UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant BILLY L. CURTIS
United States Air Force

ACM 37072

06 January 2009

Sentence adjudged 20 June 2007 by GCM convened at Charleston Air Force Base, South Carolina. Military Judge: Stephen R. Woody (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 12 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, and Captain Tiffany M. Wagner.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, and Captain Coretta E. Gray.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

HEIMANN, Senior Judge:

The appellant was tried at Charleston Air Force Base, South Carolina before a military judge alone. Consistent with his pleas and pursuant to a pretrial agreement, he was convicted of three specifications of assault consummated by a battery and a single specification of divers assaults with an unloaded weapon. The charges all stem from disputes the appellant had with his wife, none of which resulted in injuries requiring medical attention. The charges were in violation Article 128, UCMJ, 10 U.S.C. § 928.

The adjudged and approved sentence consists of a bad-conduct discharge, reduction to E-1, and 12 months of confinement.

The appellant raises two issues on appeal.[1] In the first, the appellant contends that his pleas were improvident because he suffers from a severe mental disease or defect, specifically, Post Traumatic Stress Disorder (PTSD). In the second, he contends that his sentence is too severe in light of his PTSD diagnosis. Having considered the record, the briefs from both parties, and the appellant's post-trial submissions, we grant no relief.

Background

The appellant and his wife were married on 9 October 1999. Together they had two children who were ages seven and three at the time of trial. The appellant admitted at trial that on five occasions between 1 May 2005 and 1 September 2006, he committed an assault consummated by a battery upon his wife. The assaults consisted of ripping a pair of shorts she was wearing, of striking her on the face, of twice grabbing her around the throat, and finally of shoving her wedding rings into her mouth. In each case, the assaults were generally reactions to his unhappiness with her response to a request he made to her. Also in each case, they were short lived events and resulted in either no injuries or minor "red marks" on her face or throat.

In addition to the assaults described above, on two occasions during this same period of time, the appellant took an unloaded handgun and placed it near his wife's head, threatening her in some manner. In each case, she did not know whether the gun was unloaded. These incidents were simple assaults in violation of Article 128, UCMJ.

Other than the charged misconduct, the appellant had no disciplinary record and appeared to be a model airman. Joining the Air Force in early 2001, the appellant quickly established himself as a first rate Air Transportation Apprentice. Every performance report he received over his six-year career contained the top ratings possible in every category. He was selected for and excelled in repeated deployments in support of Operation Iraqi Freedom, Operation Enduring Freedom, and humanitarian missions. Of particular note, he deployed to Al Udeid Air Base, Qatar from 16 January 2003 to 1 May 2003, to Balad Air Base, Iraq from 5 July 2004 to 11 September 2004, and to Pakistan from 5 December 2005 to 5 January 2006.

The issue of PTSD first arose prior to trial. At the appellant's request, and pursuant to Rule for Courts-Martial (R.C.M.) 706, the military judge ordered a sanity board on 11 June 2007. The judge found the request was appropriate because the appellant's detailed defense counsel cited "stressful events" surrounding the appellant's deployment to Iraq, raising concerns that the appellant lacked mental responsibility for

[1] The appellant raised both issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

the offenses charged. A two-member board of clinical psychologists conducted an inquiry and released its results on 15 June 2007. It concluded that the appellant did not suffer from a severe mental disease or defect at the time of the alleged criminal conduct.[2] Of particular note is the sanity board's comment that it had "carefully considered, and ruled out, a diagnosis of Post Traumatic Stress Disorder on Axis I with insufficient criteria met for the diagnosis." The military judge directed the results be attached to the record as an appellate exhibit, but did not question the appellant or his counsel on the results. The appellant did not object to the sanity board results or raise any follow-up issues at trial regarding his sanity.

Subsequent to the trial, the appellant was examined while in confinement, where a social worker diagnosed him with PTSD. The appellant provided documents supporting the diagnosis to both the convening authority and this Court, contending that he would not have pled guilty if he had been aware that he suffered from PTSD.

