

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

**Before
C.L. REISMEIER, R.E. BEAL, D.O. HARRIS
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DANIEL W. HATCHER
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 200900572
GENERAL COURT-MARTIAL**

Sentence Adjudged: 1 April 2009.

Military Judge: LtCol D.S. Oliver, USMC.

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

Staff Judge Advocate's Recommendation: Col J.R. Woodworth
USMC.

For Appellant: LCDR E. Taylor George, JAGC, USN.

For Appellee: Capt Michael W. Aniton, USMC.

21 December 2010

OPINION OF THE COURT

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

BEAL, Judge:

Pursuant to his pleas, a general court-martial composed of a military judge alone convicted the appellant of possessing child pornography in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The military judge sentenced the appellant to confinement for 18 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge.¹ The convening authority (CA) approved the sentence

¹ In addition to the adjudged forfeitures, and as a result of the adjudged 18 months of confinement and punitive discharge, the appellant's pay and allowances were also forfeited automatically pursuant to Article 58b(a)(1), UCMJ.

as adjudged. Pursuant to a pretrial agreement (PTA) and as an act of clemency, the CA suspended confinement in excess of 11 months. Pursuant to the PTA, the CA suspended adjudged forfeitures, and waived automatic forfeitures for a period of six months from the date of his action, provided the appellant established and maintained a dependent's allotment in the total amount of the waived forfeitures.

The appellant assigns one error: that the Government's delay in deferring automatic forfeitures constituted a breach of a material term in the agreement rendering the guilty plea involuntary. We hold that the timing of the deferral was not a material term to the agreement, and that the Government did not breach the PTA because the appellant failed to satisfy his obligations under the PTA. Accordingly, we find no error materially prejudicial to the appellant's substantial rights and affirm. Art. 59(a), UCMJ.

I. Background

On 26 February 2009, the appellant and his attorney signed a PTA which was accepted by the CA on 6 March 2009. The PTA indicated that the appellant understood that all forfeitures would go into effect 14 days after the sentence was adjudged or upon the CA's action, whichever event first occurred. The agreement specifically addressed the deferral and waiver of automatic forfeitures as follows:

Automatic forfeitures will be deferred *provided* that the accused establishes and maintains a dependent's allotment in the total amount of the deferred forfeiture amount *during the entire period of the deferment*. This Agreement constitutes the accused's request for, and the convening authority's approval of, deferment of automatic forfeitures pursuant to Article 58b(a)(1), UCMJ. The period of deferment will run from the date automatic forfeitures would otherwise become effective under Article 58b(a)(1), UCMJ, until the date the convening authority acts on the sentence. Further, this agreement constitutes the accused's request for, and the convening authority's approval of, waiver of automatic forfeitures. The period of waiver will run from the date the convening authority takes action on the sentence for six months.

Appellate Exhibit II (emphasis added). The appellant was not subject to pretrial restraint, but was designated a liberty risk by the command and was restricted to Camp Foster, Okinawa. Record at 56, 72-73; Defense Exhibits E and H.

On 1 April 2009, 34 days after signing the PTA, the appellant pled guilty to a single specification of possessing child pornography. The military judge correctly explained the

forfeiture provisions in detail, specifically advising the appellant that automatic forfeitures would take effect 14 days after trial. Record at 88. Furthermore, the military judge twice emphasized the appellant's requirement pursuant to the agreement to establish an allotment to his ex-wife in order to take advantage of the automatic forfeiture protection provision of the agreement. *Id.* at 88-89.

On 8 May 2009, 23 days after automatic forfeitures took effect, the appellant signed an allotment request naming his son as the "allotee." Government Motion to Attach of 19 Feb 2009.² Within the request, the appellant provided the routing transit number (RTN) for a bank that did not match the name of the institution listed on the allotment request. *Id.* The appellant's defense counsel submitted an initial clemency request on 5 June 2009, 51 days after automatic forfeitures went into effect and 28 days after the appellant signed the allotment request, failing to note nonpayment of the forfeitures. On 21 June 2009, the defective allotment request was returned to a member of the appellant's chain of command for corrective action. Government Motion to Attach.

The staff judge advocate (SJA) recommended the CA approve the adjudged sentence, subject to the limitations provided in the PTA. SJA's Recommendation (SJAR) of 6 Jul 2009. On 26 July 2009, 102 days after automatic forfeitures took effect and 79 days after the appellant signed an allotment request, the appellant's defense counsel claimed for the first time that the Government failed to comply with the forfeiture provisions of the PTA Defense Response to SJAR. The SJA recommended, as a matter of clemency, suspending an additional month of confinement. Addendum to SJAR of 3 Aug 2009. Furthermore, the SJA recommended "all automatic forfeitures be waived for six months from the date of your action provided that Cpl Hatcher establishes and maintains a dependent's allotment in the total amount of the waived forfeitures." *Id.*

By 27 July 2009, payment of the deferred forfeitures was attempted, but the receiving account had been closed due to inactivity. Government Motion to Attach. New account information was received on 16 August 2009, finally resulting in payment on behalf of the appellant's son on 24 August 2009. *Id.*

Further facts necessary to resolve the assigned error are included below.

