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

Before
M.D. MODZELEWSKI, F.D. MITCHELL, E.C. PRICE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

DAVID P. NELSON
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 201300124
SPECIAL COURT-MARTIAL

Sentence Adjudged: 19 December 2012.
Military Judge: Maj Eric Emerich, USMC.
Convening Authority: Commanding Officer, 2d Battalion, 9th Marines, 2d Marine Division, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: Maj J.N. Nelson, USMC.
For Appellant: Maj Peter Griesch, USMCR; LT Jessica Fickey, JAGC, USN.
For Appellee: LT Lindsay Geiselman, JAGC, USN.

17 October 2013

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 special court-martial composed of a military judge convicted the appellant, pursuant to his pleas, of conspiracy to possess marijuana with intent to distribute, five specifications of violation of a lawful order, wrongful possession of anabolic steroids, wrongful possession of marijuana with intent to distribute, and wrongfully manufacturing marijuana with intent to distribute, in violation of Articles 81, 92, and 112(a),

Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, and 912(a). The appellant was sentenced to reduction to pay grade E-1, forfeiture of $900.00 pay per month for 11 months, confinement for 11 months, and a bad-conduct discharge.

Background

This case was originally submitted to this court without assignment of error. While reviewing the record and allied documents, it was discovered that in an unsworn statement the appellant made during the sentencing portion of the trial the appellant told the military judge that he was depressed when he came back from Afghanistan, and began to use marijuana to "[cope with] my depression of losing 16 of my fellow Marines and my ex-girlfriend of three and a half years". Record at 66. The appellant went on to say that he recently started to enroll himself in the Navy's Substance Abuse Rehabilitation Program (SARP) and was attempting to get a mental health evaluation for post-traumatic stress disorder (PTSD). The appellant's trial defense counsel additionally offered Defense Exhibit A, the appellant's SARP evaluation, which indicated that he was diagnosed with cannabis dependence.

On 8 July 2013, this court ordered the parties to submit briefs addressing the appellant's comments during his unsworn statement regarding PTSD and whether the military judge should have inquired further regarding the appellant's mental state.[1] The appellant now alleges that the military judge abused his discretion by failing to inquire into lack of mental responsibility as a possible defense after the appellant disclosed that he was seeking an evaluation for PTSD.

Having reviewed the parties' pleadings and the record of trial, we are satisfied that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Mental Responsibility and Provident Plea

[1] The Court specified the following issue: DID THE MILITARY JUDGE ABUSE HIS DISCRETION IN ACCEPTING THE APPELLANT'S PLEAS OF GUILTY WITHOUT FURTHER INQUIRY INTO THE APPELLANT'S MENTAL STATE OR ADVICE TO THE APPELLANT REGARDING THE DEFENSE OF LACK OF MENTAL RESPONSIBILITY, IN LIGHT OF THE APPELLANT'S STATEMENTS AND MATERIAL IN THE RECORD INDICATING SOME HISTORY OF DEPRESSION AND A PENDING EVALUATION FOR POST-TRAUMATIC STRESS DISORDER? *UNITED STATES V. RIDDLE*, 67 M.J. 335, 338-39 (C.A.A.F. 2009) (CITING *UNITED STATES V. SHAW*, 64 M.J. 460, 462 (C.A.A.F. 2007)); RECORD AT 65-67, 71; DEFENSE EXHIBITS A, C AT 3-4; DEFENSE REQUEST FOR CLEMENCY OF 23 JAN 2013 AT 1-2 AND ENCLOSURE (1); R.C.M. 916(K).

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. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

When an accused establishes facts that 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). In accordance with RULE FOR COURTS-MARTIAL 916(k)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), "[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. *Shaw*, 64 M.J. at 462; *see also Phillippe*, 63 M.J. at 310-11 (holding 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"). 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 substantial conflict with the plea and thus a possibility of a defense or only the "mere possibility" of conflict. *See 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 before us is whether the appellant's reference to being depressed and seeking a mental health evaluation for PTSD raises a possible defense or the "mere possibility" of a defense. The facts in this case are analogous to those presented in *Shaw*, where 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 PTSD without any corroborating documentary or testimonial evidence to support his claim.

The appellant contends that he was suffering from PTSD at the time of trial and that he was self-medicating by using marijuana. The appellant points to his SARP evaluation, Defense Exhibit A, which indicates that he is addicted to cannabis as corroborating evidence of his lack of mental responsibility. We find this argument unpersuasive. Quite to the contrary, in addition to prescribing treatment for cannabis addiction, the appellant's SARP evaluation recommends that he "be held strictly accountable for [his] actions" and "processed for Administrative Separation for illicit substance use." This document makes no mention of PTSD as the impetus for the appellant's marijuana use and subsequent addiction.

Finally, we note that during the plea inquiry, the appellant stated he freely decided to commit misconduct, was not forced or coerced into 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 or 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 and SARP evaluation do not raise an apparent inconsistency with his plea. Without additional evidence to substantiate his statement, the appellant's reference to his desire to be evaluated for PTSD, at most raised only the "mere possibility" of a conflict with the plea. *Shaw*, 64 M.J. at 464. Accordingly, we find this assignment of error to be without merit.

Conclusion

We affirm the findings and sentence as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court