28 February 2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

Senior Airman (E-4)
Candice N. Cimball Sharpton
USAF,
Appellant.

Crim. App. No. ACM 38027

USCA Dkt. No. 14-0158/AF

BRIEF IN SUPPORT OF PETITION GRANTED

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INDEX

TABLE OF AUTHORITIES

Supreme Court of the United States Cases

United States Court of Military Appeals Cases

Courts of Military Review

Miscellaneous

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

Issue Presented

WHETHER THE AIR FORCE COURT ABUSED ITS DISCRETION IN FINDING THE EVIDENCE LEGALLY SUFFICIENT TO SUPPORT A CONVICTION FOR LARCENY FROM THE AIR FORCE.

Statement of Statutory Jurisdiction

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

Statement of the Case

On 16-18 August 2011, Appellant, Senior Airman (SrA) Candice N. Cimball Sharpton, was tried by a general court-martial composed of a military judge alone at Keesler Air Force Base, Mississippi. The Charges and Specifications on which she was

arraigned, her pleas, and the findings of the court-martial are as follows:

Chg	UCMJ Art	Spec	Summary of Offenses	Plea	Finding
I	121			NG	G
			Did, on divers occasions, steal money, military property, of a value of greater than $500, the property of the United States Air Force.	NG	G, except the words “military property,” of the excepted words, not guilty.
Add Chg I	83			NG	G
			Did, by means of knowingly false representations that she never experimented with, used, or possessed any illegal drug or narcotic, when in fact she had used an illegal drug or narcotic, procure herself to be enlisted as an Airman Basic in the US Air Force, and did thereafter receive pay and allowances under the enlistment so procured.	NG	G
Add Chg II	112a			NG	G
		1	Did, b/o/a 1 Feb 10 and o/a 23 Feb 10, wrongfully use oxycodone, a Schedule II controlled substance.	NG	NG
		2	Did, b/o/a 24 Jan 11 and o/a 7 Feb 11, wrongfully use oxycodone, a Schedule II controlled substance.	NG	G
		3	Did, b/o/a 24 Jan 11 and o/a 7 Feb 11, wrongfully use cocaine.	NG	G

		1	Did, b/o/a 1 Feb 10 and o/a 23 Feb 10, wrongfully use oxycodone, a Schedule II controlled substance.	NG	NG

Appellant was sentenced to a bad-conduct discharge, confinement for 12 months, payment of a $20,000 fine, further confinement for an additional 6 months in the event the fine was not paid, and reduction to E-1. J.A. at 111. On 18 August 2011, the convening authority approved only so much of the sentence as called for a bad-conduct discharge, confinement for 12 months, payment of a $20,000 fine, and reduction to E-1.

On 6 September 2013, the Air Force Court of Criminal Appeals (AFCCA) affirmed. *United States v. Cimball Sharpton*, 72 M.J. 777 (A.F. Ct. Crim. App. 2013). On 5 November 2013, counsel filed Appellant's petition for grant of review and a motion to extend time to file a supplement. That motion was granted on 6 November 2013 and Appellant filed a supplemental brief on 25 November 2013. The government filed a general opposition on 26 November 2013. On 30 January 2014, this Court granted review on the issue presented.

Statement of Facts

Appellant was a Government Purchase Card (GPC) holder at Keesler Air Force Base, Mississippi. J.A. at 38, 112. Pursuant to this role, Appellant was authorized to use the GPC to purchase needed medical supplies for the hospital. J.A. at 38, 42, 112. Pursuant to a contract with the government, US Bank National

Association (US Bank) issued Appellant a GPC in her name. *Cimball Sharpton*, 72 M.J. at 781. The bills from the GPC accounts get paid by the Defense Finance and Accounting Service (DFAS). J.A. at 57, 184-200. The money used to pay the accounts is provided to the Air Force from the appropriated funds of the Department of Defense. J.A. at 57-58.

After a GPC is used by a holder, it must be approved by an approving official. J.A. at 42-43. Technical Sergeant (TSgt) Coleen Sago was in charge of approving Appellant's purchases through US Bank's website. *Id.* TSgt Sago noticed charges to the card that appeared suspicious. J.A. at 43. TSgt Sago eventually uncovered some purchases in the bank records that did not match the hospital inventory system. J.A. at 44. It appeared that Appellant made a series of unauthorized purchases at the Army Air Force Exchange Service (AAFES), the Class Six, Walgreens, and Walmart. J.A. at 45, 49, 54.

Investigator Kacy Castro of the 81st Security Forces Squadron on Keesler Air Force Base, began investigating and through interviews, obtained video, and receipts learned Appellant had purchased Visa Gift Cards from AAFES and Walgreens. J.A. at 50, 114-117.

The government admitted documents from US Bank showing all of the purchases made on Appellant's GPC. J.A. at 65-67, 201-251. They similarly admitted DFAS payment records that included Appellant's GPC account. J.A. at 65-67, 201-251.

These purchases were paid by DFAS with funds provided to the Air Force from the appropriated funds of the Department of Defense. J.A. at 57-58, 067.

