

26 August 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

United States,
Appellee

v.

Jordan C. Passut,
Senior Airman (E-4),
United States Air Force,
Appellant

USCA Dkt. No. 13-0518/AF

BRIEF ON BEHALF OF APPELLANT

Matthew T. King, Major, USAF
CAAF Bar No. 32710
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240)612-4770

Counsel for Appellant

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,)	BRIEF ON BEHALF OF APPELLANT
Appellee,)	
)	
v.)	Crim. App. No. ACM 37755
)	
)	USCA Dkt. No. 13-0518/AF
)	
Jordan C. Passut)	
Senior Airman (E-4))	
United States Air Force,)	
Appellant.)	

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

Issue Presented

**WHETHER A STATEMENT MADE TO AN AAFES EMPLOYEE
FOR THE PURPOSE OF CASHING A WORTHLESS CHECK
SATISFIES THE "OFFICIAL" ELEMENT OF A FALSE
OFFICIAL STATEMENT.**

Statement of Statutory Jurisdiction

Appellant's approved court-martial sentence included a bad-conduct discharge, which brought his case within the Air Force Court of Criminal Appeals' Article 66 jurisdiction. See Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2006). On January 25, 2013, the Air Force Court of Criminal Appeals affirmed the sentence. *United States v. Passut*, 72 M.J. 597, No. ACM 37755 (A.F. Ct. Crim. App. Apr. 16, 2013). (J.A. 1-9.) This Court has jurisdiction to review the Air Force Court's opinion. Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

Statement of the Case

On 26-27 August 2010, Appellant was tried by a general court-martial composed of a military judge alone at MacDill Air Force Base, Florida. In accordance with his pleas, Appellant was convicted of one specification of wrongful use of oxycodone in violation of Article 112a, UCMJ; seven specifications of making false official statements in violation of Article 107, UCMJ; eight specifications of forgery in violation of Article 123, UCMJ; one specification of unauthorized absence in violation of Article 86, UCMJ; one specification of dereliction of duty in violation of Article 92, UCMJ; twelve specifications of making and uttering worthless checks by dishonorably failing to maintain sufficient funds in violation of Article 134, UCMJ; and one specification of wrongfully and falsely altering a military identification card in violation of Article 134, UCMJ. J.A. 10-24. On 27 August 2010, the military judge sentenced Appellant to confinement for 10 months, a bad-conduct discharge, and reduction to the grade of E-1. J.A. 24. On October 12, 2010, the convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered it executed. J.A. 24-25. The convening authority also waived automatic forfeitures until the soonest of six months, Appellant's release from confinement, and or Appellant's expiration of term of service. *Id.*

On 16 April 2013, the Air Force Court of Criminal Appeals set aside and dismissed two of the false official statements, but

otherwise affirmed the findings and sentence. J.A. 9. On 5 August 2013, this Honorable Court granted Appellant's petition for review. *United States v. Passut*, __ M.J. __, No. 13-0518/AF (C.A.A.F. Aug. 5, 2013).

Statement of Facts

Charge II alleged that Appellant made false official statements in violation of Article 107 of the Uniform Code of Military Justice. J.A. 30, 32. Specifications 1, 5, and 9 alleged false statements made to employees of MacDill Air Force Base's Army and Air Force Exchange Service (AAFES) shoppette. J.A. 56-58, ¶¶ 4-13. The check acceptance process involved either entering a customer's Social Security Number (SSN) into a database or scanning the barcode from the customer's Common Access Card (CAC) to check for any history of dishonored checks. J.A. 57, ¶ 5. When Appellant gave his CAC to a shoppette employee, a civilian, she noticed that the SSN and barcode were scratched almost completely off of the card. *Id.*, ¶ 6. When the employee asked Appellant what happened to the card, he replied falsely that it was scratched because it had gone through the washer and dryer. *Id.* He then gave the cashier a false SSN, which she used to determine whether to accept the check. *Id.* On a later visit to the shoppette, he again provided the cashier with a false SSN. *Id.*, ¶ 7.

