

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

**Before  
R.E. VINCENT, E.S. WHITE, J.E. STOLASZ  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**AUDLEY G. EVANS II  
DENTALMAN (E-3), U.S. NAVY**

**NMCCA 200600806  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 12 September 2005.

**Military Judge:** Col Bruce Landrum, USMC.

**Convening Authority:** Commanding General, 3d Force Service Support Group, Okinawa, Japan.

**Staff Judge Advocate's Recommendation:** LtCol D.K. Margolin, USMC.

**For Appellant:** LT Gregory Manz, JAGC, USN.

**For Appellee:** Maj Tai Le, USMC.

**12 August 2008**

-----  
**OPINION OF THE COURT**  
-----

**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

WHITE, Senior Judge:

This case is again before us on remand from our superior court.

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of conspiracy to commit murder, premeditated murder, three specifications of larceny, and obstruction of justice, in violation of Articles 81, 118, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 918, 921, and 934. The appellant was sentenced to confinement for life, without eligibility for parole, forfeiture of all pay and allowances, reduction to pay grade E-1, and a

dishonorable discharge. The convening authority approved the sentence adjudged but, pursuant to a pretrial agreement (PTA), suspended the "without eligibility for parole" portion of the sentence until the appellant's discharge from the Navy.

In his initial appearance before this court, the appellant raised four assignments of error, and five supplemental assignments of error.<sup>1</sup> All nine assignments concerned the illegality and/or invalidity, for various reasons, of the PTA provision by which the appellant waived his right to be considered for clemency and parole for a period of 40 years from the date of trial.<sup>2</sup> On remand, the appellant advances three new

---

<sup>1</sup> Assignments of Error (AOE):

I. THE PRETRIAL AGREEMENT VIOLATED RULE FOR COURTS-MARTIAL 705(c) BY DENYING APPELLANT THE POST-TRIAL RIGHT TO SEEK CLEMENCY AND PAROLE.

II. THE PRETRIAL AGREEMENT PROVISION WAIVING CLEMENCY AND PAROLE IS VOIDABLE BECAUSE IT WAS INDUCED UNDER DURESS AND BECAUSE IT WAS UNCONSCIONABLE.

III. THE PRETRIAL AGREEMENT PROVISION WAIVING CLEMENCY AND PAROLE UNCONSTITUTIONALLY INFRINGES ON THE EXECUTIVE POWER OF THE PRESIDENT.

IV. MILITARY COURTS LACK THE JURISDICTION TO ENFORCE A PRETRIAL AGREEMENT PROVISION WAIVING CLEMENCY AND PAROLE BECAUSE SUCH ACTION INVOLVES AN ADMINISTRATION OF THE SENTENCE.

Supplemental AOE's:

I. APPELLANT'S SENTENCE WAS INAPPROPRIATELY SEVERE BECAUSE HE WAS FORCED TO SURRENDER HIS RIGHT TO APPLY FOR CLEMENCY IN THE FUTURE.

II. APPELLANT'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN HE WAS FORCED TO SURRENDER HIS RIGHT TO APPLY FOR CLEMENCY IN THE FUTURE.

III. APPELLANT'S RIGHT TO EQUAL PROTECTION WAS VIOLATED WHEN HE RECEIVED A SENTENCE GROSSLY DISPARATE FROM OTHER OFFENDERS.

IV. APPELLANT'S SURRENDER OF HIS RIGHT TO APPLY FOR CLEMENCY IN THE FUTURE CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE 55, U.C.M.J., AND THE EIGHTH AMENDMENT BECAUSE OTHER OFFENDERS WERE NOT SUBJECT TO THE SAME PUNISHMENT.

V. APPELLANT'S WAIVER OF HIS RIGHT TO SEEK FUTURE CLEMENCY IN HIS PRETRIAL AGREEMENT WAS UNCONSCIONABLE BECAUSE APPELLANT HAD GOOD CHARACTER, A LIFETIME OF PEACEABLE BEHAVIOR AND BECAUSE THE CHARGES AGAINST HIM WERE HIS FIRST CRIMINAL OFFENSE.

The supplemental assignments of error were submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

<sup>2</sup> Both parties refer in their briefs to a post-trial agreement between the appellant and the convening authority reducing the period of waiver from 40 to 37 years. The court notes that this agreement is not included in the record of trial (though a *proposal* for such a deal, signed by the appellant

assignments of error<sup>3</sup> and, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), five supplemental assignments of error.<sup>4</sup> Because our superior court set aside our prior decision and remanded the record for a new Article 66, UCMJ, review, all 17 assignments of error are now before this court.

