

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

**Before
J.A. MAKSYM, J.R. PERLAK, R.Q. WARD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**TYLER M. ROSSMAN
GUNNER'S MATE SECOND CLASS (E-5), U.S. NAVY**

**NMCCA 201100186
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 14 December 2010.

Military Judge: LtCol Michael Mori, USMC.

Convening Authority: Commander, Destroyer Squadron THREE ONE, Pearl Harbor, HI.

Staff Judge Advocate's Recommendation: LT Sarah E. Harris, JAGC, USN.

For Appellant: LT Daniel W. Napier, JAGC, USN.

For Appellee: CDR Kimberly D. Hinson, JAGC, USN; Capt Mark V. Balfantz, USMC.

17 November 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 special court-martial convicted the appellant, pursuant to his pleas, of one specification of assault consummated by a battery and one specification of aggravated assault in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928.¹

¹ Prior to accepting the appellant's guilty pleas, the military judge dismissed with prejudice one specification of assault consummated by battery,

The approved sentence included confinement for 200 days, reduction to pay grade E-1, a fine of \$6,000.00, and a bad-conduct discharge. Pursuant to the pretrial agreement, the convening authority (CA) suspended all confinement in excess of time-served (89 days).

In a sole assignment of error, the appellant asserts that the military judge abused his discretion in accepting the appellant's guilty pleas without adequately explaining the potential defense of lack of mental responsibility and by failing to elicit facts to negate that defense. We have examined the record of trial, the appellant's assignment of error, and the pleadings of the parties. 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. However, error exists in the CA's action and court-martial promulgating order that requires correction, which we will mandate in our decretal paragraph.²

Trial Proceedings

Prior to trial, the convening authority ordered a mental competency examination pursuant to RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Defense Exhibit A. The R.C.M. 706 board diagnosed the appellant with Anxiety Disorder, Not Otherwise Specified (With Post-Traumatic Features); Alcohol Abuse; and Personality Disorder, Not Otherwise Specified (Narcissistic and Antisocial Personality Traits). *Id.* at 1. The board found him to be mentally responsible at the time of the offenses and to have sufficient mental capacity to stand trial. *Id.* In addition, a forensic psychiatrist detailed as a defense expert consultant, evaluated the appellant and came to the same conclusions. Record at 67.

During the providence inquiry on the battery specification, the appellant explained to the military judge that he had no

citing multiplicity and unreasonable multiplication of charges. Record at 72-73.

² At trial, the appellant plead not guilty to Charge II and its two specifications. Record at 25. After accepting his guilty pleas, the military judge inquired as to the Government's intention with Charge II. In response, the Government withdrew and dismissed Charge II and its two specifications. *Id.* at 96-97. The Results of Trial incorrectly lists findings of not guilty for Charge II and its specifications. The CA's action and promulgating order contains this same error. Special Court-Martial Order No. 01-11 of 15 Mar 11 at 1.

independent recollection of the offenses due to his intoxication at the time. *Id.* at 33, 43. He also explained that a previous head injury from 2008 may have contributed to his lack of memory. *Id.* at 65-66. The military judge asked both the appellant and his civilian counsel whether they had discussed any potential defense related to intoxication or the appellant's prior head injury, and both replied in the affirmative. *Id.* at 48-49. Civilian counsel also indicated that he did not believe either issue raised a defense. *Id.* The military judge explained to the appellant that by pleading guilty, he was waiving any possible defense of intoxication or related to his prior head injury and the appellant indicated he understood. *Id.* at 53. When the military judge then brought up the R.C.M. 706 examination, civilian counsel replied that the R.C.M. 706 evaluation ruled out any potential mental responsibility defense. *Id.*³

During sentencing, several witnesses described changes in the appellant's personality once he returned from Afghanistan. *Id.* at 125, 134-36, 170-72, 181. The military judge subsequently re-opened the providence inquiry and again inquired whether counsel had discussed the potential defense of mental responsibility with the appellant. Civilian counsel again acknowledged that he had done so and that he did not believe the evidence gave rise to a potential defense; rather it was evidence in extenuation and mitigation. *Id.* at 216-17. The appellant also acknowledged that he had discussed the issue of mental responsibility with his counsel, that he did not wish to raise any such defense, and agreed that it was only offered as extenuation and mitigation. *Id.*

