

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

J.D. HARTY

R.G. KELLY

W.M. FREDERICK

UNITED STATES

v.

**Douglas L. MULLINAX, Jr.
Corporal (E-4), U.S. Marine Corps**

NMCCA 200600911

Decided 7 June 2007

Sentence adjudged 24 January 2006. Military Judge: S.F. Day. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, 2d Force Service Support Group, U.S. Marine Corps Forces, Atlantic, Camp Lejeune, NC.

LtCol R.R. POSEY, USMC, Appellate Defense Counsel
LCDR DEREK HAMPTON, JAGC, USN, Appellate Defense Counsel
Capt T.J. DEMAY, JAGC, USN, Appellate Government Counsel
LT JESSICA M. HUDSON, JAGC, USN, Appellate Government Counsel
LT JUSTIN E. DUNLAP, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

KELLY, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, in accordance with his pleas, of conspiring to damage and steal private property, damaging private property, and larceny, in violation of Articles 81, 109, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 909, and 921. The appellant was sentenced to confinement for four months, reduction to pay grade E-1, forfeiture of \$500.00 pay per month for four months, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged and suspended all confinement in excess of 180 days for 12 months from the date of his action.¹

¹ The suspension of confinement had no legal effect since the military judge sentenced the appellant to confinement for less than 180 days.

We have examined the record of trial, the appellant's three assignments of error,² the Government's response to this court's order compelling production of documents, and the Government's answer. 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.

Background

The appellant pled guilty to conspiring with Private First Class (PFC) I., a junior Marine, to break into a fellow Marine's car and steal its installed audio equipment. After forming this conspiracy, the appellant's accomplice damaged the car, and removed more than \$500.00 worth of the owner's property from the car. Before trial, the appellant negotiated a pretrial agreement (PTA) with the CA to limit his exposure to confinement and to provide financially for his spouse. In particular, the PTA required the CA to: (1) suspend confinement in excess of 180 days for a period of twelve months from the date of the CA's action; (2) to suspend adjudged forfeitures in excess of \$600.00 pay per month for six months for twelve months from the date of the CA's action; and (3) to defer automatic forfeitures "from the date automatic forfeitures would otherwise become effective under Article 58b(a)(1), UCMJ, until the date the convening authority acts on the sentence" and thereafter to waive the automatic forfeitures "from the date the convening authority takes action on the sentence for six months." The waived forfeitures were to be paid to the appellant's dependent spouse. Appellate Exhibit III at 1.

The appellant was sentenced on 24 January 2006. The staff judge advocate's recommendation (SJAR) failed to inform the CA of his PTA obligations regarding the deferral and waiver of automatic forfeitures. Staff Judge Advocate's Recommendation of 20 Mar 2006. The CA took action on the appellant's case on 2 May 2006. In doing so, the CA approved the sentence as adjudged. Convening Authority's Action of 2 May 2006 at 3. The CA did not, as required by the PTA, defer automatic forfeitures from the date they became effective until the date of his action, nor did the

²I. THE CONVENING AUTHORITY MATERIALLY BREACHED THE TERMS OF THE PRETRIAL AGREEMENT BY FAILING TO DEFER AND WAIVE AUTOMATIC FORFEITURES WHILE CORPORAL MULLINAX WAS SERVING HIS SENTENCE TO CONFINEMENT.

II. IN THE ALTERNATIVE, IF THE RELIEF REQUESTED IN ASSIGNMENT OF ERROR I IS NOT GRANTED, THE CONVENING AUTHORITY ERRED IN NOT LISTING IN HIS ACTION ANY REFERENCE TO THE COMPANION CASE TO THIS MATTER AND IN NOT CONSIDERING THE RESULTS OF THE COMPANION CASE IN TAKING HIS ACTION.

III. IN THE ALTERNATIVE, IF THE RELIEF REQUESTED IN ASSIGNMENT OF ERROR I IS NOT GRANTED, THE STAFF JUDGE ADVOCATE COMMITTED ERROR BY OMITTING FROM HIS RECOMMENDATION TO THE CONVENING AUTHORITY A STATEMENT OF ACTION THE CONVENING AUTHORITY WAS OBLIGATED TO TAKE UNDER THE PRETRIAL AGREEMENT WITH RESPECT TO THE AUTOMATIC FORFEITURES.

CA waive automatic forfeitures from the date of his action until six months afterward. *Id.*

Material Breach of the PTA

In his first assignment of error, the appellant contends that the CA "materially breached the terms of the pretrial by failing to defer and waive the automatic forfeitures while Appellant was serving his sentence to confinement, thereby making Appellant's pleas improvident." Appellant's Brief and Assignments of Error of 30 Sep 2006 at 5. Appellate defense counsel avers that "the Appellant has verbally affirmed that, to the best of his knowledge and belief, neither he nor his wife received military pay while he was confined after the sentence was adjudged." Appellant's Brief at 7. Consequently, appellate defense counsel argues that even if the Government "could somehow make the Appellant financially whole, now, by paying him or his wife the amount of pay forfeited due to the convening authority's non-compliance with the pretrial agreement, such a remedy would be inadequate because it will not ameliorate the hardship suffered by the Appellant's wife and stepchildren during the period while he remained confined and unable to help the family." *Id.* The appellant asks that this court "set aside the findings and sentence, or in the alternative, affirm a sentence of no punishment." *Id.* We decline to do so.

