

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

**Before
C.L. REISMEIER, J.K. CARBERRY, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**CARL D. PRIVOTT
INFORMATION SYSTEMS TECHNICIAN
THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 201100002
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 7 October 2010.

Military Judge: CAPT David Berger, JAGC, USN.

Convening Authority: Commanding Officer, USS GEORGE
WASHINGTON (CVN 73).

Staff Judge Advocate's Recommendation: LCDR J.D. Pilling,
JAGC, USN.

For Appellant: CAPT Diane Karr, JAGC, USN.

For Appellee: LT Kevin Shea, JAGC, USN.

30 August 2011

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A military judge sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of one specification of making a false official statement and one specification of assault consummated by a battery on a child under the age of 16 in violation of Articles 107 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 928. The

military judge sentenced the appellant to confinement for 29 days, restriction for 60 days, reduction in pay grade to E-2, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged. Pursuant to a pretrial agreement (PTA), the CA suspended the bad-conduct discharge for a period of 6 months.

The appellant asserts that the staff judge advocate and CA materially breached the terms of the pretrial agreement by failing to defer and waive automatic forfeitures as contemplated by the pretrial agreement.¹ We disagree. We have considered the record of trial and the parties' pleadings, and 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.

Discussion

The interpretation of the meaning and effect of the terms of a PTA is a question of law, reviewed *de novo*. *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006). Whether the Government has complied with the material terms of an agreement presents a mixed question of law and fact. *United States v. Smead*, 68 M.J. 44, 59 (C.A.A.F. 2009). When an appellant pleads guilty pursuant to a PTA, 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 appellant. See *United States v. Perron*, 58 M.J. 78, 82 (C.A.A.F. 2003). The Court of Appeals for the Armed Forces 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, 296 (C.A.A.F. 2000); see also *Santobello V. New York*, 404 U.S. 257 (1971).

The appellant bargained for deferment of automatic forfeitures until the CA acted on sentence and waiver of

¹ The appellant was sentenced to 29 days confinement and a punitive discharge. Although the military judge imposed no adjudged forfeitures, by operation of law, the appellant would suffer automatic forfeitures during the period of his confinement. The appellant began his confinement on 7 October 2010. Automatic forfeitures became effective 14 days after trial, or 21 October 2010. Assuming the appellant did not receive any credit for "good time" his initial release date would have been 4 November 2010, or 15 days after commencement of automatic forfeitures. Upon release from confinement, automatic forfeitures would cease. The CA took action on 13 December 2010, five weeks after the appellant's initial release date.

automatic forfeitures for a period of six months following the CA's action. Appellate Exhibit II at 3b. The PTA required that the automatic forfeitures be paid to his spouse. *Id.* A condition precedent to deferral of automatic forfeitures was that the appellant "provide proof of this allotment to the Convening Authority before the Convening Authority acts to defer any automatic forfeitures under this Agreement." *Id.* Moreover, the PTA provided that the appellant "agree[d] to notify the Convening Authority in writing if the Department of Defense fail[ed] to defer or waive the forfeitures." Further, the appellant agreed to something akin to "liquidated damages" -- that his "only remedy for Government noncompliance of this provision is subsequent payment of the improperly withheld forfeitures and not the setting aside of [this] Agreement." *Id.*

We recognize that the appellant is, in a way, correct. The post-trial paperwork does not include provisions giving life to the bargained-for exchange noted in the PTA. However, the lack of provision in the paperwork he might have expected does not give rise to prejudicial error, and in fact, may not be error at all. Said differently, the form of the SJAR and action may have nothing to do with the substance of putative harm. We note first that the pretrial agreement itself was the deferral mechanism for the appellant. The agreement stated that "[t]his Agreement constitutes my request for, **and the Convening Authority's approval of, deferment of automatic forfeitures**" (emphasis added). Nothing further needed to be said in the action regarding deferment. Second, since the appellant's 29 days of confinement terminated five weeks before the convening authority took action, there were no automatic forfeitures to waive in the action. Third, even assuming the predicate claim to erroneous action by the convening authority was correct and that forfeitures were in fact collected from the appellant (assumptions that are not supported by the record before us as there is proof of neither an allotment nor collection of forfeitures),² the appellant has not demonstrated why the "liquidated damages" clause to his PTA should not be enforced (the appellant has not made any claim of prejudice regarding the putative collection of deferred and waived forfeitures).³

² Appellate defense counsel neither avers that her client established an allotment, nor that automatic forfeitures were collected.

³ We note the total value of the deferred and waived forfeitures to be approximately \$500.00. As it takes affirmative governmental action to execute the automatic forfeitures, we have no evidence before us that establishes that the forfeitures were in fact imposed for the very short duration of confinement.

Conclusion

There is no substantial basis in law or fact to overturn the appellant's guilty plea. See *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). The findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court