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

Before
J.A. MAKSYM, L.T. BOOKER, R.E. BEAL
Appellate Military Judges

UNITED STATES OF AMERICA

v.

LAZZARIC T. CALDWELL
PRIVATE (E-1), U.S. MARINE CORPS

NMCCA 201000557
SPECIAL COURT-MARTIAL

Sentence Adjudged: 4 June 2010.
Military Judge: LtCol David Jones, USMC.
Convening Authority: Commanding Officer, 4th Marine Regiment, 3d Marine Division, Okinawa, Japan.
Staff Judge Advocate's Recommendation: LtCol K.J. Estes, USMC.
For Appellant: LT Michael Hanzel, JAGC, USN.
For Appellee: Maj William Kirby, USMC; Maj Elizabeth Harvey, USMC.

15 November 2011

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.

BOOKER, Senior Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of orders violations,[1] larceny, and wrongful self-injury, respectively

[1] Charge II, Specification 1: Operated a motor vehicle after his operator's permit was revoked.

violations of Articles 92, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 921, and 934. The military judge also convicted the appellant, contrary to his pleas, of a separate order violation for wrongfully possessing "spice". The convening authority approved the adjudged sentence of confinement for 180 days and a bad-conduct discharge from the United States Marine Corps.

The appellant now raises 5 assignments of error before us: that the military judge abused his discretion in accepting the appellant's plea to self-injury; that the military judge abused his discretion in not ordering a mental examination of the appellant; that the evidence is factually insufficient to sustain the conviction for the contested order violation; that the military judge abused his discretion in accepting the appellant's plea to larceny; and that the appellant did not voluntarily enter into a pretrial agreement. I agree that the plea to larceny was improvident, and would therefore set aside that guilty finding. Likewise, I would set aside the guilty finding regarding self-injury. The findings of guilty to the three orders violations are affirmed. After reassessing the sentence, I am convinced that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Guilty Pleas to Larceny and Self-Injury

We review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea *de novo*. If there is a substantial basis in either law or fact for questioning the plea, then we may set aside a finding of guilty based on the plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

Turning first to the larceny plea, a military judge abuses his discretion if his findings of fact are clearly erroneous or if he has an incorrect view of the law. My review of the record convinces me that the military judge's view of the law of principals was incorrect in this case. The providence inquiry establishes that the appellant never counseled his companion, a Japanese female he had known for several months, to take the object of the larceny, a belt, or to secret it in her purse for later transfer to her boyfriend, or to walk out of the store with it. He did not share her criminal intent to deprive the merchant permanently of the use and benefit of the property or

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Charge II, Specification 2: Failure to report to the Joint Forces Vehicle Registration office.

to convert it to another's use. He was not acting as a lookout for his companion. He left the store before his companion did, not knowing for certain that she would persist in her larceny. The appellant had no duty to stop the offense and his mere presence at the scene is insufficient to impose criminal liability upon him for his companion's offense. While the appellant maintained during the providence inquiry that his laughter constituted "permission" to steal the item, we and the law must differentiate between active encouragement and mere acquiescence. "The law of aider and abetter is not a dragnet theory of complicity. . . . Neither does later approval of the act supply a ground for conviction." *United States v. Jackson*, 19 C.M.R. 319, 327 (C.M.A. 1955) (citations omitted).

As for the plea to self-injury, the appellant now urges that his plea is improvident because evolution in mental health care should prohibit prosecuting persons who attempt suicide. Rather than resolve the assignment on that basis, I would find that there is a problem with the factual sufficiency regarding the second element of the General Article offense. I would therefore set aside the guilty finding to this offense as well.

The Government is required to prove in this case (a) a disorder or neglect that is prejudicial to good order and discipline; or (b) conduct that is of a nature to bring discredit upon the armed forces. Art. 134, UCMJ. The record adequately supports the disorder or conduct – cutting oneself with a razor blade – and I assume without deciding that the appellant harbored the requisite intent to injure himself when he applied the blade to his wrists. It is the impact on good order and discipline, or the tendency of this activity to tarnish the reputation of the service, that is not shown.

The appellant told the military judge that he believed that his conduct was prejudicial because "people that I looked at as being friends didn't know how to react . . . . It was a touchy subject no one wanted to speak about." Record at 100. He thought it might send a message "that basically I couldn't handle what was going on, and they couldn't help me at that point in time. So it makes them feel as if can I really go to them and ask for help . . . ." *Id*. at 101. Significantly, though, the appellant never stated that the unit ceased to function, that morale suffered, or that Marines in fact shied away from the chain of command. His mere supposition of possible effects is insufficient to demonstrate prejudice to good order and discipline. His conclusory statement in the

stipulation of fact, Prosecution Exhibit 1, does not establish prejudice.

