

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

**Before
V.S. COUCH, J.A. MAKSYM, B.E. DELURY
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JASON W. DOMEIER
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 200700253
GENERAL COURT-MARTIAL**

Sentence Adjudged: 12 December 2006.
Military Judge: CDR Robert Redcliff, JAGC, USN.
Convening Authority: Commanding General, 3d Marine
Aircraft Wing, MarForPac, San Diego, CA.
Staff Judge Advocate's Recommendation: Col V.A. Ary, USMC.
For Appellant: Maj Christian Broadston, USMC.
For Appellee: LCDR Frank L. Gatto, JAGC, USN; Capt
Geoffrey S. Shows, USMC.

31 March 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

COUCH, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of two specifications of wrongful appropriation, two specifications of forgery, and one specification of bank fraud under 18 U.S.C. § 1344, in violation of Articles 121, 123, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 921, 923, and 934. The appellant was sentenced to confinement for 13 months, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. A pretrial agreement had no affect on the adjudged sentence. The convening authority approved the sentence as adjudged and, except for the bad conduct discharge, ordered it executed.

We have reviewed the record of trial, the appellant's four assignments of error,¹ and the Government's response. We conclude that the appellant's pleas to both specifications under Charge II are improvident and must be set aside, and his sentence reassessed. After our corrective action, we conclude that the findings and 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.

Background

Over the course of approximately two months, the appellant wrote and cashed numerous checks that were returned for insufficient funds at local banks and several base exchange facilities operated by Marine Corps Community Services (MCCS) onboard Marine Corps Air Station (MCAS) Miramar. Record at 104-05, 116-17. In an attempt to recoup the returned check fees levied by Wells Fargo Bank, the appellant made a claim with the bank alleging that his checkbook had been reported stolen. *Id.* at 125. In support of the appellant's claim, the bank requested the appellant produce affidavits from law enforcement stating that the appellant's checkbook had, in fact, been reported stolen. *Id.* The bank also requested an affidavit from the appellant's command, stating that the appellant was deployed at the time of the "theft." Prosecution Exhibit 1 at 26. In response to these requests, the appellant drafted, signed, and forwarded two false affidavits to the bank's claims department. Record at 127.

The first affidavit bore the heading of the base Provost Marshal's Office, and the signature of a nonexistent Corporal (Cpl) John S. Myers, purportedly an investigator in that office. *Id.* at 124; PE 4. The affidavit alleged that the appellant, upon his return from deployment, reported that his checkbook and other personal items had been stolen out of his car. *Id.* at 125-26. The appellant admitted that the checkbook used to write the bad

¹ I. THE TWO SPECIFICATIONS UNDER CHARGE II FAIL TO STATE AN OFFENSE FOR FORGERY IN VIOLATION OF ARTICLE 123 OF THE UNIFORM CODE OF MILITARY JUSTICE (UCMJ).

II. APPELLANT WAS DENIED HIS RIGHT TO SPEEDY POST-TRIAL REVIEW BY THE UNREASONABLE DELAY IN POST-TRIAL PROCESSING.

III. APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL WHEN AN AGENT OF THE GOVERNMENT RIFLED THROUGH HIS PAPERS MARKED "ATTORNEY CLIENT PRIVILEGE. DO NOT OPEN."

IV. THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO AWARD APPELLANT MORE THAN DAY-FOR-DAY CREDIT AFTER FINDING THAT APPELLANT WAS SUBJECT TO UNDULY RIGOROUS PRE-TRIAL [SIC] RESTRICTION CONDITIONS IN VIOLATION OF ARTICLE 13, UCMJ.

Assignments of error III and IV were submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

checks had not, in fact, been stolen from his car, and that the appellant falsely signed the Cpl Myers's affidavit. *Id.* at 126.