"It is fundamental to a knowing and intelligent guilty plea that, where an accused pleads guilty in reliance on promises made by the Government in a pretrial agreement, the voluntariness of the plea depends on the fulfillment of those promises by the Government." *United States v. Perron*, 58 M.J. 78, 82 (C.A.A.F. 2003)(citing *Santobello v. New York*, 404 U.S. 257, 262 (1971)). "[W]here there is a mutual misunderstanding regarding a material term of a pretrial agreement, resulting in an accused not receiving the benefit of his bargain, the accused's pleas are improvident," *Id.* at 82; see *United States v. Hardcastle*, 53 M.J. 299, 302 (C.A.A.F. 2000). "In such instances . . . remedial action, in the form of specific performance, withdrawal of the plea, or alternative relief is required." *Perron*, 58 M.J. at 82. An appellate court may not, however, impose alternate relief without the appellant's consent. *Id.* at 83-4.

The appellant bears the burden of establishing that a term of a PTA was material to his decision to plead guilty and that the Government failed to comply with that term or condition. *United States v. Lundy*, 63 M.J. 299, 302 (C.A.A.F. 2006). In determining whether a term was material, we look not only to the agreement, but also to the appellant's understanding of the terms, as reflected in the record as a whole. *Id.*; *Perron*, 58 M.J. at 85.

Following the imposition of sentence, the military judge reviewed the sentence limitations portion of the PTA with the parties. Record at 68-74. The military judge determined, and

the parties agreed, that under the terms of the PTA, the CA was free to approve the adjudged forfeitures of \$500.00 pay per month for four months, because the adjudged amount was less than what the CA had agreed to suspend. *Id.* at 68. With regard to automatic forfeitures, the following colloquy represents the entire discussion between the military judge and the parties:

MJ: In two weeks, all automatic forfeitures will be deferred. And then [the CA] will waive these automatic forfeitures for 12 months. And those forfeitures will be paid to T[] M[], [the appellant's] dependant.

TC: Yes, sir.

MJ: The reduction to pay grade E-1 may be approved as adjudged. And that will take place two weeks from now, in all likelihood. Is that right?

TC: Yes, sir.

MJ: Okay. Two weeks from now the accused will be an E-1 and will be getting E-1 pay, which is about \$1273 per month; right.

DC: Yes, sir.

MJ: Is that your understanding also?

ACC: Yes, sir.

MJ: OK. So you won't get the pay of a corporal. It will be the pay of a private. And then there are some understandings with respect to money going to your dependents; right?

ACC: Yes, sir.

MJ: Okay. What will go to the dependant two weeks from today, \$1273, minus taxes of course, \$1273 per month, or \$1273 minus \$500 per month?

TC: It's our understanding that it would be the latter, sir.

MJ: What is your understanding? \$1273 minus \$500 pay per month, that is adjudged forfeitures, equals \$773 pay per month.

DC: I would say that it would be the \$1273 and the government is saying minus the five hundred?

MJ: Right.

DC: I believe that is the same, sir.

MJ: Okay, \$773 pay per month.

DC: Yes, sir.

MJ: All right. That would be going to [TM], starting two weeks from today, roughly \$783. I am looking at the base pay of a private minus the \$500 I adjudged, which he has agreed to defer, the defer application of the adjudged forfeiture provision, which would be two weeks from now. All right.

So two weeks from now he will be in a pay status, or at least the pay will be going to [TM] in the amount of \$773 pay per month. Now this automatic forfeitures, this is all deferred until he takes his action. He will take his action in two or three or four months from now, roughly about the time that the accused gets released from pretrial confinement. Correct? I'm sorry, confinement.

TC: Yes, sir.

MJ: At that time. Automatic forfeitures really don't apply anymore?

TC: Correct, sir.

MJ: And so with respect to automatic forfeitures, I don't see that there will be any need to waive in excess of six month - you know, waive the automatic forfeitures for six months after the [CA's] action. By that time he will be out of confinement. The automatic forfeiture provision applies during the period of confinement; correct?

TC: Yes, sir.

DC: Yes, sir.

. . . .

MJ: Okay. Do you understand how this is working now?

ACC: Yes, sir.

MJ: The way everybody understands this agreement to work, you'll most likely be reduced to pay grade E-1, or at least the [CA] can approve that.

Do you understand that?

ACC: Yes, sir.