Providency of the Pleas

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)). An accused may not plead guilty unless the plea is consistent with the actual facts of his case. *United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977). An accused may not simply assert his guilt; the military judge must elicit facts to support the plea of guilty. *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996); *United States v. Higgins*, 40 M.J. 67, 68 (C.M.A. 1994) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). Where there is a substantial basis in law or fact for questioning the appellant's plea, the plea cannot be accepted. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

In claiming that his guilty pleas were improvident, the appellant relies on *United States v. Harris*, 61 M.J. 391 (C.A.A.F. 2005). In *Harris*, our superior court found there was a substantial basis in law and fact for questioning Harris' guilty pleas and therefore set aside the findings and sentence. Harris' mental state had been evaluated several times, with conflicting results. *Harris*, 61 M.J. at 393-94. After a one-member, pretrial sanity board found he did not suffer from any mental defect and was "mentally

[2] We note that the report does not indicate if the appellant was able to understand the nature of the proceedings against him and cooperate intelligently in his defense. Rule for Courts-Martial (R.C.M.) 706(c)(2). We also note that the defense counsel's request for the sanity board does not ask for a board to consider this issue, thus it was not ordered by the military judge. While we appreciate why the military judge would have issued the more limited order, we believe such a practice is inconsistent with the mandates of R.C.M. 706(c)(2). A failure to order a properly justified report addressing an accused's competence to understand the proceeding and cooperate in his own defense is an error of constitutional magnitude. *Drope v. Missouri*, 420 U.S. 162 (1975). Applying the appropriate test for such errors, and considering the request and the evidence presented, we are satisfied that the failure to comply with R.C.M. 706(c)(2) was harmless error beyond a reasonable doubt. *United States v. Brewer*, 61 M.J. 425, 432 (C.A.A.F. 2005) (citations omitted).

responsible for his behavior," Harris entered mixed pleas and was found guilty of writing several bad checks, larceny, and unauthorized absence. *Id.* at 392-93.

Upon incarceration, Harris was evaluated again. This time, he was diagnosed with a bipolar disorder, and the examining doctor concluded that Harris was not able to appreciate the wrongfulness of his actions. *Id.* at 393. When the convening authority was informed of this diagnosis via the appellant's clemency submissions, he ordered a post-trial session pursuant to Article 39(a), UCMJ, 10 U.S.C. § 839(a). *Id.* The military judge found that Harris, at the time of the offenses, suffered from a severe mental disease or defect but could appreciate the wrongfulness of his actions and was competent to stand trial. *Id.* Based upon the military judge's findings, the convening authority then ordered a second sanity board, which found that Harris suffered from a severe mental disease or defect but "was able to appreciate the nature and quality or wrongfulness of his conduct." *Id.* at 394. The convening authority approved the sentence as adjudged. *Id.* at 393-94.

In reversing the guilty plea, our superior court concluded:

> We do not see how an accused can make an informed plea without knowledge that he suffered a severe mental disease or defect at the time of the offense. Nor is it possible for a military judge to conduct the necessary *Care* inquiry into an accused's pleas without exploring the impact of any potential mental health issues on those pleas.

Id. at 398. The appellant argues both the facts and the law of *Harris* control this case.

In response to the appellant's claim, the appellee cites *United States v. Glenn*, 66 M.J. 64 (C.A.A.F. 2008), which, it argues, is more analogous to the appellant's case. In *Glenn*, the accused suffered from a cyclothymic disorder, a mood disorder. *Glenn*, 66 M.J. at 65. The accused referred to his mental health problems during the defense sentencing case, and variously referred to having a "bipolar disorder" and a "borderline personality disorder." *Id.* The disorder from which the accused actually suffered, the cyclothymic disorder, was characterized by rapid mood swings, but it did not rise to the level of a defense from criminal responsibility, nor did the accused assert that it did. *Id.* Rather, it was offered as evidence in mitigation. In ruling that the accused's pleas in *Glenn* were provident, our superior court noted that the accused placed his mental health problems into evidence as a matter in mitigation and did not raise a defense of lack of mental responsibility. *Id.* at 66. The Court also stressed that the accused did not suffer from bipolar disorder as he asserted, but, according to a licensed professional, a different disorder, and one which did not relieve him of culpability. *Id.*

Prior to *Glenn*, in *United States v. Shaw*, 64 M.J. 460 (C.A.A.F. 2007), our superior court was urged to extend the holding in *Harris* to a case where, following a guilty plea, the accused mentioned that he had been diagnosed with a bipolar disorder.

