WILLIAMS, USMC, Appellate Defense Counsel
Capt WILBUR LEE, USMC, Appellate Government Counsel

DORMAN, Chief Judge:

The appellant was tried by a special court-martial composed of a military judge sitting alone. Contrary to her pleas, the appellant was convicted of a single specification of uttering a $1,500.00 bad check, a single specification of the dishonorable failure to pay a just debt, and 20 specifications of dishonorable failure to maintain sufficient funds. The appellant's crimes violated Articles 123a and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 923a and 934. For these offenses the appellant was sentenced to a bad-conduct discharge, 30 days confinement, 30 days hard labor without confinement, and forfeiture of $500.00 pay per month for 1 month. The convening authority approved the sentence as adjudged, then disapproved "[e]xecution of that part of the sentence adjudging 30 days hard labor without confinement."

On appeal before this court the appellant has raised two assignments of error.

I. THE EVIDENCE IS FACTUALLY AND LEGALLY INSUFFICIENT TO SUPPORT FINDINGS OF GUILTY FOR THE

CHARGE, ADDITIONAL CHARGE I AND ADDITIONAL CHARGE II.

II. AN UNSUSPENDED BAD-CONDUCT DISCHARGE IS INAPPROPRIATELY SEVERE FOR THIS OFFENDER AND HER OFFENSES.

The appellant also requested oral argument on the first assignment of error, and that argument was conducted on 9 March 2004.

We have carefully reviewed the record of trial, the appellant's assignments of error, and the Government's response. We have also considered the excellent oral arguments presented by both appellate counsel. Based upon our review we have found error. We conclude that, following our corrective action, the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Sufficiency of Evidence

Since the appellant asserts that the evidence is both legally and factually insufficient, we set out the standards of review as to those issues. The test for legal sufficiency requires this court to review the evidence in the light most favorable to the Government. In doing so, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Applying that standard to the evidence in this case, we find the evidence is legally sufficient to sustain the appellant's conviction as to all Charges and Specifications of which she was found guilty.

The test for factual sufficiency, however, is more favorable to the appellant. It requires this court to be convinced of her guilt beyond a reasonable doubt, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses. *Turner*, 25 M.J. at 325. Reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). "[T]he factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). So too may we. In resolving the question of factual sufficiency, we have carefully reviewed the record of trial, but have given no deference to the factual determinations made at the trial level. Based on that review, we are not convinced beyond a reasonable doubt of the appellant's guilt of the Specification under Additional Charge I, alleging that the appellant issued a check for $1,500.00 knowing that she did not or would not have sufficient funds available in her checking account to make payment on the check. We are also not convinced beyond a reasonable doubt of the appellant's guilt

of each of the 20 specifications of which she was convicted under the Additional Charge II alleging a dishonorable failure to maintain sufficient funds. We are convinced beyond a reasonable doubt of the appellant's dishonorable failure to pay a just debt, as alleged in the Specification under the Charge.

A. Uttering a Check with the Intent to Defraud

In November 1998, the appellant purchased a used automobile from a dealer in Escondido, CA. At the time of the purchase on 21 November 1998, the appellant presented a check to the dealership for $1,500.00. The check was marked "NSF" on 27 November 1998, a standard notation for not sufficient funds. During the defense case-in-chief, the appellant's mother testified that she told her daughter -- the appellant -- to write the check. She also testified that the car dealership told her that they were going to hold the check as a down payment, until the dealership received the check from the appellant's parent's, who were buying the car for their daughter. During the Government's case-in-chief, the financial manager for the dealership was called as a witness. He testified that he had dealt with the appellant while she was at the dealership, and that if the appellant's check was to have been held, that fact would have been noted in the sales contract. Unfortunately, however, there are three different sales contracts. Although none of them indicate that the appellant's check would be held, it was apparently held for at least a few days. Although the check was written on 21 November 1998, the first discernable "date-stamp" on the check is 27 November 1998. The financial manager also testified that it is possible that more than one financial manager can work the same contract. Additionally, the Government did not call the salesperson who worked with the appellant prior to the financial manager getting involved.

To prove the appellant's guilt of uttering a bad check to the auto dealership, the Government was required to prove, among other things, that when the appellant uttered the check she knew that she would not have sufficient funds in her account at the time the check was presented for payment. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 49b(1)(d). We are not convinced beyond a reasonable doubt that the Government met its burden with respect to that element.

