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

Before
J.R. PERLAK, M.D. MODZELEWSKI, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JOEL C. MILLER
STAFF SERGEANT (E-6), U.S. MARINE CORPS

NMCCA 201200184
GENERAL COURT-MARTIAL

Sentence Adjudged: 15 December 2011.
Military Judge: LtCol Gregory L. Simmons, USMC.
Convening Authority: Commanding General, 1st Marine Division (Rein), Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: Maj V.G. Laratta, USMC.
For Appellant: Maj S. Babu Kaza, USMCR.
For Appellee: LT Philip S. Reutlinger, JAGC, USN.

20 November 2012

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 general court-martial, convicted the appellant, pursuant to his pleas, of larceny and fraud against the United States, in violation of Articles 121 and 132, Uniform Code of Military Justice, 10 U.S.C. §§ 921 and 932. Members with enlisted representation were empanelled for sentencing, and they sentenced the appellant to confinement for 90 days, reduction to pay grade E-3, and a bad-conduct

discharge. The pretrial agreement had no effect on the adjudged sentence. The convening authority (CA) approved the sentence as adjudged.[1]

The appellant assigns two errors: first that the military judge abused his discretion by accepting the guilty plea without inquiring about the appellant's traumatic brain injury;[2] and second, that a punitive discharge is inappropriate for these offenses, considering the appellant's service record and the brain injury issue.

While not raised as error, we also note that the court-martial order, *see* RULE FOR COURTS-MARTIAL 1114, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), contains error. We order the necessary corrective action in our decretal paragraph. *See United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). We conclude that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the appellant's substantial rights was committed.

Background

In April 2009, the appellant began receiving medical treatment at Naval Medical Center San Diego (NMCSD). He traveled there two to three times each week because equivalent treatment was not available at Twentynine Palms, California, his permanent duty station. The appellant filed false claims related to this travel, which formed the basis of his larceny and fraud convictions.

During the providence inquiry, the military judge did not ask, and the appellant did not disclose, the reason for which he sought medical treatment. The stipulation of fact is also silent on this subject. Prior to sentencing, the appellant's trial defense counsel posed no questions about the brain injury during his *voir dire* of the members.

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[1] To the extent that the CA's action purports to direct that the punitive discharge will be executed after final judgment it is a legal nullity. *United States v. Tarniewicz*, 70 M.J. 542 (N.M.Ct.Crim.App. 2011).

[2] None of the medical records contained in the record of trial document that the appellant suffered a traumatic brain injury (TBI). *See* Defense Exhibits Y and GG. The only place the term TBI appears is in the appellant's rebuttal to a counseling entry on page 11 of his service record. Prosecution Exhibit 1 at 7. In this opinion we will refer to the injury as a "brain injury."

At the presentencing hearing, the appellant made an unsworn statement. He mainly described his history in the Marine Corps, but for the first time in the court-martial also discussed his brain injury.[3] The extent of the appellant's statement about the injury is as follows:

> Q. . . . we are going to talk a little bit about some medical treatment you were going through . . . to kind of help the members understand a little bit more about these travel claims . . . . Why were you going to [NMCSD] for? . . .
>
> A. For an injury I sustained in Iraq, an IED. I received a concussion, which definitely in itself doesn't sound that heavy, but it gave me vestibular, or balance, issues. And the vision in my left eye is like I am looking through a hole. There is a dark shadow around everything. I was getting treatment for those issues.
>
> Q. Now this treatment was fairly intensive. Correct?
>
> A. Yes, sir, twice a week. Tuesdays and Thursdays usually were my days to go down to [NMCSD].

Record at 219-20.

After this exchange, neither the appellant nor his counsel ever mentioned the concussion or its effects again during the unsworn statement. The appellant did place part of his medical record into evidence, and it included two references to "Postconcussion Syndrome" and "Post-traumatic Stress Disorder [PTSD]." Defense Exhibit GG at 1, 7. These references appear in a list of the appellant's medical history with no explanation concerning how or whether they affected the appellant's behavior, or whether they are even traceable to the 2004 IED blast. The narrative portions of the medical record primarily address his 2011 motorcycle accident, with a brief paragraph devoted to the IED blast and the impaired vision, balance, and memory that resulted. *Id.* at 8.

Discussion

[3] The appellant began his unsworn statement by discussing more recent, unrelated injuries, incurred during a motorcycle accident. Record at 211.

