

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

**Before
J.A. MAKSYM, B.L. PAYTON-O'BRIEN, M. MCALEVY
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**THOMAS J. HAYES
MIDSHIPMAN FIRST CLASS (MIDN, 1C), U.S. NAVY**

**NMCCA 201000366
GENERAL COURT-MARTIAL**

Sentence Adjudged: 4 March 2010.

Military Judge: CAPT Bruce W. MacKenzie, JAGC, USN.

Convening Authority: Superintendent, United States Naval Academy, Annapolis, MD.

Staff Judge Advocate's Recommendation: CDR Matthew C. Dolan, JAGC, USN.

For Appellant: Capt Jeffrey R. Liebenguth, USMC.

For Appellee: LT Kevin D. Shea, JAGC, USN.

27 January 2011

OPINION OF THE COURT

**IN ACCORDANCE WITH RUE 18.2, NMCCA RULES OF PRACTICES AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of 11 specifications of selling military property without authority and 10 specifications of theft of military property, in violation of Articles 108 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 908 and 921. The appellant was sentenced to confinement for 36 months, forfeiture of all pay and allowances, a fine of \$28,000.00 and a dismissal. The convening authority approved the sentence but, pursuant to the pretrial agreement, suspended all confinement in excess of 12 months for the period of confinement plus three months.

We have considered the record of trial and the pleadings. We conclude that the military judge erred in accepting the appellant's pleas of guilty without having reopened the providence inquiry in light of the appellant's unsworn statement in sentencing which raised issues in conflict with his pleas of guilty. Absent specific inquiry by the trial judge and supplemental explanations by the appellant, the findings cannot be affirmed by this court.

Background

On 10 separate occasions during a five month-period from October 2008 to February 2009, the appellant, a midshipman at the United States Naval Academy [USNA] majoring in electrical engineering, stole lab equipment from the Engineering Lab at USNA and sold it on eBay. During the appellant's unsworn statement in sentencing, he explained his offenses as resulting from the pressures that he was receiving from his mother, who was despondent and threatening suicide over her financial difficulties, and who was daily requesting his financial support. In pertinent part, the appellant stated that:

The first time this (taking an item and selling it)—it was purely curiosity . . . how much things were worth, and I was like, "Well, my mom needs money, there's all these extra things laying around." I know it wasn't right, but in my state of mind I just--I just couldn't differentiate the difference between doing the right thing for--for home or doing the right thing that's going to make the phone calls stop, or doing the right thing for being a Midshipman.

. . . .

. . . I used the money, and I'd go home every weekend, and whether--whatever my mom needed I was doing, whether it was just taking her out to dinner or taking all my brothers and sisters out for ice cream, I mean just being there. I'm not--I didn't know how to deal with somebody who's threatening to end their life or threatening to, you, not be there anymore.

And that's--that's the pressures that I was feeling at that time, sir, and I—I hope that the court shows some sort of compassion for—for those things.

Record at 214-15.¹

¹ During sentencing, a letter from appellant's mother was admitted in which she detailed that during the period of appellant's misconduct, she made constant phone calls to appellant telling him her thoughts about ending her life, and that she asked him for money on a daily basis, and that he feared for her safety. Defense Exhibit A.

Following the conclusion of appellant's unsworn statement, the military judge failed to reopen the providence inquiry to question the appellant about any possible defenses. The military judge also failed to ask the defense counsel whether he had explored potential defenses arising from the appellant's claimed stress in connection with this mother.

Providence of the Plea

In his sole assignment of error, the appellant alleges that that the military judge erroneously failed to reopen the providence inquiry to inquire into the potential defenses of duress and mental responsibility raised by the appellant's unsworn statement during sentencing. Appellant's Brief and Assignment of Error of 23 Aug 2010 at 5.

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion and questions of law arising from the guilty plea *de novo*. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008); *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. *Inabinette*, 66 M.J. at 322. A potential defense to the charged crime constitutes "matter inconsistent with the plea" under Article 45(a), UCMJ. If, at any time during the proceeding, an accused advances a matter raising a possible defense, then the military judge is obligated to make further inquiry to resolve any apparent ambiguity or inconsistency. *United States v. Philipe*, 63 M.J. 307, 309 (C.A.A.F. 2006). A failure to do so constitutes a substantial basis in law and fact for questioning the guilty plea. *Id.* at 311.

Once the military judge has accepted the pleas and entered findings based upon them, an appellate court will not reverse those findings and reject the plea unless it finds a substantial conflict between the pleas and the accused's statements or other evidence of record. *Shaw*, 64 M.J. at 462. More than a "mere possibility" of such a conflict is required to overturn the trial results. *Id.*

In the present case, the appellant's unsworn statement sets forth matter clearly inconsistent with his admission of culpability. Specifically, the appellant raises the possible defense of duress upon which there is no inquiry by the trial judge. 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). Under RULE FOR COURTS-MARTIAL 916(h), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), the defense of duress applies 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. The apprehension must reasonably continue throughout the commission of the act." The appellant's statement indicated that he was under apprehension and fearful that his mother would commit suicide, and (2) that he committed his acts in order to prevent that from happening, indicating some immediacy in his mind as to the prospective threat. In the absence of further inquiry by the military judge and without adequate facts on the record to resolve the conflict, we can only speculate and cannot be confident that the appellant was not under duress when he committed the acts to which he pled guilty. As such, there remains a substantial question of law or fact that compels us to question the appellant's pleas below. The appellant clearly raised material inconsistent with his guilty pleas. We are not in a position to assess the provident nature of the appellant's pleas, in the face of such ambiguity.

Conclusion

Accordingly, we set aside the findings of guilty and the sentence and return the record of trial to the Judge Advocate General for remand to an appropriate convening authority with a rehearing authorized.

For the Court

R.H. TROIDL
Clerk of Court