

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

**Before  
J.A. MAKSYM, J.R. PERLAK, R.E. BEAL  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**DEREK L. ALLEN  
AVIATION BOATSWAIN'S MATE AIRMAN (E-3), U.S. NAVY**

**NMCCA 201100040  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 18 October 2010.

**Military Judge:** CDR Kevin O'Neil, JAGC, USN.

**Convening Authority:** Commander, Navy Region Northwest,  
Silverdale, WA.

**Staff Judge Advocate's Recommendation:** CDR T.F.  
DeAlicante, JAGC, USN.

**For Appellant:** LCDR Anthony Yim, JAGC, USN.

**For Appellee:** Maj Elizabeth Harvey, USMC; Maj William  
Kirby, USMC.

**28 July 2011**

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**OPINION OF THE COURT**  
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**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, pursuant to his pleas, of one specification of absence without leave, one specification of missing movement, four specifications of wrongful use and possession of a controlled substance, one specification of aggravated assault with a dangerous weapon, and one specification of reckless endangerment, in violation of Articles 86, 87, 112a, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 887, 912, 928, and 934. The appellant was sentenced to confinement for 62 months, reduction to pay grade E-1, and a

dishonorable discharge. The convening authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered the sentence executed.

The appellant has submitted one assignment of error: that the military judge abused his discretion by accepting the appellant's pleas without inquiring into the possible defense of duress. We have examined the record of trial, the appellant's assignment of error, and the pleadings. 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.

### **Background**

On 20 April 2010, the appellant and a friend were driving the appellant's vehicle about Everett, WA when they noticed an individual, Q, whom they believed to be a former gang member, pumping gas into his vehicle at a local gas station. The appellant was riding as passenger in his car while his friend was driving.

After Q entered traffic with his car, the appellant's friend cut in front of Q's car and then backed the appellant's vehicle into Q's vehicle. Prosecution Exhibit 1. Q had two passengers in the vehicle at the time, including his then eighteen-month-old daughter. Following the accident, the appellant and his friend drove away and were pursued by Q for two miles. Record at 65. Unable to elude Q, the appellant's friend stopped the car, at which point the appellant exited the vehicle with a revolver and fired multiple rounds in the direction of Q's vehicle in order to "scare [Q] off." Record at 71.

During the providence inquiry, the appellant repeatedly stated that he had been "scared for his life" at the time he committed the assault because he knew Q was a former member of the "Crips" gang, and he had witnessed occasions of gang violence in the past. *Id.* at 65, 70, 71. In view of the appellant's statements, the military judge stopped the inquiry and directed the appellant to consult with his counsel relative to prospective defenses. *Id.* at 72. Following the appellant's consultation with counsel, the military judge discussed the concept of self-defense with the appellant. The military judge explained that, in order to avail himself of the defense, at the time of the incident, the appellant must have had a reasonable apprehension of death or grievous bodily harm being inflicted upon him, and that the amount of force he deployed was necessary to protect against the prospective harm with which he was faced. *Id.* at 75.

After being instructed as to self-defense by the trial judge, the appellant stated that he was convinced that a reasonable adult in his situation would not have feared death or grievous bodily harm. *Id.* at 76, 79. The appellant acknowledged that he did not see Q with a weapon, Q was not making any

movements to get out of his car, and Q was not saying anything to the appellant or the appellant's friend. *Id.* at 73-74. Notably, the appellant admitted that he "overreacted" and would "take that mistake back" if he could. *Id.* at 76. The appellant told the military judge that he had discussed the concept of self-defense at length with his counsel. *Id.* at 78. Both the appellant and his counsel informed the military judge that they did not believe a defense of self-defense was available for the aggravated assault offense. *Id.* at 79. At the close of the inquiry, the appellant admitted that he acted wrongfully and did not have any legal justification or excuse for his actions. *Id.* at 80. We note that the trial judge did not deign to advise the appellant as to the corollary defense of duress.

