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

BEFORE

Charles Wm. DORMAN **M.J. SUSZAN** **R.C. HARRIS**

UNITED STATES

v.

Scott E. WILLIAMS
Private First Class (E-2), U.S. Marine Corps

NMCCA 200400094 Decided 23 November 2004

Sentence adjudged 13 September 2002. Military Judge: M.J. Catanese. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Headquarters Battalion, Marine Forces Reserve, New Orleans, LA.

CDR REGINALD HENDERSON, JAGC, USNR, Appellate Defense Counsel
Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
Maj RAYMOND BEAL, USMC, Appellate Government Counsel

DORMAN, Chief Judge:

The appellant was tried before a special court-martial composed of a military judge sitting alone. In accordance with his pleas, the appellant was convicted of one specification each of making and uttering checks with the intent to defraud, in violation of Articles 123a and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 923a and 934. The adjudged and approved sentence consists of confinement for 100 days, reduction to pay-grade E-1, and a bad-conduct discharge. Upon taking action, the convening authority suspended that portion of the sentence to confinement in excess of 90 days for a period of 6 months from the date of sentencing.

We have reviewed the appellant's record of trial, submitted to us without assignment of error. Following our review, we conclude that the findings with respect to the original Charge and Specification, alleging the making and uttering of checks with the intent to defraud, must be set aside. Following that action and our reassessment of the sentence we conclude that the remaining findings and reassessed sentence are correct in law and

fact and that no error remains that was materially prejudicial to substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Providence of Guilty Plea to Article 123a Offense

The original Charge and Specification alleges that the appellant made and uttered 28 checks with the intent to defraud. During the inquiry into the providence of his guilty plea to that offense the appellant admitted that he wrote the 28 checks over a one month period of time, knowing that he would not have sufficient funds in his account to cover the checks. The appellant also admitted that he had the intent to defraud when he wrote the checks. The appellant also entered into a stipulation of fact detailing his misconduct. Prosecution Exhibit 1.

The military judge, however, did not advise the appellant of the elements of this offense. Rather, he began to advise the appellant of the elements of the offense of uttering a forged document, but he did not complete that advice. See Record at 14-15. Furthermore, although the military judge did advise the appellant of some of the definitions involved in the charged offense, to include "intent to defraud," he did so **after** the appellant had detailed his activities on the record. The military judge never asked the appellant if he understood the definitions or if those definitions applied to the appellant's conduct. See Record at 19 and 20.

A military judge may not accept a guilty plea to an offense without inquiring into its factual basis. Art 45(a), UCMJ; *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). Before accepting a guilty plea, the military judge must ordinarily explain the elements of the offense, and must ensure that a factual basis for the plea exists. *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002); *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); RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Discussion. Acceptance of a guilty plea requires an appellant to substantiate the facts that objectively support the guilty plea. *United States v. Schwabauer*, 37 M.J. 338, 341 (C.M.A. 1993); R.C.M. 910(e).

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. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). Such questioning must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty, and the only exception to the general rule of waiver arises when an error prejudicial to the substantial rights of the appellant occurs. Art. 59(a), UCMJ; R.C.M. 910(j).

For complex offense such as conspiracy, robbery, or murder, a failure to discuss and explain the elements of the offense during the providence inquiry has been held to be fatal to the guilty plea on appeal. *United States v. Pretlow*, 13 M.J. 85, 88-89 (C.M.A. 1982); *United States v. Nystrom*, 39 M.J. 698, 701-02 (N.M.C.M.R. 1993). A different result occurs for less complex cases, such as simple military offenses where the elements are commonly known by most servicemembers. *Nystrom*, 39 M.J. at 701.

In the case before us the appellant was charged with making and uttering 28 checks "with the intent to defraud and for the procurement of lawful currency or an article of value." Additionally, the offence required that the appellant knew at the time if the making and uttering of the checks that he would not have sufficient funds in his account to cover the checks. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 49b(1). We conclude that this offense is not a simple military offense for which most servicemembers would be aware of the elements. In fact, we note that there has been much confusion between this offense and that of the offense frequently charged under Article 134, Dishonorably Failing to Maintain Sufficient Funds. Accordingly, we conclude that the failure of the military judge to advise the appellant of the elements of the offense alleged in the Specification under the Charge materially prejudiced the appellant's substantial rights and rendered the appellant's guilty plea improvident to that offense.

Conclusion

Accordingly, we set aside the guilty plea to the Specification under the original Charge and the original Charge and order the original Charge and its Specification dismissed. The remaining findings are affirmed. In light of our setting aside the original Charge and its Specification we must reassess 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 only so much of the approved sentence as extends to confinement for 60 days, reduction to pay grade E-1, and a bad conduct discharge is affirmed.

Judge SUSZAN and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court