

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

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

UNITED STATES OF AMERICA

v.

**AMIR H. R. HOGUE II
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201100039
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 8 October 2010.

Military Judge: LtCol Eugene H. Robinson, Jr., USMC.

Convening Authority: Commanding Officer, Headquarter and Service Battalion, Marine Corps Base, Quantico, VA.

Staff Judge Advocate's Recommendation: LtCol Chris M. Greer, USMC.

For Appellant: CAPT Salvador Dominguez, JAGC, USN.

For Appellee: CAPT James B. Melton, JAGC, USN; Maj William C. Kirby, USMC.

16 June 2011

OPINION OF THE COURT

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

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of unauthorized absence terminated by apprehension, in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886. The appellant was sentenced to confinement for 120 days, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

We have carefully considered the record of trial and the pleadings of the parties and 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.

Admissibility of NJP Records

In a summary assignment of error, the appellant contends that the military judge committed plain error by considering records of a nonjudicial punishment (NJP) imposed more than two years prior to the offense alleged in the specification under the charge. An NJP offense is "stale" and inadmissible if it was committed more than two years prior to the commission of any court-martial offense of which the accused stands convicted. Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7E, § 0141 (Ch-2, 16 Sep 2008). The Government concedes, and we conclude, that the NJP in question, which was awarded in October 2006 and introduced by the Government in Prosecution Exhibits 1 and 2, met this definition, and was admitted into evidence during the presentencing phase contrary to the policy set forth in JAGMAN § 0141.

The trial defense counsel failed to object to the admission or consideration of the stale NJP. Therefore, the issue will be considered to have been forfeited unless this court finds "plain error." RULE FOR COURTS-MARTIAL 801(g), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.); MILITARY RULE OF EVIDENCE 103(a)(1) and (d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). To constitute "plain error," an error must in fact exist, that error must be plain or obvious, and the error must materially prejudice a substantial right of the appellant. *United States v. Lepage*, 59 M.J. 659, 660 (N.M.Ct.Crim.App. 2003). While it was obviously error for the military judge to admit this NJP into evidence in noncompliance with the policy constraints set forth by the Judge Advocate General, whether it had a "significant effect on the sentence" is determined on a case-by-case basis. *United States v. Wrenn*, 36 M.J. 1188, 1193 (N.M.C.M.R. 1993).

There is nothing in the record indicating that the military judge was unduly influenced by the admission of this NJP. The appellant pled guilty to an unauthorized absence (UA) spanning approximately ten and a half months, aggravated by the fact that it was terminated by apprehension. He received significantly less confinement than the maximum of one year possible at a special court-martial.

During the course of the court-martial, trial counsel did not highlight the NJP. He referenced the NJP on one occasion, and then only in response to a question posed by the military judge about the accuracy of the charge sheet. In the 78 pages of sentencing evidence submitted by trial counsel, the unit punishment book entry, and page 11 which documents the subsequent counseling of the appellant are the only records referencing the stale NJP. While the NJP charges were numerous, including an unauthorized absence, insubordination, disobeying orders by

driving on base while his driving privileges were suspended, evading arrest, and missing movement to Iraq, the offenses occurred four years prior to the date of the current court-martial sentence, and no further details of the crimes are available in the record. The appellant's later and more recent misconduct more likely overshadowed the prior NJP. Of more importance, immediately preceding his current court-martial, and while he was in his UA status, the appellant received a civilian conviction for marijuana possession. Furthermore, his personnel records indicate that the appellant had two minor UA periods totaling 39 days in the months just prior to commencing his long-term UA for which he stands convicted.

Given the adjudged sentence in this case, and based upon the record as a whole, we believe the military judge gave little if any weight to the stale NJP. Additionally, we note that the appellant requested that a punitive discharge be adjudged in his case.¹ Accordingly, we find no evidence that admission of the stale NJP materially prejudiced the substantial rights of the appellant. Finding no plain error, we decline to grant relief to the appellant on this basis.

