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

BEFORE

C.A. PRICE **C.L. CARVER** **R.C. HARRIS**

UNITED STATES

v.

Antonine GALVAN
Fireman Recruit (E-1), U.S. Navy

NMCCA 200200948 Decided 29 January 2004

Sentence adjudged 12 July 2001. Military Judge: K.C. McManaman. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commander, Fleet Activities, Yokosuka, Japan.

CDR DENNIS E. BOYLE, JAGC, USNR, Appellate Defense Counsel
LT JOHN J. LUKE, JAGC, USNR, Appellate Defense Counsel
CDR GEORGE F. REILLY, JAGC, USN, Appellate Defense Counsel
Capt GLEN R. HINES, USMC, Appellate Government Counsel
LT LORI MCCURDY, JAGC, USNR, Appellate Government Counsel

CARVER, Senior Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of uttering worthless checks (17 specifications), and altering or falsely using a military identification card (two specifications), in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to a bad-conduct discharge, confinement for five months, and forfeiture of $640.00 pay per month for five months. Pursuant to a pretrial agreement, the convening authority approved the sentence as adjudged, but was obligated to suspend all confinement over 100 days for twelve months.

The appellant initially filed two summary assignments of error: that the convening authority failed to suspend confinement as required by the pretrial agreement, and that his sentence was inappropriately severe. *See* Appellant's Summary Assignment of Errors of 18 Sep 2002. This court then specified an additional issue of whether the appellant's pleas to the worthless check

offenses were provident, and ordered supplemental briefs on that issue. *See* Order of 6 Feb 2003.

After carefully considering the record of trial, the appellant's assignments of error, the Government's response, and the supplemental briefs in response to the specified issue, we conclude that the findings of guilty as to four specifications must be disapproved, but that the remaining findings and the sentence are correct in law and fact and that no other error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Providence Inquiry

In response to the specified issue, the appellant contends that his pleas of guilty to Charge I and Additional Charge I should have been rejected. He asserts that there is an insufficient factual basis to establish that his actions in maintaining his checking account were dishonorable. We grant partial relief.

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*, 18 C.M.A. 535, 541, 40 C.M.R. 247, 253 (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." RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Discussion. To impart the seriousness of the *Care* inquiry, an accused is questioned under oath about the offenses to which he has pled guilty. R.C.M. 910(e).

However, a military judge "may not arbitrarily reject a guilty plea." *United States v. Penister*, 25 M.J. 148, 152 (C.M.A. 1987). We will not speculate as to the existence of facts that might invalidate the plea. *See United States v. Johnson,* 42 M.J. 443, 445 (C.A.A.F. 1995). The standard of review to determine whether a plea is provident is whether the record reveals a substantial basis in law and fact for questioning the plea. *See United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). The factual issue of guilt is ordinarily waived by a voluntary plea of guilty. The only exception to the general rule of waiver is if an error is materially prejudicial to a substantial right of the appellant. Art. 59(a), UCMJ; R.C.M. 910(j).

This court has on several occasions reviewed providence inquiries for the Article 134 offense of making or uttering worthless checks. What constitutes a "dishonorable" failure to maintain funds in a checking account and what constitutes merely "negligent" conduct is a fine line and inherently fact-specific. The former must be characterized by deceit, evasion, false promises or other such culpable circumstances as deliberate nonpayment or gross indifference toward one's financial obligations. *See United States v. Hurko*, 36 M.J. 1176, 1178-1179 (N.M.C.M.R. 1993)(citations omitted). Failure to keep an accurate account of one's account balance, however, is no more than simple negligence and typically does not rise to the level of gross indifference. *Id.* Our obligation on appeal is to preserve this line between simple negligence and dishonorable failure. *United States v. Ellis*, 47 M.J. 801, 802 (N.M.Ct.Crim.App. 1998).

The military judge accurately listed the elements and definitions applicable to this offense. Record at 22-23; Prosecution Exhibit 1 at ¶ 7. The appellant repeatedly indicated a clear understanding of those elements and definitions, and admitted that they accurately described his conduct. Record at 17, 21, 47. Thus, the only real issue is whether the appellant's conduct crossed that line from negligent to dishonorable.[1]

The appellant wrote and cashed 17 bad checks over the course of two months, totaling more than $1,750.00. Of the 17 checks, most of the earlier checks were written to Naval Exchange and MWR facilities. He also passed five bad checks to a fellow Sailor. All of the checks were exchanged for cash. At the time of the offenses, the appellant was a Fireman Recruit grossing less than $1,000.00 per month.

Of the 17 worthless checks before us, Specifications 7-10 were the first in time made and uttered by the appellant. The providence inquiry as to these specifications is woefully inadequate.[2] The record does not clearly reveal the appellant's mindset as to the status of his checking account, the processing

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[1] The Stipulation of Fact, while lengthy, is not particularly helpful in this regard. It does little more than recite the elements with legal conclusions. *See United States v. Campos*, 37 M.J. 1110, 1112 (N.M.C.M.R. 1993). We encourage trial and defense counsel to put actual *facts* in such stipulations; otherwise, the time spent preparing such a document is largely wasted.

