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

**Before**
**B.L. PAYTON-O'BRIEN, R.G. KELLY, D.O. HARRIS**
**Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**LUIS A. VELEZ**
**LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201100456**
**SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 10 June 2011.
**Military Judge:** LtCol R.Q. Ward, USMC.
**Convening Authority:** Commanding Officer, 2d Battalion, 6th Marine Regiment, 2d Marine Division, Camp Lejeune, NC.
**Staff Judge Advocate's Recommendation:** Capt T.J. Covey, USMC (24 Feb 2012); Col T.M. Dunn, USMCR (3 Aug 2011).
**For Appellant:** CDR Don Evans, JAGC, USN.
**For Appellee:** CDR Kevin L. Flynn, JAGC, USN; Capt David Roberts, USMC.

**12 September 2012**

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**OPINION OF THE COURT**

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PAYTON-O'BRIEN, Senior Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of disobeying a superior noncommissioned officer, disrespect toward a superior noncommissioned officer, violating a lawful general order (a uniform violation), willful dereliction of duty, damaging the personal property of another, sleeping on post, assault

consummated by a battery, and communicating a threat, in violation of Articles 91, 92, 109, 113, 128, and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 891, 892, 909, 913, 928, and 934. The military judge sentenced the appellant to confinement for six months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged but, in accordance with a pretrial agreement, suspended confinement in excess of 120 days.

On 23 December 2011, in response to a Government motion, we set aside the original CA's action (CAA) and returned the record of trial to the Judge Advocate General for remand to an appropriate CA for correction of the record of trial and new post-trial processing. Following a new CAA, this case was returned to us for review.

The appellant raises five assignments of error (AOEs): (1) The specification alleging communication of a threat fails to state an offense due to the omission of the terminal element; (2) the military judge erred by failing to explain all elements of communicating a threat; (3) the appellant's efforts at obtaining post-trial relief were compromised because his clemency waiver was included in the record of trial; (4) the military judge erred by not inquiring into lack of mental responsibility as a possible defense; and (5) the military judge erred by failing to inquire into self-defense prior to accepting the guilty plea to assault.

The appellant engaged in a variety of misconduct over a seven-month period which commenced on his deployment to Afghanistan and continued after he returned stateside. Relevant facts of this case will be discussed herein as they pertain to the assignments of error.

**Communication of a Threat**

1. Failure to Allege the Terminal Element

The appellant first alleges that communication of a threat specification fails to state an offense because it fails to include, either explicitly or implicitly, the terminal element as required for charged violations of Article 134, UCMJ.

Whether a charge and specification state an offense is a question of law that we review *de novo*. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). A specification states an offense if it alleges every element of the offense,

either expressly or by necessary implication. *United States v. Ballan,* 71 M.J. 28, 33 (C.A.A.F. 2012); *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994); RULE FOR COURTS-MARTIAL 307(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). The requirement to state every element ensures the accused is given notice and protection against double jeopardy. *Dear*, 40 M.J. at 197.

The specification at issue is defective because it does not expressly allege the terminal element, and we do not find the terminal element necessarily implied. Because the appellant failed to object to the sufficiency of the specification at trial, we review for plain error and test for prejudice. *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012).

While failure to allege the terminal element of an Article 134 offense is error, in the context of a guilty plea the error is not prejudicial where the military judge correctly advises the appellant of all the elements and the plea inquiry shows that the appellant understood to what offense and under what legal theory he was pleading guilty. *Ballan*, 71 M.J. at 34-36. In the present case, the appellant did not object at trial that the Article 134 charge and specification failed to state an offense. He pleaded guilty to the charge and specification in accordance with a pretrial agreement which required that he enter into a stipulation of fact. The stipulation of fact included language that the appellant's conduct in threatening another service member was prejudicial to good order and discipline. During the plea inquiry, although not expressly alleged in the specification, the military judge properly advised the appellant of the terminal element of the Article 134 charge and explained the meaning of conduct prejudicial to good order and discipline. The appellant admitted his guilt, acknowledged understanding all the elements and definitions of the offense, and explained to the military judge why he believed communication of a threat of a fellow service member was prejudicial to good order and discipline. Therefore, as in *Ballan*, the appellant suffered no prejudice to a substantial right: he knew under what clause he was pleading guilty and clearly understood how his conduct violated the terminal element of Article 134. Thus, although the specification was defective, the appellant has not demonstrated prejudice. *Ballan*, 71 M.J. at 35.