We have carefully considered the record of trial, the appellant's 17 assignments of error and his briefs in support thereof, the Government's answers, and the appellant's reply of 7 March 2008. We again conclude the appellant's first original assignment of error has merit, and take corrective action in our decretal paragraph. Following our corrective action, we conclude the findings and sentence are correct in law and fact, and that

---

and his counsel, is included as an enclosure to his 23 March 2006 clemency submission). The absence of his agreement, if it does indeed exist, neither renders the record of trial incomplete nor interferes with our ability to conduct post-trial appellate review in this case. Consequently, we decide the case without stopping to order the Government to produce the agreement.

<sup>3</sup> New AOs on remand:

I. WHETHER A PROVISION OF APPELLANT'S PRETRIAL AGREEMENT (PTA) THAT AUTHORIZES THE CONVENING AUTHORITY (CA) TO SUSPEND A PORTION OF HIS SENTENCE UNTIL HE IS "DISCHARGED FROM THE U.S. NAVY" IS FOR AN UNREASONABLE AMOUNT OF TIME WITHIN THE MEANING OF RULE FOR COURTS-MARTIAL 1108(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ED.), AND SHOULD BE VOID FOR INDEFINITENESS.

II. WHETHER APPELLANT'S SUSPENDED SENTENCE WAS IMPROPERLY VACATED BECAUSE HIS ALLEGED MISCONDUCT WAS NOT A MATERIAL BREACH OF THE PTA.

III. WHETHER APPELLANT'S SUSPENDED SENTENCE WAS IMPROPERLY VACATED BECAUSE THE R.C.M. 1109 VACATION HEARING WAS NOT HELD WITHIN A REASONABLE AMOUNT OF TIME.

<sup>4</sup> Supplemental AOs on remand:

I. APPELLANT'S SENTENCE OF LIFE WITHOUT POSSIBILITY OF PAROLE IS INAPPROPRIATELY SEVERE FOR THIS OFFENSE AND THIS OFFENDER.

II. THIS COURT SHOULD REASSESS APPELLANT'S SENTENCE BECAUSE IT IS NOT UNIFORM WITH SENTENCES OF OTHER COURTS-MARTIAL FOR SIMILAR OFFENSES.

III. THE GOVERNMENT COERCED APPELLANT WITH THE THREAT OF CAPITAL PUNISHMENT TO PLEAD GUILTY TO THE OFFENSES AND TO ACCEPT AN UNFAIR PTA.

IV. THE PROVISION OF APPELLANT'S PTA THAT DEFINED "MISCONDUCT" AS ANY ACT OR OMISSION IN VIOLATION OF THE UNIFORM CODE OF MILITARY JUSTICE, WHICH WOULD BE A MATERIAL BREACH OF THE PTA, WAS INVALID AND THE DEFINITION OF "MISCONDUCT" SHOULD HAVE BEEN LIMITED TO VIOLENT OFFENSES.

V. APPELLANT WAS DEPRIVED OF HIS RIGHT TO SPEEDY POST-TRIAL REVIEW WHEN IT TOOK THE CA OVER SEVEN MONTHS TO ACT ON HIS COURT-MARTIAL. APPELLANT WAS PREJUDICED BY THIS DELAY BECAUSE HAD THE CA ACTED IN A TIMELY MANNER, APPELLANT WOULD HAVE BEEN TRANSFERRED FROM OKINAWA PRIOR TO MARCH 2006 AND APPELLANT WOULD NOT HAVE BEEN ABLE TO COMMIT THE ALLEGED MISCONDUCT.

no other error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

## I. FACTUAL AND PROCEDURAL HISTORY

On 2 February 2005, following a prearranged plan, the appellant and two other Sailors lured an unsuspecting fellow Sailor, whom they feared would inform authorities of their on-going course of larceny from military exchanges, to a remote area and brutally attacked him with knives. After initially slicing the victim's neck from behind, the appellant further cut at the victim's neck. In the end, he cut through the victim's carotid artery, jugular vein, esophagus, and windpipe, and nearly severed the victim's head from his body. Additionally, the conspirators repeatedly stabbed the victim in the chest, abdomen and back, resulting in injuries to his heart, lungs, and liver. The victim was alive, conscious and sensate while being stabbed in the body, though he was essentially helpless due to the gaping wounds to his neck and the resultant blood loss. After killing the victim, the conspirators dragged him into a nearby drainage ditch, and then into a tunnel, where they left him.