The tendency to bring discredit is superficially a closer call given the appellant's statement that he thought the public might have "a badder [sic] outlook on the superiors . . . . as not doing their job." Record at 104. On more exacting examination, however, the appellant's statement focuses not on how the public would perceive his actions, but rather how the public would view the reaction of the chain of command to the appellant's conduct. The conclusory statement in the stipulation of fact, PE 1, is insufficient to establish this element, either.

Failure to Order a Mental Examination

The appellant claims that the military judge should have ordered a mental health examination under RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), after he had questioned the appellant about the wrongful self-injury. As he phrases it, the military judge abused his discretion in accepting the guilty plea to self-injury when he substituted the defense counsel's assessment of the appellant's mental state for an assessment by a mental health professional. The appellant did not claim at trial, and does not claim before us, that he was not competent to stand trial, and he did not claim at trial, and does not claim before us, that his depression and other mental health issues bore on his violating orders on separate occasions both weeks before and weeks after the wrongful self-injury.

My action in setting aside the guilty finding to wrongful self-injury would moot the appellant's specific claim in his assignment of error. I reiterate that I would set aside the larceny conviction.

As for the offenses of which the appellant remains convicted, we note that intent is not an element, and thus mental condition at the time of the offense is not as critical as it would be in the case of self-injury or larceny. While Rule 706 and reported court-martial case law are not helpful in articulating a standard for review, we hold that the military judge's failure to order an investigation must be examined for an abuse of discretion. *See United States v. Nickels*, 324 F.3d 1250, 1251-52 (11th Cir. 2003) (construing federal statutes regarding mental capacity); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), App. 21, at A21-41 (Analysis of R.C.M. 706

noting similarity to 18 U.S.C. § 4242). The military judge certainly understood his authority to order an investigation, and he clearly concluded that such an investigation was unnecessary given the appellant's articulation of his mental state at the time of trial, and given further that the appellant had seen a mental health professional shortly after the self-injury. Record at 103. The military judge thus did not abuse his discretion in failing, on his own motion, to order a mental health examination.

Factual Sufficiency of Spice Conviction

When we review a case for factual sufficiency, we weigh all the evidence of record and, making allowances for not having personally observed the witnesses, determine whether we are satisfied beyond a reasonable doubt of the appellant's guilt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Having reviewed the testimony of all the witnesses and the photographs admitted into evidence, we are convinced beyond a reasonable doubt from the foil packages found in the appellant's single-occupant barracks room, the tobacco residue in that same trashcan, the observations by the duty personnel of the group in the abandoned chow hall, the physical evidence taken from the chow hall, and the testimony of an investigator with experience in identifying illicit substances, that the appellant did possess Spice.

Coerced Pretrial Agreement

In his final assignment, the appellant claims that he did not voluntarily enter into a pretrial agreement. He makes this claim notwithstanding his assurance to the military judge that he entered into the agreement freely and without coercion. Record at 113, 129.

If the facts are as the appellant and his counsel allege them to be in their affidavits submitted in support of this assignment of error, then one can conclude that the chain of command might not have done all that it could to support this Marine once he entered pretrial confinement. His family had apparently notified the command of his mother's serious illness, yet the command apparently made little or no effort to help the appellant learn all the details. The appellant had difficulty gaining access to personal funds for authorized hygiene and morale items. The command visited him only sporadically. That possible failure of leadership, however, is a far cry from the "threats, improper harassment, misrepresentation, or 'promises

that are by their nature improper'" that will cause us to conclude that the appellant did not voluntarily or intelligently enter into the agreement. *See United States v. Burnell*, 40 M.J. 175, 176 (C.M.A. 1994) (quoting *Brady v. United States*, 397 U.S. 742, 755 (1970)). We therefore resolve this assignment adversely to the appellant.

