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

Before
K.J. BRUBAKER, M.C. HOLIFIELD, A.Y. MARKS
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JOSEPH K. COELHO
AVIATION STRUCTURAL MECHANIC FIRST CLASS (E-6), U.S. NAVY

NMCCA 201400444
SPECIAL COURT-MARTIAL

Sentence Adjudged: 16 October 2014.
Military Judge: CAPT A.H. Henderson, JAGC, USN.
Convening Authority: Commander, Naval Medical Center, San Diego, CA.
Staff Judge Advocate's Recommendation: CDR K.M. Messer, JAGC, USN.
For Appellant: CDR Ricardo A. Berry, JAGC, USN.
For Appellee: LCDR Keith B. Lofland, JAGC, USN; Capt Stacy M. Allen, USMC.

25 June 2015

OPINION OF THE COURT

PER CURIAM:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of one specification each of failing to go to his prescribed place of duty and of disobeying a general order, and two specifications each of wrongful use of methamphetamine and of making worthless checks in violation of Articles 86, 92, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 892, 912a, and 934.

The military judge sentenced the appellant to 190 days' confinement, reduction to pay grade E-3, a $2,000.00 fine, and a bad-conduct discharge. The convening authority (CA) approved the adjudged sentence and, pursuant to a pretrial agreement, suspended all confinement in excess of 120 days and the bad-conduct discharge.

The appellant raises two assignments of error: (1) that the appellant's plea of guilty to the specification of Charge IV and the specification of the Additional Charge were improvident; and, (2) that the court-martial order (CMO) incorrectly states the pleas and findings regarding the additional charges. We agree that the CMO is erroneous and order corrective action in our decretal paragraph.

Although not raised as error, we note that the CA in his action extends the period of suspension of confinement beyond the terms agreed to in the pretrial agreement. We address this in our decretal paragraph, as well.

After carefully considering the record of trial and the submissions of the parties, we conclude that the findings and the sentence are otherwise correct in law and fact and that following our corrective action no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Background

Between 2 and 20 July 2014, the appellant wrote sixteen worthless checks, totaling $3028.22, to the Navy Exchange. At trial, the appellant pleaded guilty pursuant to a pretrial agreement. In accordance with RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), and *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969), the military judge conducted a providence inquiry into each of the charges to which the appellant pleaded guilty.

The stipulation of fact signed by the appellant in this case states, "I failed to maintain enough money in my checking account to cover the amount of these checks," and that this failure was "dishonorable."[1] However, during the providency inquiry the appellant stated that he believed he had overdraft protection and that these checks would be covered. The following colloquy pertains:

[1] Prosecution Exhibit 1 at 4.

MJ: Did you think you had enough money to cover these [checks] when you wrote them?

ACC: Prior to writing those checks, sir, I had an overdraft. And what happened prior in the past didn't matter how much I wrote over, the overdraft would cover it and I'd pay an overdraft fee. [The bank] decided to stop my overdraft protection without my consent . . . [a]nd so I made those purchases and they were not covered by my overdraft.[2]

Upon hearing this, the military judge granted a recess to allow the appellant to confer with his defense counsel. The military judge then continued his inquiry to determine whether the appellant reasonably believed that he had credit with the bank in the form of overdraft protection and that this service would have covered the checks he was writing.

The appellant explained that when he had previously made a check for an amount in excess of the money in his checking account, the bank would pay the check and charge him an additional fee of $35.00. When his account later contained sufficient funds to cover both the amount of the check and the $35.00 fee, the bank would automatically deduct the full amount from his account.

During the month of July 2014 the appellant's basic pay was $3,530.40. By 2 July, however, he had spent the first half of that amount and his bank account was empty. Even if the overdraft protection had remained in place, the remainder of his monthly pay, $1,765.20, would not have covered the full amount of the checks plus the expected $560.00 in overdraft service fees. The appellant admitted this to the court:

MJ: So those first 13 checks at least and then going out to the additional three, you were going to have at most half a month's pay to cover $3,588. Does that sound about right?

ACC: Yes, sir. That sounds right, sir.

MJ: Did you think you'd be able to cover that based on what –

ACC: No, sir.

[2] Record at 56.

MJ: -- having nothing in your account?

ACC: No, sir.

MJ: So you knew you couldn't cover the checks and the overdraft in the month of July; is that accurate?

ACC: That's correct, sir. Yes, sir.[3]

At the conclusion of the inquiry, the military judge accepted the appellant's guilty plea.

Additional facts are developed below as needed.

