

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

BEFORE

D.O. VOLLENWEIDER

R.E. VINCENT

V.S. COUCH

UNITED STATES

v.

**Demarcus D. LAW
Private (E-1), U. S. Marine Corps**

NMCCA 200601295

Decided 22 February 2007

Sentence adjudged 17 March 2006. Military Judge: J.G. Bartolotto. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Headquarters and Service Battalion, Quantico, VA.

LtCol EDWARD C. DURANT, USMCR, Appellate Defense Counsel
Maj KEVIN C. HARRIS, JAGC, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

COUCH, Judge:

The appellant was convicted, pursuant to his pleas, by a military judge sitting as a special court-martial, of two specifications of unauthorized absence, in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886. The appellant was sentenced to confinement for 60 days and a bad-conduct discharge. The convening authority approved the findings and the sentence as adjudged.¹ After considering the record of trial, the appellant's three assignments of error, and the Government's response, we conclude that the findings and the 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.

In his first assignment of error, the appellant claims that his guilty plea to Specification 2 of the Charge is improvident, alleging that his return to military control was voluntary, rather than terminated by apprehension as stated in the charge sheet. We disagree.

¹ A pretrial agreement between the parties had no effect on the sentence approved.

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. Pleas of guilty should not be set aside on appeal unless there is a substantial basis in law and fact for questioning the guilty plea. *United States v. Phillippe*, 63 M.J. 307, 309 (C.A.A.F. 2006)(quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). In order to find the plea improvident, this court must conclude that there has been an error prejudicial to the substantial rights of the appellant. Art. 59(a), UCMJ. Such a conclusion "must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty." *United States v. Dawson*, 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999); *see also* RULE FOR COURTS-MARTIAL 910(j), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.)

The record indicates that the appellant knew he was in an unauthorized absence status, and was not in the process of turning himself in to civilian police authorities when they apprehended him at his residence. Record at 29. Further, it is clear that the appellant had no intention of returning to military control until sometime after he was apprehended by the police. *Id.* We conclude that the appellant was provident in his guilty plea to Specification 2 of the Charge.

The appellant's second assignment of error again claims that his guilty plea to Specification 2 of the Charge was improvident, because his unauthorized absence was "caused in part by duress, or the common law doctrine of necessity, defenses that were not explored by the military judge." Appellant's Brief and Assignments of Error of 21 Nov 2006 at 2. Again, we disagree.

A military judge's acceptance of guilty plea will not be overturned based on a "mere possibility" of a defense. The record must show a "substantial basis" in law and fact for rejecting the plea of guilty. *United States v. Olinger*, 50 M.J. 365, 367 (C.A.A.F. 1999)(quoting *Prater*, 32 M.J. at 436). Duress is a defense to a crime if the accused was compelled or coerced to commit the crime by some human agency, under a threat of serious imminent harm to the accused or others. *United States v. Rockwood*, 52 M.J. 98, 112 (C.A.A.F. 1999); *see also* R.C.M. 916(h). The common law defense of necessity, closely related to the defense of duress, involves compulsion or coercion of the accused to commit the crime by "pressure of circumstances" of the situation itself. *Id.*

In his unsworn statement before sentencing, the appellant described his concern for the welfare of his grandmother, who he claimed had raised him. The appellant stated that his grandmother did not ask him to absent himself from his unit. Record at 48. During his argument on sentence, the trial defense counsel referred to the appellant's description of his grandmother's plight, but acknowledged that the appellant's circumstances did not "rise to the level of legal defense," and conceded the issues. *Id.* at 50. Nothing in the record suggests that the appellant was compelled to leave his unit for any other

reason than he was feeling angry and frustrated, and manipulated by his recruiter and other people in authority. *Id.* at 16-18. We will not speculate post-trial as to the existence of fact which might invalidate an appellant's guilty pleas. *Olinger*, 50 M.J. at 367 (quoting *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995)). We conclude there is no substantial basis in law or fact sufficient to set aside the appellant's pleas of guilty in this case, and again find the appellant's guilty plea to Specification 2 of the Charge to be provident.

The appellant's final assignment of error claims that a bad-conduct discharge is inappropriately severe for the offenses to which he pled guilty. We disagree.

The appellant pled guilty to two periods of unauthorized absence. The first began while he was in Marine combat training at Camp Lejeune, North Carolina, and lasted 46 days. A mere two days after he ended this period of unauthorized absence, the appellant left again and was gone for 60 days until he was apprehended. Such flagrant disregard for authority is behavior that deserves severe punishment. After reviewing the entire record, we conclude that the sentence is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Granting sentence relief at this point would be to engage in clemency, a prerogative reserved for the convening authority. *Healy*, 26 M.J. at 395-96.

Accordingly, we affirm the findings and the sentence as approved by the convening authority.

Senior Judge VOLLENWEIDER and Judge VINCENT concur.

For the Court

R.H. TROIDL
Clerk of Court