Sentence Reassessment

I would set aside the findings of guilty to Charge IV and its specification and to Charge V and its specification and dismiss those Charges and specifications. I have independently reviewed the remaining findings. I have considered the appellant's prior disciplinary record, which includes a summary court-martial conviction for an order violation (the conviction coming after the appellant had served 60 days in confinement pending the summary court-martial), a false statement, and communicating a threat, and I have reviewed his counsel's response to the summary court-martial findings and sentence. I observe that the spice possession for which the appellant stands convicted before us occurred while he was serving pretrial restriction. I also note the appellant's medical history submitted on sentencing and the generally positive brig observation report. Considering all this evidence, plus that adduced during the trial on the merits, I am confident that a sentencing authority would impose, and a convening authority would approve, a sentence that at least included a punitive discharge. *See, e.g., United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006).

Conclusion

The remaining findings of guilty are affirmed. Only so much of the adjudged sentence as extends to a bad-conduct discharge is affirmed.

BEAL, Judge: (concurring in part)

I concur with Senior Judge Booker's opinion except for that part concerning the appellant's guilty pleas to larceny and self injury; I find no substantial basis in law or fact to question either of these pleas. Accordingly, I would affirm the findings. I join Senior Judge Booker in affirming the sentence as approved by the convening authority.

Larceny

Under Article 77, Uniform Code of Military Justice, 10 U.S.C. § 877, "[a]ny person . . . who . . . commits an offense . . . or aids, abets, counsels, commands, or procures its commission . . . is a principal." Even if a person is not the actual perpetrator of an offense, he or she may still be guilty of the offense if they encouraged or instigated another to commit the offense and they shared in the perpetrator's criminal purpose or design. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 1b(2)(b).

The appellant was charged with the theft of a belt from an Okinawan shopkeeper under the aider and abettor theory. The actual perpetrator of the theft was the appellant's friend, Miko, a female local national with whom the appellant shared an intimate understanding of each other's looks and gestures due to a language barrier between them at the outset of their friendship. Record at 71. The appellant and Miko were shopping together and the appellant handed her a belt which he thought she might want to purchase. *Id*. at 66-67. Instead, Miko told him that she did not have the money for it and she was thinking of just taking it. *Id*. The appellant laughed and watched as she put the belt in her purse. When Miko put the belt in her purse, the appellant knew she was going to steal it, gestured his approval, and then casually walked out of the store, stopping to chat with the shopkeeper. *Id*. at 71. Once Miko emerged from the store with the stolen belt, the appellant laughed again and the two continued on with their shopping excursion. *Id*. at 67.

At trial, the military judge repeatedly informed the appellant that he had to have participated in the theft in some knowing way, that his mere presence was not enough, and that he must have shared Miko's criminal intent. *Id*. at 66-86. The appellant told the military judge that Miko looked to him for approval before taking the belt and that he "gave her the green light" to take the belt by laughing and making gestures when she indicated she might steal it. *Id.* at 71. Furthermore, the appellant told the military judge that Miko would not have taken the belt without his indicating to her that it was "okay." *Id*. at 73, 77. Additionally, the appellant admitted that when he saw Miko put the belt in her purse, that she intended to steal the belt and that he shared in that purpose. *Id.* at 73.

Under the facts of this case, I find: 1) the military judge's explanation of the aider and abettor theory under Article 77, UCMJ, was adequate; 2) the appellant understood Article 77; and 3) the appellant provided a factual basis in

support of his plea of guilty to the theft of the belt under the aider and abettor theory. Accordingly, I see no substantial basis to reject the appellant's guilty plea to this offense.

Self-Injury

The appellant was alone in his barracks room, located in Camp Schwab, Okinawa, when he intentionally cut open his wrists with a razor blade, leaving a trail of blood on the barracks floor. Record at 88, 92, 96. The appellant was in a highly distraught state at the time of the self-injury. Moments later Gunnery Sergeant (GySgt) C, one of the staff noncommissioned officers in the appellant's unit, entered the room and discovered the appellant in his injured state. *Id*. at 92-93, 96. GySgt C administered first aid by wrapping socks around the appellant's wounds and then called for the assistance of corpsmen who resided in the barracks, who responded with their medical kits. *Id.* at 92-93. After the appellant received acute care for his self-inflicted injuries, he was kept for a day in the base hospital's psychiatric ward for observation before being placed into pretrial confinement. *Id*. at 103.

The undeveloped facts in this guilty plea indicate the self-injury was a genuine suicide attempt which was precipitated by the appellant receiving two pieces of bad news: 1) the death of a close friend who had just returned home after being discharged, and 2) his commanding officer was ordering him back into pretrial confinement.[1] These two events constituted what the appellant considered the "last straw" in a recent series of emotional hardships which ranged from the deaths of several family members to a variety of personal problems the appellant was having in the unit.

