

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
C.L. REISMEIER, E.E. GEISER, J.K. CARBERRY  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**VICTOR L. LEWIS  
SEAMAN (E-3), U.S. NAVY**

**NMCCA 200900586  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 18 June 2009.

**Military Judge:** CAPT Keith J. Allred, JAGC, USN.

**Convening Authority:** Commanding Officer, USS RUSHMORE  
(LSD 47).

**For Appellant:** CAPT Frederic Matthews, JAGC, USN.

**For Appellee:** CAPT M.A. Grover, JAGC, USN; LT Brian C.  
Burgtorf, JAGC, USN.

**30 March 2010**

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**OPINION OF THE COURT**  
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**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICES AND PROCEDURE, THIS  
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of one specification of failing to obey a lawful order, ten specifications of larceny, three specifications of forgery, one specification of wrongful use of a false base vehicle pass, one specification of identity theft, and two specifications of bank fraud, in violation of Articles 92, 121, 123, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 921, 923, and 934. The approved sentence was confinement for 12 months, reduction to pay grade E-1, forfeiture of \$900.00 pay per month for 6 months, a fine of \$1000.00, and a bad-conduct discharge. The convening authority approved the findings and sentence and, pursuant to the

pretrial agreement, suspended all confinement in excess of 8 months.

The appellant raises the following errors: (1) that the military judge erred in not establishing a factual predicate for his pleas of guilty to Specifications 2 and 3 of Charge III; and (2) that without the staff judge advocate's recommendation, the record of trial is incomplete and denies the appellant proper post trial review.<sup>1</sup>

After considering the record of trial and the pleadings by the parties, we find the military judge failed to conduct an adequate providence inquiry, as required by RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS MARTIAL, UNITED STATES (2008 ed.), into Specifications 2 and 3 of Charge III. We will take corrective action in our decretal paragraph. The remaining findings and the sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

### **Background**

Pursuant to a pretrial agreement, the appellant pled guilty to multiple charges and specifications related primarily to the stealing and forging of other Sailors' checks. Prior to his inquiry into Specification 1 of Charge III with the appellant, the military judge correctly advised the appellant of the general elements of forgery. Record at 54-55. The military judge then provided the tailored elements for Specification 1 of Charge III to the appellant and over the next five pages of the record ascertained a factual basis for the guilty plea to Specification 1. *Id.* at 55-61. Following his inquiry into Specification 1, the court recessed. *Id.* at 61. Upon resumption of the court-martial, the military judge began his inquiry into Charge IV without making any inquiry into Specifications 2 and 3 of Charge III. *Id.* When the military judge concluded the providence inquiry, he informed both parties that he had read the stipulation of fact and would rely upon it in making his findings. *Id.* at 73. The military judge entered findings of guilt as to Specifications 2 and 3 of Charge III. *Id.* at 87-88.

### **Discussion**

Before accepting a plea of guilty, the military judge must conduct an inquiry of the accused to determine whether there is a factual basis for the plea and whether the accused understands the plea and enters it voluntarily. *United States v. McCrimmon*, 60 M.J. 145, 152 (C.A.A.F. 2004); *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969); R.C.M. 910(c)-(e). The accused must admit every element of the offense to which the accused is pleading guilty. See R.C.M. 910(e), Discussion. Although the

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<sup>1</sup> The second assignment of error is moot as the legal officer's recommendation has since been attached to the record.

stipulation of fact establishes a factual basis for the guilty plea, R.C.M. 910 nonetheless requires that "[t]he accused shall be questioned under oath about the offenses." See *United States v. Aleman*, 62 M.J. 281 (C.A.A.F. 2006). In this instance, the military judge failed to inform the appellant of the elements of Specifications 2 and 3 of Charge III and asked no questions of the appellant to establish a factual basis for the appellant's pleas of guilty to those specifications.

The failure to advise the appellant of the elements of the offenses in Specifications 2 and 3 of Charge III and the failure to establish a factual basis for the appellant's guilty pleas constitute error and a substantial basis in law for not accepting the appellant's guilty pleas to those offenses. Accordingly, we will set-aside the findings of guilty to Specifications 2 and 3 in our decretal paragraph.

#### **Sentence Reassessment**

Having set aside Specifications 2 and 3 of Charge III, we reassess the sentence. Applying the analysis set forth in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), and carefully considering the entire record, we are satisfied beyond a reasonable doubt that the sentencing landscape has not substantially changed and that even if the error had not occurred, the military judge would have adjudged a sentence no less than that approved by the convening authority in this case.

#### **Conclusion**

The findings of guilty to Specifications 2 and 3 of Charge III are set aside and those specifications are dismissed. The remaining findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL  
Clerk of Court