

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
J.D. HARTY, D.E. O'TOOLE, R.E. VINCENT  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JOSEPH E. MALLIA, Jr.  
STAFF SERGEANT (E-6), U.S. MARINE CORPS**

**NMCCA 200600537  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 26 October 2005.  
**Military Judge:** Col Bruce Landrum, USMC.  
**Convening Authority:** Commanding Officer,  
Headquarters and Headquarters Squadron, MCAS Futenma,  
Okinawa, Japan.  
**Staff Judge Advocate's Recommendation:** Col R.W.  
Koeneke, USMC.  
**Addendum:** LtCol K.J. Brubaker, USMC.  
**For Appellant:** CAPT Diane Karr, JAGC, USN.  
**For Appellee:** LCDR Paul Bunge, JAGC, USN.

**18 September 2007**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

VINCENT, Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of six specifications of larceny of personal property, consisting of currency in each instance having a value less than \$500.00, one specification of larceny of currency belonging to the United States Government and having a value less than \$500.00, and one specification of wrongful appropriation of personal property of a value less than \$500.00, in violation of Article 121, Uniform Code of

Military Justice, 10 U.S.C. § 921. The military judge sentenced the appellant to confinement for three months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, pursuant to a pretrial agreement, suspended confinement in excess of two months for a period of 12 months from the date of trial.

In his sole assignment of error, the appellant contends that his guilty pleas were improvident. He asserts that he suffered from an undiagnosed bipolar disorder at the time of the offenses which compelled him to consume alcohol as self-medication and that his mental responsibility for committing the charged offenses was not considered in accordance with RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

We have examined the record of trial, the appellant's assignment of error and the Government's response. 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 pled guilty to committing seven larcenies and wrongfully appropriating the personal property of other Marines and the United States Government by entering the Semper Fit Gym male locker room onboard MCAS Futenma, Japan, opening unsecured lockers, searching the personal property of the users of the lockers, and stealing United States and Japanese currency that he located in the lockers. During the providence inquiry, the appellant informed the military judge that he stole currency on each occasion in order to purchase beer and that he consumed beer in an attempt to deal with personal and family stress. Record at 32-33, 38, 41, 45, 53, 57, 60-61. In response to the military judge's questions, the appellant stated that he did not suffer from any alcohol dependency or addiction that would have compelled him to steal currency or lose control of his faculties. *Id.* at 32-37. Additionally, the appellant's trial defense counsel informed the military judge that there were no potential defenses relating to the appellant's alcohol use. *Id.* at 33. Finally, the appellant repeatedly informed the military judge that he did not have any legal justification or excuse for his actions, was not forced or coerced, and could have avoided stealing the currency if he wanted to do so. *Id.* at 30, 33-37, 39-40, 43, 47-48, 51-52, 55, 59.

On 6 March 2006, the appellant's trial defense counsel filed a second clemency request. Although this request

contained a post-trial medical diagnosis that the appellant had a bipolar disorder, his trial defense counsel did not request a post-trial R.C.M. 706 examination. Rather, the trial defense counsel informed the convening authority that the medical diagnosis "does not excuse" the appellant's actions and requested clemency based on the appellant's military record and letters of support. See Clemency Request of 5 March 2006, ¶¶ 4-5 and enclosure (2).

On 11 September 2006, the appellant filed a motion before this Court requesting an R.C.M. 706 examination. In support of the motion, the appellant presented no factual matters in the form of affidavits or mental health examinations, except for the report of a mental health examination conducted following trial that was provided to the convening authority as part of the appellant's second request for clemency. This report indicated that, post-trial, the appellant had been diagnosed with a bipolar disorder. The report did not state any medical opinion that indicated that the appellant was not mentally responsible before, during, or after trial. On 16 November 2006, we denied the motion based on the lack of any factual basis to question whether the appellant was unable to fully understand his appellate rights and to assist in his case.

On 20 November 2006, the appellant filed a motion to attach two documents, a clinical psychologist's assessment of the appellant's mental condition and a summary of the appellant's current mental health treatment regimen.<sup>1</sup> Although the appellant filed a motion to attach, we treated the motion as both a motion to attach and a motion to reconsider our 16 November 2006 decision.

