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.

JOSEPH A. ZARUBA
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 201000382
GENERAL COURT-MARTIAL

Sentence Adjudged: 15 January 2010.
Military Judge: CDR Charles D. Stimson, JAGC, USN.
Convening Authority: Commanding General, II Marine Expeditionary Force, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: Col B.T. Palmer, USMC; **Addendum:** Col Carol K. Joyce, USMC.
For Appellant: CAPT Stephen White, JAGC, USN.
For Appellee: Maj William C. Kirby, USMC.

28 February 2011

OPINION OF THE COURT

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

PAYTON-O'BRIEN, Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of wrongful possession and distribution of cocaine, wrongful distribution of Oxycodone and Pregabalin (also known as Lyrica),[1] burning an automobile with the intent to defraud an insurer, and solicitation of a fellow Marine to burn an automobile with the intent to defraud, in violation of Articles 112a and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 912a and 934. The appellant was sentenced to confinement for two years, reduction

[1] Pregabalin is a Schedule V controlled substance.

to pay grade E-3, total forfeiture of pay and allowances, a fine of $1,000.00, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged, except for the total forfeitures, which he disapproved. Additionally, pursuant to a pretrial agreement, the CA waived the automatic forfeitures contingent upon the appellant establishing an allotment for the benefit of his dependent daughter.

The appellant has assigned three errors, but we need address only the first:

> DID THE MILITARY JUDGE ERR WHEN HE FAILED TO REOPEN THE PROVIDENCE INQUIRY AFTER EVIDENCE OF THE APPELLANT'S DIAGNOSIS OF POST-TRAUMATIC STRESS DISORDER AND BIPOLAR DISORDER WERE INTRODUCED DURING SENTENCING IN ORDER TO QUESTION APPELLANT AND TRIAL DEFENSE COUNSEL OF POSSIBLE MENTAL RESPONSIBILITY AND CAPACITY TO STAND TRIAL DEFENSES?

We conclude that the military judge erred by failing to reopen the providence inquiry.

Facts

During the sentencing portion of the trial, the appellant offered written statements and other documentary evidence establishing that he was medically diagnosed with post-traumatic stress disorder (PTSD) and bipolar disorder.[2] This evidence included segments of the appellant's medical record and statements by various family members and friends which described the appellant's changed behavior after returning from his two tours in Iraq. Sworn testimony from the appellant's aunt indicated the appellant had been suffering from panic attacks and nightmares for which he had sought medical assistance.

After the military judge admitted and reviewed the statements and segments of the appellant's medical record, and before announcing sentence, he stated:

> Before I ask the accused and counsel to rise, I will share with you that this case is disturbing to me . . . . It's disturbing in the sense that there is actual proof that this Marine is suffering from PTSD and bipolar disorder. A lot of cases you hear it mentioned, you might suspect it, but there is no proof . . . .
>
> We do owe it to our fellow service members to provide the appropriate services when they are suffering, when we send them in harms (sic) way. Of

[2] During the providence inquiry portion of the trial, the appellant said little that would have led the military judge to suspect that his mental responsibility or mental capacity was at issue.

> course, there are times when one would think that maybe the person should at least ask for help, but in the case of PTSD and bipolar disorder often times, the person is either unable to do that, incapable of doing that, in denial, or a combination thereof.

Record at 148-49. The military judge was apparently convinced that the appellant suffered from PTSD and bipolar disorder. Nonetheless, the military judge made no inquiry into whether the appellant was aware of, understood or discussed with his counsel any of the possible affirmative defenses that may have existed because of these mental defects.

Providence Inquiry

We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Shaw,* 64 M.J. 460, 462 (C.A.A.F. 2007)(quoting *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 if there is 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 incurs a duty to inquire further and resolve the matters inconsistent with the plea, or reject the plea. *United States v. Phillippe*, 63 M.J. 307, 310 (C.A.A.F. 2006); *see also* Article 45(a), UCMJ; 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. *Phillippe,* 63 M.J. at 311. We will not reverse a military judge's decision to accept a guilty plea unless we find "a substantial conflict between the plea and the appellant's statements or other evidence of record." *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996). However, the "mere possibility" of such a conflict is not a sufficient basis to overturn the trial results. *Shaw,* 64 M.J. at 462.

In accordance with R.C.M. 916(k)(1), "[i]t is an affirmative defense to any offense that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his or her acts." The existence of an apparent and complete defense is necessarily inconsistent with a plea of guilty. *See Phillippe*, 63 M.J. at 311 (held that "when, either during the plea inquiry or thereafter, and in the absence of prior disavowals . . . circumstances raise a possible defense, a military judge has a duty to inquire further to resolve the apparent inconsistency").

