

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

**Before
F.D. MITCHELL, J.A. MAKSYM, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MICHAEL T. SIMMONS
CULINARY SPECIALIST FIRST CLASS (E-6), U.S. NAVY**

**NMCCA 200700779
GENERAL COURT-MARTIAL**

Sentence Adjudged: 20 June 2007.

Military Judge: LtCol Paul McConnell, USMC.

Convening Authority: Commander, Navy Region Mid-Atlantic, Norfolk, VA.

Staff Judge Advocate's Recommendation: CDR T. Riker, JAGC, USN (21 Aug 07 and 22 Apr 08); CDR K.J. Golden, JAGC, USN (21 May 09).

For Appellant: LT D.J. Ambrose, JAGC, USN; LT Ryan Santicola, JAGC, USN.

For Appellee: LCDR Sergio Sarkany, JAGC, USN; LT D.J. Kim, JAGC, USN.

11 March 2010

OPINION OF THE COURT

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

MITCHELL, Senior Judge:

Pursuant to his pleas of guilty, a military judge sitting as a general court-martial convicted the appellant of one specification of sodomy, on divers occasions, upon a child under the age of 12; two specifications of indecent acts upon a child, on divers occasions; and the taking of indecent liberties with a child, on divers occasions, in violation of Articles 125 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925 and 934. The appellant was sentenced to 25 years confinement, reduction to pay

grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. In his most recent action, the convening authority (CA) approved the sentence as adjudged, but pursuant to a pretrial agreement, suspended all confinement in excess of six years.

This is the third time this case has been before this court as a result of post-trial processing errors. The new post-trial processing has rendered moot two of the appellant's four original assignments of error.¹ We note, however, that the corrected CA's action failed to disapprove adjudged forfeitures in accordance with the provisions of the pretrial agreement. When a convening authority fails to take action required by the pretrial agreement, the service appellate court has authority to enforce the agreement. See *United States v. Cox*, 46 C.M.R. 69, 72 (C.M.A. 1972). We will take corrective action in our decretal paragraph.

Including the appellant's additional assignment of error, there remain three assignments of error before this court: first, that the offenses of sodomy and indecent acts are multiplicitous; second, that the appellant's counsel were ineffective for failing to raise a suppression motion with respect to a video-taped confession and for failing to elicit testimony from the appellant's wife during sentencing; and third, that the appellant has not received the benefit of his pretrial agreement which requires waiver of automatic forfeitures in favor of his dependents.²

After carefully considering the record of trial, the appellant's remaining assignments of error, the Government's answer, and the appellant's reply, including the affidavits of the appellant and his former trial defense counsel, and following the corrective action discussed above, we conclude the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Multiplicity of Sodomy and Indecent Acts

In his first assignment of error, the appellant contends there was insufficient evidence elicited by the military judge during the providence inquiry to support his findings of guilty to the specifications of Charge II. More specifically, the appellant asserts that there is confusion in the charging and the facts based on the range of dates alleged, which overlap as to some specifications, and because of the appellant's description of his stepdaughter's different ages at the times of his various

¹ Incorrect summary of charges in the prior SJAR; and ineffective assistance of counsel in failing to contact the appellant prior to waiving submission of clemency matters.

² After receiving the record back with a new staff judge advocate's recommendation and CA's Action, the appellant alleges this additional assignment of error.

crimes upon her. Appellant's Brief of 10 Dec 2007 at 3. We disagree.

Having carefully reviewed the appellant's extensive stipulation of fact and his testimony, we find no substantial basis in law or in fact to question his pleas. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

Further, any multiplicity issue implicated by the assigned error was forfeited by the appellant's failure to object at trial, and his entry of an unconditional guilty plea. Under such circumstances, the appellant is entitled to no relief in the absence of plain error. *United States v. Britton*, 47 M.J. 195, 198 (C.A.A.F. 1997). Plain error results only when "the offenses 'could be seen as facially duplicative, that is, factually the same.'" *United States v. Ramsey*, 52 M.J. 322, 324 (C.A.A.F. 2000) (quoting *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997)). The record reflects that the Government was faced with serial offenses over a two-year period, and logically charged the offenses by act, rather than by date, alleging each of the following criminal acts was committed more than once during the time period: sodomy; indecent acts by kissing his stepdaughter's breasts; indecent acts by kissing her vagina; and indecent liberties by exposing his penis and having her touch it at times separate from the sodomy. We find these offenses to be separate acts and not facially duplicative.

