IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

J.D. HARTY **R.G. KELLY** **W.M. FREDERICK**

UNITED STATES

v.

Patrick R. CRISWELL
Ship's Serviceman Third Class (E-4), U.S. Navy

NMCCA 200601200 Decided 23 May 2007

Sentence adjudged 30 January 2006. Military Judge: B.W. MacKenzie. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Hawaii, Pearl Harbor, HI.

LCDR DEREK HAMPTON, JAGC, USN, Appellate Defense Counsel
LT AIMEE SOUDERS, JAGC, USN, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HARTY, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, in accordance with his pleas, of violating a general order, and intentional infliction of grievous bodily harm with a loaded firearm, in violation of Articles 92 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 928. The appellant was sentenced to total forfeitures of pay and allowances, reduction to paygrade E-1, confinement for 12 years, and a dishonorable discharge. Pursuant to a pretrial agreement, the convening authority (CA) approved the sentence as adjudged, but suspended confinement in excess of 10 years for 10 years from the date of his action.

We have reviewed the record of trial, the appellant's assignments of error alleging that: (1) the military judge erred by not reopening the providence inquiry when the possibility of self-defense was reasonably raised; (2) the military judge erred when he allowed evidence of uncharged misconduct to be admitted during the presentence hearing; and, (3) the sentence is inappropriately severe; and the Government's answer. 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 was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was approached by the victim and two of the victim's friends in the barracks parking lot on board Naval Station, Pearl Harbor, Hawaii. The victim challenged the appellant to a fight but did not touch him in any way. The appellant removed a .22 semi-automatic handgun from the trunk of his car and got into his car, which was backed into a parking space with nothing blocking its path out of the parking lot. The victim approached the driver's side of the car and knocked on the window while one of his friends went to the passenger side of the car. The appellant rolled his window down and pointed the gun at the victim. The victim thought it was a cap gun and cursed at the appellant. The appellant then fired one round into the victim's abdomen.

Providence

For his first assignment of error, the appellant claims that the military judge erred by not reopening the appellant's providence inquiry when the victim's testimony during the pre-sentence hearing, combined with the appellant's answers during the providence inquiry, reasonably raised the issue of self-defense. Appellant's Brief and Assignments of Error of 25 Sep 2006 at 5. We disagree.

A military judge "may not arbitrarily reject a guilty plea." *United States v. Penister*, 25 M.J. 148, 152 (C.M.A. 1987). When the accused reasonably raises a defense, the military judge must resolve the defense with the accused. *United States v. Timmins*, 45 C.M.R. 249, 253 (C.M.A. 1972); *see* RULE FOR COURTS-MARTIAL 910(h)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.)(requiring the military judge to reopen the providence inquiry if, after findings, an accused raises matters inconsistent with his guilty plea). However, a guilty plea will not be overturned on the mere possibility of a defense. *United States v. Olinger*, 50 M.J. 365, 367 (C.A.A.F. 1999). We will not speculate as to the existence of facts that might invalidate the plea. *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995).

The standard of review to determine whether a plea is provident is whether the record reveals a substantial basis in law and fact for questioning the plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). The factual issue of guilt is ordinarily waived by a voluntary plea of guilty. The only exception to the general rule of waiver is if an error is materially prejudicial to a substantial right of the appellant. Art. 59(a), UCMJ; R.C.M. 910(j).

The appellant and the victim had been present at an altercation two months earlier between one of the appellant's friends and one of the victim's friends. That altercation did not involve weapons, and the appellant and the victim exchanged words but no physical contact at the time. On 9 June 2005, the victim and two of his friends approached the appellant while the appellant was alone in the barracks parking lot. The victim challenged the appellant to a fight, and one of the victim's friends asked the appellant if he thought he was "bad." Record at 192. The appellant responded by stating "I guess y'all going to jump me now" and "smirked." *Id*.

The appellant retrieved a loaded handgun from his trunk, got into his car, and locked the doors. The appellant tried to drive off "but all [his] car did was just move." *Id*. at 193.[1] The victim began knocking on the driver's window and told the appellant to get out of the car. The appellant chambered a round in his handgun and took the gun off safety. He then rolled the window down and when the victim "swung in,"[2] the appellant shot the victim, *id*. at 193, in order to get the victim away from the car so he could leave. *Id*. at 197. The appellant fired his gun without warning or saying anything to the victim. *Id*. at 279. Neither the victim nor his two friends ever touched the appellant, displayed a weapon, or tried to get inside the appellant's car. *Id*. at 266. During the providence inquiry, the military judge twice asked the appellant if he was acting in self-defense, and each time the appellant stated that he was not. *Id*. at 196, 201. The military judge, however, never defined self-defense or explained that concept to the appellant.

R.C.M. 916(e) addresses the special defense of self-defense. That rule provides, in pertinent part, that:

> It is a defense to a . . . battery involving deadly force that the accused:
>
> (A) Apprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted wrongfully on the accused; ***and***
>
> (B) Believed that the force the accused used was necessary for protection against death or grievous bodily harm.