Shaw, 64 M.J. at 461. Despite the comment, the accused in *Shaw* never offered any further evidence of his condition, nor did he suggest or assert that his condition affected his ability to appreciate the wrongfulness of his acts. *Id.* at 462-63. Presented with a claim on appeal that his plea was improvident, our superior court found that "when the accused is presenting his sentencing statement through or with the assistance of counsel, the military judge may properly presume, in the absence of any indication to the contrary, that counsel has conducted a reasonable investigation into the existence of the defense." *Id.* at 463. The Court highlighted that there "was no factual record developed during or after the trial substantiating [the appellant's] statement or indicating whether and how bipolar disorder may have influenced his plea. Nor did [the appellant's] conduct during the plea inquiry raise concerns." *Id.* at 462. In closing, the Court, finding the plea provident, held that the reference to a bipolar disorder, "without more, at most raised only the 'mere possibility' of a conflict with the plea." *Id.* at 464.

Subsequent to counsel's submission of briefs, our superior court addressed the issue again, in *Unites States v. Inabinette*, 66 M.J. 320 (C.A.A.F. 2008). In *Inabinette*, the appellant plead guilty to a variety of offenses which he committed "under combat conditions." *Inabinette*, 66 M.J. at 321. During the course of his plea inquiry, he commented that he had no memory of committing the offenses. *Id.* Subsequent to the plea inquiry, the trial court considered testimony from a doctor who testified that while the appellant had a bipolar disorder with psychotic features, the doctor had no evidence to suggest that the appellant did not appreciate the wrongfulness of his actions. *Id.* Finding these facts more consistent with the *Shaw* case, our superior court affirmed the pleas. *Id.* at 323-24. The Court concluded that the key to their decision was the fact that the military judge inquired into the appellant's mental responsibility and concluded that the evidence of a bipolar disorder did not "undermine the adequacy of the plea." *Id.* at 323.

Discussion

The appellant's claim today raises a number of issues. We begin by looking to only the trial itself and asking whether the plea was provident. In response to this question, we find that *Shaw* controls. Like *Shaw*, the appellant presented some testimony to suggest the mere possibility of a sanity defense. While both the appellant and his sister suggested that his service in Iraq was stressful and partially to blame for the appellant's conduct, this evidence must be considered in view of the sanity board's findings. As the Court noted in *Shaw*, "the military judge may properly presume, in the absence of any indication to the contrary, that counsel has conducted a reasonable investigation into the existence of the [sanity] defense." *Shaw*, 64 M.J. at 463. We believe this is such a case. The military judge was well aware that the appellant had recently completed a sanity board, that the board was expressly ordered to consider the possibility of PTSD, and that the board found the appellant did not suffer from PTSD or any other severe mental disease or defect. Thus, like *Shaw*, we find nothing in the plea inquiry or the sentencing phase of trial, standing alone, to impact the providence of the plea.

This leads to the question of the significance of the post-trial diagnosis, in light of *Harris*. We begin this assessment by concluding that under *Inabinette*, the standard of review to this question of law is de novo.[3] *Inabinette*, 66 M.J. at 322. Applying a de novo review, we look "at whether there is something in the record of trial, [to include the post-trial submissions,] with regard to the factual basis or the law that would raise a substantial question regarding the appellant's guilty plea." *Id.* at 322. We also note our superior court's comments in *Shaw,* that this review must be addressed as "a contextual determination." *Shaw*, 64 M.J. at 464.

Thus, under *Harris*, *Shaw,* and *Inabinette,* we must look at every aspect of this case, to include the plea inquiry, the evidence introduced at trial in aggravation and mitigation, and the post-trial matters, to determine the providence of the appellant's pleas. If this contextual review raises a substantial basis for questioning the pleas, they must be set aside. *Id.*; *Inabinette*, 66 M.J. at 322.