Appellant pleaded guilty to those specifications and was found guilty in accordance with those pleas. J.A. 41, 54. The

parties' stipulation of fact stated that Appellant's statements to the cashier "on those two occasions were official statements." J.A. 57, ¶ 9. The stipulation explained that the cashier "was an employee of AAFES, a military organization, and the statements the accused made to her related to her work duties, namely operating the cash register and accepting payments." *Id.* The stipulation continued, "Additionally, the accused's statements pertained to his military ID card, an official government document, and his SSN, a government issued identification number." *Id.*

The stipulation also described five other incidents when Appellant presented checks to a different cashier at the AAFES exchange. J.A. 58, ¶¶ 10-13. Appellant gave a false SSN to that cashier as well. *Id.*, ¶¶ 11-12. The stipulation stated that those were official statements. *Id.*, ¶ 13. The stipulation explained that the cashier "was an employee of AAFES, a military organization, and the statements the accused made to him related to his work duties, namely operating the cash register and accepting payments." *Id.*

During the providence inquiry, the military judge contradicted the portions of the stipulation stating that AAFES is "a military organization." J.A. 52. He stated, "The stipulation said that AAFES is a military organization. It really is not quite so much a military organization. But it certainly is an organization that exists on every Air Force base

to provide services to military members and their dependents." *Id.* Appellant agreed. *Id.* Appellant then agreed with the military judge that "one of their duties is to ensure that the person for whom they cash a check doesn't have a bunch of other bad checks and that sort of thing, with the BX." *Id.* Appellant further agreed that "since they work closely with and provide services to the military, . . . in requesting that information . . . they were performing a governmental-like function." *Id.*

Summary of Argument

This Court's case law establishes that a statement to a civilian will be considered "official" for Article 107 purposes only if that civilian "is performing a military function at the time the speaker makes the statement." *United States v. Spicer*, 71 M.J. 470, 475 (C.A.A.F. 2013). In this case, the "hearer" was performing the common commercial function of cashing a check when the speaker made the statement. Cashing a check at a convenience store is not a "military" function; the applicability of Article 107 should not turn on the fortuity of whether the speaker is buying an ICEE from an AAFES or a Slurpee from a 7-11. Rather, this Court should hold that common commercial transactions such as cashing checks or selling drinks or snacks are not "military functions."

Argument

Check cashing by a civilian in a convenience store is not a "military function" and therefore fails the "official" element of Article 107, UCMJ.

A. Standard of Review

A military judge's acceptance of a guilty plea is reviewed for abuse of discretion, and underlying questions of law are reviewed de novo. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). It is an abuse of discretion for a military judge to rely on an erroneous view of the law. *Id.*

B. Analysis

A necessary element of an Article 107 violation is that the statement at issue was "official." See MANUAL FOR COURTS-MARTIAL, UNITED STATES, Pt. IV, ¶ 31.b(1) (2008 ed.).

In *Spicer*, this Court held that Article 107 applies only "to statements affecting military functions." *Spicer*, 71 M.J. at 473. This Court explained that to have such a military function, the speaker must be acting in the line of duty, the statement must directly relate to the speaker's official military duties, the hearer must be a military member carrying out a military duty, or the hearer must be a civilian necessarily performing a military function when the statement is made. *Id.* at 473, 475; *United States v. Capel*, 71 M.J. 485, 487 (C.A.A.F. 2013).

The providence inquiry in this case fails to support the conclusion that Appellant's statements to the AAFES employees at a shoppette affected "military functions." The providence inquiry does not indicate that Appellant was on duty or carrying out any duty-related functions when he made the statements at issue. The statements about personal checks did not relate to

Appellant's official military duties. The AAFES employees to whom the statements were made were not military members carrying out their duties. The providence inquiry fails to establish the AAFES employees to whom the statements were made were civilians "necessarily performing a military function at the time the statement[s] [were] made." *Spicer*, 71 M.J. at 473.