Providence of the Pleas

A. Standard of Review

A military judge's decision to accept or reject an appellant's guilty plea is reviewed for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). A decision to accept a guilty plea will be set aside only where the record of trial shows a substantial basis in law or fact for questioning the plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). Should an appellant establish facts which raise a possible defense, the military judge must inquire further and resolve the matters inconsistent with the plea, or

³ The military judge conducted a similar colloquy with counsel and the appellant during the providence inquiry on the aggravated assault specification. *Id.* at 66-68.

reject the plea. *United States v. Phillippe*, 63 M.J. 307, 310-11 (C.A.A.F. 2006). A failure to do so constitutes a substantial basis in law or fact for questioning the guilty plea. *Phillippe*, 63 M.J. at 311. However, the "mere possibility" of a conflict between the plea and the appellant's statements or other evidence of record is not a sufficient basis to overturn the trial results. *United States v. Riddle*, 67 M.J. 335, 338 (C.A.A.F. 2009); *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007).

Questions of law arising during or after the plea inquiry are reviewed *de novo*. *Inabinette*, 66 M.J. at 321. Whether a military judge has an affirmative duty to inquire into a potential defense is a pure question of law. *Id.* at 322.

In addressing this issue of statements or evidence that conflict with an appellant's guilty plea, the Court of Appeals for the Armed Forces (CAAF) has focused on whether the matter raised a "mere possibility" of a conflict with the guilty plea, or an actual conflict necessitating action by the military judge. Compare *Shaw*, 64 M.J. at 463 (a passing reference to a diagnosis of bipolar disorder was insufficient), with *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005) (a military judge who concluded a serious mental defect existed erred by failing to explore its impact upon pleas). More recently, CAAF has characterized cases as being analogous to either *Shaw* or *Harris*. See *Riddle*, 67 M.J. at 339; *Inabinette*, 66 M.J. at 323; *United States v. Glenn*, 66 M.J. 64, 65-66 (C.A.A.F. 2008).

B. Analysis

This case is most analogous to *Shaw*. Here the military judge had the benefit of a R.C.M. 706 board whose findings were corroborated by the defense's own forensic psychiatrist. The appellant twice acknowledged to the military judge that he had discussed any potential defense relating to mental responsibility with his counsel and he did not wish to raise it. Record at 53, 66-68, 216-17. And while witnesses testified to changes in the appellant's personality, mood, and temperament, none of this evidence contradicted or cast substantial doubt on the findings of the R.C.M. 706 board, nor did it indicate that the appellant lacked mental responsibility at the time of the offenses. *Riddle*, 67 M.J. at 340; *Glenn*, 66 M.J. at 66. Lastly, we note that the appellant's statements to the military judge did not assert that he was unable to appreciate the nature and quality or wrongfulness of his acts as a result of a mental disease or defect. *Shaw*, 64 M.J. at 463. On the contrary, we

conclude that his statements were "a mere rationalization of his behavior" rather than a matter inconsistent with his pleas of guilty. *United States v. Peterson*, 47 M.J. 231, 235 (C.A.A.F. 1997).

A military judge may presume both that an appellant is sane and that his counsel is competent,⁴ but here the military judge did not need to presume. The findings of the R.C.M. 706 board negated the possibility of a defense. The military judge took the prudent measure of re-opening the providence inquiry to confirm the lack of a possible defense with the appellant and his counsel. The appellant now points to this action as evidence that more than a "mere possibility" of a defense exists. We disagree. Under the facts of this case, we find the military judge's inquiry sufficiently resolved any potential conflict. We find no substantial basis in law or fact for questioning the providence of his pleas. *Inabinette*, 66 M.J. at 322. Accordingly, we find that the military judge did not abuse his discretion by accepting the appellant's guilty pleas.

Conclusion

The findings and sentence as approved by the convening authority are affirmed. The supplemental court-martial promulgating order will indicate that Charge II and its two specifications were withdrawn and dismissed without prejudice.

For the Court

R.H. TROIDL
Clerk of Court

⁴ See *Riddle*, 67 M.J. at 338.