

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

**Before
E.E. GEISER, R.G. KELLY, L.T. BOOKER
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**WINFIELD S. CARSON
LIEUTENANT COLONEL (O-5), U.S. MARINE CORPS**

**NMCCA 200600994
GENERAL COURT-MARTIAL**

Sentence Adjudged: 19 January 2006.

Military Judge: Col Steven F. Day, USMC.

Convening Authority: Commanding General, 1st Marine
Aircraft Wing, Okinawa, Japan.

Staff Judge Advocate's Recommendation: LtCol D.S. Jump,
USMC.

For Appellant: Capt Sridhar Kaza, USMC; LT R.H. McWilliams,
JAGC, USN.

For Appellee: Capt Geoffrey Shows, USMC.

6 November 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BOOKER, Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of several offenses involving indecent acts and language with two of his daughters, C and U. The convening authority (CA) approved the judge's sentence of confinement for six years, forfeiture of all pay and allowances, and a dismissal from the United States Marine Corps.

The appellant raises four assignments of error. First, he asserts that the Government failed to honor a material term of the pretrial agreement (PTA) involving post-trial contact with

his family. Second, the appellant avers that the military judge erred when he admitted salacious photographs of a third daughter. Third, the appellant asserts that several of the offenses were multiplicitous. Finally, the appellant claims that he suffered illegal pretrial punishment.

In April 2008 this court ordered a *DuBay*¹ hearing to develop more fully the facts incident to his first assignment of error. The military judge conducting the *DuBay* hearing made extensive findings of fact and conclusions of law.² The military judge's findings of fact³ are supported by the record and we adopt them as our own.

We have carefully examined the parties' briefs, the record of trial, and the *DuBay* record. We find that the appellant's third assignment of error has merit and we will grant appropriate relief. We conclude that following our corrective action the findings and the sentence are correct in law and in fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59 and 66, UCMJ.

Pretrial Agreement Terms

A PTA, as the parties note, is a specialized contract. When interpreting the provisions of a PTA, courts must be mindful that "contract principles are outweighed by the Constitution's Due Process Clause protections for an accused." *United States v. Acevedo*, 50 M.J. 169, 172 (C.A.A.F. 1999).

In addressing this issue we assume, without deciding, that the CA could bind all agencies of the United States when he entered into the PTA. The signatories of the agreement were the United States, the appellant, and the appellant's counsel. For the purposes of our discussion, it is not relevant whether the CA could or could not bind, for example, the Commandant of the U.S. Disciplinary Barracks, Fort Leavenworth (USDB), as we conclude that the appellant has in fact received the benefit of his bargain.

Specially negotiated provision 15(k) of Appellate Exhibit IX is at the heart of the appellant's argument before us. The language of the term is as follows:

The Government agrees that there is an understanding regarding my current military protective order. Specifically, that this order will be modified after

¹ *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

² The record of that hearing is paginated consecutively with the record of the original trial; however, the exhibits attached to that record are not consecutively numbered with the exhibits of the original trial. They will therefore be described as *DuBay* exhibits.

³ *DuBay* Appellate Exhibit XXII.

this Agreement is approved to allow phone calls and letters to and from my son, [M]. Further, that after sentence is announced in this case, there should no longer be a need for the military protective order, and that I will be allowed contact with my entire family, if they so desire.

The appellant maintains now, and testified at the *DuBay* hearing, that this provision should be read to mean that he would be allowed "unfettered access to," including physical contact with, his family after his court-martial adjourned. He claims that the action of the Marine Corps in transferring him to the USDB, and that facility's revised policies regarding visits by minors to convicted sex offenders, have denied him the substantial right that was included in his bargain. He further claims that because in his mind the language is ambiguous, it is appropriate to resort to contract-interpretation principles to resolve the issue.

"[C]ontractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts." *Great Am. Ins. Co. v. Norwin Sch. Dist.*, 2008 U.S. App. LEXIS 20435, at 34-35 (3d Cir. Pa. Sept. 29, 2008)(quoting *Murphy v. Duquesne University*, 777 A.2d 418, 429-30 (Pa. 2001)). An unambiguous written term presents a question of law for the court. *Murphy*, 565 Pa. at 591, 777 A.2d at 430.

We do not believe in this context that specially negotiated provision 15(k) is ambiguous. It addresses an immediate and pressing concern of the appellant -- to be freed from the strictures of the military protective order (MPO) imposed by his commanding officer -- and both parties performed under the agreement, the appellant by pleading guilty, and his commanding officer by rescinding the MPO after sentence was announced.⁴

Originally, the appellant had sought more liberal terms with respect to contact with his family. A draft term read as follows:

The government agrees to modify my military protective order to allow visits from my wife and daughters U and A as well as phone contact and letters with my son M up until the date of trial and to eliminate this protective order at the time my trial is completed.