The second affidavit bore the heading of the Commanding Officer, Marine Aviation Logistics Squadron (MALS) 26, and had the signature of the purported commanding officer, Lieutenant Colonel (LtCol) Robert M. Ehnou. *Id.*; PE 3. The affidavit alleged that at the time of the "theft" of the appellant's checkbook, the appellant was deployed. PE 3. Upon further investigation, it came to light that MALS-26 did not exist, and at the time the appellant drafted and signed the affidavit, LtCol Ehnou actually was the commanding officer of MALS-16 and did not draft an affidavit on behalf of the appellant. *Id.* at 126-27, 212.

Improvident Guilty Plea

The appellant styles his first assignment of error as a failure to state an offense for forgery because the affidavits the appellant drafted lack legal efficacy. Appellant's Brief of 7 Apr 2008 at 7 (citing *United States v. Thomas*, 25 M.J. 396, 398 (C.M.A. 1988)). While we are satisfied that Charge II and each of its two specifications adequately state an offense,² we consider the appellant's challenge of whether the affidavits lack real or apparent legal efficacy to be an issue over the providence of his pleas. In light of this challenge, we must determine whether there is "a substantial basis in law and fact for questioning the guilty plea." *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)(quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991))(internal quotation marks omitted). We will review this question of law *de novo*. *Id.*

Article 123, UCMJ, defines forgery as follows:

² CHARGE II: Violation of UCMJ, Article 123

Specification 1: In that Sergeant Jason W. Domeier, U.S. Marine Corps, on active duty, did, at or near San Diego, California, on or about 31 March 2006, with intent to defraud, falsely make the signature of Corporal John S. Myers, U.S. Marine Corps, on a letter to Wells Fargo Bank, which writing would, if genuine, apparently operate to the legal harm of another, and which could be used to the legal harm of Wells Fargo Bank, in that Wells Fargo Bank could have relied on the writing to pay the said Sergeant Jason W. Domeier U.S. currency in an amount of about \$44,886.88.

Specification 2: In that Sergeant Jason W. Domeier, U.S. Marine Corps, on active duty, did, at or near San Diego, California, on or about 31 March 2006, with intent to defraud, falsely make the signature of Lieutenant Colonel Robert M. Ehnou, U.S. Marine Corps, on a letter to Wells Fargo Bank, which writing would, if genuine, apparently operate to the legal harm of another, and which could be used to the legal harm of Wells Fargo Bank, in that Wells Fargo Bank could have relied on the writing to pay the said Sergeant Jason W. Domeier U.S. currency in an amount of about \$44,886.88.

Any person subject to this chapter who, with intent to defraud—

(1) falsely makes or alters any signature, to, or any part of, any writing which would, if genuine, *apparently impose a legal liability* on another or change *his legal right or liability* to his prejudice; or

(2) utters, offers, issues, or transfers such a writing, known by him to be so made or altered;

is guilty of forgery and shall be punished as a court-martial may direct.

(Emphasis added). The types of writings which can be the subject of a forgery is defined by MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 48c(4):

With respect to the apparent legal efficacy of the writing falsely made ... the writing must appear either on its face or from extrinsic facts to impose a legal liability on another, or to change a legal right or liability [to] the prejudice of another. If under all the circumstances the instrument has neither real nor apparent legal efficacy, there is no forgery.

Our superior court summed up the interaction of Article 123 and Paragraph 48c(4) of the MCM by stating that both "stand for the proposition that the mere making of a false signature or other entry on a document is not, in itself, sufficient to constitute forgery; the apparent nature of the document is also critical." *Thomas*, 25 M.J. at 398. Additionally, the court held that "[h]istorically, we have interpreted [Article 123] rather strictly." *Id.* at 399.