The military judge expressly stated that AAFES "is not quite so much a military organization." J.A. 52. He rested the acceptance of Appellant's plea on AAFES's "governmental-like function." *Id.* But as *Spicer* establishes, such a "governmental-like function" is inadequate to uphold an Article 107 conviction. Rather, the statement must affect "military functions." *Spicer*, 71 M.J. at 473. The providence inquiry fails to establish that by performing the common commercial function of cashing a check, the AAFES employees were "necessarily performing a military function at the time the statement[s] [were] made." *Id.*

In its opinion, the Air Force Court stated: "'In determining the providence of a guilty plea, the scope of review is limited to the record of the trial.' *United States v. Roane*, 43 M.J. 93, 99 (C.A.A.F. 1995) (citations omitted); *United States v. Joseph*, 11 M.J. 333, 334 (C.M.A. 1981)." The Court then went on to consider numerous regulations, instructions, and websites¹ to discern the nature of AAFES. See J.A. 4-6. Regardless of

whether these additional materials are considered, they at best show AAFES to be a government entity. They do not make check cashing a military function, and certainly not so in the regular course of commerce on a CONUS-located Air Force base.

This case should hinge on the nature of a function or activity ("military" or otherwise), and not on what entity is carrying out such a function. See *United States v. Day*, 66 M.J. 172, 174 n.3 (C.A.A.F. 2008) (citing *United States v. Arthur*, 8 C.M.A. 210, 210-11, 24 C.M.R. 20, 20-21 (1957) and *United States v. Cummings*, 3 M.J. 246, 248 (C.M.A. 1977)). The Air Force Court properly found that check cashing, even on a military installation, was not in itself a military function and dismissed the specifications involving Armed Forces Bank. J.A. 7. The fact that AAFES is a Department of Defense-affiliated entity does not transform the commercial act of check cashing into a military function. At best, it suggests that there may be a case against Appellant under the broad 18 U.S.C. § 1001 (2006), for perversion of a government function. See *Spicer*, 71 M.J. at 474.

Regarding the nature of the function, the Air Force Court drew comparison between this case and the facts of *Day* and *United States v. Quillen*, 27 M.J. 312 (C.M.A. 1988). J.A. 6. However, both of these cases are significantly different in the nature of the hearer and the implicated function. *Day* involved a statement

¹ To the degree that they are relevant, Appellant notes that the AAFES web pages cited by the Air Force Court are on the ".com"

to an on-base firefighter who happened to be a civilian. 66 M.J. at 173. That case directly implicated a core Air Force function, the fire protection of the flight line and base infrastructure. See *id.* at 175. Firefighting is a military function performed by military members and civilians on behalf of the installation commander. *Id.* Check cashing by a civilian convenience store clerk is not a function sufficiently tied to the execution of the Air Force mission to qualify it as a military function.

Quillen involved an AAFES store detective and whether she had to read Article 31 rights to a military suspect before interrogation. 27 M.J. at 313. The Air Force Court noted that "a civilian AAFES store detective acts as 'an instrument of the military' when stopping a military member suspected of shoplifting." J.A. 5 (citing *Quillen*, 27 M.J. at 314) (further citations omitted).

However, in *Quillen*, this Court did not create a per se rule that AAFES workers are military instrumentalities -- quite the opposite. This Court distinguished *Quillen* from prior lower court cases that found that AAFES store detectives did *not* need to read Article 31 rights. *Id.* (citing, *contra*, *United States v. Pansoy*, 11 M.J. 811, 813 (A.F.C.M.R. 1981); *United States v. Jones*, 11 M.J. 829, 831 (A.F.C.M.R. 1981)). The difference in *Quillen*, and what made the AAFES worker an instrument of the military, was that the "conduct in questioning appellant was at

and not the ".mil" domain. J.A. 4, n.4.

the behest of military authorities and in furtherance of their duty to investigate crime at base exchanges." *Id.* at 314.