The CA rejected this proffered term, and further negotiations led to the term that appears in the PTA as Specially Negotiated Provision 15(k).

We further believe that the "particular set of facts" in whose context the PTA term must be interpreted admits of but one

⁴ *DuBay* AE XXII ¶ 28.

interpretation. Among those particular facts are the "legislative history" of previously negotiated terms; the agreement of the appellant with the military judge's interpretation of the agreement's terms; the clarity and simplicity of other specially negotiated terms; the knowledge of the parties of the regulatory context in which these terms were drafted;⁵ and the clear and apparent understanding of the CA's ability to speak directly to other persons involved in the administrative aspects of this trial.⁶

In our view, the appellant's difficulties are a collateral consequence of his conviction and his sentence to confinement. See *United States v. Miller*, 63 M.J. 452, 457 (C.A.A.F. 2006). That being the case, we will set aside the guilty plea only if we can determine that

[T]he collateral consequences are major and the appellant's misunderstanding of the consequences (a) results foreseeably and almost inexorably from the language of a [PTA]; (b) is induced by the trial judge's comments during the providence inquiry; or (c) is made readily apparent to the judge, who nonetheless fails to correct the misunderstanding.

United States v. Bedania, 12 M.J. 373, 376 (C.M.A. 1982). Our review of the record reveals that the only prong of the *Bedania* test that may apply is the first, as the trial judge himself made no comments that could have caused or contributed to any misunderstanding, and as the parties' own responses to the trial judge during the plea colloquy revealed no "readily apparent" misunderstanding regarding the provision.⁷ In our view, it is

⁵ At trial, the defense demonstrated considerable knowledge of various issuances concerning corrections within the Department of Defense. Record at 549-59; AE VII.

⁶ We speak here particularly of the actions of the CA with respect to the MPO. Counsel for both the appellant and the CA avoided having the CA himself cancel the order, but rather were content to have him communicate with the appellant's immediate commanding officer to affect the rescission. The CA could likewise have been required, in the agreement, to make recommendations as to disposition at the ultimate confining facility. The agreement is silent in that respect.

⁷ At the trial in January 2006, the following colloquy occurred between the military judge and one of the appellant's defense counsel:

MJ: [I]s there an MPO in effect now?
DC: There is currently, sir.

MJ: What does this mean then?
DC: Sir, there's an MPO in place. When this was negotiated, there was an MPO in place that limited all contact to family members too, with the exception of phone calls with the spouse. We negotiated this to allow Lieutenant Colonel Carson contact with his son [M]. The intent of the agreement is once the sentence is announced, the current MPO in place which prohibits contact

unreasonable to conclude that a misunderstanding of the consequences of confinement for sexual abuse of a minor -- denial of access to minors⁸ -- was a foreseeable result of the language of the agreement. The appellant therefore does not carry his burden.

Admission of Photographs

The evidence in aggravation and the evidence in extenuation and mitigation was voluminous, accounting for well over three-quarters of the record of trial. Most of the documentary and physical evidence from both parties was admitted without objection; however, the defense did object to the admission of Prosecution Exhibit 9, photographs of the appellant's third daughter, A, who was not named as a victim in any of the allegations.

The photographs in Prosecution Exhibit 9 were never linked definitively to the appellant. The photographs do not depict any of the victims named in offenses of which the appellant was found guilty. They are salacious and could even, in some respects, be considered obscene. It is true that they were found in the appellant's house in a photo-processing envelope bearing his name, but that is where the connection falls apart. The military judge himself was aware of the tenuous link when admitting them. Record at 378. We agree with the appellant that admission of the photographs was error. We will now consider whether the appellant was materially prejudiced by this error.

At trial, the Government made limited use of the photographs at issue, mostly in the context of cross-examining defense witnesses. The photographs were used to test various witnesses' opinions of the appellant's good military character or potential

between Lieutenant Colonel Carson and his daughters will be lifted and allow -- there'll be no MPO. They will go away basically.
MJ: All right. Who signed the MPO, the special court-martial convening authority?
DC: Correct, sir, the commander.

MJ: So he's bound by this?
TC: That's right, Lieutenant Colonel Nelson, sir.

MJ: He's aware of this provision?
TC: He is, sir.

MJ: Okay.

Record at 75-76. Shortly after this colloquy, the military judge secured from the appellant his concurrence with the interpretation of the terms. *Id.* at 78.

⁸ We acknowledge that the USDB modified its policy after the appellant was incarcerated there to make access to minors even more controlled; however, given the broad discretion granted to facility commanders to control access, DODINST 1325.7 of 17 July 2001, ¶ 6.7.5, we believe that this policy modification was foreseeable and should have been addressed by the parties if it were a concern.

for rehabilitation, viz., "if you knew that these photographs existed, would you have a different view of the appellant or his offenses?" Further, the Government made only a passing reference to the photographs in the lengthy argument on sentencing.