The appellant was sentenced on 12 September 2005, and initially confined in the Joint Services Brig on Okinawa, Japan. In March 2006, brig authorities discovered the appellant had bribed a guard, paying him \$1,525.00 for preferential treatment. On 20 July 2006, the guard was convicted by a special court-martial and sentenced to a bad-conduct discharge, reduction to pay grade E-1, and six months confinement. He also was confined in the Joint Forces Brig on Okinawa. Shortly thereafter, in mid-August, brig authorities transferred the appellant to the United States Disciplinary Barracks at Fort Leavenworth, Kansas.

By letter dated 29 November 2006, the convening authority referred the matter of the appellant's misconduct in the Okinawa brig to the Garrison Commander, Fort Leavenworth, recommending that he consider vacating the suspension of a portion of the appellant's sentence. Around March 2007, the Garrison Commander referred the matter to Commander, Navy Reserve Forces Command (COMNAVRESFOR), as the officer exercising general court-martial jurisdiction (OEGCMJ) over the appellant. COMNAVRESFOR, in turn, assigned the Commanding Officer, Navy Operational Support Center (NOSC), Kansas City, Missouri, to conduct a hearing pursuant to RULE FOR COURTS-MARTIAL 1109, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).<sup>5</sup> On 1 May 2007, the NOSC Kansas City commanding officer held the hearing, and on 29 June 2007, COMNAVRESFOR vacated the suspension.

---

<sup>5</sup> The appellant was ordered to temporary additional duty (TAD) at NOSC Kansas City for the purposes of giving the commanding officer of that unit special court-martial jurisdiction over the appellant.

As this court had, by then, already affirmed the findings and sentence in the appellant's case,<sup>6</sup> the appellant petitioned the U.S. Court of Appeals for the Armed Forces (CAAF) for a grant of review on three issues related to the vacation of the suspension. CAAF summarily set aside this court's decision, and remanded the case to this court for a new review under Article 66(c), UCMJ, to consider the three issues raised for the first time before that court. As noted above, on remand, this court permitted the appellant to file five supplemental assignments of error pursuant to *Grostefon*.

## II. LIMITS ON CLEMENCY AND PAROLE

In his first original assignment of error, the appellant argues that his PTA violates R.C.M. 705(c) by denying him the post-trial right to seek clemency and parole. Our superior court has recently ruled that PTA provisions depriving an appellant of parole and clemency consideration under generally applicable procedures are unenforceable under R.C.M. 705(c)(1)(B). *United States v. Tate*, 64 M.J. 269, 272 (C.A.A.F. 2007). In light of *Tate*, the provisions of the appellant's PTA that waive his right to be considered for clemency and parole for a period of 40 years from the date of trial are unenforceable.

In paragraph 7 of Part II of the PTA (Appellate Exhibit II), the parties agreed that if any provision of the agreement were found invalid or unenforceable, then the remaining provisions would remain in full force, to the degree they could be enforced not inconsistent with the agreement. In view of the agreement of the parties, and under the facts of this case, we conclude the terms and conditions at issue may be stricken without impairing the balance of the agreement or the plea. We will take appropriate corrective action in our decretal paragraph.<sup>7</sup>

## III. REASONABLE PERIOD OF SUSPENSION

In his first assignment of error on remand, the appellant argues that the provision of this PTA that calls for a portion of his sentence to be suspended "until [he is] discharged from the U.S. Navy" is for an unreasonably long time, in violation of R.C.M. 1108(d). We disagree.

R.C.M. 1108(d) provides that "[s]uspension shall be for a stated period or until the occurrence of an anticipated future event. The period shall not be unreasonably long." R.C.M. 1108(d). The courts of criminal appeals have concluded that suspension for the entire period of one's approved confinement is reasonable. *United States v. Ratliff*, 42 M.J. 797

---

<sup>6</sup> This court's earlier decision was released on 29 March 2007.

<sup>7</sup> Our resolution of the first original AOE renders it unnecessary to decide the remaining eight AOE's alleged in the appellant's initial brief on appeal.