² Included among the several documents contained in the motion to attach were the appellant's allotment request of 8 May 2009 and an undated affidavit signed by a person involved in the administrative processing of the appellant's allotment request. The affidavit includes the names of several individuals whose roles in these proceedings are not explained anywhere in the record. The court assumes that these individuals were either on staff at the brig where the appellant was housed, or from the appellant's command.

II. Discussion

When an accused pleads guilty pursuant to a pretrial agreement, the voluntariness of his plea hinges upon the Government's performance of those promises made in order to secure the plea of guilty from the accused. See *United States v. Perron*, 58 M.J. 78, 82 (C.A.A.F. 2003). The Court of Appeals for the Armed Forces (CAAF) has held that, where the issue of pay is a material term, a plea may be rendered improvident where the Government fails to provide the requisite pay. See *United States v. Smith*, 56 M.J. 271, 279 (C.A.A.F. 2002); *United States v. Hardcastle*, 53 M.J. 299, 302 (C.A.A.F. 2000); *United States v. Williams*, 53 M.J. 293, 295 (C.A.A.F. 2000); see also *Santobello v. New York*, 404 U.S. 257 (1971). In some cases, delayed payment in full is an insufficient remedy because the timing of the payment may itself be a material term of the agreement. See *Perron*, 58 M.J. at 85. Timing of payment is not material in every case, however. *United States v. Lundy*, 63 M.J. 299, 303 (C.A.A.F. 2006). The court must evaluate the entire record to determine whether the timing of payment was material to the appellant's decision to plead guilty. *Id.* (citing *Perron*, 58 M.J. at 85). The appellant has the burden of establishing that the term or condition of the agreement was material to his decision to plead guilty, and that the Government failed to comply with that term or condition. *Id.* at 302.

The interpretation of a PTA is a question of law, reviewed *de novo*. *United States v. Acevedo*, 50 M.J. 169, 172 (C.A.A.F. 1999). Whether the Government has complied with the material terms of an agreement presents a mixed question of law and fact. *Lundy*, 63 M.J. at 301. We find that the Government complied with all of its obligations arising under the PTA; furthermore, even if the delayed payment of deferred forfeitures constituted a failure to comply with a term of the PTA, we find the timing of payment was not material to the appellant's decision to plead guilty.

1. Materiality of the Timing of Deferred Automatic Forfeitures to the Appellant's Decision to Plead Guilty

The PTA specifies that the period of deferment was to run "from the date automatic forfeitures would otherwise become effective under Article 58b(a)(1), UCMJ," until the date the CA acted on the sentence. Forfeitures take effect 14 days after the date on which the sentence is adjudged. Here forfeitures took effect on 15 April 2009.

The agreement specified that deferral of automatic forfeitures was contingent upon the appellant establishing and maintaining a dependent's allotment for the full forfeiture amount "during the entire period of deferment." Since the deferment started on 15 April 2009 and ran until the CA acted, the appellant was required to establish the allotment by 15 April 2009 to satisfy his obligation under the agreement.

The agreement set forth a condition precedent to fulfill before the CA was obliged to defer automatic forfeitures: a dependent's allotment through the "entire period of deferment." The appellant failed to satisfy this condition by failing to establish the dependent's allotment before 15 April 2009.

The appellant's failure to meet his obligation prevented the Government's obligations from ever arising. However, notwithstanding the appellant's failure to comply with his obligations, the Government attempted to pay the deferred forfeitures once the appellant attempted to establish the allotment.³

In determining whether the timing of the deferral was material, we look to the record as a whole. *Lundy*, 63 M.J. at 303. The appellant signed the PTA on 26 February 2009, 34 days before he pled guilty, a period during which he was not subject to pretrial restraint. Nonetheless, the appellant failed to sign a request for an allotment until 18 May 2009, 71 days after signing the PTA, 36 days after sentencing, and 23 days after the deferment period commenced. While we are mindful that the nature of incarcerated life may complicate some common everyday tasks the appellant's failure to establish this pay allotment during the 34 days preceding trial compels the conclusion that the timing of the deferral was not material to his decision to plead guilty. This conclusion is further buttressed by the appellant's failure to complain in his first clemency request, 5 June 2009, about the delay in the deferral of automatic forfeitures.

