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

Before
R.E. VINCENT, E.C. PRICE, J.R. PERLAK
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ANTHONY M. MCFARLIN II
SEAMAN (E-3), U.S. NAVY

NMCCA 200900541
SPECIAL COURT-MARTIAL

Sentence Adjudged: 18 June 2009.
Military Judge: CDR Tierney Carlos, JAGC, USN.
Convening Authority: Commanding Officer, USS ENTERPRISE (CVN 65).
Staff Judge Advocate's Recommendation: LCDR M.A. Lindsey, JAGC, USN.
For Appellant: CAPT Salvador Dominguez, JAGC, USN.
For Appellee: Mr. Brian Keller, Esq.

12 January 2010

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.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 unauthorized absence, escape from custody, making a false official statement, three larceny offenses, and breaking restriction, in violation of Articles 86, 95, 107, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 895, 921, and 934. The convening authority (CA) approved the appellant's sentence of confinement for 180 days, reduction to pay grade E-1, and a bad-conduct discharge. Pursuant to a pretrial agreement, the convening authority agreed to suspend all confinement in excess of 120 days for the period of confinement served, plus 12 months, to be

remitted without further action unless sooner vacated. His action was at variance with that agreement.

This case was submitted without assignment of error.

The appellant was arraigned on 6 May 2009 and stood trial on 18 June 2009. With pretrial confinement credit of 93 days and an additional 30 days of credit ordered by the military judge, as of the 18 June date the appellant had accumulated 123 days of confinement credit to be applied to the adjudged sentence. With a 120 day limitation in the pretrial agreement, the appellant had completed the confinement portion of his sentence as of the date of trial.

An accused 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).

The CA, in taking his action, suspended confinement in excess of 120 days, ". . . for twelve (12) months from the date of this action . . . ." This is inconsistent with the terms of the pretrial agreement as detailed above and, by virtue of the appellant having completed the confinement portion of his sentence as of the date of trial, operated to the prejudice of the appellant by effectively extending the period of suspension an additional three and a half months.

Thus, the CA erred by failing to enforce the terms of the pretrial agreement. 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). We take corrective action in our decretal paragraph.

The findings and sentence are affirmed. The supplemental court-martial order shall indicate that the period of suspension runs for twelve months from the end of the period of confinement served. Following this correction, 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