(N.M.Ct.Crim.App. 1995); *United States v. Snodgrass*, 22 M.J. 866, 870 (A.C.M.R. 1986). See also *United States v. Kinney*, 22 M.J. 872, 875 (A.C.M.R. 1986). In this case, the appellant is sentenced to confinement for life. It is entirely reasonable to expect that appellate review of this case will be completed, and the appellant will be discharged from the U.S. Navy, well before he would have been eligible for parole (after 20 years<sup>8</sup>) had the suspension not been vacated.

Nor is our superior court's decision in *Spriggs v. United States*, 40 M.J. 158 (C.M.A. 1994), to the contrary. In that case, an adjudged bad-conduct discharge was suspended until the appellant completed a sex offenders treatment program, which the program director indicated was of indefinite duration, but could take up to 15 years to complete. In judging that period to be unreasonable, the court looked not only to the length of time, but also to the fact the appellant was required to pay for the treatment himself, despite being hampered in his ability to find gainful employment by the fact he had been involuntarily placed in a no-pay status, and not provided a DD-214. The instant case does not present the same unreasonable combination of factors.

The term of the appellant's PTA that calls for a portion of his sentence to be suspended until he is discharged from the U.S. Navy is not, on the facts of this case, unreasonably long, and does not violate R.C.M. 1108(d).

#### IV. MATERIAL BREACH

In his second assignment of error on remand, the appellant contends his misconduct in the Okinawa brig was not a material breach of the PTA, and therefore did not justify the OEGCMJ vacating the suspension. We disagree.

As an initial matter, we note that whether a violation of one's probation must be "material" to justify vacating a suspension is an open question.<sup>9</sup> It is, however, unnecessary to answer that question in order to resolve this case. Even assuming, *arguendo*, that any probation violation must be material, we find the appellant's misconduct constituted a material breach.

"A pretrial agreement is a contract between the accused and the convening authority.... Therefore, 'we look to the basic

---

<sup>8</sup> See Secretary of the Navy Instruction 5815.3J of 12 June 2003 at ¶ 503.a(3).

<sup>9</sup> The relevant Rules for Courts-Martial do not explicitly require that a probation violation be material before a suspension may be vacated. See R.C.M. 705, 1108, and 1109. Nor is the court aware of any on-point decision by either this court or our superior court. *But see United States v. Bulla*, 58 M.J. 715 (C.G.Ct.Crim.App. 2003)(holding R.C.M. 705(c)(2)(D) requires a material breach before either party may be excused from their obligations under a PTA).

principles of contract law when interpreting pretrial agreements.'" *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006)(quoting *United States v. Acevedo*, 50 M.J. 169, 172 (C.A.A.F. 1999)). Because, however, a pretrial agreement is a *constitutional* rather than a *commercial* contract, "'contract principles are outweighed by the Constitution's Due Process Clause protections for an accused.'" *Id.* (quoting *Acevedo*, 50 M.J. at 172).

"Material" means to be "of such a nature that knowledge of the item would affect a person's decision-making; significant; essential." BLACK'S LAW DICTIONARY 998 (8th ed. 2004). In evaluating the materiality of a provision, "we look not only to the terms of the agreement, or contract, but to the accused's understanding of the terms . . . as reflected in the record as a whole." *Lundy*, 63 M.J. at 301 (citing *Gilbert v. Dep't of Justice*, 334 F.3d 1065, 1072 (Fed. Cir. 2003) and *United States v. Green*, 1 M.J. 453, 456 (C.M.A. 1976)). See *United States v. Frazier*, 3 Fed. Appx. 533, 536 (7th Cir. 2001)(to determine if breach of plea agreement is material, court "considers parties' reasonable expectations upon entering the agreement"). As well, it is appropriate to consider "the extent to which the injured party will be deprived of the benefit which he reasonably expected," and "the extent to which the behavior of the party failing to perform . . . comports with standards of good faith and fair dealing." Restatement (Second) of Contracts § 241 (1981).

In this case, the PTA provides that, "should [the appellant] commit any misconduct (i.e. any act or omission in violation of the Uniform Code of Military Justice *which constitutes a material breach of this agreement*)," the convening authority may withdraw from the sentence limitation provisions. Appellate Exhibit I at ¶12 (emphasis added). This language makes reasonably clear the parties considered any violation of the UCMJ to be a material breach. If, however, any doubt remained, the appellant has conceded this language was an "attempt[] to define material breach of [the PTA] as any violation of the UCMJ." Appellant's Brief of 29 Jan 2008 at 8.