### **Providence of the Plea**

#### **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) (citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)). 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). "If an accused 'sets up matter inconsistent with the plea' at any time during the proceeding, the military judge must either resolve the apparent inconsistency or reject the plea." *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996) (quoting Article 45(a), UCMJ); see RULE FOR COURTS-MARTIAL 910(h)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). A failure to do so constitutes a substantial basis in law or fact for questioning the guilty plea. See *United States v. Phillippe*, 63 M.J. 307, 311 (C.A.A.F. 2006). 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. 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. See *Id.* at 321-22 (citing *United States v. Pena*, 64 M.J. 259, 267 (C.A.A.F. 2007); *United States v. Harris*, 61 M.J. 391 (C.A.A.F. 2005)). Under R.C.M. 916(h), the defense of duress applies only when the accused has "a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act." In its duress instruction, the Military Judge's Bench Book defines duress as "causing another person to do something against his will by the use of either physical force or psychological coercion." Military Judge's Benchbook, Dept. of the Army Pamphlet Instruction 27-9 at 5-5, DURESS (COMPULSION OR

COERCION) (1 Jan 2010). If the accused has a reasonable chance to avoid committing the offense without subjecting himself or another to the harm threatened, the defense of duress does not exist. R.C.M. 916(h).

## B. Analysis

The question this court faces is whether the appellant's statements raised a possible defense of duress and whether the military judge's failure to inquire into such a defense renders the appellant's guilty plea improvident. We find that the defense of duress was not reasonably raised by the appellant's statements during the providence inquiry. As such, there was no affirmative duty on the part of the military judge to advise on or inquire into such a defense. The military judge's inquiry into whether the appellant was acting in self-defense adequately addressed any issues raised by the appellant's statements relative to fearing for his life. The military judge resolved any inconsistencies and properly established the appellant's pleas as provident.

The military judge did not specifically define a duress defense for the appellant. However, his lengthy inquiry into the appellant's statements confirmed that an effective defense under the theory of duress could not have been established under the specific facts of this case. The appellant's admission that none of the victims appeared to have weapons or attempted to get out of their car demonstrates that the element of immediacy necessary for a duress defense was lacking in this instance. Additionally, there was no evidence that Q threatened or coerced the appellant at any point before or during the offense. We note that the appellant told the military judge that a reasonable person in his situation would not have felt in fear of death or serious bodily harm. Record at 79. Furthermore, the appellant stated that he "could have easily alluded [sic] the problem by calling the police or trying to get away from [Q]." Record at 74. This interchange between the military judge and the appellant brought clarity to the factual underpinnings of his plea and eradicated the specter of any defense. *United States v. Jemmings*, 1 M.J. 414, 418 (C.M.A. 1976).

The present case can be distinguished from our decisions in *United States v. Soucie* and *United States v. Hayes* because the military judge conducted an adequate inquiry into the facts that could have potentially given rise to a duress defense. *United State v. Soucie*, No. 200900687, slip op. at 3 (N.M.Ct.Crim.App. 9 Sep 2010) (finding that evidence of a threat from appellant's girlfriend to terminate the life of their unborn child required inquiry from the military judge as to the availability of a duress defense); *United States v. Hayes*, No. 201000366, slip op. at 4 (N.M.Ct.Crim.App. 27 Jan 2011) (finding that evidence of a threat of suicide from appellant's mother set forth matters inconsistent with his guilty plea and thus required inquiry from the military judge as to the availability of a duress defense).

The trial judge in this case conducted a lengthy inquiry into the appellant's account of the assault that provided "adequate facts on the record to resolve the conflict" between appellant's statements and his guilty plea. *Hayes*, No. 201000366 at 4; *Soucie*, No. 200900687 at 3. The inquiry failed to produce any facts that demonstrated the level of coercion or immediacy necessary to give rise to a defense of duress.

The appellant's discussion with the military judge confirmed that his "scared for my life" statement was "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). The military judge's inquiry, though centered upon self defense, adequately established the unavailability of a duress defense under these specific facts. 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.

For the Court

R.H. TROIDL  
Clerk of Court