

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

**Before
J.K. CARBERRY, L.T. BOOKER, M.D. MODZELEWSKI
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MATTHEW E. DAVIS
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201100057
GENERAL COURT-MARTIAL**

Sentence Adjudged: 15 November 2010.
Military Judge: Maj Robert G. Palmer, USMC.
Convening Authority: Commanding General, Marine Corps
Recruit Depot/Eastern Recruiting Region, Parris Island, SC.
Staff Judge Advocate's Recommendation: LtCol E.R. Kleis,
USMC.
For Appellant: Maj Kirk Sripinyo, USMC.
For Appellee: LT Kevin D. Shea, JAGC, USN.

15 September 2011

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of one specification of unauthorized absence, two specifications of willful disobedience of a superior commissioned officer, five specifications of failure to obey a lawful general order, three specifications of making a false official statement, and one specification of simple assault in violation of Articles 86, 90, 92, 107, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 890, 892, 907, and 928. The military judge sentenced the appellant to 18 months confinement, reduction to pay grade E-1, total forfeitures of pay and allowances, and a bad-conduct

discharge. After setting aside Specification 5 of Charge III due to the inadequacy of the providence inquiry, the convening authority (CA) approved the sentence as adjudged.

Before us, the appellant alleges that the military judge abused his discretion by accepting the appellant's guilty plea to assault without inquiring into the negligence of the victim.

The appellant pled guilty to an offer type assault. The record indicates that Sergeant (Sgt) T, a fellow Marine recruiter, saw the appellant exit a bar adjacent to the Marine Corps recruiting office where the appellant was assigned. At the time, a police officer was in the recruiting office looking for the appellant. Sgt T alerted the police officer that the appellant was outside and then walked toward the appellant. Sgt T and the police officer approached the appellant's vehicle. As Sgt T was speaking with the appellant, he leaned into the vehicle compartment through the window. Prosecution Exhibit 1 at 8. As Sgt T was leaning through the window, the appellant began to drive away. *Id.* Sgt T then jumped onto the vehicle running board as the appellant drove down an alleyway. The appellant admitted that he was culpably negligent in driving the vehicle down the alleyway while Sergeant T was clinging to the vehicle and that his actions placed fear in, and could have caused bodily injury to, Sgt T. Record at 184-85. The appellant also stated that his actions were without justification and that he was not responding to any provocation from Sgt T or acting in self defense. *Id.* at 182.

The appellant maintains that the military judge should have inquired into whether the victim's negligence constituted a defense, i.e., whether the victim's negligence loomed so large in comparison to that of the defendant's that the appellant cannot be said to be the proximate cause of the victim's harm. *United States v. Oxedine*, 54 M.J. 508, 510-11 (N.M.Ct.Crim.App. 2000), *aff'd*, 55 M.J. 323 (C.A.A.F. 2001).

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). An abuse of discretion occurs when there is a substantial basis in law or fact for questioning the guilty plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). 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 (2008 ed.).

It is well-settled that if an accused sets up a matter inconsistent with the plea at any time during a guilty plea proceeding, the military judge must resolve the conflict or

reject the plea. Art. 45(a), UCMJ; see R.C.M. 910(h)(2). In the event that the accused's statements or matters in the record indicate a defense might exist, the military judge must determine whether that information raises a conflict with the plea and thus the possibility of a defense or only the 'mere possibility' of conflict. *United States v. Riddle*, 67 M.J. 335, 338 (C.A.A.F. 2009)(citing *Shaw*, 64 M.J at 462). The "possibility of a defense" conflicts with a guilty plea and the military judge must inquire into the defense. *Id.* Conversely, the "mere possibility" of a defense does not raise conflict with the plea. *Id.*

The record makes clear that the appellant knew that Sgt T was a Marine recruiter; that Sgt T yelled "Davis" and headed toward the appellant's parked vehicle; that the appellant put his vehicle in motion while Sgt T was leaning into it and began driving down the alley; that the appellant could have stopped rather than continuing to drive the vehicle as Sgt T was hanging onto it; and, that it was reasonable for Sgt T to fear hitting a stairwell that was protruding into the alley, falling off the vehicle, and injuring himself. In view of the facts elicited from the appellant, his stipulation of fact regarding the incident, and Sgt T's testimony, there is no evidence that suggests that Sgt T was negligent. Having found that the record does not raise a matter inconsistent with his plea, we find that the military judge did not abuse his discretion in accepting the appellant's guilty plea.

Conclusion

The findings and the approved sentence are affirmed. Arts. 59(a) and 66(c), UCMJ.

For the Court

R.H. TROIDL
Clerk of Court

Senior Judge BOOKER participated in the decision of this case prior to detailing from the court.