In addition, under the circumstances of this case, where the specifications were aimed at distinctly separate criminal acts, the separate specifications do not misrepresent or exaggerate the appellant's criminality, and, where no suggestion exists of prosecutorial overreaching, we find no unreasonable multiplication of charges. See *United States v. Quiroz*, 55 M.J. 334, 338-39 (C.A.A.F. 2001).

Ineffective Assistance of Counsel

In his second assignment of error, the appellant complains that his counsel were ineffective for failing to properly advise him regarding the viability of a motion to suppress his video-taped confession, and because they failed to call his wife as a witness at the sentencing hearing.

We review ineffective assistance of counsel claims *de novo*. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005). In doing so, we analyze such claims under the framework established in *Strickland v. Washington*, 466 U.S. 668 (1984). Under this framework, the appellant has the burden of demonstrating that his counsel was deficient. *Id.* at 687. To meet the deficiency prong, the appellant must show his defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* In doing so, the appellant "must surmount a very high hurdle." *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998) (quoting *United*

States v. Moulton, 47 M.J. 227, 229 (C.A.A.F. 1997)). This is because it is strongly presumed that counsel are competent in the performance of their representational duties. *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000).

The *Strickland* two-part test also applies to sentencing hearings. *Id.* Trial defense counsel may be ineffective at the sentencing phase "when counsel either 'fails to investigate adequately the possibility of evidence that would be of value to the accused in presenting a case in extenuation and mitigation or, having discovered such evidence, neglects to introduce that evidence before the court-martial.'" *Id.* (quoting *United States v. Boone*, 49 M.J. 187, 196 (C.A.A.F. 1998)). However, as a general matter, we will not second-guess the strategic or tactical decisions made at trial by defense counsel. *United States v. Paxton*, 64 M.J. 484, 489 (C.A.A.F. 2007).

Having reviewed the record and the affidavits of the appellant, his trial defense counsel (TDC) and his individual military counsel (IMC), we conclude, consistent with the principles announced in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), that we can resolve the appellant's claim without directing a *DuBay* hearing.³ The first point of contention by the appellant is that he provided the name of his wife to his counsel, yet they did not present her as a witness during sentencing. These basic facts are conceded by the affidavits of counsel. As a result, there is no material fact in dispute, and we may resolve the legal issue. *Id.*

Counsel explain that they concluded there was a significant risk of damaging testimony on cross-examination in this case, if the mother of the child victim testified, particularly because she was expected to testify that she wanted the appellant, by then a convicted child-sex offender, to return to the home in which the child victim lived. In counsel's assessment, the risk of negative testimony out-weighed any benefit of positive testimony on direct examination. Affidavit of 14 Oct 2008 at 1-2. We recognize counsel's concern as legitimate in a case of this nature, and we conclude that declining to call the mother of the child-victim falls within the bounds of reasonable tactical judgment in this case.⁴

The appellant also alleges that his counsel were ineffective because they indicated "there was no way" to suppress his video-taped confession, despite the fact that he was deprived of food, water and medication for bi-polar disorder over a five-hour interrogation. Appellant's Declaration of 6 Dec 2007 at 1. The affidavits of the TDC and the IMC indicate that the appellant's over-riding concern in preparing for trial was that he did not want his step-daughter to be further traumatized by having to

³ *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

⁴ However, we caution that failing to interview potential witnesses provided by a client generally falls below the level of professional performance to be expected of an attorney preparing for trial.

testify in court. The TDC admitted to having told the appellant "there was no way" to suppress his confession and still protect the victim from having to testify at trial. This, his counsel relate, was unacceptable to the appellant. The appellant's brief affidavit provides no specific facts regarding the conversation of which he complains, nor has he contradicted the statements of counsel regarding the context of the limited quote that all affiants concede was made.

Furthermore, the record of trial indicates that trial defense counsel advised the military judge that there were potential motions regarding the admissibility of the appellant's statement. The military judge specifically asked the appellant if he understood that, pursuant to the pretrial agreement, he was waiving these motions, and received the appellant's affirmative acknowledgement that he understood he had the right to raise these motions, but that it was in his best interest to waive them. Record at 56-57. The appellant also affirmatively assured the military judge, under oath, that he was satisfied with his counsel and believed their advice was in his best interest. At no time did he express any reservation about waiving what was clearly described as a confession-related motion. *Id.* at 59. On appeal, the appellant has not explained or otherwise reconciled his statements under oath with his current complaint. This record as a whole compellingly demonstrates the improbability of the limited fact now asserted by the appellant on appeal, and we conclude he is entitled to no relief.

