

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

**Before
J.F. FELTHAM, J.W. ROLPH, R.G. KELLY
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ANDREW W. SMEAD
STAFF SERGEANT (E-6), U.S. MARINE CORPS**

**NMCCA 200201020
GENERAL COURT-MARTIAL**

Sentence Adjudged: 14 December 2001.
Military Judge: LtCol J.G. Meeks, USMC.
Convening Authority: Commander, 3d MAW, MARFORPAC, San Diego, CA.
Staff Judge Advocate's Recommendation: Col V.A. Ary, USMC.
For Appellant: Maj J.S. Stephens, USMC.
For Appellee: Capt Geoffrey Shows, USMC.

10 January 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

ROLPH, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of one specification of knowingly receiving child pornography transported in interstate commerce in violation of 18 U.S.C. § 2252; two specifications of knowingly possessing computer files containing child pornography, also in violation of 18 U.S.C. § 2252; and committing an indecent act upon a female under the age of 16. All these offenses violated Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. Various additional offenses alleged against the appellant were dismissed "with prejudice" by

the military judge pursuant to the terms of the appellant's pretrial agreement.

The appellant entered unconditional pleas of guilty pursuant to a pretrial agreement. He was sentenced to confinement for 20 years, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence adjudged and, except for the dishonorable discharge, ordered it executed. In accordance with the appellant's pretrial agreement, the CA suspended all confinement in excess of 108 months (approximately 9 years) for a period of 12 months from the date of the CA's action. He also deferred and waived automatic forfeitures on behalf of the appellant's family.

After carefully considering the record of trial, the appellant's three assignments of error,¹ and the briefs submitted by counsel for the appellant and the Government, 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.

Procedural History of the Case

This case was originally tried upon these same charges in December, 2001. The appellant pled guilty pursuant to a pretrial agreement at his original general court-martial to essentially the same charges now before us on review. He was sentenced by a military judge to 24 years confinement, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence adjudged; however, in accordance with the pretrial agreement, he suspended all confinement

¹ I. THE CHARGE OF RAPE OF A CHILD, WITHDRAWN AND DISMISSED "WITH PREJUDICE" AT APPELLANT'S FIRST COURT-MARTIAL, WAS UNFAIRLY REINSTITUTED AT APPELLANT'S REHEARING.

II. CHARGING APPELLANT FOR POSSESSION OF CHILD PORNOGRAPHY UNDER SPECIFICATIONS 2 AND 3 OF CHARGE III WAS AN UNREASONABLE MULTIPLICATION OF CHARGES WITH RECEIPT OF THE SAME PORNOGRAPHY AT THE SAME LOCATION AND DURING THE SAME TIME PERIOD UNDER SPECIFICATION 1 OF CHARGE III.

III. APPELLANT WAS DENIED HIS RIGHT TO TIMELY POST-TRIAL REVIEW OF HIS CASE.

We additionally specified an issue relating to ineffective assistance of counsel which subsequently became moot based upon the concessions of the parties that no ineffective assistance occurred.

greater than 12 years, and deferred and waived automatic forfeitures on behalf of the appellant's family.

In August 2004, we reviewed the appellant's first court-martial and found error materially prejudicial to the appellant when the Government failed to comply with a material term of his pretrial agreement. See *United States v. Smead*, 60 M.J. 755 (N.M.Ct.Crim.App. 2004)[*Smead I*]. Specifically, the appellant's original pretrial agreement required the CA to confine the appellant at the brig located at Marine Corps Air Station, Miramar, CA, so that he could attend a two-year sex offender treatment program.² Though initially assigned to the Miramar brig and scheduled to begin the two-year treatment program in January 2003, the appellant was thereafter transferred (just eight months later) to the U.S. Disciplinary Barracks at Fort Leavenworth, KS. This transfer in December 2002 effectively precluded his opportunity to participate in the two-year sex offender treatment program.

We held that this transfer, and the concomitant inability of the appellant to attend the promised treatment program, constituted a material breach of the appellant's pretrial agreement. *Id.* at 758. We returned the case to the Judge Advocate General for remand to an appropriate CA, who we directed to elect one of the following options:

1. Set aside the findings and sentence and, if appropriate, order a rehearing;
2. Grant specific performance of the original pretrial agreement term by securing the appellant's transfer back to the MCAS Miramar Brig so he could participate in the two-year sex offender treatment program; or

² The relevant pretrial agreement terms from the prior court-martial read as follows:

17. I agree to enroll in and successfully complete the sexual offender treatment program available to me at the facility where I may be confined.

