

16 September 2011

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,	)	<b>BRIEF IN SUPPORT OF</b>
<i>Appellee,</i>	)	<b>PETITION GRANTED</b>
v.	)	
	)	USCA Dkt. No. 11-0526/AF
Senior Airman (E-4)	)	
<b>KODY T. WEEKS,</b>	)	Crim. App. No. 37535
USAF,	)	
<i>Appellant.</i>	)	

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:**

**ISSUE PRESENTED**

**WHETHER APPELLANT'S GUILTY PLEA TO CHARGE II AND ITS SPECIFICATION IS IMPROVIDENT BECAUSE APPELLANT DID NOT FALSELY MAKE OR ALTER A SIGNATURE OR WRITING?**

**Statement of Statutory Jurisdiction**

The Air Force Court of Criminal Appeals reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c) (2006). This Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

**Statement of Proceedings**

On 18 and 20 June 2009, Appellant was tried at a general court-martial by military judge alone at Langley AFB, VA. He was arraigned on four charges; he pled guilty to and was found guilty of all four. Charge II had one specification and was for a violation of Article 123 for "uttering" 31 checks in 2008. Thirty of the checks were for \$500.00, the other for \$1,000.00.

On 30 March 2011, the AFCCA affirmed the findings and sentence. J.A. 3. Appellant filed a timely Petition with this Court on 26 May 2011. Review was granted on 18 August 2011.

### **Statement of Facts**

Sometime prior to September 2006, Appellant received checks from his cousin, Jamael Barber, and his cousin's wife, Claudia Barber ("the Barbers"), ostensibly as gifts. J.A. 49. Between 22 January and 16 June 2008, Appellant used account information from those checks to steal money from the Barbers' checking account on 31 separate occasions. *Id.* at 49-50.

This process did not involve actual "writings":

[Appellant] would cause the checks to be made by using the [Barbers'] account information to create electronic checks by calling a phone number to Best Buy and using their automated payment system to create checks from the Barbers' bank account that would be credited to his balance. On each occasion [Appellant] selected an option to pay by check, provided the Barbers' account number, routing number, a specific check number, and an amount to create the electronic check. The check would automatically be generated from this information and would be credited to [Appellant's] balance.

*Id.* at 50. Appellant described the process as follows:

I would make a call over the phone before Best Buy and use [their] automated bill pay system. I create[d] electronic checks by using the account and router [sic] number, a specific check number and the amount of each check I wanted to create. Then they would automatically generate check [sic] with the information on it. I provided the name and address for the checks. All other information was the Barbers[']. I would sometimes talk to a Best Buy

employee to complete the transaction or just use the automated system.

J.A. 28.

During the providency inquiry, the military judge engaged in the following exchange with Appellant:

MJ: Okay. Now were these paper checks or something else?

ACC: They were electronic checks, Your Honor.

. . .

MJ: Now tell me about the process for doing an electronic check. How does that work?

. . .

ACC: Once I made a call over the phone, the automated service just asked for account information, the router number and checking information. Once I plugged that - or once I gave that to either the automated teller or a Best Buy or Customer Service representative, that's when the checks were electronically generated.

. . .

ACC: . . . *I wasn't actually using the checks to go in the store and pay, Your Honor.*

*Id.* at 30-31, 42 (emphasis added).

Appellant never misrepresented his identity as the following exchanges demonstrate:

MJ: Okay, so did you indicate to them that it was your account? Was that what you did?

ACC: Once I made a payment over the Internet or over the phone, it was no - there wasn't an option to say it was my account or not.

*Id.* at 32.

MJ: . . . Now when you made these payments online or on the phone, did they ask you for any kind of authentication of who you were or that you were authorized to use the account?

ACC: No, Your Honor.

MJ: Okay, you just had to enter the information?

ACC: Yes, Your Honor.

MJ: Who did you indicate the payment was coming from? Did they ask you for any information related to that, or it was just you logged and put the information in and as long as the account had money in it, the money was credited to your bill?

ACC: Yes, Your Honor.

MJ: Okay, so the latter? So it was just credited to your bill. They didn't ask you if you were Ronde [sic] Barber or if you were Claudia Barber?

ACC: No, Your Honor.

*Id.* at 37-38.

### **Summary of the Argument**

First, either a writing or signature is a required element for Article 123. Appellant did not make or alter a signature. Thus, his plea to forgery is improvident.

Second, even if Appellant electronically "made" a writing or signature, it was not falsely made.

### **Argument**

**APPELLANT'S GUILTY PLEA TO CHARGE II AND ITS SPECIFICATION IS IMPROVIDENT BECAUSE APPELLANT DID NOT FALSELY MAKE OR ALTER A SIGNATURE OR WRITING.**

### *Standard of Review*

A military judge's acceptance of a guilty plea is reviewed for an abuse of discretion. *United States v. Erickson*, 61 M.J. 230 (C.A.A.F. 2005). The standard of review for providency is whether there is a "'substantial basis' in law and fact for questioning the guilty plea." *United States v. Milton*, 46 M.J. 317, 318 (C.A.A.F. 1997) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). This Court reviews de novo the legal conclusion that Appellant's pleas were provident. *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005).