2. Missing Element

The appellant also alleges the military judge did not conduct a sufficient plea inquiry because the military judge

failed to explain the fourth element of communicating a threat, which states "[t]hat the communication was wrongful." *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 110b(3). The military judge explained each element of the offense during the plea inquiry. However, due to a record of trial printing error, the explanation was initially omitted, but has since been corrected.[1] Having reviewed the record in its entirety, we conclude this assignment of error has no merit.

**Providence of the Appellant's Plea**

The appellant next alleges that military judge failed to inquire into self-defense and lack of mental responsibility as possible defenses after the appellant disclosed a diagnosis of post-traumatic stress disorder during his unsworn statement and indicated he felt provoked by the victim prior to the assault.

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). 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). 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 accused's statements or other evidence of record." *United States v. Shaw,* 64 M.J. 460, 462 (C.A.A.F. 2007) (citation and internal quotation marks omitted). A "mere possibility" of conflict is insufficient. *Id.* (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

1. Mental Responsibility

During sentencing, the appellant made an unsworn statement in which he stated, "I am currently being diagnosed with PTSD and with my childhood experiences, I never allowed anyone to get close to me because of a violent background and Marines killing Marines."[2] When an accused establishes facts which raise a possible defense, the military judge has a duty to inquire further and resolve matters inconsistent with the plea, or reject the plea. *United States v. Phillippe*, 63 M.J. 307, 309 (C.A.A.F. 2006). Should the accused's statement or material in the record indicate a history of mental disease or defect, the military judge must determine whether the information raises a

[1] *See* Certificate of Correction of 9 Feb 2012 at 2.

[2] Record at 111.

conflict with the plea and thus a possibility of a defense or only the "mere possibility" of conflict. *United States v. Riddle*, 67 M.J. 335, 338 (C.A.A.F. 2009) (citing *Shaw*, 64 M.J. at 462). If there is only a "mere possibility" of a conflict, the military judge is not required to reopen the plea. *Shaw*, 64 M.J. at 464.

In the absence of contrary circumstances, the military judge may properly presume that the accused is sane. *Id.* at 463. The question here is whether the appellant's reference to being diagnosed with PTSD raises a possible defense or a "mere possibility" of a defense. The facts in this case are analogous to those presented in *Shaw*. In *Shaw*, the appellant suggested in his unsworn statement that he suffered from bipolar disorder, but provided no corroboration concerning his alleged condition. Likewise in the present case, the appellant suggested in his unsworn statement that he suffers from post-traumatic stress disorder without any corroborating documentary or testimonial evidence to support his claim.

During the plea inquiry, the military judge specifically questioned the appellant about his mental responsibility at the time of the offenses. The appellant stated he freely decided to commit misconduct, was not forced or coerced in committing misconduct, and intended to commit misconduct. Moreover, the appellant acknowledged the wrongfulness of his actions and indicated he had no legal justification or excuse for his conduct. There was no evidence to suggest the appellant did not understand the nature and quality of the wrongfulness of his actions when committing the offenses.

Given the facts of this case, we conclude that the military judge was not required to reopen the providence inquiry to explain or discuss the defense of lack of mental responsibility with the appellant. The appellant's unsworn statement alone does not raise an apparent inconsistency with his plea. Without additional evidence to substantiate his statement the appellant's reference to his diagnosis of post-traumatic stress disorder at most raised only the "mere possibility" of a conflict with the plea. *Shaw,* 64 M.J. at 464.