We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). In order to set aside a guilty plea, we must find "'a substantial conflict between the plea and the accused's statements or other evidence.'" *United States v. Watson*, 71 M.J. 54, 58 (C.A.A.F. 2012) (quoting *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996)). "The 'mere possibility' of a conflict is not sufficient." *Id.*

Whether the statements at issue here present a "substantial conflict" is answered by comparing the appellant's case to *United States v. Shaw*, 64 M.J. 460 (C.A.A.F. 2007), a case that also dealt with an appellant's unsworn statement about brain injuries. There, the accused described an assault that resulted in serious brain trauma and left him in a coma, but the Court of Appeals for the Armed Forces found that this statement did not present a substantial conflict with his plea because no other evidence in the record suggested that the injuries played a role in the offense. *Id.* at 464. As such, the uncorroborated statement was insufficient to overcome two presumptions on which the military judge could reasonably rely: first, that the accused was sane (*see* RULE FOR COURTS-MARTIAL 916(k)(3)(A), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.)), and second, that his counsel was competent. *Shaw*, 64 M.J. at 463 (citing *United States v. Cronic*, 466 U.S. 648, 658 (1984), and *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987)).

Two important similarities between this case and *Shaw* combine to support our conclusion that the appellant's statement does not present a substantial conflict with his plea. First, the appellant's statements were also isolated, unsworn remarks that were mentioned but not amplified anywhere else in the record.[4] Defense Exhibit GG. During the providence inquiry, the appellant made no reference to the injuries and repeatedly assured the military judge that his conduct was knowing and goal-directed. Record at 67, 69, 72, 77. At the presentencing hearing, when the members for sentencing were presented with additional evidence, there was still nothing to suggest that the injury was relevant to the appellant's plea. The medical records do not connect the injury to any mental disorder, nor do they connect any mental disorder to the appellant's behavior or ability to make a consequential decision such as pleading

[4] On the record before us, it is clear, the purpose of this evidence, presented on sentencing and not the merits, was for extenuation and mitigation, and not to set up matters to invalidate the pleas entered.

guilty. Thus, even if we assume that the records establish the existence of a mental disorder (at some time, and for some reason), they prove nothing about its "influence," which was dispositive in *Shaw*. 64 M.J. at 462 ("[T]here was no factual record developed . . . indicating whether and how bipolar disorder may have *influenced his plea*" (emphasis added)).

Second, as in *Shaw*, there was nothing about the appellant's conduct during the providence inquiry to raise any concern about his capacity to understand the plea process or to appreciate the wrongfulness of his actions. *Id.* at 462-63. He provided cogent answers to the military judge's questions by responding in his own words, "I needed the money and when I saw that I had the chance to get the money, I took it." Record at 72. He explicitly told the members, "I knew it was wrong to take [the money], but I took it." *Id.* at 221. He had no mistake about whether he was entitled to the funds. "I let the Marine Corps down. That was the Marine Corps' money, not mine." *Id.* at 222. Furthermore, both the appellant and his trial defense counsel repeatedly explained his reason for taking the money. He told the military judge that he kept the money because he "was going through a hard time financially." *Id.* at 72. He told the members that he "was in dire need," *id.* at 221, and his counsel told the members that the appellant was "financially desperate," *id.* at 249.

Aside from their similarities, several distinctions between these two cases make this an easier decision than *Shaw*. There, the appellant's injury occurred just four months before the beginning of trial, and he spent 22 days in the hospital during that time. *Shaw*, 64 M.J. at 461. Here, the appellant's injury occurred seven years before trial; in between he made some outpatient hospital visits but continued working as an active-duty Marine. This is consistent with the appellant's comparatively benign comments about his injury. He mentioned the concussion in passing with no reference to any psychological effects. In *Shaw*, on the other hand, the appellant explicitly identified his diagnosis as bipolar disorder, caused by being "hit in the head repeatedly with a lead pipe. . . . [[s]uffer[ing] two skull fractures, bruising and bleeding of the brain" which still affected him on the day of trial. 64 M.J. at 461. If the *Shaw* court could find no error in the context of such a graphic description, we do not find one where the appellant downplayed the injury and neither he nor his counsel[5] drew significant attention to it at trial.

[5] The trial defense counsel mentioned the appellant's injuries during his sentencing argument, but focused on the more recent motorcycle injuries.

We find the latter assignment of error to be without merit. The appellant pled guilty to falsely claiming $36,395.00 and stealing $16,540.00 from the United States, offenses for which a punitive discharge is appropriate.

Conclusion

The findings and the sentence are affirmed. The supplemental court-martial order will reflect that as to the sole specification under Charge III, the excepted language was "9. 23 March 2010, $20,475.00" vice "9. 23 March 2010, $2,475.00."

For the Court

R.H. TROIDL
Clerk of Court

Record at 246. He referred to the IED blast indirectly by again pointing out the appellant's poor vision and balance, without mentioning any psychological effects. *Id*.