First, we look at the pleas themselves. In addition to the information noted above, we find it significant that during the plea inquiry the appellant repeatedly assured the military judge that he understood the elements of the offenses, that he could have avoided the conduct which amounted to the assaults, and that he had no legal justifications or excuses for his conduct. We also note that the appellant entered a pretrial agreement with the convening authority and acknowledged to the military judge that he entered the agreement of his own free will, and that he was pleading guilty because he was in fact guilty of the offenses.

Looking to the sentencing evidence, the record includes considerable evidence highlighting the appellant's six-year record of functioning in the Air Force as a highly competent, intelligent individual. His performance reports document a six-year history of exemplary service. Significantly, the performance report written for the year immediately following the appellant's tour in Iraq notes his selection for unit Airman of the Quarter and his rating as the number 1 airman out of the 225 airmen in his unit. We also note the appellant was selected for promotion to E-4 early and was promoted to E-5

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[3] We recognize that if the appellant's request was based upon a theory of newly discovered evidence supporting a petition for new trial, under R.C.M. 1210(f)(2) he would bear the burden of proof. *See United States v. Gray*, 51 M.J. 1, 12 (C.A.A.F. 1999). Under that theory, once the appellant met his burden under R.C.M. 1210, we would be required to grant a new trial unless we were "convinced beyond a reasonable doubt that reasonable factfinders would not find by clear and convincing evidence that, at the time of the offense, [the] appellant suffered from 'a severe mental disease or defect' such as to be 'unable to appreciate the nature and quality or the wrongfulness of' his acts." *United States v. Cosner*, 35 M.J. 278, 281 (C.M.A. 1992); *United States v. Roberts*, ACM S30264 (A.F. Ct. Crim. App. 18 Feb 2005) (unpub. op.). For the same reasons discussed in our analysis of this assignment of error, we are convinced, beyond a reasonable doubt, that a reasonable fact finder would not find by clear and convincing evidence that, at the time of his offenses, the appellant suffered from a severe mental disease or defect and was unable to appreciate the nature and quality or the wrongfulness of his acts. *Cosner*, 35 M.J. at 281.

with less than four years of service. This later promotion occurred approximately five months after his return from Iraq.

As for the appellant's sentencing evidence, he provided the court with an impressive array of character statements, training certificates, and letters of appreciation. In his unsworn statement, the appellant mentioned his five deployments and how they constituted some of his "most rewarding experiences." He also stated, apparently discussing the Iraq deployment, that the "whole time was scary and it just sometimes became unreal." He went on to say, "[w]e received mortar [fire] all the time, but once a 4 foot rocket landed within 100 feet from my tent." While the rocket did not go off, another airman was killed in his sleep from a similar rocket attack while the appellant was deployed. He told the judge that after that incident, "sleeping was pretty difficult." Finally, he mentioned that the deployment was particularly stressful because his brother was serving in Iraq during the same time and he indicated that he continued to have nightmares about what could happen to him.

Regarding the offenses, the appellant said that he took his stress and frustrations out on his wife. Recognizing this was wrong, he "called Family Advocacy in order to get help." He went on to say, "[c]ounseling has been very helpful." He told the judge he had been attending counseling "weekly at Life Skills for the past ten months," and that he completed a 28-week Anger Management Criminal Domestic Violence course. The appellant credited these steps to opening his eyes "to understanding the reasons behind [his] actions."

Finally, we consider the post-trial submissions. The appellant's claim that PTSD impacts his guilt arose for the first time during the clemency phase. In his clemency submission, he advised the convening authority that he had been diagnosed in confinement with PTSD. He contended that he was never checked for PTSD prior to trial. While this contention is directly contradicted by the sanity board statement, he still argued to the convening authority "there would have been a whole different outcome during the court martial" if this had been known. In support of his claim to the convening authority, he provided two pages from his confinement medical records, dated 17 July 2007, which indicate a diagnosis of PTSD, but which are otherwise not particularly helpful, because they are illegible. Both the defense counsel and the Staff Judge Advocate mentioned the diagnosis to the convening authority, but neither contended that it impacted the providence of the plea. Each pointed to it as a matter in mitigation.