I understand that should I fail to successfully complete this program that I will lose the benefit of the sentencing limitation portion of this agreement.

19. . . . In the event that I am awarded confinement, the Convening Authority agrees to confine me at the MCAS Miramar Base Brig. I understand that the purpose for this is so I can attend the sexual offender rehabilitation class available at the Miramar brig.

22. . . . All the provisions of this Agreement are material.

Appellate Exhibit XIII at 16; *Smead I*, 60 M.J. at 758.

3. Provide alternative relief that was satisfactory to the appellant.

Id. Inexplicably, the government failed to accomplish any of the options directed.³ On 22 June 2005, in a *per curiam* opinion, we set aside the findings and sentence and returned the record of trial to the Judge Advocate General for remand to an appropriate convening authority, who we authorized to conduct a rehearing. *United States v. Smead*, No. 2002201020, unpublished op. (N.M.Ct.Crim.App. 22 Jun 2005)[*Smead II*].⁴

A rehearing was subsequently ordered by the present CA, and the findings and sentence of the appellant's second general court-martial are now before us for Article 66, UCMJ, review.

Improper Referral of Charge Dismissed "With Prejudice"

In his first assignment of error, the appellant claims that the CA erred to his substantial prejudice when he referred a charge alleging that the appellant raped his minor daughter, [CS], in August 2000, in violation of Article 120, UCMJ, to his second general court-martial. See Charge Sheet, Charge II, Specification.

This offense had earlier been referred for trial at the appellant's original general court-martial. However, pursuant to the terms of his original pretrial agreement, the rape charge and Specification were both withdrawn and dismissed "with prejudice" after the appellant successfully entered pleas of guilty to the other offenses of which he was ultimately found guilty.⁵ It appears that after the findings and sentence of the appellant's original court-martial were set aside by us with authorization for a rehearing, the Government elected to simply

³ The record is unclear in explaining what, if any, efforts the Government made to comply with the mandate contained in our original opinion. It is sufficient for this opinion to acknowledge simply that none of the 3 options we directed was ever carried out.

⁴ In so doing, we stated ". . . the convening authority failed to comply with a material term of the pretrial agreement despite our prior remand and specific direction that he remedy this error through specific performance." *Id* at 1.

⁵ A number of the appellant's originally alleged offenses were dismissed "with prejudice" after he successfully pled guilty to the offenses of which he was convicted pursuant to the pretrial agreement entered into at his first court-martial. These included the referenced alleged rape offense; an alleged violation of Article 92, UCMJ (lawful general regulation violation); and three specifications alleging various violations of 18 U.S.C. 2252A as charged under Article 134, UCMJ. See AE XII at 74-76; AE XIII at 15 ¶16.

re-refer all charges originally alleged against the appellant, without regard for the prior dismissals "with prejudice."

At his second general court-martial conducted on various dates in late 2005 and early 2006, the appellant negotiated a new pretrial agreement, which again required the withdrawal, *inter alia*, of the alleged rape offense "with prejudice" after provident pleas of guilty were entered to the other offenses of which he was convicted. See Record at 130. This agreement gave the appellant a far more favorable sentencing cap than he had at his first court-martial. It suspended all confinement in excess of 108 months (approximately 9 years), as opposed to his original agreement, which only suspended confinement in excess of 12 years. Ostensibly, the more favorable agreement terms were in large measure due to the government "taking into consideration the fact that [appellant] had been wronged" by the Government's material breach of the original agreement. Record at 295.

The appellant asserted at his second trial, and now asserts in this appeal, that the "with prejudice" language of the original dismissal precluded the Government from re-referring the rape charge at his second trial, despite our earlier action setting aside the findings and sentence of his first court-martial. Though the appellant negotiated a new pretrial agreement at his second court-martial that again resulted in the rape charge and specification being dismissed "with prejudice," he claims he was nevertheless prejudiced by the presence of this offense on his charge sheet. In a post-trial affidavit submitted in support of this assignment of error, the appellant states:

When my case was remanded for a retrial, I was charged with all of the offenses for which I was originally charged, including a charge of rape of a child that was withdrawn and dismissed with prejudice at my first trial. As this offense carried a possible life sentence, the withdrawal and dismissal of this rejuvenated offense was a major consideration in my decision to enter into in new pretrial agreement with the convening authority. *But for the government's obligation to withdraw and dismiss the rape*

*charge, I do not believe that I would have entered into this pretrial agreement.*⁶

Appellant's Affidavit of 28 Mar 2007 (italics added).