2. Self Defense

The appellant next asserts that the military judge erred in accepting his plea to the assault on Corporal (Cpl) SK because he claims an inconsistency existed between his plea inquiry responses and unsworn statement. We disagree.

During the plea inquiry, the appellant acknowledged that after losing his military bearing, he pushed Cpl SK, who had started the incident by pushing the appellant first. The appellant acknowledged that he was angry at Cpl SK, that he could have avoided pushing Cpl SK, and that his actions were unlawful. Although Cpl SK had first pushed him, the appellant asserted he did not feel provoked by Cpl SK when he pushed him back. Conversely, in his unsworn statement the appellant stated "we were both provoking each other."[3]

The appellant asserts that this unsworn statement raised a possibility of self-defense which the military judge had a duty to resolve. Yet, the appellant specifically denied acting in self-defense. His statements during the plea inquiry specifically contradict the requisite element needed to establish self-defense. *See* R.C.M. 916(e)(3) (the appellant must have reasonably apprehend that bodily harm was about to be inflicted upon him, and believe that the force he used was necessary for the protection against bodily harm.). While the victim committed the first act by shoving the appellant, the appellant admitted his subsequent action in pushing Cpl SK was not motivated by having been pushed by Cpl SK. In fact, the appellant agreed he shoved the victim because he was angry, not because he was acting in self defense.

We find no substantial basis in law or fact for questioning the plea. *Inabinette,* 66 M.J. at 322. Accordingly, the military judge did not abuse his discretion in accepting the appellant's guilty plea.

**Improper Disclosure of the Appellant's Letter**

Finally, the appellant claims that his efforts at obtaining post-trial relief were compromised because his trial defense counsel improperly released a letter from the appellant to his counsel, which letter is now attached to the record. The appellant claims that the letter contradicted his unsworn statement, in which he expressed a desire to remain on active duty in the Marine Corps. We review a defense counsel's disclosure of material *de novo*.

The 10 June 2011 letter[4] from the appellant to his counsel states, "After being fully advised of my rights by my detailed

[3] *Id.* at 110.

[4] The letter was placed in the record of trial following the appellant's "Request for Restoration/Clemency" which is addressed to the Naval Clemency

defense counsel, I waive my rights to submit matters under reference (a). I understand this waiver does not relieve my detailed defense counsel from the obligation to provide comments under reference (b)." [5]

While the appellant's letter is attached to the record, it was not commented upon specifically by either the staff judge advocate or the CA. The staff judge advocate's recommendation (SJAR) does not list this letter as an enclosure, nor does the CA include it as a matter he considered prior to taking action in the case, although we presume the CA read the appellant's letter. *United States v. Danley*, 70 M.J. 556, 559 (N.M.Ct.Crim.App. 2011). However, even if the CA was aware that the appellant waived his right to submit clemency matters, we find that this letter does not contradict the appellant's statement at trial indicating his desire to remain in the Marine Corps. Moreover, we conclude that the CA would not infer from the letter that the appellant did not desire the clemency requested on 14 June 2011, specifically that the bad-conduct discharge be suspended or that confinement be reduced. We fail to see how the appellant was prejudiced even if the CA considered the letter. We find the TDC erred by releasing the letter, but in testing for prejudice we remain satisfied that the appellant's sentence was appropriate and he suffered no prejudice at the hands of the CA. *United States v. Williams*, 57 M.J. 581, 582 (N.M.Ct.Crim.App. 2002).