Appellant stipulated that unauthorized charges to her GPC at AAFES and Walgreens were paid for by DFAS using United States government funds. J.A. at 67.

Summary of the Argument

In the present case, Appellant's conviction under Charge I and its Specification cannot stand because it is not legally sufficient. The AFCCA abused its discretion when it incorrectly distinguished the unauthorized purchases in this case from the unauthorized purchases in *United States v. Lubasky*, 68 M.J. 260 (C.A.A.F. 2010); when it incorrectly found Appellant did not misrepresent her authority; and when it incorrectly held the GPC program employs a debit card instead of a credit card.

Argument

THE AIR FORCE COURT ABUSED ITS DISCRETION IN FINDING THE EVIDENCE LEGALLY SUFFICIENT TO SUPPORT A CONVICTION FOR LARCENY FROM THE AIR FORCE.

Standard of Review

Whether a ruling by the AFCCA violates binding legal precedent is a matter of law and is, accordingly, reviewed *de novo*." *United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002).

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, a

reasonable factfinder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Chatfield*, 67 M.J. 432, 441 (C.A.A.F. 2009) (quoting *United States v. Dobson*, 63 M.J. 1, 21 (C.A.A.F. 2006)).

Law

To convict Appellant of larceny, the Government had to prove beyond a reasonable doubt that Appellant wrongfully took, obtained, or withheld, "by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind … with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner." Manual for Courts–Martial United States (MCM), Part IV, ¶ 46a(a) (2008 ed.). The MCM further explains:

> wrongfully engaging in a credit, debit, or electronic transaction to obtain goods or money is an obtaining-type larceny by false pretense. *Such use to obtain goods is usually a larceny of those goods from the merchant offering them*.

MCM, Part IV, ¶ 46c(1)(h)(vi) (2012 ed.) (emphasis added).

This above cited paragraph was added in the 2002 Amendment to the MCM to "provide guidance on how unauthorized credit, debit, or electronic transactions should usually be charged." MCM, Appendix 23, ¶ 46 (2012 ed.) (emphasis added).

In *Lubasky*, this Court found unauthorized purchases and withdrawals from the account holder's three credit cards did not constitute larceny from the account holder. *Lubasky*, 68 M.J. at 263. Instead, "[i]n using the credit cards in this case, Appellant did not obtain anything from [the account holder]. Rather, he obtained those things from other entities." *Id.* *Lubasky* also held that larceny "always requires that the accused wrongfully obtain money or goods of a certain value from a person or entity with a superior possessory interest." *Id.*; *see also* MCM, Appendix 23, ¶ 46. Thus, in *Lubasky,* this Court established that the proper victim of the card-transaction larcenies is not the account holder, but "those other entities" from which an accused received money and goods. *Id.* The failure to allege the proper victim in *Lubasky* resulted in dismissal of those charges. *Id.* at 265.

The same reasoning Court offered in *Lubasky* has been employed by the service courts of criminal appeals. In *United States v. Franchino*, 48 M.J. 875 (C.G. Ct. Crim. App. 1998), the accused similarly used a government credit card without authority to purchase merchandise for personal purposes. The Coast Guard Court of Criminal Appeals found that Franchino did not admit in his providence inquiry that a taking actually occurred from the government.[1] *Id.*

[1] The *Franchino* court upheld the plea to a closely related offense of larceny of merchandise from the business establishments. This plea was affirmed only

Analysis

AFCCA abused their discretion in three ways while approving the findings in this case. First, AFCCA incorrectly factually distinguished Appellant's case from *Lubasky*. Second, AFCCA incorrectly found Appellant did not misrepresent her authority when using her GPC. And, finally, AFCCA incorrectly found the GPC card to be a debit card instead of a credit card.

1. AFCCA incorrectly factually distinguished this case from *Lubasky*

This case is directly analogous to *Lubasky.* The charged victim in this case, the United States Air Force, is analogous to the charged victim in *Lubasky*; the account holder. In this case, Appellant was authorized by the Air Force to use a GPC to procure items for the government alone, however she used it in an unauthorized manner at AAFES, the Class Six, Walgreens, and Walmart. Per an agreement with the government, the GPC issued by US Bank was employed to expand currency owned by US Bank. J.A. 184-200. US Bank paid the vendors for all GPC purchases using its own funds. J.A. 201-51. All of Appellant's purchases had to subsequently be approved by an Air Force approving official. J.A. 39-43. After approval, DFAS would then pay US Bank for the approved purchases. J.A. 184-200. As in *Lubasky*, the theft in this case involved credit and the proper victims to be alleged

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because each specification gave notice of the merchandise stolen and business establishment whose property it was. 48 M.J. at 878.

were AAFES, the Class Six, Walgreens, and/or Walmart, not the United States government.

AFCCA distinguished this case from *Lubasky* by explaining that Appellant did not "steal" the credit card but that "she exceeded the scope of her agreement with the Government by using a card issued in her name to expend credit on unauthorized, personal purchases." *Cimball Sharpton,* 72 M.J. at 781. However, this is a false distinction, as the Appellant in *Lubasky* also had limited authorization to use the charged victim's credit cards. In that case, Lubasky

> [o]ffered, and Shirley accepted, further assistance with her financial affairs … [so] between December 1998 through June 2000, *Appellant had limited and specific authority from Shirley to use specific credit cards* and to access the UPB account.

