

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

BEFORE

D.A. WAGNER

K.K. THOMPSON

E.B. STONE

UNITED STATES

v.

**Kevin R. SMITH, Jr.
Seaman Recruit (E-1), U. S. Navy**

NMCCA 200602446

Decided 26 April 2007

Sentence adjudged 21 February 2006. Military Judge: C.L. Reismeier. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS MAHAN (DDG 72).

CAPTAIN EDWARD S. MALLOW, JAGC, USN, Appellate Defense Counsel
LCDR FRANK L. GATTO, JAGC, USN, Appellate Government Counsel
LT JESSICA HUDSON, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

STONE, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of attempting to steal \$500.00, making a false official statement, stealing four personal checks, stealing \$819.28, and two specifications of making false checks in the amount of \$500.00 each, in violation of Article 80, 107, 121, and 123, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 907, 921, and 923. The military judge sentenced the appellant to confinement for eight months, a bad-conduct discharge, and a fine of \$800.00. The convening authority (CA) approved the sentence as adjudged and, except for the bad-conduct discharge, ordered it executed. Pursuant to a pretrial agreement, the CA was obligated to suspend all confinement in excess of 100 days for the period of confinement served by the appellant plus 12 months.

After carefully considering the record of trial, the appellant's two assignments of error,¹ and the Government's

¹ I. THE CONVENING AUTHORITY'S ACTION AND COURT-MARTIAL ORDER FAILED TO CORRECTLY STATE THE PLEA AND FINDING OF SPECIFICATION 2 OF THE ADDITIONAL

response, we conclude that the findings and 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.

The CA's Action and Legal Officer's Recommendation

The appellant actually asserts three errors in his first and second assignments of error. First, the appellant asserts that the convening authority approved the sentence as adjudged, but failed to suspend confinement in excess of 100 days for the period of the appellant's confinement adjudged plus twelve months, as required by the pretrial agreement. The Government concedes this error and we agree. An accused who pleads guilty pursuant to a pretrial agreement is entitled to the fulfillment of any promises made by the Government as part of that agreement. *Santobello v. New York*, 404 U.S. 257, 262 (1971); *United States v. Smith*, 56 M.J. 271, 272 (C.A.A.F. 2002). This court has the authority to enforce the agreement. *United States v. Cox*, 46 C.M.R. 69, 72 (C.M.A. 1972); *United States v. Carter*, 27 M.J. 695, 697 n.1 (N.M.C.M.R. 1988); *see also United States v. Bernard*, 11 M.J. 771, 772-74 (N.M.C.M.R. 1981). Here, the convening authority erred by failing to enforce the terms of the pretrial agreement. While error has been committed, the appellant has not alleged that he was actually required to serve confinement in excess of the period of confinement that was required under the terms of the pretrial agreement. We therefore conclude that the appellant has received the benefit of his bargain regardless of the existence of error. While we do not condone the CA's error, remedial action is not required. *United States v. Caver*, 41 M.J. 556, 565 (N.M.Ct.Crim.App. 1994).

In his second assignment of error, the appellant asserts that the court-martial order incorrectly reflects that the appellant pled guilty to and was found guilty of Specification 2 of the Additional Charge. In fact, the appellant pled not guilty to that specification and it was withdrawn prior to the entry of findings. We agree that the appellant is entitled to a

CHARGE AND FAILED TO FOLLOW THE PRETRIAL AGREEMENT BY NOT SUSPENDING CONFINEMENT IN EXCESS OF 100 DAYS.

II. THE LEGAL OFFICER'S RECOMMENDATION FAILED TO PROVIDE THE CORRECT PLEA OF APPELLANT TO SPECIFICATION 2 OF THE ADDITIONAL CHARGE.

III. THE APPELLANT IS ENTITLED TO A NEW REVIEW AND ACTION BECAUSE THE LEGAL OFFICER WHO PREPARED THE STAFF JUDGE ADVOCATE'S [SIC] RECOMMENDATION SHOULD HAVE BEEN DISQUALIFIED AFTER HE TESTIFIED AS A WITNESS FOR THE GOVERNMENT DURING SETENCING.

corrected court-martial order. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). We will order correction in our decretal paragraph.

The appellant also alleges, as part of his second assignment of error, that the legal officer's recommendation incorrectly states he plead guilty to Specification 2 of the Additional Charge. See RULE FOR COURTS-MARTIAL 1106, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). We agree, but note that the legal officer correctly stated that this specification was withdrawn. We therefore find the error harmless. The appellant conceded that his counsel received a copy of the legal officer's recommendation on 6 November 2006. Trial defense counsel failed to comment. The failure to comment on errors contained in the legal officer's recommendation forfeits the issue on review, unless it rises to the level of plain error. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000); R.C.M. 1106(f)(6). We find that plain error does not exist in this case.

Legal Officer as a Witness

The ship's legal officer who prepared the recommendation for the CA testified at trial as a Government witness, in aggravation, during the sentencing phase. Specifically, he testified concerning the negative affect the appellant's crimes had upon the command's mission and morale, including how hundreds of hours were spent investigating and preparing the case. In addition to this testimony in aggravation, the legal officer provided beneficial testimony for the defense regarding the appellant's work performance both on direct examination and cross-examination. Record at 98, 105-06. The trial defense counsel did not object to the legal officer's testimony and did not attempt to controvert the legal officer's testimony. Additionally, the appellant did not raise the issue at the time he was served with the legal officer's recommendation. We review for plain error.

The error was plain and obvious. R.C.M. 1106(b) states that "[n]o person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, or investigating officer in any case may later act as a staff judge advocate or legal officer to any reviewing or convening authority in the same case." However, although the error was plain and obvious, the appellant has failed to allege any prejudice flowing from this error. As we also fail to find any prejudice to the appellant resulting from this error, we decline to grant relief.

Conclusion

The approved findings and sentence are affirmed. We direct that the supplemental court-martial order correctly reflect the charges, specifications, pleas, and findings.

Chief Judge WAGNER and Senior Judge Thompson concur.

For the Court

R.H. TROIDL
Clerk of Court