The appellant essentially argues that, despite the language of the PTA and the intent of the parties at the time they made the PTA, 'minor' violations of the UCMJ should not be considered material breaches. In other words, he seeks to have the court rewrite the PTA. This argument, however, is unpersuasive. Further, the appellant's misconduct was not minor or immaterial. The appellant, an adjudged prisoner, bribed a brig guard for preferential treatment. His conduct was potentially punishable by a dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years. On the particular facts of this case, the brig guard was actually sentenced to six months confinement and a bad-conduct discharge. It cannot seriously be maintained that such misconduct is minor and inconsequential.

## V. TIMELY VACATION HEARING

In his third assignment of error on remand, the appellant contends the suspension of punishment in his case was improperly vacated because the R.C.M. 1109 hearing was not held within a reasonable time after the misconduct occurred. He argues he was prejudiced because, during the interval between his misconduct and the R.C.M. 1109 hearing, the brig guard he had bribed was placed on appellate leave and disappeared, and was therefore unavailable to testify at the hearing. We disagree.

"Vacation proceedings . . . shall be completed within a reasonable time." R.C.M. 1109(b)(2). Concerning this requirement of timely hearings, this court has previously said,

We understand that elements of procedural due process and public policy considerations prompted such protections. A serviceman should know where he stands and, if he is in disciplinary difficulties, be given notice, opportunity to be heard, access to witnesses to speak or write statements in his behalf, be promptly disciplined and have opportunity to appeal adverse actions. If the Government acts in a dilatory fashion, events fog in witnesses' memories, military witnesses rotate or face release from active duty, and accused are held in suspense.

*United States v. Borneman*, 10 M.J. 663, 666 (N.C.M.R. 1979).

We are satisfied the delay did not deny the appellant procedural due process or violate public policy, was not unreasonably long, and did not prejudice the appellant. First, while indisputable that the guard whom the appellant bribed was not available at the time of the appellant's vacation hearing, his sworn testimony at his own court-martial about the subject matter of the hearing was available. There is absolutely no reason to think he would have testified any differently at the vacation hearing than he did at his own trial. Further, the Government made all reasonable efforts to locate this witness, and the hearing officer properly determined he was unavailable within the meaning of R.C.M. 405(g)(1)(A).<sup>10</sup>

Additionally, while the hearing in this case could have been held with greater alacrity, various periods of the delay are justified. It was completely reasonable to wait until the guard's court-martial was concluded before taking action on the appellant's suspended sentence. Shortly thereafter, for good and adequate independent penological reasons, the appellant was

---

<sup>10</sup> We note the Sixth Amendment right to confrontation does not apply to vacation hearings. See R.C.M. 1109(d)(1)(C) See also *Morrissey v. Brewster*, 408 U.S. 471, 480 (1972); *United States v. Kelley*, 446 F.3d 688, 691 (7th Cir. 2006).

transferred to Fort Leavenworth, removing him from the convening authority's jurisdiction. It then became necessary to identify the appropriate commander to act on the matter, and to make the appropriate arrangements.

Finally, while not dispositive, in evaluating whether the hearing in this case was completed within a reasonable time, we are mindful that Congress has allowed the Government up to five years to criminally prosecute a service member for misconduct of the sort at issue here. Art. 43(b)(1), UCMJ. We think it would be anomalous if the Government were permitted up to five years to bring a criminal prosecution, but required to act with significantly greater dispatch to vacate a suspension and impose an already adjudged sentence.

Because we find that the vacation hearing in this case afforded the appellant due process of law, and that he was not prejudiced by the delay, we conclude the hearing was held within a reasonable time. Accordingly, we hold the suspension of the appellant's sentence was not improperly vacated.

#### VI. REMAINING AOES

We have also considered the remaining five assignments of error, submitted pursuant to *Grostefon*, and find them without merit. We specifically find the sentence to be both relatively uniform and appropriate to this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *United States v. Wacha*, 55 M.J. 266, 268 (C.A.A.F. 2001); *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959).

#### VII. CONCLUSION

Accordingly, the second, third and fourth paragraphs under paragraph 2 of Part II of the Memorandum of Pretrial Agreement between the appellant and the convening authority (AE II) are hereby stricken from the agreement. The balance of the agreement may be enforced.

We affirm the findings and the sentence, as approved by the convening authority.

Senior Judge VINCENT and Judge STOLASZ concur.

For the Court

R.H. TROIDL  
Clerk of Court