R.C.M. 916(e)(1)(emphasis added). "The first element, under subparagraph (A), has an objective component, involving the perception of a reasonable person under the circumstances. The

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[1] There is no further discussion or clarification of what the appellant meant when he said his car "just moved." However, the appellant was apparently able to drive off after shooting the victim.

[2] The victim, however, denied ever swinging at the appellant while the appellant was inside the car. Record at 266.

second element, under subparagraph (B), is wholly subjective, involving the personal belief of the accused, even if not objectively reasonable." *United States v. Dobson*, 63 M.J. 1, 11 (C.A.A.F. 2006). "While '[g]enerally speaking, a person is not entitled to use a dangerous weapon in self-defense where the attacking party is unarmed and commits a battery by means of his fist,' it is possible for an attack by an unarmed assailant to create a reasonable fear of death or grievous bodily harm." *United States v. Richards*, 63 M.J. 622, 627 (Army Ct.Crim.App. 2006)(quoting *United States v. Bransford*, 44 M.J. 736, 738 (Army Ct.Crim.App. 1996))(footnote omitted).

Here, the appellant was facing not one, but three potential attackers. None of the potential attackers, however, ever displayed a weapon or attempted to harm the appellant in any way. There was no more than a verbal challenge to fight made by the victim. The victim's knocking on the appellant's car window, while the appellant sat in his car with the doors locked and the windows rolled up, would not create an objectively reasonable fear of death or grievous bodily injury. Nor do we believe it supports a subjective belief that shooting the victim was necessary for the appellant's protection from death or grievous bodily injury.

Combined with the appellant's two affirmative statements that he was not acting in self-defense, the facts established during providence did not require the military judge to reopen providence on the issue of self-defense. We do not find a substantial basis in law and fact for questioning the providence of the appellant's guilty pleas to inflicting grievous bodily harm with a loaded firearm. Therefore, we decline to grant relief.

Rehabilitative Potential

For his second assignment of error, the appellant claims that the military judge erred by admitting, over defense objection, evidence that the appellant possessed another weapon in the trunk of his car as evidence of the appellant's lack of rehabilitative potential. Appellant's Brief at 7. While we find error, we conclude that error is harmless.

The Government offered evidence that the appellant had a retractable baton in the trunk of his car at the same time that he retrieved his handgun from the trunk, as evidence of the appellant's lack of rehabilitative potential. The Government witness described this device as a defensive weapon used by law enforcement. The appellant objected to this evidence as irrelevant and not proper evidence pursuant to R.C.M. 1001. Record at 236, 240. The military judge overruled the defense objection, holding that the possession of an additional weapon was relevant to the appellant's lack of rehabilitative potential, stating:

> What the Government is saying is whether or not – you know, whether there's rehabilitative potential there, and what he's saying is that there may be some kind of *dangerousness of character* based upon the presence of physical evidence.
>
> Now, I would agree with you that rehabilitative evidence normally comes through the source of a proponent who has sufficient knowledge of the accused to make that kind of rehabilitative potential evidence, *but I don't think it certainly restricts the Government to that*. Overruled. It's relevant on that – on that narrow ground that I've discussed.

Record at 241 (emphasis added).

R.C.M. 1001(b)(5) authorizes the Government to present evidence of the appellant's rehabilitative potential or the lack thereof. Specifically, the Government may present opinion evidence on whether an accused can be restored to a "useful and constructive place in society" through "therapeutic training or other corrective measures." The source of that opinion evidence, however, "must possess sufficient information and knowledge about the accused to offer a rationally-based opinion that is helpful to the sentencing authority," R.C.M. 1001(b)(5)(B), and the opinion "must relate to the accused's personal circumstances." R.C.M. 1001(b)(5)(C). The Government does not cite, nor do we find, any case authorizing the Government to present evidence of rehabilitative potential in anything other than opinion form.

This was a judge alone trial. Absent evidence to the contrary, we presume that military judges know the law and act in accordance with the law. *United States v. Prevatte*, 40 M.J. 396, 398 (C.M.A. 1994)(citing *United States v. Vangelisti*, 30 M.J. 234 (C.M.A. 1990)). Here, however, the military judge's own words indicate a misunderstanding of, or at least the misapplication of R.C.M. 1001(b)(5). We conclude, therefore, that the military judge improperly admitted and considered the objected to evidence in determining whether the appellant had rehabilitative potential.[3]

Having determined that the military judge erred, the question now becomes whether the appellant was prejudiced by this error. We test the erroneous admission or exclusion of evidence during the sentencing portion of a court-martial to determine if the error substantially influenced the adjudged sentence. *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005)(citing *United*

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[3] It is not clear from the military judge's comments whether he was including "future dangerousness" within the term "rehabilitative potential." Future dangerousness is a proper consideration in sentencing, however, evidence on that issue is still subject to strict foundation requirements not met here. *See United States v. George*, 52 M.J. 259, 261 (C.A.A.F. 2000)(citing *United States v. Williams*, 41 M.J. 134, 137-39 (C.M.A. 1994)).