### *Law and Analysis*

Under Article 45, UCMJ, if an accused sets up a matter inconsistent with a guilty plea or enters a plea improvidently, the plea shall not be accepted. "In order to establish an adequate factual predicate for a guilty plea, the military judge must elicit 'factual circumstances as revealed by the accused himself [that] objectively support that plea.'" *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). Here, the Stipulation of Fact and providency inquiry were insufficient.

*a. Appellant did not make or alter an actual writing or a signature because his theft was telephonic or electronic.*

An essential element of forgery, whether by making or by uttering, is that "a certain signature or writing be falsely

made or altered.” *Manual for Courts-Martial, United States, (MCM)*, Part IV, ¶ 48(b)(2) (2008 ed.). Thus, to be guilty of uttering, one must utter a physical signature or writing. Here, Appellant did not utter any such writing or signature. Instead, he took the money by electronic or telephonic means. Because his conduct did not violate Article 123, there is a substantial basis to question the providency of his plea.

In *United States v. Nimmons*, 59 M.J. 550 (N.M. Ct. Crim. App. 2003), the accused was charged with violating Article 123, by forging a fellow Marine’s signature upon a number of paper checks and either cashing or make purchases with those checks. *Id.* at 551. Once, however, he used the information from a check to pay Sprint PCS by telephone. He did not sign the check or forward it to Sprint PCS. The Government relied on a theory of an “electronic signature.” *Id.* The Court set aside the portion of the Charge and Specification relating to that check, and found that “[i]nasmuch as neither a writing nor a signature was used in this telephone transaction, we conclude that there is a substantial basis to question the providence of this part of the guilty plea to forgery.” *Id.* at 552.

Electronic checks and the like have existed for decades. See, e.g., Electronic Fund Transfer Act. Pub. L. No. 95-630, 92 Stat. 3641 (1978). Yet Congress has not updated Article 123 to include “electronic” signatures.

The UCMJ adopts the common law on forgery. *Uniform Code of Military Justice of 1949: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1233, Commentary on Article 123 ("The basic common-law elements have been incorporated."). Forgery was a more serious crime because of the threat it posed to a financial system based largely on blind trust. The technological landscape has changed since Blackstone and Coke, so that photo IDs, PIN codes, instant credit checks, and biometrics now protect the system. Banks and businesses have other means to detect, deter, and defend themselves from the unscrupulous. That may be why Congress has not extended Article 123 to electronic signatures, much less to oral and telephonic transactions.

Surely Best Buy was not unaware of the risk of accepting payments by phone. It made a business choice, weighing the risk of fraud against the benefit of providing a novel service to customers. Treating Appellant's larceny as forgery would be to outsource Best Buy's loss prevention services to the military justice system.

Appellee notes that making and uttering "are two separate and distinct crimes." Supp. Answer at 6 (citing *United States v. Albrecht*, 43 M.J. 65, 68 (C.A.A.F. 1995)). That is true, but begs the question, especially in this case where the uttering and making were simultaneous and inseparable. At bottom, the

issue is whether Appellant's actions constituted forgery. Uttering presupposes forgery, as one cannot utter what was not already forged. See *MCM*, Part IV, ¶ 48(c)(1) (2008 ed.) (explaining that "three elements are common to both aspects of forgery [i.e., making and uttering]" and the second of these is "a writing falsely made or altered").

Appellee also asserts the "technical niceties" of forgery are unimportant. Supp. Answer at 15. But thievery is not forgery unless Congress decrees that it is. This Honorable Court should follow the Navy-Marine Corps and decline the extension of forgery to electronic signatures. *Nimmons*, 59 M.J. at 552 (reasoning to do so would "ignore the plain language of the UCMJ and [*MCM*] and make new law.").

*b. Even if Appellant electronically "made" writings or signatures, such writings/signatures were not falsely made.*

Each time Appellant called Best Buy, he provided a check amount and account, routing, and check numbers. J.A. 28. He was never asked for his name or identification. He never lied about either his name or identification, so he did not "make" or "alter" a signature or writing for purposes of Article 123.

The essence of forgery is "any fraudulent making of the signature of *another person*[" See William Winthrop, *Military Law and Precedents* 702-03 (2d ed. Government Printing Office 1920) (1895) (emphasis added). Indeed, "forgery is not



committed by the genuine making of a false instrument even when made with intent to defraud." *MCM*, Paragraph 48(c)(2).

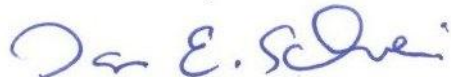
Likewise, if a person makes a false signature by another to an instrument, but adds the word 'by' with that person's own signature thus indicating authority to sign, the offense is not forgery even if not such authority exists.

*Id.* Appellant did not say "by" when he "signed" checks over the telephone, but that is effectively what he did. He purported to have authority to sign the checks, but he did not impersonate the Barbers. It is impersonation that distinguishes forgery from other thievery. Appellant did not impersonate. He stole.

Appellant gave his own name, so he did not make or alter. Because the electronic checks were not falsely made or altered, he could not utter. Thus, his conduct did not violate Article 123, and his guilty plea was improvident.

**WHEREFORE**, Appellant requests this Honorable Court set aside Charge II and its Specification.

Respectfully Submitted,



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