**Prior Nonjudicial Punishment (NJP)**

Although not assigned as error, we note that during the sentencing proceedings, the appellant made an unsworn statement indicating he previously had been punished at NJP for the offense of dereliction of duty. The trial defense counsel then made a sentencing argument indicating the appellant had received NJP for dereliction of duty as well as sleeping on post. The Government did not object to the military judge's consideration of this matter, nor did the Government offer any contradictory evidence. In fact, the Government's own sentencing evidence contained a service record entry for the NJP, revealing charges for dereliction of duty and sleeping on post.[6] The military

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and Parole Board. That request was an enclosure to the appellant's "Request for Voluntary Appellate Leave." Neither "Request" listed the appellant's letter to his counsel as an enclosure.

[5] Reference (a) is R.C.M. 1105, while reference (b) is R.C.M. 1106.

[6] Prosecution Exhibit 1. The defense did not object to PE 1.

judge asked one question about PE 1, but the question pertained to a counseling received by the appellant for wearing an earring. It appears that the NJP dereliction of duty charge is the same offense the appellant faced at court-martial, but due to a date discrepancy in the specifications, it is unclear whether the NJP sleeping on post offense is the same offense the appellant faced at court-martial.

On appeal, we are not required to identify sentence credit resulting from a prior NJP absent the appellant's request, since the appellant is the "gatekeeper" of such request. *United States v. Gammons*, 51 M.J. 169, 179, 184 (C.A.A.F. 1999). We find that the appellant raised the issue at trial during the sentencing proceedings, but the military judge did not indicate upon sentencing what consideration he gave to the prior punishment. Given the somewhat lenient sentence imposed at court-martial, we are satisfied that the military judge did not rely on the prior punishment as an aggravating factor to improperly increase the appellant's sentence. However, the military judge did not state that he applied any credit against the sentence. Rather than speculate as to whether the military judge gave appropriate credit for the prior NJP, we will resolve the doubt in the appellant's favor and order credit to ensure that he is not punished twice for the same offense.

Service members must be given "*complete* credit for any and all nonjudicial punishment suffered: day-for-day, dollar-for-dollar, stripe-for-stripe." *United States v. Pierce*, 27 M.J. 367, 369 (C.M.A. 1989). We will award credit to the appellant for the reduction in pay grade and the equivalent of forfeitures awarded at NJP to ensure he is not punished twice for the dereliction of duty charge. Following the lead of the Court of Appeals for the Armed Forces (CAAF) in *Pierce* and *Gammons*, we will utilize the Table of Equivalent Punishments, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969 ed.), ¶¶ 127(c) and 131d, as a useful guide in applying Pierce credit to court-martial sentences. *Gammons*, 51 M.J. at 183-84; *Pierce,* 27 M.J. at 369. That table states that one day of forfeitures is the equivalent to one day of confinement.

At NJP, the appellant received reduction in one pay grade and forfeiture of $961.00 pay per month for two months (the equivalent to one-half's month's pay for two months).[7] Using the

[7] We recognize that the appellant faced two charges at NJP, and based upon the record before us, we find that only one of those specifications was the same offense he faced at court-martial. We are sensitive that the appellant should not receive an unjustified windfall in sentencing credit. The

day-for-day equivalency, the appellant is entitled to 30 days of credit against confinement. Following CAAF's reasoning and our own recent precedent, in order to provide meaningful relief to the appellant, we will apply the 30 days of equivalent confinement against the 120 days of approved confinement. *United States v. Spaustat,* 57 M.J. 256, 263 (C.A.A.F. 2002); *United States v. Globke*, 59 M.J. 878, 883 (N.M.Ct.Crim.App. 2004).

**Conclusion**

The findings are affirmed. Only so much of the sentence that provides for reduction to pay grade E-2, confinement for 90 days, and a bad-conduct discharge is affirmed. Following our corrective action, no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Judge KELLY and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court

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Government is well-positioned to give early and complete consideration to the potential consequences of charging offenses that have been the subject of prior nonjudicial punishment. Here, the Government might have avoided the dilemma of "windfall" credit simply by making the tactical decision not to charge the same offense at court-martial. Having made the decision to charge the appellant again for the same crime, the appellant is now entitled to complete credit to ensure that his sentencing interests are fully protected.