On appeal before this Court, the appellant claims that if he had been diagnosed with PTSD by his sanity board, he would not have pleaded guilty. In support of his claim of PTSD, he offers several more documents from his medical records. The first four pages are dated 10 July 07 and indicate that a licensed clinical social worker, Mr. R, had diagnosed him with "combat-related PTSD." The final page is dated 20 March 2008, and in it, Mr. R referred the appellant to the Charleston Naval Hospital with a recommended

continuation of counseling and medication for PTSD. The report indicates he was stable upon being released from the brig and that he understood how PTSD affects his employment and social relationships. None of the documents submitted to the convening authority or this Court suggest that the appellant's PTSD constituted a severe mental disease or defect or that he was not able to appreciate the criminality of his offenses at the time he committed them.

This brings us to our assessment. We find this case is distinguishable from *Harris* in two respects. First, it is distinguishable from *Harris* because of the findings of the initial sanity board. In *Harris,* the pretrial sanity board found *Harris* did not suffer from *any mental defects.* In the appellant's case, the pretrial sanity board found that he suffered from both adjustment and personality disorders. Thus, similar to *Glenn*, at trial the appellant was aware that he suffered from a mental disease or defect and chose not to assert an affirmative defense. Instead, electing to accept a pretrial agreement, he presented evidence of the impact of his combat service as a matter in mitigation. *Glenn*, 66 M.J. at 66. While we acknowledge the appellant's argument that he believes PTSD is categorically different, we decline to adopt such a conclusion. While clearly an important consideration in the evaluation of the conduct of servicemen and women, PTSD is still subject to the same standards as other mental diseases or defects.

Second, unlike in *Harris*, no one has ever concluded that the appellant suffers from a *severe mental disease or defect* or that he cannot *appreciate the wrongfulness of his actions*. While we acknowledge that PTSD is a recognized anxiety disorder,[4] that does not end the inquiry. Article 50a, UCMJ, 10 U.S.C. § 850a, provides that, unless the condition is severe enough to cause the appellant to not "appreciate the nature and quality or the wrongfulness of the acts," it "does not otherwise constitute a defense." When we consider the entire record before us, to include the appellant's post trial submission, we are not convinced the record reflects that his PTSD rises to the requisite degree of severity. Like many other mental diseases or defects, PTSD exists in a range of degrees. In the appellant's case, even the diagnosis he provided does not conclude that his condition is severe or that it in any way impacts his ability to appreciate the wrongfulness of his actions. Thus, even if we dismiss the diagnosis of two licensed clinical psychologists in favor of a licensed clinical social worker, we still find the diagnosis suggests nothing more than a mere possibility of a defense.

Because we find that the evidence does not show that the appellant suffers from a severe mental disease or defect that impacts his ability to appreciate the wrongfulness of his actions, we find no substantial basis to question his pleas.

Sentence Appropriateness

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[4] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, § 309.81, 463-68 (4th ed. 2000).

In the appellant's second assertion of error, he contends that his sentence is inappropriately severe in light of his diagnosis for PTSD. His counsel argues that the recent diagnosis was not available to the military judge but should be considered by us in fulfilling our responsibilities under Article 66(c), UCMJ, 10 U.S.C. § 866(c). The appellant argues that when the new diagnosis is viewed in light of his exceptional duty record, the sentence is inappropriate, and this Court should not approve the bad-conduct discharge.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005); *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006) (citations omitted). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006) (citations omitted). We have a great deal of discretion in determining whether a particular sentence is appropriate, but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The appellant's assaults on his wife were egregious and amounted to gross and violent overreactions to otherwise reasonable conduct by his wife. While his exceptional military record is compelling, it in no way excuses or mitigates such conduct, particularly the threats involving a handgun. As for the recent diagnosis, it contains little more than what was already presented at trial. The trial defense counsel presented evidence that the appellant suffered from stress originating with his deployment, and argued it to the military judge as a matter in mitigation. When we consider all the evidence, to include the recent diagnosis, we remain satisfied that the sentence is appropriate.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court