Failure to Comply with the Pretrial Agreement

In his final assignment of error, the appellant avers that he did not receive the full benefit of his pretrial agreement. Specifically, he contends that his dependent spouse did not receive the waived automatic forfeitures that he negotiated as part of the pretrial agreement. Citing *United States v. Perron*, 58 M.J. 78 (C.A.A.F. 2003), the appellant further alleges that because he did not get the benefit of his bargain, his pleas should be rendered improvident. Because the allotment was started late (July 09) and his spouse only recently started receiving the payments, the appellant requests that this court "provide an additional remedy by [reducing] Appellant's approved sentence." Appellant's Response to Court Order of 26 Jan 2010 at 2.

The interpretation of a pretrial agreement is a question of law that we review *de novo*. *United States v. Acevedo*, 50 M.J. 169, 172 (C.A.A.F. 1999) (citations omitted). The question as to "[w]hether the government has complied with the material terms and conditions of an agreement presents a mixed question of law and fact." *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006) (citations omitted).

It is firmly rooted in military jurisprudence that where an accused negotiates a pretrial agreement in exchange for his pleas of guilty and then does not reap the benefit of a material term of the agreement, his guilty plea may be rendered improvident. *Perron*, 58 M.J. at 83 (citing *United States v. Hardcastle*, 53 M.J. 299, 302 (C.A.A.F. 2000)). "When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *United States v. Smith*, 56 M.J. 271, 272 (C.A.A.F. 2002) (quoting *Santobello v. New York*, 404 U.S. 257, 262 (1971)). The remedies for the failure of the Government to fulfill the promises contained in a pretrial agreement are generally specific performance or withdrawal of the plea. *Perron*, 58 M.J. at 84. "In an appeal that involves a misunderstanding or nonperformance by the Government, the critical issue is whether the misunderstanding or nonperformance relates to 'the material terms of the agreement.'" *Smith*, 56 M.J. at 273 (quoting RULE FOR COURTS-MARTIAL 910(h)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.)). In order to prevail on this assignment of error and thereby invalidating his guilty pleas, the appellant must show: 1) the presence of a term or condition of the pretrial agreement was material to his pleading guilty; and 2) the Government has failed to comply with that term or condition. *Lundy*, 63 M.J. at 302.

There is little doubt the negotiated waiver of automatic forfeitures was a term of the pretrial agreement that was material to the appellant's decision to plead guilty. With regards to the first prong of the test, we find in favor of the appellant. The appellant, however, has failed to satisfy the second prong of the test, i.e., he has not demonstrated that the Government failed to comply with that term of the agreement. To the contrary, the Government has consistently demonstrated its intent to comply with its obligation under this term of the agreement once the appellant satisfied his own obligation.

The applicable portion of the appellant's pretrial agreement required him to initiate an allotment for his dependent spouse as a condition precedent to the Government's deferral and waiver of automatic forfeitures.⁵ The appellant was sentenced on 20 June 2007 but he did not start the allotment until July 2009, more than two years after automatic forfeitures went into effect and long after even the most recent CA's action.

The appellant's spouse received the first allotment in August 2009. The allotment was automatically terminated in September 2009 because the appellant was, by then, beyond his end of active obligated service. The Government has submitted proof,

⁵ Part II, paragraph 3a of the PTA provides that "[a]utomatic forfeitures will be deferred provided that the Accused establishes and maintains a dependent allotment in the total amount of the deferred forfeitures amount during the entire period of deferment and for six months thereafter." Appellant Exhibit II at 8. The provision goes on to state that "[t]he period of deferment will run from the date automatic forfeitures would otherwise become effective . . . until the date the Convening Authority acts on the sentence." *Id.*

via affidavit by Mr. Lawrence Johnson, a Military Pay Supervisor from Personnel Support Detachment, San Diego, that this matter will be resolved and that the appellant's spouse will receive the additional five allotments over the next few months. Government Response to Court Order of 15 Jan 2010 at 3. We find that the appellant has not demonstrated that the Government failed to comply with the terms of the agreement. Accordingly, we find this assignment of error to be without merit.

Finally, we note that the appellant requests that because the payment of the forfeited pay is late, this court use its discretionary powers to reduce his sentence. The sole reason the appellant's spouse hasn't received the full amount of forfeited pay is due to his failure to set up the allotment in a timely manner. While we appreciate that the appellant is entitled to get the benefit of his bargain with regards to his pretrial agreement in a timely fashion, we will not allow the appellant to create a problem which impedes the Government from performing its pretrial agreement obligations, call it error, and then await a windfall. Accordingly, we decline to grant relief.

Conclusion

The findings are affirmed. Only that part of the sentence as provides for confinement for 25 years, reduction to pay grade E-1, and a dishonorable discharge is affirmed.

Judge MAKSYM and Judge BEAL concur.

For the Court

R.H. TROIDL
Clerk of Court