Although a military judge may presume that an appellant is sane,[3] there is no doubt that bipolar disorder—particularly in

[3] *See United States v. Riddle*, 67 M.J. 335, 338 (C.A.A.F. 2009); *Shaw*, 64 M.J. at 463.

conjunction with PTSD—*may* constitute a severe mental disease or defect and, therefore, a complete defense. *See Shaw*, 64 M.J. at 462 ("combat and other operational conditions may generate or aggravate certain mental health conditions, such as post-traumatic stress disorder);[4] *United States v. Martin*, 56 M.J. 97, 103 (C.A.A.F. 2001)(bipolar disorder may exist with enough severity to raise a substantial question regarding the accused's mental responsibility).

The appellant presented evidence that the military judge determined to be "actual proof that [the appellant] is suffering from PTSD and bipolar disorder." The evidence reveals that the appellant was suffering from these mental defects at the time he committed the misconduct and, considering the military judge's use of the present tense when explaining why he found the case "disturbing," at the time of the providence inquiry. Record at 148-49. As a result, the military judge had a *sua sponte* duty to resolve the conflict through discussions with the appellant so as to ensure a defense was not available. *See United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005); *see also* R.C.M. 706(a).

This case presents facts easily distinguishable from those presented in *Shaw*, *supra*. In *Shaw*, the accused merely suggested in his unsworn statement that he suffered from bipolar disorder and that the disorder may have impacted his behavior. There was no corroborating documentary or testimonial evidence submitted in *Shaw.* Rather, the appellant in *Shaw* argued that his plea was improvident solely on an unsworn statement, which is clearly not the situation we find in the present case.

The instant record presents a far more developed record of mental illness that could have affected the appellant's ability to form the intent to commit the offenses charged, and his decision to plead guilty. Here, prior to giving his unsworn statement, the appellant presented convincing medical evidence that he suffered from PTSD and bipolar disorder at the time he committed the misconduct and—as the military judge apparently concluded—at the time he was going through the providence inquiry. The medical evidence which was admitted without Government objection and was not rebutted, reveals the appellant was seen by a mental health care provider just months prior to trial, and was diagnosed with a form of bipolar disorder and PTSD. Defense Exhibit B at 4-8.

Testimony from the appellant's aunt during sentencing and various statements from family and friends submitted as defense exhibits during the sentencing hearing reveal a troubled young man who had psychologically changed after returning from two deployments to Iraq. Indeed, when the military judge questioned the appellant's aunt during her testimony as to whether she had observed any signs that the appellant was "suffering mentally in

[4] Military judges should take particular care to make sure that considerations of mental health do not put the providence of pleas at issue.

any way," she related a story in which the appellant confessed to her that he was suffering from nightmares, sleeplessness, and an increase in his consumption of alcohol. Record at 127. Furthermore, his aunt's testimony revealed that while in pretrial confinement the appellant related to her that he was experiencing panic attacks and had been prescribed certain psychotropic medications as a result. *Id.* at 129-30.

It was only after all the medical, testimonial, and documentary evidence of the appellant's troubled mental state had already been received into evidence that the appellant made an unsworn statement at trial. *Id.* at 130-33. Contrary to the circumstance encountered in *Shaw*, a factual record was developed during the trial substantiating the appellant's maladies prior to the submission of his actual unsworn statement. And, of paramount importance, the medical evidence, which is not supplemented by any sanity board report,[5] contains material that calls into question the impact that a bipolar disorder diagnosis may have had on the appellant's plea. Defense Exhibit B at 1-4.

Unlike *Shaw,* wherein there was only an uncorroborated unsworn statement, this case presented substantial evidence that triggered a military judge's responsibility to conduct an inquiry into the possibility of a defense. We are mindful that the appellant's statement need not assert a complete defense—it must only set up a matter raising a possible defense. *Phillippe* 63 M.J. at 310. The evidence presented in this case establishes to our satisfaction that the appellant's PTSD and bipolar disorder raised "a possible defense." *Id.* It was not possible, therefore, for the military judge to conduct the necessary inquiry into the appellant's pleas without exploring the impact of these mental health issues on those pleas. *Harris*, 61 M.J. at 398; *see also United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969)(requiring the military judge to establish, on the record, the factual bases that establish that "the acts or omissions of the accused constitute the offense or offenses to which he is pleading guilty"). This oversight was error.

[5] There was no evidence to suggest that the military judge was aware of the existence of any Rule for Court-Martial 706 board report.

Conclusion

We therefore set aside the findings and the sentence. A rehearing is authorized.

Senior Judge MAKSYM and Judge PERLAK concur.

For the Court

R.H. TROIDL
Clerk of Court