Other evidence in this record -- the appellant's stipulation, the various video files of other victims, the forensic interview of the principal victim, C -- provided the military judge with a sound basis on which to determine a sentence. We are satisfied that the military judge was not influenced by the photographs contained within PE 9 or their limited use by the Government. We decline to grant relief on this basis.

Multiplicity

The appellant maintains that his convictions for two violations of Article 133, conduct unbecoming an officer and a gentleman, are multiplicitious with his convictions of the indecent assaults, acts, and language with respect to C and U. We agree that on the record before us the only distinction between the Article 133 offenses and the underlying acts is the appellant's commissioned status. We find, therefore, that the offenses are multiplicitious.

In fashioning an appropriate remedy, we are mindful of the line of cases suggesting that the Government should be permitted to decide whether to retain the 133 conviction or the convictions for the underlying conduct. *See United States v. Cherukuri*, 53 M.J. 68, 74 (C.A.A.F. 2000). Mindful of judicial economy, however, we will exercise our authority under Article 66 and will disapprove the findings of guilty to the Article 133 offenses and affirm the findings of guilty to the Article 134 offenses. Following our action, the remaining findings correctly capture the range of the appellant's criminal activity.

We further note that when the military judge calculated the maximum sentence, he erred in determining the maximum punishment with regard to the offense involving U. The gravamen of the offense of which the appellant was convicted was communication of indecent language to an adult. This offense carries a maximum confinement of 6 months, whereas the attempted indecent act with another which the military judge used to calculate the maximum punishment carries a maximum confinement of 5 years. The total maximum confinement, therefore, was 30 years, 6 months, not the 35 years determined by the military judge.⁹

Significantly, we observe that this reduction is related to the adult victim of a single offense. The overwhelming bulk of the offenses and possible confinement are still attributable to

⁹ When he calculated the maximum sentence to ensure the providence of the appellant's pleas, the military judge took into account the potential for multiplicity or for an unreasonable multiplication of charges. Record at 61.

the appellant's criminal activity with the minor child C. In view of the remaining charges and considering the evidence properly admitted during the presentencing hearing, we are confident that the minimum sentence for the remaining offenses would have included, at least, the sentence approved by the CA. *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998)

Article 13

The appellant was placed into pretrial confinement on Okinawa on 25 August 2005. There is no dispute that the applicable guidelines of RULE FOR COURTS-MARTIAL 305, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) were observed. An initial review officer considered his continued confinement and approved continued confinement.

Roughly contemporaneously with the confinement, the appellant's commanding officer imposed the MPO upon the appellant and renewed that order several times pending trial. The appellant was in pretrial confinement when the initial and all subsequent orders were imposed. Among other restrictions, the MPO prohibited the appellant's having any contact with his son, M, who was a college student at the time.

The appellant maintains that this denial of contact with his son, M, amounted to pretrial punishment. We disagree. It is clear that at the time the denial of contact was ordered, the appellant was already suspected of attempting to influence witnesses. This alone is sufficient reason for the contact limitation. We note that once the parties' positions were solidified by the PTA, the MPO was relaxed to allow broader access.

The appellant also raises issues relating to prisoner classification and control procedures used in his transfer from Okinawa to the Camp Lejeune, North Carolina brig facility in December 2005. In this regard, the appellant was transferred in what has become a standard "prisoner transfer" uniform in the Marine Corps -- blue coveralls, footgear, and green underwear. He flew on commercial air and, consistent with prisoner transfer policy, was in handcuffs for the entire period of transfer.

The appellant has provided us with no factual or legal basis to depart from the long-established precedents in the area of prisoner classification and control, and we decline to grant any relief for alleged abuses as far as classification and daily routine are concerned. *See United States v. Crawford*, 62 M.J. 411, 416 (C.A.A.F. 2006). We agree with the military judge that the appellant was not subjected to illegal pretrial punishment as relates to classification and control procedures.

The appellant also claims that the conditions of the Camp Lejeune brig constituted illegal pretrial punishment. The un rebutted testimony from the appellant describes conditions at

Camp Lejeune -- as the military judge put it, "austere, older, and undoubtedly less desirable" -- that are not acceptable in the brig or in the barracks. Specifically, the appellant complained that his cell at Camp Lejeune was filthy and that the plumbing was in disrepair. Significantly, however, the military judge found that the appellant "appeared . . . before th[e] court . . . in an adequate state of health and does not appear to be deprived of the necessities of life." Record at 565. We do not find that the military judge's decision not to grant relief was an abuse of discretion.

Conclusion

The findings of guilty to Specifications 2 and 3 (as originally numbered) of Charge III, and to Charge III itself, are set aside, and those specifications and Charge III are dismissed. The remaining findings and the approved sentence are affirmed.

Senior Judge GEISER and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court