Another matter which may have been a contributing factor leading to the appellant's actions was the fact that the appellant had been treated for depression, post-traumatic stress disorder, and an unspecified personality disorder. *Id*. at 94-95. Part of his treatment included a prescription of a number of medications, including "Zoloft." *Id*. at 95. According to the appellant, the medications might have been the cause for seizures and brain hemorrhages which caused the appellant to stop taking his medication approximately two weeks before the self-injury. *Id*. Notwithstanding these issues, the appellant

[1] The appellant was previously held in pretrial confinement for 60 days on charges unrelated to this court-martial, which were ultimately disposed of at a summary court-martial.

disavowed any severe mental disease or defect at the time of his offense. *Id.* at 97-98. Likewise, the appellant's defense counsel, who represented the appellant on other legal assistance and military justice matters, was convinced that an inquiry into the appellant's mental responsibility or capacity was not warranted under RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). *Id*. at 97.

The assigned error in regard to the self-injury specification sought relief under the theory that prosecution of a genuine suicide attempt ought to be prohibited under public policy reasons. The lead opinion does not address the assigned error; instead, it sets aside the conviction because it finds a substantial basis in fact to question the plea. I very respectfully disagree with the lead opinion's resolution of the issue and decide the assigned error against the appellant.

The appellant pled guilty under both a clause 1 and clause 2 theory of culpability, i.e., that his self-injury was: 1) an act prejudicial to good order and discipline (clause 1) and 2) conduct of a nature to bring discredit upon the armed forces (clause 2). I am satisfied the appellant provided a factual and legal basis that his self-injury was prejudicial to the good order and discipline and was therefore provident to his plea under clause 1 at a minimum. There is no dispute that the appellant intentionally cut both of his wrists with a razor blade. Furthermore, the record amply satisfies the requirement that the appellant's act was prejudicial to good order and discipline. By cutting himself, the appellant caused a disorder in the barracks. He needlessly exposed GySgt C to his bodily fluids and he caused corpsmen to respond with their medical kits, presumably expending medical supplies in the process. Furthermore, the appellant did not go into pretrial confinement as ordered by his commanding officer; instead he was transported to the hospital where he received treatment in the psychiatric ward for 24 hours. The appellant himself stated that the impact of his actions on his fellow Marines was palpable by the way they acted around him after he returned to the unit. Accordingly I find no substantial basis in law or fact to question the appellant's plea

As to the public policy argument, I'm not persuaded that criminal prosecution of genuine suicide attempts should be prohibited under military law. As both parties note in their briefs, self-injury has long been a chargeable offense in military jurisprudence. Conceivably, many instances of malingering or self injury could be concealed in the guise of a

sincere suicide attempt. My own personal experience over the past 25 years of active duty service leads me to believe that self-injury, whether it results in an intentional suicide or not, has the potential to cause tremendous prejudice to the good order and discipline within a unit. If a convening authority feels it necessary to resort to court-martial to address this type of a leadership challenge, he or she should be allowed to do so, at least until the executive or legislative branches of government have proscribed this approach by law or regulation.

Inquiry into the Mental Capacity or Mental Responsibility of the Accused

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion and questions of law arising from the guilty plea are reviewed de novo. *United States v. Riddle*, 67 M.J. 335, 338 (C.A.A.F. 2009) (citations omitted). In light of the public attention paid to the possible link between suicide and certain prescription anti-depressants, and considering the fact that the appellant was using this type of medication over a period of time preceding his self-injury, the only aspect about this guilty plea which causes me to pause is whether the military judge abused his discretion by accepting the appellant's pleas without ordering an R.C.M. 706 inquiry. After careful consideration of this record, I find that he did not.

An appellate court will not set aside a military judge's acceptance of a guilty plea unless it finds a substantial conflict between the appellant's plea and the evidence of the record. *Id*. "Should the accused's statements or material in the record indicate a history of mental disease or defect on the part of the accused, the military judge must determine whether that information raises either a conflict with the plea and thus the possibility of a defense or only a 'mere possibility' of conflict." *Id*. at 338 (quoting *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007)). If the military judge determines the information presented on the record only raises a mere possibility of a conflict, then no further inquiry from the military judge is required. *Id*. The trial judge's determination is a contextual one, which appellate courts review *de novo*. *Id*.