On 29 November 2006, we denied this motion noting that the existence of a mental disorder, in and of itself, is not sufficient to cause us to order an examination under R.C.M. 706. We determined that the submitted document remained insufficient to factually support a request for an R.C.M. 706 inquiry. Specifically, we concluded that the assessment from the mental health professional did not provide any opinion that the appellant was, at any time, not responsible for his actions, unable to appreciate the criminality of his actions, or unable to participate meaningfully in his defense at trial and in his appeal before this court.

Accompanying the appellant's Brief and Assignment of Error were three separate motions to attach documents, which he stated were relevant to his assignment of error.

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<sup>1</sup>The latter document was not attached to the motion and, therefore, it was not considered in the court's ruling.

We granted the three motions to attach and considered the contents of the documents during our appellate review. One document contains the appellant's post-trial affidavit, another contains a declaration from Dr. Joseph F. Colligan, a psychiatrist who had been treating the appellant from April 2006 through February 2007, and the third document contains a declaration from J. Thomas Stack, a clinical psychologist, who provided treatment to the appellant from April 2006 until November 2006.

The attached documents confirm that the appellant was diagnosed with a bipolar disorder post-trial, but had been suffering from this particular mental disorder at the time that he committed the charged offenses. The documents also indicate the appellant unknowingly self-medicated his bipolar disorder through his excessive consumption of alcohol. Additionally, Dr. Colligan, the psychiatrist who treated the appellant for 10 months, opined that "it is possible, and even probable, that [the appellant's] ability to understand the criminality of his actions during the June-July 2005 timeframe was impacted." See Declaration of Dr. Colligan of 26 Feb 2007. Dr. Colligan also opined that,

Although it is possible that [the appellant] may have understood the criminality of his action, his Bipolar Disorder may have caused an impairment regarding his personal and moral judgment as well as to impair his ability to clearly rationalize his actions. . . . Because I do not know [the appellant's] actual bipolar state, nor his state of mind secondary to possible influence of alcohol at the time he committed the offenses, I cannot speak to his level of impairment at the time.

Although [the appellant] should have been responsible for his actions to some degree, without knowing his state of mental health at the time he committed the offenses, I cannot determine whether he actually had the capabilities to exercise unimpaired judgment in order to prevent him from doing such actions as a result of his untreated bipolar disorder.

Although [the appellant] most likely understood the meaning of his court-martial, without knowing his mental health state during the September-October 2005 timeframe, I am not able to currently judge his abilities in the past.

*Id.* at 2.

Dr. Stack, the clinical psychologist who treated the appellant for eight months, opined that, although the

appellant has a bipolar disorder, he does not have "a significant personality disorder and that his condition is due to a chemical imbalance that is out of his control." See Declaration of Dr. Stack of 5 Nov 2006. In his affidavit, the appellant now asserts, that he "needed to consume alcohol in order to deal with the psychological effects of my bipolar disorder." See Appellant's Affidavit of 27 Feb 2007.

### **Improvident Pleas**

The appellant contends that his guilty pleas were improvident because he suffered from an undiagnosed bipolar disorder at the time of the offenses which compelled him to consume alcohol as self-medication and his mental responsibility for committing the charged offenses was not considered in accordance with R.C.M. 706. He requests that this court disapprove the findings of guilt and sentence. We disagree.

"A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion." *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007) (quoting *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996)). Acceptance of a guilty plea requires the accused to substantiate the facts that objectively support his plea. *United States v. Schwabauer*, 37 M.J. 338, 341 (C.M.A. 1993); see R.C.M. 910(e).

A guilty plea is provident unless 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). We will not reverse a military judge's decision to accept a guilty plea unless we find "a substantial conflict between the plea and the accused's statements or other evidence of record." *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996). "A 'mere possibility' of such a conflict is not a sufficient basis to overturn the trial results." *Id.* (quoting *Prater*, 32 M.J. at 436). Additionally, "[i]f any potential defense is raised by the accused's account of the offense or by other matter presented to the military judge, the military judge should explain such a defense to the accused and should not accept the plea unless the accused admits facts which negate the defense." R.C.M. 910(e), Discussion.