[2] The trial counsel properly urged the military judge, on more than one occasion, to question the appellant more extensively to establish a factual basis for the pleas. The military judge asked a few more questions, but failed to engage the appellant in the kind of colloquy that is essential for an offense such as this. There is a fine line between non-criminal negligence and criminal dishonor as to this particular offense. In fact, this is one of the most difficult offenses in terms of making and accepting a provident guilty plea. Staff judge advocates, trial practitioners and military judges should therefore proceed with great care in charging, pleading and convicting of this offense of dishonorable failure to place and maintain funds under Article 134.

of these checks, and whether he ever learned that these checks were dishonored.

For the checks listed in the remaining specifications, the account was closed when these checks were presented for payment. Based on our review of the record, the appellant was aware of that fact or should have been aware of that fact by the time the checks were dishonored. By continuing to utter checks on a closed account over a period of several weeks, and apparently doing nothing to make good on those checks after having uttered them, the appellant demonstrated the requisite dishonor. *See United States v. Silas*, 31 M.J. 829, 830 (N.M.C.M.R. 1990). At no time during the providence inquiry did the appellant manifest a belief that the checks would be paid, or that he intended to place additional monies in his account to cover them; to the contrary, he believed there was not enough money in the account, and expressly stated that he did not care. *Cf. Ellis*, 47 M.J. at 802-03; *United States v. Campos*, 37 M.J. 1110, 1111 (N.M.C.M.R. 1993); *Hurko*, 36 M.J. at 1178-79.

In light of the foregoing, we conclude that the pleas of guilty to Specifications 7, 8, 9, and 10 of Charge I were improvident and that those specifications must be dismissed. As to the remaining specifications of worthless checks, we find that there is sufficient evidence in the record to conclude that the appellant's conduct constituted a dishonorable failure to maintain funds and not mere negligence. Thus, we affirm the remaining findings of guilty.

Error in Convening Authority Action

The appellant, in a summary assignment of error, contends that he is entitled to a new convening authority's action. The appellant's pretrial agreement required the convening authority to suspend all confinement in excess of 100 days for a period of twelve months from the date of trial. Appellate Exhibit II at ¶ 2. In his action, however, the convening authority failed to suspend any of the confinement. Special Court-Martial Action of 29 Jan 2002. The appellant's trial occurred on 12 July 2001, meaning that he should have served all of his confinement by the time of the convening authority's action. Moreover, over half of the suspension period would have run by the date of the action.

The convening authority's action must indicate whether the sentence is to be executed, or if all or part of the sentence is to be suspended. *See* R.C.M. 1107(f)(4)(B). We agree with the appellant that the action fails to comply with the pretrial agreement. However, we do not find that the appellant has suffered any prejudice as a result of this technical error.

The appellant does not allege that he served any confinement in excess of what the pretrial agreement required. We also note that the Results of Trial memorandum, attached to the record of trial, correctly states the terms of the pretrial agreement. *See*

Report of Results of Trial of 12 Jul 2001. A copy of this document was sent to the brig where the appellant was to serve his confinement. *Id.* Absent some showing by the appellant to the contrary, we assume that he was released in accordance with the terms of the pretrial agreement several months before the erroneous action was issued. Furthermore, what would have been the suspension period for the remaining confinement has long since expired. While we do not condone the convening authority's error, remedial action is not required. *United States v. Caver*, 41 M.J. 556, 565 (N.M.Ct.Crim.App. 1994).

Sentence Appropriateness

In a second summary assignment of error, the appellant asserts that his sentence is inappropriately severe and requests that we set aside the bad-conduct discharge. We decline to grant such relief.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 10 C.M.A. 102, 106-07, 27 C.M.R. 176, 180-81 (1959)).

The appellant points out that he pled guilty and accepted responsibility for his actions. He also points to evidence of his good work performance, which was offered at trial. Nonetheless, his misconduct is quite serious. He wrote 13 bad checks, 5 of those to a fellow junior enlisted Sailor. He also altered a military identification card to hide his true social security number. We note that appellant has a prior special court-martial conviction in the U.S. Navy for what appears to be similar offenses.[3] After reviewing the entire record, we find that the sentence is appropriate for this offender and these offenses. *Healy*, 26 M.J. at 395-96; *Snelling*, 14 M.J. at 268. Granting sentence relief at this point would be to engage in clemency, a prerogative reserved for the convening authority. *Healy*, 26 M.J. at 395-96.

Conclusion

Upon reassessment, in light of our dismissal of 4 of the 17 specifications of worthless checks, we find that the sentence received by the appellant would not have been any lighter even if

[3] The clemency petition submitted by the appellant, referenced in his summary assignment of error, mentions a prior punitive discharge from the U.S. Army, separate from the prior conviction in the U.S. Navy. Evidence of that earlier Army conviction and discharge was offered by the trial counsel but excluded by the military judge. As this evidence is not part of the record of trial, we have not considered it here.

he had not been charged with those four specifications. We further find that the sentence is appropriate for this offender and the remaining offenses. *See United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986); *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985).

Accordingly, the findings of guilty to specifications 7, 8, 9, and 10 of Charge I are set aside and those specifications are

dismissed. The remaining findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Senior Judge PRICE and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court