B. Uttering Worthless Checks by Dishonorably Failing to Maintain Sufficient Funds

The appellant stands convicted of having uttered 20 worthless checks between May 1998 and May 1999. The check for the largest amount was written for $720.00, and the smallest was written for $1.34. During this same period, many checks that the appellant wrote were paid upon presentment to the Navy Federal Credit Union. Throughout the entire period of time, the appellant's pay was apparently being automatically deposited into her Navy Federal Credit Union account. For reasons, sometimes

beyond the appellant's control, the amount of the deposit would fluctuate from month to month. This time period was also one of both professional and personal turmoil for the appellant. Professionally, her unit was relocated from one Marine Corps facility to another in Southern California, resulting in commuting and housing problems for her. Personally, her marriage was breaking up, and during the first few months of this period her husband was a joint owner of the account.

> There are five elements of the offense of dishonorable failure to maintain sufficient funds in violation of Article 134, UCMJ. . . . One element is that "this failure was dishonorable." MANUAL FOR COURTS-MARTIAL, UNITED STATES, (1995 ed.), Part IV, ¶ 68(b)(4)[hereinafter MCM]. "Mere negligence in maintaining one's bank balance is insufficient for this offense, for the accused's conduct must reflect bad faith or gross indifference in this regard." MCM, Part IV, ¶ 68c ("Explanation"). Our obligation on appeal is to preserve the line between simple negligence in maintaining funds, for which no criminal sanctions lie, and a dishonorable failure to maintain funds, which is "characterized by deceit, evasion, false promises, or other distinctly culpable circumstances indicating a . . . grossly indifferent attitude." MCM, Part IV, ¶ 71c. *See United States v. Hurko*, 36 M.J. 1176, 1178 (N.M.C.M.R. 1993).

United States v. Ellis, 47 M.J. 801, 802 (N.M.Ct.Crim.App. 1998). As we review the Government's proof in this case, we are not convinced beyond a reasonable doubt that the appellant exhibited the characteristics of one who dishonorably fails to maintain sufficient funds.

C. Dishonorable Failure to Pay a Just Debt

When the appellant was notified that her check to the auto dealership had been presented for payment and had been returned for insufficient funds, she went to the dealership with her then boyfriend. Once there, he made good on the check, using his personal credit card. At trial he testified that he used his credit card to loan the appellant the money she needed to keep her car. She was to repay the loan in February 1999. He also testified concerning numerous efforts he made to collect on the loan. Eventually, he took the appellant to small claims court and secured a judgment against her for the loan. As of the date of trial, the appellant still had not repaid the loan. Under these facts, we find the evidence to be factually sufficient to

sustain the appellant's conviction under the Charge and its Specification.[1]

Sentence Appropriateness

While the corrective action we will take in reassessing the sentence moots the appellant's second assignment of error, we comment on one aspect of this case. This is the appellant's second special court-martial. She was tried and convicted in June 1999 for writing bad checks under Article 123a, UCMJ. As a result of that conviction, she was reduced to private. During the appellant's unsworn statement, she told the military judge that the members of her prior court-martial heard some of the same evidence as was presented at the court-martial now before us. She also stated that the checks that were involved in the case before us were written before the checks she was convicted of uttering by her June 1999 special court-martial. No explanation is contained on the record as to why all charges where not brought before the same court-martial. However, given the "light" punishment she received at her earlier court-martial, we perceive no prejudice as it relates to unitary sentencing. Given the nature of the prior conviction, and the timing of it, we give very little weight to it as a matter in aggravation.

Conclusion

In light of our findings, noted above, we affirm the appellant's conviction of the Charge and the Specification thereunder, alleging the appellant's dishonorable failure to pay a just debt. The appellant's conviction of Additional Charge I and its Specification, alleging the uttering of a check with the intent to defraud, is set aside, as is the appellant's conviction under Additional Charge II and all Specifications thereunder, for which the appellant was convicted of the dishonorable failure to maintain sufficient funds in her checking account for the payment of those checks upon presentment. The Charges and Specifications we have set aside are ordered dismissed.

As a result of our action on the findings, we have reassessed the sentence in accordance with the principles of *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), and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). Upon reassessment of the sentence, we approve only so much of the sentence as extends to confinement for 30 days and forfeiture of

[1] In evaluating the evidence with respect to this Charge and Specification, we have not considered the document attached to the appellant's Motion to Attach of 14 Feb 2003.

$500.00 pay per month for 1 month. The supplemental promulgating order will reflect the findings and the sentence as modified by this decision.

Judge VILLEMEZ and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court