Providence of Plea

"A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion." *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (citations and internal quotation marks omitted). We will not disturb a guilty plea unless the record of trial shows a substantial basis in law or fact for questioning the guilty plea. *Id*. This court "must find 'a substantial conflict between the plea and the [appellant's] statements or other evidence' in order to set aside a guilty plea. The 'mere possibility' of a conflict is not sufficient." *United States v. Watson*, 71 M.J. 54, 58 (C.A.A.F. 2012) (quoting *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996)). In determining whether such a substantial conflict exists, we examine "the 'full context' of the plea inquiry, including Appellant's stipulation of fact." *United States v. Goodman*, 70 M.J. 396, 399 (C.A.A.F. 2011) (quoting *United States v. Smauley*, 42 M.J. 449, 452 (C.A.A.F. 1995)).

One of the elements of making worthless checks is that the failure to place or maintain sufficient funds in or credit with the drawee bank must be dishonorable. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), Part IV, ¶ 68.b(4). An accused's conduct must reflect bad faith or gross indifference, and must be more than the result of "negligence in maintaining funds." *United States v. Ellis*, 47 M.J. 801, 802 (N.M.Ct.Crim.App. 1998). It must constitute "a dishonorable failure to maintain funds, which is characterized by deceit, evasion, false promises, or other distinctly culpable circumstances indicating a . . . grossly indifferent attitude." *Id.* (citations and internal quotation marks omitted).

[3] *Id*. at 65.

The appellant claims the military judge abused his discretion by accepting his guilty pleas regarding the worthless checks, as the appellant's statements indicated that the making of the checks was not dishonorable, but merely the result of negligence, and thus created a substantial conflict with the pleas. He argues that any statements to the contrary simply reflect his acquiescence to the military judge's conclusions.

We find that the military judge's inquiry resulted in provident pleas. The appellant admitted that he knew he had no money in his account on 2 July 2014, when he began writing the checks, and would only receive another $1,765.20 through the month's end. He admitted that this amount would not cover the checks and expected overdraft fees. He stated that he knew how to access his account statement via the Internet but did not do so during the month of July 2014. He told the military judge he purposefully refrained from using his debit card, as he knew any use of the debit card would require an immediate withdrawal from his account and he did not have sufficient funds.

Although the appellant claimed to believe that overdraft protection would allow the checks to clear, he also explained that the bank would withdraw funds from his account as available to cover the bounced checks and fees. This knowledge that there would not be sufficient funds available for the bank to withdraw is sufficient to show that any purported faith in continuing overdraft protection, endlessly covering his bad checks, was fantastical. He admitted as much when he agreed with the military judge that his financial situation would not allow him to "catch up to it in any way."[4] He further admitted that he did not maintain a ledger of any kind to track the numerous checks he was writing - sometimes amounting to five per day. In light of these facts, his decision to continue writing checks clearly evidenced a gross indifference to the matter.

There is a clear "factual predicate" in the record supporting the appellant's legal conclusion (contained in the stipulation of fact) that he was grossly indifferent to the maintenance of sufficient funds. *Ellis*, 47 M.J. at 803. The military judge's careful approach to the potential conflict with the plea drew forth responses – not acquiescence - from the appellant sufficient to remove any such conflict. Accordingly, we find the military judge did not abuse his discretion in accepting the appellant's plea, as the totality of facts elicited during the *Care* inquiry fully established that the

[4] *Id*. at 66.

appellant's failure to maintain sufficient funds was dishonorable.

Post-Trial Processing

The appellant is correct that the CMO erroneously reflects the pleas regarding the additional charges. The charges referred to trial initially contained two additional charges. Prior to arraignment, Additional Charge I was withdrawn and dismissed, and Additional Charge II was renamed as simply the "Additional Charge." Despite this, the CMO states that the appellant pleaded not guilty to Additional Charge I, repeating a mistake made in the staff judge advocate's recommendation by referring to the Additional Charge as "Additional Charge II."

We test error in CMOs under a harmless-error standard, *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998) (citation omitted), and find this error did not materially prejudice the appellant's substantial rights. The appellant alleges no prejudice resulting from the error, and we find none. However, the appellant is entitled to accurate court-martial records. *Id.* Accordingly, we order the necessary corrective action in our decretal paragraph.

We also note that in his action the CA suspended all confinement in excess of 120 days for six months from the date of the CA's action. The pretrial agreement, however, required that the suspension of the confinement run for six months from the date of trial. Since the period of suspension has run regardless of the inception date of the suspension and there being no evidence that the suspension was vacated, no corrective action is warranted other than to correct the appellant's record.

Conclusion

The findings and the sentence as approved by the CA are affirmed. The supplemental CMO shall correctly reflect the charges and specifications to which the appellant pleaded guilty, and that all confinement in excess of 120 days was suspended for six months from the date of trial.

For the Court

R.H. TROIDL
Clerk of Court