2. The Government's Performance on the Agreement to Defer Automatic Forfeitures

On 31 July 2009, the Government attempted to pay \$3,929.64. This attempt failed because the designated account had closed due to inactivity resulting from the delay caused by the appellant's inaccurate and delayed allotment request. On 24 August 2009, this same sum was successfully transferred after the correct routing and account numbers were provided to DFAS. Notwithstanding the appellant's failure to satisfy the conditions required for the deferral of automatic forfeitures, the Government deferred those funds. Accordingly, we find that the Government complied with the terms of the PTA.

3. No Prejudice

Even if we had found Government noncompliance with a material term of the PTA, which we do not, we would still deny relief. "When the issue on appeal involves delayed timing of

³ The better practice would be to include language in the pretrial agreement that clearly states the parties' intentions. If the parties actually intended that the forfeitures be paid during the pendency of an established allotment regardless of the inception date of the allotment, the agreement should so state.

performance by the government, the question of whether belated performance constitutes an adequate remedy must be assessed on a case-by-case basis." *Lundy*, 63 M.J. at 305 (Effron, J., concurring in part and in the result). The appellant has received the benefit of his bargain in full, and we have no specific facts before us suggesting that he suffered any prejudice by the delay in receiving that payment. On this record, we hold that the delayed performance was sufficient as a remedy for any breach by the Government. Notwithstanding the evidence of the appellant's financial distress that was admitted for the purposes of presentencing, the appellant himself was satisfied to permit forfeitures to take effect well before he took any action to forestall them. Having caused the delay in the first instance, he cannot now claim prejudice by the delay.

III. Conclusion

The findings and sentence, as approved by the convening authority below, are affirmed.

Chief Judge REISMEIER concurs.

HARRIS, J. (concurring in part and in the result):

I agree with the lead opinion's legal analysis and its ultimate conclusion that the appellant suffered no prejudice due to the delayed payments to his dependent child. However, I must respectfully disagree with Part II(1) of that opinion because I would hold that the timing of payment was a material term of the agreement.

At trial, the appellant's case in extenuation and mitigation focused extensively on his financial difficulties, particularly his ongoing child support obligations. See Defense Exhibits C, D, E, J, N and O. Trial defense counsel likewise devoted a significant portion of his argument to describing the appellant's difficulties with making child support payments, particularly in light of some military pay issues that compounded that problem. Record at 70-72, 80. At the time of trial, the appellant's ex-wife had already brought an action in Florida state court to enforce the child support order from the couple's divorce decree, under which the appellant apparently agreed to pay considerably more than the standard child support schedule would have required. *Id.* at 70, 80; DEs J and O. The appellant had filed a petition with the state court to have his child support obligation reduced. DE C. In his response to the Staff Judge Advocate's Recommendation, the trial defense counsel indicated that "legal action was initiated against [the appellant] for failure to meet the child support payments which the deferred pay was designed to address." Detailed Defense Counsel ltr of 26 Jul 2009.

There is little question that by the time of trial the appellant's finances were in complete disarray, and his child support obligations were a major reason why. Child support is

not a typical civil judgment; rather, nonpayment of that particular obligation also poses the threat of jail time. See generally *Gregory v. Rice*, 727 So.2d 251 (Fla. 1999). Based upon the record as a whole, I would find that prompt payment—not just payment—was clearly anticipated by the parties and was a material term of the pretrial agreement. Accordingly, I cannot join Part II(1) of the lead opinion.

I do agree that the appellant falls short of meeting his burden of showing that the Government failed to comply with this term, particularly in light of his own failure to follow through with his obligations under the agreement. But I wish to point out that, in my view, that issue is a closer call than the lead opinion might indicate. The Government claims that “any delay was the fault of Appellant[.]” Government Brief of 19 Feb 2010 at 10. That broad statement is not supported by the record. I do not believe that the lead opinion was intended to be, nor should it be read as, an endorsement of the Government’s processing in this particular case. The Government apparently did nothing to process the allotment during the ensuing six weeks after the appellant completed the necessary form. Affidavit of Jacquelyn S. Jackson. Moreover, Ms. Jackson noted the name/address discrepancy on the allotment form on 25 June 2009, but it took another entire month before that relatively minor error was corrected. The timeline does not indicate who Lance Corporal Sauls is, or when *the appellant* was notified of the discrepancy. I find nothing in the Motion to Attach explaining these significant periods of delay. In other words, there was plenty of blame to go around in this case.

Even though I would find the timing of payment was a material term of the pretrial agreement, I would still deny relief. Absent some showing of specific prejudice to the appellant resulting from the delay, any breach of the agreement was harmless error. Art. 59(a), UCMJ. For the reasons set forth in Parts II(2) and II(3) of the lead opinion, I join in holding that the delayed performance was a sufficient remedy on the specific facts of this case.

For the Court

R.H. TROIDL
Clerk of Court