

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

**Before
J.A. MAKSYM, E.E. GEISER, J.R. PERLAK
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JOHN D. EDWARDS
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201000215
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 1 February 2010.

Military Judge: Col John R. Ewers, Jr., USMC.

Convening Authority: Commanding Officer, 8th Marine Corps
District, Fort Worth, TX.

Staff Judge Advocate's Recommendation: LtCol M.B.
Richardson, USMC.

For Appellant: CAPT Frederic E. Matthews, JAGC, USN.

For Appellee: CAPT Jerry J. Bishop, JAGC, USN; LT Brian C.
Burgtorf, JAGC, USN.

29 June 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of five orders violations involving general orders, regulations, and other lawful orders, two false official statements, and adultery, in violation of Articles 92, 107, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907, and 934. The convening authority (CA) approved the appellant's sentence of confinement for 7 months, reduction to pay grade E-1, and a bad-conduct discharge. Pursuant to a pretrial agreement, the CA agreed to suspend all confinement in excess of 4 months for the period of confinement

served, plus 12 months. His action was not at variance with that agreement. However, for reasons developed below, corrective action is taken in our decretal paragraph.

Background

The facts are not in dispute. The appellant, then a 25-year-old, married sergeant, was assigned duties as a canvassing recruiter in the Houston area. He entered into an improper sexual relationship with AH, a 16-year-old high school sophomore, whom he met while addressing her band class. AH, being of an age ineligible for inclusion in the pool of active prospective recruits, maintained contact with the recruiting station and attended various pool functions as a prospective recruit applicant. Under these pretenses, the appellant carried on a nonprofessional, sexual relationship with AH until it so consumed AH and her family that it required command investigation and action.

Error in the Convening Authority's Action

In his assignment of error, the appellant avers that the CA erred in suspending confinement which the appellant had already served. In his prayer for relief, the appellant request that this court affirm only so much of the sentence of confinement that was served and disapprove the remaining suspended portion. The Government does not dispute the error and concurs in the remedy.

As summarized above, the CA took action consistent with the terms of the pretrial agreement. However, the record indicates that the appellant stood trial with 126 days already served in pretrial confinement. As a practical matter, the appellant could not fully receive the benefit of his bargain with the CA, having already exceeded his share of that bargain by 6 days and then entering the requisite provident pleas. We specifically note that, per Appellate Exhibits I and II, the agreement with the CA, signed by the trial defense counsel and the appellant in October 2009, was concluded with the CA's signature on 21 December 2009. The appellant stood trial, (4-month agreement in-hand), over 40 days hence, on the first of February, 2010. The record does not reveal additional negotiations or extraordinary docketing considerations involving an appellant, who had already served nearly 3 months in pretrial confinement, which serve to explain why this trial was held on day 126 of his pretrial confinement.

At trial, upon comparison of his adjudged sentence with AE II, the maximum sentence appendix, the military judge immediately noted that the accrued pretrial confinement exceeded the limitation on confinement agreed to by the CA in the pretrial agreement. Record at 96. Upon inquiry by the military judge, counsel for both sides, and the appellant himself, each stated their concurrence in an understanding that the bargain struck had been for time served. *Id.* at 97. Counsel specifically agreed,

absent any amplification, with the military judge's interpretation of the agreement as a time-served bargain. *Id.* This court cannot reconcile the conversation above with the extant documents, concluded and approved by the CA 43 days earlier, containing a clear confinement limitation of "4 months," AE II. If "time-served" had indeed been the understanding of the parties upon entering the agreement, then either party countenancing the interceding 43 days becomes even less tolerable.¹

An appellant 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).

While properly crediting the appellant with the 126 days he served, the CA, in taking his action, states, "confinement in excess of four months is suspended for the period of confinement served plus twelve months. . . ." While ostensibly compliant with the pretrial agreement, this action operates to the prejudice of the appellant in two ways. First, it adds the six days he unnecessarily served to the overall period pertaining to the suspension. Second, it then fails to credit the six days unnecessarily served, against the remaining three months suspended. Effectively, the appellant faces the prospect of again serving 6 days he has already served, for a window of time incongruously rendered 6 days longer, due to the fact that he had already served them.

Thus, while it is clear from the trial transcript and pleadings before this court that the appellant still wishes to be bound by the pretrial agreement, and we do not question the providency of his pleas following the time-served colloquy, we find the CA has doubly erred by failing to enforce at least so much of its remaining terms as are necessary to fully account for the appellant's additional time served and to prevent further prejudice. Valuable consideration remains, relating to the suspended portion of the sentence. When a CA fails to take action required by a pretrial agreement, this court has authority to enforce the agreement. *United States v. Cox*, 46 C.M.R. 69, 72 (C.M.A. 1972). Additionally, given the state of the appellate pleadings, the way forward is clear.

Conclusion

The findings are affirmed. Only so much of the approved sentence as relates to reduction, punitive discharge, and 126 days of confinement is affirmed. The portion of the sentence

¹ Short of death, the greatest criminal sanction available under the Uniform Code of Military Justice is the loss of personal liberty through confinement. Advocacy, from both sides of the bar, must be conducted with scrupulous awareness of this fact.

relating to confinement in excess of the 126 days served is disapproved. Following this action, no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

For the Court

R.H. TROIDL
Clerk of Court

Senior Judge GEISER participated in the decision of this case prior to commencing terminal leave.