Discussion

"It is fundamental to a knowing and intelligent plea that where an accused pleads guilty in reliance on promises made by the Government in a pretrial agreement, the voluntariness of that 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)). "If the Government does not fulfill its promise, even through inadvertence, the accused 'is entitled to the benefit of any bargain on which his guilty plea was premised.'" *United States v. Smith*, 56 M.J. 271, 272 (C.A.A.F. 2002)(quoting *United States v. Bedania*, 12 M.J. 373, 375 (C.M.A. 1982)). Where there is a mutual misunderstanding regarding a material term of a PTA that results in the accused not receiving the benefit of his bargain, his pleas are considered involuntary, and therefore improvident. *Perron*, 58 M.J. at 82.

In his excellent concurring opinion in *United States v. Lundy*, 63 M.J. 299 (C.A.A.F. 2006)[*Lundy IV*], Chief Judge Effron discusses various remedies which may adequately address the Government's failure to perform its responsibilities under a plea agreement, including:

- 1) Requiring specific performance by the Government, or permitting withdrawal from the agreement and returning the parties to the status quo ante.
- 2) Providing for acceptable alternative relief, with the consent of the appellant (generally via a post-trial agreement).
- 3) Providing an adequate remedy to cure the material breach of the agreement.

Id. at 305; *Smith*, 56 M.J. at 273, 279; *United States v. Sheffield*, 60 M.J. 591, 593 (A.F.Ct.Crim.App. 2004).

In this case, it is clear that the Government failed to provide the appellant with the benefit of that term of his

⁶ We interpret this comment to mean that the appellant may have elected not to enter pleas of guilty at all at his second general court-martial had the rape offense not been re-referred.

pretrial agreement requiring that he be confined at the brig in Miramar, California, for a period long enough for him to successfully complete the two-year sex offender treatment program. It is also clear this was a material term of the pretrial agreement, and that specific performance is no longer an option available to the appellant. See *Smead I*, 60 M.J. at 757. The Government concedes both these points. *Id.*; Answer on Behalf of the Government of 04 May 2007 at 6. Though this failure appears to have been the result of an unfortunate misunderstanding on the part of the Government and not the result of any willful malfeasance,⁷ the result, nevertheless, was that the appellant did not receive the benefit of his bargain. Accordingly, the *Perron* principles became applicable to appellant's case, and his original pleas of guilty were rendered involuntary and thus improvident. *Perron*, 58 M.J. at 82; *United States v. Lundy*, 60 M.J. 52, 57 and 60 (C.A.A.F. 2004)[*Lundy II*]; *Smith*, 56 M.J. at 273; *United States v. Dunbar*, 60 M.J. 748, 751 (Army.Ct.Crim.App. 2004).

Because Staff Sergeant Smead's case involved a material breach of his original pretrial agreement, we apply basic principles of contract law to resolve the issue at hand. See *Lundy IV*, 63 M.J. at 301 (citing *United States v. Acevedo*, 50 M.J. 169, 172 (C.A.A.F. 1999)). We additionally assess whether this contractual matter has impacted upon the appellant's due process rights. *Perron*, 58 M.J. at 85-86 (stating that any remedy for a material breach of a pretrial agreement that upholds the agreement must corroborate the voluntariness of a guilty plea). In this arena, when an appellant establishes that a term or condition of his pretrial agreement was material to his decision to plead guilty, and that the Government breached that term or condition and cannot provide an adequate remedy, his pleas of guilty are considered involuntary, and thus improvident. This is so not because of an insufficient factual basis for the original pleas, but based upon the appellant's failure to receive the benefit of his contractual bargain. *Lundy IV*, 63 M.J. at 302.