When determining whether the information presented on the record regarding an appellant's mental responsibility or capacity raises the possibility of a conflict with the plea (as opposed to a mere possibility of a conflict), an appellate court

will consider: 1) the appellant's history of mental illness; 2) the appellant's conduct during the providence inquiry and whether it reflected on his capacity to plead guilty; and, 3) if the appellant's statements indicated an inability to appreciate the nature and wrongfulness of his acts. *Id*. at 339. For the following reasons, I conclude that the information contained in the record only raised a mere possibility of a conflict with the plea, thus obviating any further inquiry into the matter.

First, the record before us offers little to no information to disturb the presumption that the appellant was mentally responsible at the time of his misconduct or that he had the capacity to stand trial. During the providence inquiry, the appellant informed the military judge that, some months before the self-injury, he had been diagnosed with "delayed PTSD as well as personality disorder and depression." The appellant also informed the military judge that, during his treatment, he started "to have seizures due to some of the medication, so they took me off of it to see which ones were doing what." Record at 94. Following his self-injury, the appellant was brought to the psychiatric ward where he was observed for a day prior to being placed into pretrial confinement. *Id.* at 103. Approximately six weeks following the incident, the appellant was examined at the neurology department at the Okinawa Naval Hospital for a seizure disorder. Defense Exhibit L at 1. The notes from that examination reveal the appellant had three seizures from March 2009 to February 2010. *Id*. at 2. The notes also reveal the appellant had a history of several car accidents in which his head had been injured, and also documented a family history of epilepsy. *Id*. at 2-3. The physician's notes do not indicate any issue in regard to the appellant's mental health and concludes the appellant was likely suffering from epilepsy. *Id*. at 3. Neither of the post-trial affidavits provided by the appellant and his trial defense counsel contains any new matter regarding the appellant's mental health. Affidavit of Appellant of 11 Jan 2011; Affidavit of Captain S. Russell Shinn of 6 Jan 2011. Likewise neither affidavit asserts that the appellant is presently laboring under any sort of mental infirmities. *Id*.

Second, the appellant's statements throughout the providence colloquy with the military judge were oriented, lucid, and articulate. On the whole, the appellant's conduct reflected that he was well-within his capacity to plead guilty.

Third, the appellant provided a detailed account of the events leading up to and following his misconduct. He openly and freely admitted that he knew what he was doing and could

have avoided hurting himself if had wanted to. Nothing in the appellant's colloquy with the military judge indicated the appellant was unable to appreciate the nature and wrongfulness of his acts.

Based upon the foregoing reasons and also taking into consideration the assurances of the appellant's counsel, with whom he had a long relationship, I see no substantial basis in law or fact to question any aspect of this guilty plea.

MAKSYM, Senior Judge: (dissenting)

I dissent. I cannot bring myself to join either of my colleagues as I am firmly convinced by this record that the trial judge was in no position to accept pleas of any kind in this matter prior to a board being convened under RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) and a certification of competence and mental responsibility having been tendered to the court below.

The facts, to the degree that they are cultivated within the record, are most troubling. The appellant was suffering from brain seizures, a personality disorder of some magnitude, depression, and post-traumatic stress disorder (PTSD), the severity and genesis of which also lacks explanation. Record at 94; Defense Exhibit L. These disorders commanded the attention of a mental health specialist who had prescribed the anti-depressant Zoloft and two additional medications not identified within the record. Record at 95; Defense Exhibit L. The appellant rather than any medical authority terminated the use of one or more of these medications sometime prior to the commission of the offenses at bar. Record at 95. Moreover, before us lays a record in which the appellant asserts, without rejoinder from the United States, that his command would not visit him whilst in confinement – in stark contravention of regulation -- and would not facilitate his acquisition of permissible financial means so as to make contact with his dying mother while confined. Affidavit of Appellant of 11 Jan 2011; Affidavit of Captain S. Russell Shinn of 6 Jan 2011. With those facts as a backdrop, we engage the merits of the litigation.

For reasons not made clear within the record before us, the trial judge did not seek evaluation of the appellant by a board convened under R.C.M. 706. Rather, he deferred to the detailed defense counsel for an informal evaluation of the appellant's state of mind. Record at 97-99. The record clearly betrays

that the military judge was aware that the appellant had been or was being treated for PTSD, depression and an unspecified personality disorder along with seizures, but he failed to garner additional facts as to the cause or severity of same, or the efficacy of the prescribed and sometimes-not-taken medications, through the review of appellant's medical record or the calling of his medical providers. *Id.* at 94-95.