"Moreover, the exchange detectives are particularly tasked with developing information for these reports [to appropriate military officers] and even detaining suspects without force for additional questioning by military police authorities." *Id.* at 315.

Thus, what both *Day* and *Quillen* demonstrate is that working for AAFES or on the installation alone is insufficient to create a nexus to a military function. There must be an important military need served (such as firefighting or installation law enforcement, critical to good order and discipline) and a specific tasking from the installation to participate in such a function. Otherwise, there is not an adequate military link. In the past, the Air Force Court recognized this separation between the military and AAFES, discussing off-duty employment at AAFES as "[i]n addition to [one's] military duties" -- that is, something separate from one's military functions. *United States v. Austin*, No. ACM 29831 (A.F.C.M.R. Dec. 16, 1993) (unpub. op.) (J.A. 89.); see also *Jones*, 11 M.J. at 831 (the AAFES detective "was in no sense an instrument of the military or conducting a military investigation. On the contrary, she was acting in a private capacity."). This Court should similarly recognize the separate nature of AAFES activities and military functions.

This is not a case where a civilian clerk was cashing checks at the cash-cage in the military finance office. There is no indication in the record that the bad checks in this case would somehow be forwarded on to the Air Force. The necessary link between the AAFES employee and a military function is not extant in the record.

A more useful analogy than the *Quillen* store detective is to view how AAFES property is regarded. AAFES property is not military property. *United States v. Schelin*, 15 M.J. 218, 220 (C.M.A. 1983); *cf. United States v. Simonds*, 20 M.J. 279, 280-81 (C.M.A. 1985) (unlike property of AAFES or a Navy Exchange, an item is military property when it was from a Navy ship's store and was procured with appropriated funds through the Navy Supply Corps). In *Schelin*, this Court reasoned:

At least two meanings of "military property" are readily apparent. In a narrower sense, it could refer to property having some unique military nature or function, such as tanks, cannons, or bombers. In a broader sense, it could refer to any property belonging to or under the control of the military.

15 M.J. at 220. The Court determined that "it seems most likely to us that 'military property' was selected for special protection due to its role in the national defense." *Id.*

The Court did not draw the "military property" definition so narrowly as to include only weapons systems, but it again confirmed that the scope does not include retail items sold by AAFES:

We do not suggest that it is only tanks, cannons, or bombers that merit the protection of Article 108, for many items of ordinary derivation are daily put to military use. However, retail merchandise of the Army and Air Force Exchange Service does not seem to fit into that specially-protected category.

Id.

In *Spicer*, this Court faced a similar choice -- to read Article 107 broadly, or specific to its roots as a uniquely military offense concerned with military functions. 71 M.J. at 473. This Court took the narrower path. *Id.*; *Capel*, 71 M.J. at 487. It should do so here, as well, by not stretching the cashing of checks in a convenience store into a "military function."

Conclusion

AAFES and the military are not the same. AAFES may be a government entity, but that does not make running a convenience store a military function. As with property, a function should only become a "military" one when it warrants "special protection due to its role in national defense." *Schelin*, 15 M.J. at 220. Check cashing does not rise to this level.

WHEREFORE, this Honorable Court should set aside Specifications 1, 5, and 9 of Charge II and remand the case for a rehearing on sentence.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Matthew T. King". The signature is written in a cursive, slightly slanted style.

Matthew T. King, Major, USAF
CAAF Bar No. 32710
Appellate Defense Division
1500 W. Perimeter Rd., Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
matthew.king@pentagon.af.mil

Counsel for Appellant

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 August 26, 2013.

A handwritten signature in black ink, appearing to read "Matthew T. King". The signature is stylized and cursive.

Matthew T. King, Major, USAF
CAAF Bar No. 32710
Appellate Defense Division
1500 W. Perimeter Rd., Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
matthew.king@pentagon.af.mil

Counsel for Appellant