Our earlier action of setting aside the findings and sentence in this case had the effect of returning both the Government and the appellant to the status quo ante. See *Perron*, 58 M.J. at 86; *Dunbar* 60 M.J. at 752. "Status quo ante"

⁷ As we explained in our original opinion, the appellant was apparently transferred to the DB at Fort Leavenworth pursuant to regulations that overrode the CA's authority to direct the place of confinement. We held the Government accountable for failing to properly ascertain in advance their legal and regulatory ability to comply with the promise they made to the appellant in his pretrial agreement. *Smead I* at 757.

literally means "the state of things before." BLACK'S LAW DICTIONARY 1410 (6th ed., West 1990). Where findings and sentence have been set aside due to the Government's failure of performance on a material term of the pretrial agreement, the status quo ante is the position the parties were in prior to entry into the original pretrial agreement. Accordingly, we hold that the prior dismissal of charges "with prejudice" under the original pretrial agreement was rendered void *ab initio* by our decision in *Smead I*, leaving the Government free to re-refer all offenses originally alleged against the appellant.

We have carefully considered the argument set forth by the appellant based upon our superior court's holding in *United States v. Cook*, 12 M.J. 448 (C.M.A. 1982). *Cook* confirmed that charges withdrawn "without prejudice" pursuant to a pretrial agreement -- entered in return for acceptable guilty pleas to other offenses -- could later be resurrected and re-referred after pleas of guilty were set aside during appellate review. Chief Judge Everett, the author of the *Cook* decision, appears in dicta to attach significance to the fact that there was nothing in Lance Corporal (LCpl) Cook's record of trial to suggest that the withdrawal of charges in his case was intended to be "with prejudice to any future prosecutorial efforts to rejuvenate it." *Id.* at 454. Because the appellant's case involved an express dismissal "with prejudice" pursuant to terms in a pretrial agreement, he believes the ruling in *Cook* would mandate that those dismissed charges could never be resurrected. We disagree.

First, we are not convinced that the dicta from Chief Judge Everett in the 1982 *Cook* case is an accurate representation of the law in this area as it exists today. Second, the appellant's case is clearly distinguishable from that of LCpl Cook. In *Cook*, the appellant's pleas were rejected on appeal on the basis that they were factually improvident; that is, there was an insufficient factual basis in the record upon which to conclude that the appellant was actually guilty of the offenses he was found guilty of. *Id.* at 450. The reversal was not based upon failure to perform a material term of the appellant's pretrial agreement, and resulting contract breach, as was the case here.

Because we previously held in *Smead I* that the disputed term in the appellant's pretrial agreement was material, and that the Government failed (albeit in good faith) to deliver specific performance of that term (or an agreed upon or adequate alternative), our most appropriate remedy applying contract principles was to set aside the findings and sentence, returning

the parties to the status quo ante.⁸ This is what we did in *Smead II*.

Accordingly, under the unique circumstances existing in this case, the Government was not precluded from re-referring the allegation of rape against the appellant at his second court-martial.

Post-Trial Delay

The appellant asserts that he was denied speedy post-trial processing in his case. In light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006) and *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006), we will assume, without deciding, that the appellant was denied his due process right to speedy post-trial review and appeal. Because we find, based on the totality of the circumstances, that the appellant has not suffered any specific prejudice flowing from this delay, we hold that any due process violation that may have occurred in processing this case was harmless beyond a reasonable doubt.

We have also examined the issue of post-trial delay in this case pursuant to the authority contained in Article 66(c), UCMJ, our superior court's guidance in *Toohey v. United States*, 60 M.J. 100, 101-02 (C.A.A.F. 2004); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); and the factors we articulated in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(*en banc*). Again, after examining the totality of the circumstances, we conclude that the delay in this case has no affect upon the findings and sentence that should be approved.

Unreasonable Multiplication of Charges

Finally, we have considered the appellant's assertion in his second assignment of error alleging an unreasonable multiplication of charges. Despite the Government's concession on this issue, we find this assignment of error to be without merit, *see United States v. Madigan*, 54 M.J. 518, 521 (N.M.Ct.Crim.App. 2000), and will not discuss it further. *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

⁸ It is significant to our decision that the Government's breach in this case occurred in good faith. Had the failure of performance resulted from bad faith, the appellant's due process rights would be clearly implicated and our ruling would no doubt be altered accordingly.

Conclusion

The findings and the approved sentence are affirmed.

Senior Judge FELTHAM and Judge Kelly concur.

For the Court

R.H. TROIDL
Clerk of Court