There is no question that the trial judge recognized that the issues of mental competency and mental responsibility had at least been raised by the commentary of the appellant during the providence inquiry. Indeed, it was the military judge, not the detailed defense counsel, who raised the issues of competency and mental responsibility after the appellant had offered an outline of his past mental health related difficulties. *Id.* at 97. However, rather than pursuing the matter via extra-record materials, such as the appellant's medical record or through the taking of testimony, the judge's concern was seemingly satiated by the endorsement of detailed defense counsel who stated the following:

> Sir, Private Caldwell and I have known each other for quite some time and through my interactions with him, well, I think that he was in a very depressed state at the time of the incident. Through our conversations, I believe that he knew what he was doing and that point, and he knew that what he was doing was wrong. And also that at present he has the ability to understand our conversations and to adequately defend himself, sir.

Id. at 97. The appellant then attempted to bolster his counsel's endorsement by immediately adding the following:

> Sir, it wasn't to the fact that I didn't know what was going on. It was just that over the time, while in the unit there were a lot of situations that had arised that I felt were kind of hard to deal with at the time. But it wasn't that I went temporarily insane or anything of that nature. *I just was putting on a show for everyone just making it seem like I was okay, but there was only those few people that I would let know that, okay, there really is something wrong. There was something bad.* But they didn't know how to - - how to really treat it. And then *whenever they actually did get really worried, I would make them feel as if no, no, it's okay, it's okay.* And then it

> was just over the year from being stabbed by the ex-fiancee, then great grandmother passed, my grandma passed and my friend passed and all the other things at the unit as far as some trouble, some not trouble, just too many things at that point in time, and I just felt that I made a conscious decision at that time that I did not want to live at that time. *And it was an attempt to try to kill myself*, but it wasn't just temporary insanity, sir.

Id. at 97-98 (emphasis added). Rather than delve further into the factual basis behind the appellant's comments related to his mental health, the military judge simply articulated the following policy:

> [T]his court is not a court that immediately upon hearing anything to do with some sort of mental problem stops the proceedings - - I am just putting this for the record - - and indicates everyone has to have a 706 hearing. I don't believe that that's required, and I don't believe it's necessary. But it is necessary that I understand and that I believe that you were not suffering from some sort of mental disease or defect at the time, that you understood the nature and course of your action, and that you were committing a wrongful or illegal act, and that you explain that to me. And then, of course, that you can participate in your defense here in trial. And I think Captain Shinn spoke to all those issues. You heard him speak that.

Id. at 98-99.

Detailed defense counsel should request, and a military judge should order, even in the absence of such a request, a hearing pursuant to R.C. M. 706 if it appears "that there is reason to believe that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial . . . ." R.C.M. 706(a). While trial defense counsel offered assurances that he personally believed that the appellant was competent and responsible, the appellant's statements that he was fooling people into thinking his problems were not that significant can only cause one to wonder whether counsel – and the military judge – were just two of the people for whom he was "*just was putting on a show . . . just making it seem like I was okay*." Accordingly, I would hold that where a military judge identified the diagnoses of PTSD (the nature and effect of which

are not described by any evidence), an unspecified personality disorder, seizure activity, the proscription of an anti-depressant and two other unidentified mental health related medications, along with an actual suicide attempt, there exists no possible alternative other than to order a hearing pursuant to R.C.M. 706. *See United States v. Zaruba*, No. 201000382, 2011 CCA LEXIS 27, at *9 n.5, unpublished op. (N.M.Ct.Crim.App. 28 Feb 2011) (setting aside a guilty plea conviction where "[t]here was no evidence to suggest that the military judge was aware of the existence of any Rule for Court-Martial 706 board report" and the military judge failed to conduct an adequate providence inquiry after learning that the accused may have suffered from PTSD and bi-polar disorder).

In the absence of some evidence or testimony to clarify the nature and effect of the appellant's multiple psychiatric/ psychological maladies, and the medication prescribed for them, I cannot have confidence that the appellant could providently plead to any offense. I am of the opinion that the trial judge could not accept the appellant's pleas because there existed a substantial basis to question them. I therefore cannot affirm any conviction in this matter. I would remand the matter for a hearing pursuant to R.C.M. 706 and dispose of the matter dependent upon a report from that hearing. I respectfully dissent.

For the Court

R.H. TROIDL
Clerk of Court

Senior Judger BOOKER participated in the decision of this case prior to detaching from the court.