

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

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

UNITED STATES OF AMERICA

v.

**NICHOLAS A. PEACOCK
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 201100596
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 25 August 2011.

Military Judge: Maj Robert Palmer, USMC.

Convening Authority: Commanding Officer, Marine Aircraft
Group 31, 2d Marine Aircraft Wing, U.S. Marine Forces
Command, Beaufort, SC.

Staff Judge Advocate's Recommendation: Maj V.C. Danyluk,
USMC.

For Appellant: Maj Rolando Sanchez, USMCR.

For Appellee: LT Joseph Moyer, JAGC, USN.

30 April 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 special court-martial convicted the appellant, pursuant to his pleas, of two specifications of violation of a lawful general order by using and possessing a prohibited substance in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892. The approved sentence included confinement for six months, reduction

to pay grade E-1, forfeiture of \$950.00 pay per month for six months, and a bad-conduct discharge.

In a sole assignment of error,¹ the appellant asserts that his guilty pleas were not provident and his case should be remanded for a new trial due to his post-trial hospitalization after suffering psychotic symptoms. We have examined the record of trial, the appellant's assignment of error, and the pleadings of the parties. 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.

Trial Proceedings

The offenses stem from the appellant's use and possession of the substance commonly known as "Spice" and in this case prohibited by general order. At trial, the appellant took the stand and testified in his own behalf during his case in extenuation and mitigation. He explained that he was using Spice to help relieve tension as he was experiencing different stressors in his life. Record at 80-02. At the suggestion of one of his staff noncommissioned officers, he sought mental health counseling both on and off base. *Id.* Once counsel finished their examination, the military judge began inquiring as to the appellant's potential addiction to Spice. In response to his questions, the appellant explained that he believed he was addicted to Spice, and his addiction overcame his independent will. *Id.* at 94. However, after a brief recess where he discussed the issue with his counsel, the appellant acknowledged that he could have quit using Spice and that while it may have been addictive, it did not overwhelm his independent will and he could have stopped using it. *Id.* at 97.

The military judge then shifted to the issue of mental responsibility and asked the appellant if he was waiving "the lack of mental responsibility defense". *Id.* The military judge asked the appellant if he had discussed the defense with his counsel, to which the appellant replied that he had and he wished to waive any potential defense based on mental responsibility. *Id.* at 97-102. Furthermore, trial defense counsel agreed that they were waiving any related defense and both the appellant and his counsel stated that they did not believe any such defense applied. *Id.* at 100-02. Even so, following the argument of counsel the military judge ordered a

¹ This assignment of error is submitted pursuant to *United States v. Grofstefson*, 12 M.J. 431 (C.M.A. 1982).

mental competency examination pursuant to RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) and recessed the trial. *Id.* at 110-11. The R.C.M. 706 board found the appellant to be mentally competent at the time of the offenses and to have sufficient mental capacity to stand trial. Appellate Exhibit X at 2-3. Thereafter, the military judge reconvened the court and sentenced the appellant. Record at 112.

Providence of the Pleas

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). 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). Should an appellant establish facts which raise a possible defense, the military judge must inquire further and resolve the matters inconsistent with the plea, or reject the plea. *United States v. Phillippe*, 63 M.J. 307, 310-11 (C.A.A.F. 2006). A failure to do so constitutes a substantial basis in law or fact for questioning the guilty plea. *Id.* at 311. When evidence of lack of mental responsibility is raised post-trial following a guilty plea, we must set aside the findings and sentence if the post-trial evidence renders the plea improvident. A petition for a new trial of the facts does not apply where an appellant pleads guilty to the offense at trial. *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005); R.C.M. 1210.

In this case, the military judge inquired extensively as to a potential defense for lack of mental responsibility. The appellant explained that he had discussed the matter thoroughly with his counsel and he did not believe that such a defense existed. Trial defense counsel agreed. Still, the military judge took the precautionary step to order a mental competency evaluation anyway, the findings of which corroborated the assertions of both the appellant and trial defense counsel.

The appellant now relies on several pages of intake notes and a discharge summary from the VA hospital where he was admitted following an episode of an "unspecified psychosis" nearly five and a half months after trial. Appellant's Brief of 17 Jan 2012. These records provide limited information. They do substantiate that the appellant displayed psychotic behavior sufficient to warrant limited inpatient care, after which he was

deemed mentally fit for discharge. They do not substantiate that he was similarly laboring under such a condition either at the time of the offenses or at trial. Unlike the cases relied on in the appellant's brief, here the record contains a thorough inquiry by the military judge on the subject of mental responsibility and the independent conclusions of an R.C.M. 706 board.

We do not find that the matters now submitted by the appellant raise a substantial conflict with his statements and guilty pleas at trial. Consequently, we do not find a substantial basis in either law or fact to question his pleas. *Inabinette*, 66 M.J. at 322. 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