MJ: That will take place two weeks from today, most likely. It's on the sooner of whatever the earlier date of the convening authority's action or two weeks from the date of trial. Today is the date of trial. The [CA's] action typically takes place two or three months after the trial because it takes that long to prepare the record of trial, to get it reviewed, to get it authenticated and for the CA to get the paper work up to him so he can take his action. So let's just think of this in terms of two weeks from today you'll . . . most likely be reduced to pay grade E-1 by operation of law. On that date, you'll continue to be paid; however, but at a reduced rate.

Is that your understanding?

ACC: Yes, sir.

MJ: And the moneys [sic] will be sent to your dependent, [TM]. At a certain point, maybe three or four months from now, the [CA] will take his action, but you'll probably be out of the brig by then, because I only adjudged four months of confinement.

Do you understand that?

ACC: Yes, sir.

MJ: Once you're out of the brig, you'll continue to get paid, or you'll get paid some moneys [sic] any way, not the full private's pay of \$1273, but less the forfeitures, since the [CA] approves those forfeiture that is [sic] adjudged. But when you go on appellate leave you'll be in a no-pay status, so there will be nothing to suspend.

Do you understand that?

ACC: Yes, sir.

Record at 70-74.

On 17 April 2007, this court ordered the Government to produce the appellant's military financial documentation for the period of 24 January 2006 to 22 November 2006 in order to determine whether the appellant received the benefit of his bargain concerning the adjudged and/or automatic forfeitures. As evidenced by the appellant's Leave and Earning Statements (LESS) contained in the Government's response to that Order, the following actions took place:

1. The appellant was confined from 24 January 2006 until 3 May 2006.

2. The appellant began his appellate leave on 13 June 2006.

3. From 24 January 2006 until 22 November 2006, the appellant received Basic Pay, Basic Allowance for Housing with dependents, Basic Allowance for Subsistence, and Family Separation Allowance Type II, totaling \$7,682.84. He received this amount in payments of \$634.57 on 1 February 2006, \$954.00 on 10 May 2006, \$1,022.54 on 1 June 2006, and \$5,071.73 on 1 October 2006.

Based on our review of the record, we find that the automatic forfeitures provision of the PTA was a material term of the agreement. The Government did not initially comply with that term, but eventually did comply with that term. The question before us is whether the timing of the payment was a material term of the PTA. If not material, then the Government's delayed payment constituted specific performance of the PTA. If it was material, then the delayed payment could not be treated as specific performance of the terms of the PTA, but would constitute alternative relief which cannot be substituted without the appellant's consent. *Lundy*, 63 M.J.at 305; *Perron*, 58 M.J. at 85-86.

As evidenced by the appellant's discussion with the military judge concerning the terms of the PTA and how they affected his pay, it is clear from the record that the appellant thought, and both the Government and trial defense counsel agreed, that the appellant's wife would be receiving some portion of his pay (although less than he received as a corporal) during his incarceration. However, there is no evidence that either the appellant or his wife: (1) attempted to determine whether there was any problem; (2) brought this to the attention of the Government; (3) complained about the problem prior to filing his Brief with this court; or (4) submitted a request for clemency seeking relief from the problem. Most telling, there is no evidence in the record of harm, hardship, or negative consequences flowing from the Government's delayed compliance.

We conclude that the timing of the payment was not a material term of the PTA, because the record does not establish that the appellant was concerned with whether or not his dependent spouse received the benefit of the agreement at the time it was due. We further find that the Government's belated payment of the forfeited pay constituted specific performance of the PTA. The appellant is not entitled to relief.³

³ Similarly, in his third assignment of error, the appellant argues in the alternative, that if this court does not grant relief as to the first assignment of error, then the court should remand the case to the CA for a new SJAR and CA's action because the SJA failed to mention the automatic forfeiture provisions of the PTA in his recommendation. Appellant's Brief at 8-9. However, we find that this issue was waived by the trial defense counsel's failure to respond to the SJAR. RULE FOR COURTS-MARTIAL, 1106(f)(6), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). We do not find plain error.

Failure of the Convening Authority to Note Companion Case

In his second assignment of error, the appellant argues, that if this court does not grant relief as to the first assignment of error, then the court should return the record of trial to the CA for a new action because the action does not list his co-actor's, PFC I's, case as a "companion case." Appellant's Brief at 8.

The administrative requirement to note companion cases is contained in the Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7D § 0151a(2)(15 Mar 2004). Failure to comply with this administrative requirement, however, does not render a CA's action fatally defective. *United States v. Bruce*, 60 M.J. 636, 642 (N.M.Ct.Crim.App. 2004). Even assuming, *arguendo*, that the CA was required to reference the co-actor's case, the appellant has not alleged any prejudice and we find none. *See United States v. Swan*, 43 M.J. 788, 792 (N.M.Ct.Crim.App. 1995). The appellant is not entitled to relief.

Conclusion

The findings and sentence, as approved by the CA, are affirmed.

Senior Judge HARTY and Judge FREDERICK concur.

For the Court

R.H. TROIDL
Clerk of Court