Providence Inquiry

Although not raised as error, we address the prospective issue of duress raised relative to the appellant's rationale for departing on his unauthorized absence. In his own words, he was guilty of unauthorized absence because ". . . I had to go and retrieve my son because my ex-wife abandoned him because her mother was a drug addict." Record at 20. He felt compelled to board a plane and travel cross-country because "I had nobody else that I could ask to do it" *Id.* at 23. The military judge then established that members of the appellant's family lived in the same city as the child, and suggested that the appellant could have solved this problem through a power of attorney (POA) granting a member of his family legal permission to care for his child. It is unclear from the written record whether the appellant's child was actually, versus legally, under anyone's supervision at the time the appellant commenced his unauthorized absence. But the appellant himself did not believe a POA was an option, explaining, "I didn't have the time, sir. It was a dire situation, so I acted in the moment." *Id.* at 24. To the extent these statements show the appellant absented himself based on fear for the physical safety of his child, they would clearly raise the possibility of a duress defense. R.C.M. 916(h).

If, during the proceedings, the appellant asserts a matter inconsistent with his plea, it is the responsibility of the

¹ The appellant requested a bad-conduct discharge during the presentencing proceedings, Record at 51, and in his brief indicates he suffered no prejudice in this regard. Appellant's Brief of 21 Mar 2011 at 3 n.1. The appellant does not claim on appeal that he suffered any other form of prejudice, for example, increased adjudged confinement.

military judge to either resolve the inconsistency or reject the plea. *United States v. Riddle*, 67 M.J. 335, 338 (C.A.A.F. 2009). The existence of an apparent and complete defense is necessarily inconsistent with a plea of guilty. *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007). If the appellant is not advised of an available defense by the military judge, there may be a substantial basis for questioning his guilty plea, requiring it to be set aside. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

The threshold question is whether the information presented by the appellant regarding his son raised a sufficient inconsistency to require the military judge to inquire further. See *Shaw*, 64 M.J. at 462. In *Shaw*, the military judge did not have to pursue the defense of lack of mental responsibility based on the appellant's bipolar disorder, when that disorder may have, but did not necessarily provide a defense. *Id.* At a minimum, a duress defense requires reasonable apprehension of physical harm causing the appellant to commit the offense. *United States v. Soucie*, No. 200900687, unpublished op. (N.M.Ct.Crim.App. 9 Sep 2010). In *Soucie*, this court set aside a plea based on the military judge's failure to explore a possible duress offense, when the appellant insinuated what was purported to be a commercial instrument to purchase a house through unlawful means based on his girlfriend's threat to terminate her pregnancy.

In this case, there was no inconsistency, only a mere possibility of a conflict. The appellant established that his child's mother had abandoned their child, and that he left his unit out of compulsion for his child's well-being. But, there was no real indication that the child was perceived to be in physical danger, and we decline to speculate post-trial as to the existence of facts which might invalidate the appellant's guilty plea, particularly in light of the extended period of the appellant's absence.² Since no possible defense existed on the facts presented, the military judge had no obligation to inquire further. More importantly, during the providence inquiry the appellant advised the military judge that his decision to go UA was made freely, nothing prevented him from returning from UA, and he could have returned from UA with his child. We find there is no substantial basis in law or fact sufficient for questioning the appellant's plea of guilty in this case. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

Convening Authority's Action

Although not assigned as error, we note that the action states that "[i]n accordance with the UCMJ, Rules for Courts-Martial, applicable regulations, this pretrial agreement, and

² The appellant's rationale for absenting himself from his unit was to retrieve his minor son from his ex-wife, who he claims was addicted to drugs. We certainly would expect him to return with his son or make other child care arrangements in less than 8 months time.

this action, the sentence is ordered executed. Pursuant to Article 71, UCMJ, the punitive discharge will be executed after final judgment." To the extent that this language purports to direct anything, it is a legal nullity. Article 71 is restrictive in its wording (a discharge "may not be" executed until after final action). It is not, as is the language of the action, directive ("will be executed"), as the determination as to whether a discharge "will be" executed cannot be made until after judgment as to the legality of the proceedings, and, in case of death or dismissal, approval under Article 71(a) or (b). The better practice would be to mirror the language of the statute (although that construct would add nothing legally to the action), or to follow the recommended forms for action in Appendix 16 of the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

Conclusion

The findings and the sentence as approved by the convening authority are affirmed.

For the Court

R.H. TROIDL
Clerk of Court