States v. Boyd, 55 M.J. 217, 221 (C.A.A.F. 2001)(citing *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). If the answer is yes, then the result is material prejudice to the appellant's substantial rights. *Id*. (citing Article 59(a), UCMJ). When determining whether evidence presented in sentencing was unduly prejudicial, we apply the following four-prong analysis formulated in *United States v. Weeks*, 20 M.J. 22, 25 (C.M.A. 1985): (1) the strength of the Government's case; (2) the defense theory; (3) the materiality of the evidence; and (4) the quality of the evidence. *United States v. Latorre*, 53 M.J. 179, 182 (C.A.A.F. 2000).[4]

First, regarding the strength of the Government's case, the appellant plead guilty to shooting the victim and violating the general order prohibiting the possession of firearms on base without first checking them in with base security. There was no question as to guilt. Second, regarding the defense's case for rehabilitative potential or for less than a maximum sentence, the best the appellant can argue is that there was only one victim, he only shot him once, the victim did not die, and he felt remorse for shooting the victim. Third, as for the materiality and quality of the objectionable evidence, the military judge stated that he was limiting consideration of the evidence to whatever relevance it may have on the issue of rehabilitative potential. We find little relevance to that issue, and we presume that the judge took the information for what it was worth, and nothing more. *See United States v. Raya*, 45 M.J. 251, 253 (C.A.A.F. 1996). We are also mindful that in a bench trial, the "prejudicial impact of erroneously admitted evidence [is] . . . substantially less than it might have been in a jury trial." *United States v. Cacy*, 43 M.J. 214, 218 (C.A.A.F. 1995)(quoting *United States v. Cardenas*, 9 F.3d 1139, 1156 (5th Cir. 1993).

The appellant's offense and its impact on the victim[5] call for a harsh sentence including the maximum authorized sentence. We conclude, therefore, that the improperly admitted and considered evidence did not substantially influence the adjudged sentence. Accordingly, we find the error was harmless beyond a reasonable doubt, and decline to grant relief. Art. 59(a), UCMJ; *see United States v. Bins*, 43 M.J. 79, 86 (C.A.A.F. 1995) (applying harmless error standard to improper evidence admitted during sentencing)(citing *Chapman v. California*, 386 U.S. 18, 24 (1967)[citations omitted]).

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[4] Although *Weeks* established this test for evidence presented on the issue of guilt or innocence, our superior court adopted this test in *Latorre* for evidence presented in sentencing as well.

[5] The victim testified that he has a drain tube in his abdomen that will remain there for one more year. The drain tube is connected to a bag that has to be emptied several times each day. Record at 254.

Sentence Severity

In his third assignment of error, the appellant asserts that imposition of the maximum authorized sentence, including a dishonorable discharge, 12 years of confinement, total forfeiture of pay and allowances, and reduction to paygrade E-1, is inappropriately severe for the offenses and the person. We disagree. Taking into account all the facts and circumstances, and mindful of our responsibility to maintain general sentence uniformity among cases under our cognizance, *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999), we believe the sentence is within the range of appropriate sentences.

Our mandate under Article 66(c), UCMJ, requires that we affirm only such part or amount of the sentence as we determine, on the basis of the entire record, "should be approved." We do not enter the realm of clemency, an area reserved for the convening authority. However, we are compelled to act when we find inappropriate severity within an adjudged and approved sentence. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

The appellant's crimes are certainly dishonorable and warrant a substantial period of confinement. We are mindful of the approved sentences of similar cases in the field as we discharge our statutory mandate. After careful review and consideration of the record, we find the imposition of the maximum authorized sentence to be appropriate for this offender and these offenses.

The appellant, when faced with a non-life threatening situation, chose to resolve the matter by shooting the victim. The level of force used demonstrated a lack of respect for human life that cannot be overcome by having attended church as a child and having done well in high school. *See United States v. Gogas*, 58 M.J. 96, 99 (C.A.A.F. 2003)("Indifference to the nature or consequences of criminal conduct is an aggravating factor that may be considered in determining an appropriate sentence for that misconduct."). Accordingly, we conclude that imposing the maximum authorized sentence, including 12 years of confinement, did not result in an inappropriately severe sentence, and decline to grant relief.

Conclusion

The findings, and the sentence as approved below, are affirmed. We note that the court-martial order (CMO) erroneously states that the adjudged sentence included forfeiture of all pay and allowances "for twelve (12) years." No such time limitation was placed on the adjudged forfeitures. Although this error does not materially prejudice the substantial rights of the appellant,

he is entitled to correct records. The supplemental CMO will properly reflect the adjudged sentence in this case.

Judge KELLY and Judge FREDERICK concur.

For the Court

R.H. TROIDL
Clerk of Court