The appellant, relying on *Thomas*, argues that the submission of false affidavits to a bank in support of a fraudulent claim is not forgery. In *Thomas*, the court held that a falsified "Commanding Officer's Letter," used as a credit reference, did not constitute forgery under Article 123, because it "lacked . . . legal efficacy." *Id.* at 402. The court reasoned that the letter was akin to a letter of recommendation, as the letter "asserted essentially that appellant had no financial or disciplinary problems and that he was an excellent soldier." *Id.* at 401. Evidence also revealed that the bank, upon receipt of a favorable Commanding Officer's Letter, still remained free to accept or deny the application in question. Thus, the facts in *Thomas* do not "reflect or assert that the credit union was under any obligation to, or owed any duty to, appellant or anyone else." *Id.* at 402.

We believe that application of *Thomas* requires the same result in this case. Upon a review of the record, we cannot discern whether the bank was "under any obligation to, or owed

any duty to, appellant or anyone else" as a result of the two affidavits that the appellant drafted. *Id.* at 402. Further, it is not clear from the apparent nature of the documents that any legal liability was created between the bank and the appellant. At his plea inquiry, the appellant admitted that in drafting and signing the affidavits, he assumed that the bank "would have probably credited me back the amount of fees that they had charged for the checks." Record at 127; *see United States v. Burnette*, 35 M.J. 58, 60 (C.M.A. 1992). In drafting and signing the affidavits, the appellant believed that the bank was under a legal obligation to refund the insufficient fund fees. However, the appellant's belief is not enough to surmount the legal efficacy requirement, absent other facts.

While the appellant made a factually supportable guilty plea to the offense of forgery, there still exists a substantial basis in law for questioning it. *Inabinette*, 66 M.J. at 322. We hold that the appellant's pleas to Specifications 1 and 2 of Charge II and to Charge I were improvident, and the military judge abused his discretion by accepting them. The findings of guilty for Specifications 1 and 2 of Charge II and Charge II must be set aside. Additionally, Charge II and its two specifications must be dismissed.

Unreasonable Delay in Post-Trial Processing

In his second assignment of error, the appellant alleges that the 336 day lapse from the CA's action to docketing at this court is excessive and facially unreasonable. Appellant's Brief at 11. Assuming that the appellant was denied the due process right to speedy post-trial review and appeal, we proceed directly to the question of whether any error was harmless beyond a reasonable doubt. *United States v. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006). The appellant alleges no specific prejudice as a result of post-trial delay, and we can find none. In that the appellant has failed to provide any substantiated evidence of prejudice to the contrary, we conclude that the assumed error was harmless beyond a reasonable doubt. *United States v. Allende*, 66 M.J. 142, 145 (C.A.A.F. 2008).

The delay does not affect the findings and sentence that should be approved in this case. *Toohey v. United States*, 60 M.J. 100, 101-02 (C.A.A.F. 2004); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc).

Sentence Reassessment

As a result of our action on the findings, we reassess the sentence in accordance with the principles of *United States v. Moffeit*, 63 M.J. 40, 42 (C.A.A.F. 2006); *United States v. Eversole*, 53 M.J. 132, 133 (C.A.A.F. 2000); *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). We are satisfied that the sentencing landscape in this case has not changed dramatically as a result of our decision to set aside the findings of guilty to forgery. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006). We conclude that absent the military judge's acceptance of the appellant's improvident pleas to forgery, the adjudged sentence for the remaining offenses would have been at least the same as that adjudged by the military judge and approved by the convening authority. *Id.* at 478.

Conclusion

We have considered the appellant's remaining assignments of error and find they have no merit. *United States v. Reed*, 54 M.J. 37, 42 (C.A.A.F. 2000)(citing *United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987)); *see also United States v. Pinson*, 56 M.J. 489, 493 (C.A.A.F. 2002)(privileged documents); and *United States Stringer*, 55 M.J. 92, 94 (C.A.A.F. 2001)(confinement credit for Article 13, UCMJ, violations).

Accordingly, the findings of guilty to Charge II and its two specifications are set aside. Charge II and its two specifications are dismissed. The remaining findings and the sentence, as approved by the convening authority, are affirmed.

Judge DELURY and Judge MAKSYM concur.

For the Court

R.H. TROIDL
Clerk of Court