

# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before  
MERCK, CURRIE, and JOHNSON  
Appellate Military Judges

UNITED STATES, Appellee  
v.  
Private E1\* MICHAEL W. ELVERUM  
United States Army, Appellant

ARMY 20010864

Fort Carson  
G.V. Casida, Military Judge

For Appellant: Lieutenant Colonel E. Allen Chandler, Jr., JA; Major Mary M. McCord, JA; Captain Christopher D. Carrier, JA (on brief).

For Appellee: Lieutenant Colonel Paul H. Turney, JA; Major Paul T. Cygnarowicz, JA (on brief).

24 July 2002

-----  
MEMORANDUM OPINION  
-----

Per Curiam:

A military judge, sitting as a general court-martial, convicted appellant, pursuant to his pleas, of absenting himself from his unit without authority, absenting himself from his unit without authority until terminated by apprehension, disobeying a noncommissioned officer, disrespect towards a noncommissioned officer, wrongful appropriation of government property, larceny of approximately \$1,111.49, wrongfully making a false writing with the intent to defraud, wrongfully uttering a

---

\* We disagree with appellate defense counsels' assertion that appellant was a Private E2 at the time of trial. While appellant's Enlisted Record Brief (Prosecution Exhibit 2) states he was promoted to E2 on 31 October 2000, the allied papers contain a record of nonjudicial punishment administered on 30 November 2000; his punishment included reduction to E1 and forty-five days extra duty. Appellant's punishment was suspended for forty-five days, during which time, according to the stipulation of fact, he was late for extra duty and once reported to extra duty intoxicated. Apparently, his commander vacated the suspension, reducing him to E1. Our conclusion is consistent with the data on the charge sheet and representations by appellant's defense counsel at trial.

false writing with the intent to defraud, wrongfully making worthless checks with the intent to defraud, and wrongfully uttering worthless checks with the intent to defraud, in violation of Articles 86, 91, 121, 123, and 123a, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 891, 921, 923, and 923a [hereinafter UCMJ]. He was sentenced to bad-conduct discharge, confinement for twenty-two months, and forfeiture of all pay and allowances. Pursuant to a pretrial agreement, the convening authority approved only so much of the sentence as provided for a bad-conduct discharge, confinement for eighteen months, and forfeiture of all pay and allowances. This case is before the court for review under Article 66, UCMJ.

In Specification 2 of Charge I, appellant was convicted only of absence without authority. The staff judge advocate's post-trial recommendation (SJAR) erroneously advised the convening authority that appellant was convicted of absence without authority terminated by apprehension. Appellant and his trial defense counsel filed no objection to the erroneous SJAR. *See* Rules for Courts-Martial 1105 and 1106(f)(4).

Unless indicated otherwise in his action, a convening authority approves the findings as stated in the SJAR. *See United States v. Diaz*, 40 M.J. 335, 343 (C.M.A. 1994). As such, the convening authority's purported approval of a finding of guilty as to Specification 2 of Charge I beyond a simple absence without authority was a nullity. *Id.*

Applying *United States v. Wheelus*, 49 M.J. 283, 288-89 (1998), and considering the record as a whole, we find that appellant has made no colorable showing of possible prejudice to his substantial rights concerning the approved sentence. UCMJ art. 59(a). The SJAR correctly advised the convening authority as to the maximum possible punishment based on the convictions at trial, and the adjudged sentence exceeded that bargained for by the parties in the pre-trial agreement. Under the facts of this case, we are satisfied that a correct statement of the findings in the SJAR would not have affected the sentence as approved by the convening authority.

We have considered the matter personally raised by appellant under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find it to be without merit.

The Court affirms only so much of the finding of guilty of Specification 2 of Charge I as finds that appellant did, on or about 6 June 2001, without authority, absent himself from his unit, to wit: B Company, 1-12th Infantry Battalion, located at or near Fort Carson, CO, and did remain so absent until on or about 9 August 2001. The remaining findings of guilty are affirmed. Reassessing the sentence on

ELVERUM - ARMY 20010864

the basis of the error noted, the entire record, and the principles of *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), the court affirms the sentence.

FOR THE COURT:

*Mary B. Dennis*  
MARY B. DENNIS  
Deputy Clerk of Court