In our opinion, when the appellant informed the military judge that he committed the larcenies in order to purchase and consume alcohol in an attempt to deal with personal and family stress, the military judge properly inquired whether the appellant believed that he suffered from any alcohol dependency or addiction that would have compelled him to commit the larcenies or lose control of his faculties. The appellant declared that he did not.

Additionally, in response to the military judge's question, the appellant's trial defense counsel stated that there were no potential defenses relating to the appellant's alcohol use. Record at 33. Accordingly, we conclude that the military judge did not abuse his discretion in accepting the appellant's guilty pleas because the record did not reveal a substantial basis in law and fact for questioning the plea. This assignment of error is without merit.

### **Post-Trial Evidence of Bipolar Disorder**

Although we have addressed the appellant's assignment of error concerning the providency of his guilty pleas, our analysis does not end there. The appellant has presented post-trial evidence that he was diagnosed with a bipolar disorder and, furthermore, that this disorder existed at the time that he committed the offenses and during his trial. However, he has not filed a petition for a new trial under R.C.M. 1210. Our superior court, having examined our fact-finding function under Article 66 (c), UCMJ, and considering an accused's burden of demonstrating his lack of mental responsibility by clear and convincing evidence under R.C.M. 916(b) and (k)(3)(A), has set forth the following standard for our consideration of the impact of the appellant's post-trial evidence of a lack of mental responsibility, when he has not filed a petition for a new trial:

Is the appellate court convinced beyond a reasonable doubt that reasonable fact finders would not find by clear and convincing evidence that, at the time of the offense, [the] appellant suffered from "a severe mental disease or defect" such as to be "unable to appreciate the nature and quality or the wrongfulness of" his acts?"

*United States v. Harris*, 61 M.J. 391, 396 (C.A.A.F. 2005) (quoting *United States v. Cosner*, 35 M.J. 278, 281 (C.M.A. 1992)).

As we conduct our review of the appellant's post-trial evidence of his bipolar disorder, we are mindful of his burden of demonstrating his lack of mental responsibility by clear and convincing evidence as well as the presumption that he was "mentally responsible at the time of the alleged offense." R.C.M. 916(k)(3)(A). Additionally, we note that the appellant's trial defense counsel "is presumed to be competent." *Shaw*, 64 M.J. at 463 (citing *United States v. Cronin*, 463 U.S. 648, 658 (1984) and *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987)).

As we previously noted, the appellant's trial defense counsel filed a second clemency request informing the convening authority that, post-trial, the appellant was diagnosed with a bipolar disorder. However, the trial defense counsel further informed the convening authority that the medical diagnosis "does not excuse" the appellant's actions. See Clemency Request of 5 Mar 2006, ¶¶ 4-5 and enclosure (2). We "may properly presume, in the absence of any indication to the contrary," that the trial defense counsel conducted a reasonable post-trial investigation into the existence of a defense of lack of mental responsibility and determined, based on his representations to the convening authority, that a defense did not exist. *Shaw*, 64 M.J. at 463.

Furthermore, based on our review of Dr. Colligan's and Dr. Stack's post-trial declarations and the appellant's post-trial affidavit, we conclude that the appellant has not provided sufficient evidence that he suffered a severe mental disease or defect when he committed the offense or at the time of his court-martial. Dr. Colligan opined that that he did not know the appellant's actual bipolar state and could not offer an opinion concerning the appellant's state of mental health at the time of the offenses or at trial. Dr. Stack concluded that the appellant did not have a significant personality disorder. These opinions and conclusions must be considered in light of the appellant's own statements at trial that he appreciated the wrongfulness of his acts because he knew that the stolen property did not belong to him and, furthermore, he knew that stealing the property was wrong.

Accordingly, we are convinced beyond a reasonable doubt that reasonable fact finders would not find by clear and convincing evidence that, at the time of the offense, the appellant suffered from a severe mental disease or defect such as to be unable to appreciate the nature and quality or the wrongfulness of his acts, or lacked the capacity to stand time.

### **Conclusion**

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

Senior Judge HARTY and Judge O'TOOLE concur.

For the Court

R.H. TROIDL  
Clerk of Court