Lubasky, 68 M.J. at 262 (emphasis added). Lubasky then exceeded his authority to use the credit cards for his own personal purposes, and committed larceny, but not against the account holder.

This is not a new principle. As explained in *Franchino,* above, in 1998 the Coast Guard Court held those same facts: unauthorized use of a GPC at different merchants can result in stealing from those merchants, but it does not "establish a taking of money from the Government." *Franchino,* 48 M.J. at 878.

The distinction AFCCA makes in this case is directly contrary to the holding in *Lubasky,* and actually changes the required elements of larceny. AFCCA's opinion essentially re-

writes Article 121. The AFCCA's holding would make it a crime *to, on divers occasions, exceed one's authority to charge on a GPC, of a value greater than $500.* In doing so, AFCCA finds that Article 121 can be violated even if there is no "steal[ing] of 'Air Force property'". AFCCA's interpretation eviscerates the plain language of Article 121, the MCM, and the legislative history of the Article, all while directly contradicting this Court's holding in *Lubasky*.

As support for its holding, AFCCA determined that "[t]he appellant's misconduct could not have been charged as a larceny from the merchants offering the goods, because those merchants made a sale for which they were compensated, and therefore they did not lose anything of value." *Cimball Sharpton*, 72 M.J. at 781. Following AFCCA's logic, a car thief is not guilty of stealing from the car's owner if the owner is reimbursed by their insurance company; instead, the insurance company would be the victim, and in AFCCA's eyes the only possible victim. However, an after-the-fact compensation to the merchants by US Bank and US Bank's after-the-fact compensation by DFAS does not negate the fact that the Appellant did not actually steal from the Air Force. The government's failure to allege the proper victim is simply not reason enough to depart from the holding in *Lubasky*, or the established elements of larceny.

Under the law, Charge 1 and its Specification do not allege the actual victim in this case. As in *Lubasky* and *Franchino*, the

victim is *not* the United States Air Force. As such, Charge 1 and its Specification should be dismissed.

2. AFCCA incorrectly stated Appellant did not misrepresent her authority.

AFCCA also incorrectly found that the Appellant did not misrepresent her authority. *Cimball Sharpton,* 72 M.J. at 781. This finding is not supported by the facts or AFCCA's own precedent.

Previously, the AFCCA held that an Air Force member's use of a credit card designated for government use makes implicit misrepresentation when using the card. *United States v. Schaper*, 42 M.J. 737, 739 (A.F. Ct. Crim App. 1995). In *Schaper*, AFCCA found the appellant made implied representations by using his government provided travel card. These representations included that the appellant was authorized by a travel authorization to use the card and any withdrawals made from the card were needed for official government business. *Id.* at 740. As such, these misrepresentations were legally sufficient to prove larceny by false pretenses. *Id.* In congruence with the intent of Article 121, UCMJ, Schaper was charged with larceny from the banks giving him cash advances, not the United States Air Force who repaid the travel costs.

In this case, similar representations were made. The Appellant misrepresented her authority to use the card for the purchase of gift cards. Her GPC was for the sole use of

purchasing medical supplies. J.A. at 38, 42, 112. Further, she also misrepresented the fact that she had the authority to use it to make unauthorized purchases. Such misrepresentation of authority was recognized by a merchant who cancelled the transaction made by appellant.[2] J.A. at 91. Ms. Andria Crayton-Palmer, an assistant manager at Walgreens, was asked to verify a purchase made by Appellant. J.A. at 90. After the purchase of gift cards was complete, the transaction "didn't feel right" to Ms. Crayton-Palmer, who cancelled the transaction after Appellant left. J.A. at 92.

3. AFCCA incorrectly likened the GPC card to a debit card instead of a credit card

AFCCA erroneously compared the GPC program to a debit account. *Cimball Sharpton,* 72 M.J. at 782. This comparison fails. A debit account results in the user taking funds previously deposited in an account by the victim. *See generally Lubasky*, 68 M.J. at 263-64. A credit transaction does not expend the account holder's funds; instead, it expends the banking institution's funds with the bank being reimbursed by the account holder at a later date. This is the quintessential aspect of any creditor-debtor relationship. In this case, US Bank is the creditor and the federal government is the debtor. The theft was therefore from US Bank or the vendors who gave the accused goods in return for US Bank's money – not the government.

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[2] The facts of this transaction were admitted as aggravating evidence in the

Conclusion

AFCCA abused its discretion when it upheld Charge I and its Specification. The correct victim was never alleged. Further, AFCCA incorrectly found both that the Appellant did not "misrepresent" her authority and that the GPC card was a debit card and not a credit card. When considering all the evidence in the light most favorable to the prosecution, no reasonable fact-finder could have found all the essential elements of larceny beyond a reasonable doubt, indeed, one of those essential elements – the correct victim – was never even charged.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside the conviction as to Charge I and its Specification.

Respectfully Submitted,

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sentencing portion of the trial. J.A. at 89-92.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on February 28, 2014.

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