

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

**Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**BRANDON J. SCHAADT
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201100390
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 25 April 2011.

Military Judge: LtCol Stephen Keane, USMC.

Convening Authority: Commanding Officer, 5th Marine Regiment, 1st Marine Division (REIN), MarForPac, Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: Col D.K. Margolin, USMC.

For Appellant: CAPT Diane Karr, JAGC, USN.

For Appellee: CDR Brendan C. Curran, JAGC, USN; LT Benjamin J. Voce-Gardner, JAGC, USN.

20 December 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, consistent with his pleas, of larceny, in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. The appellant was sentenced to confinement for

eight months, forfeiture of \$960.00 pay per month for eight months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved only so much of the sentence as provided for the confinement, reduction, and bad-conduct discharge. Pursuant to a pretrial agreement (PTA), the CA agreed to suspend confinement in excess of six months and approved the deferral and waiver of all automatic forfeitures.

On appeal, the appellant asserts that the CA's action (CAA) fails to waive all automatic forfeitures as provided for in the PTA and instead waived automatic forfeitures in excess of \$960.00 per month. Appellate Exhibit II; Appellant's Brief of 12 Oct 2011 at 3-4. The Government concedes that the CAA failed to correctly waive all automatic forfeitures as required under the PTA. Government Answer of 10 Nov 2011 at 4. An accused who pleads guilty pursuant to a PTA 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).

After careful consideration of the record of trial, the appellant's summary assignment of error, and the Government's response, following our action below, we conclude that the findings and approved sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ

Our review of the record reveals that the PTA itself not only defers all automatic forfeitures contingent upon the appellant's establishment and maintenance of a dependent's allotment, but also grants a six-month waiver of automatic forfeitures.¹ Appellant Exhibit II at 1. The appellant asserts, and the Government does not dispute, that such an allotment was, in fact, executed. In view of this, the CAA failed to properly reflect in the CAA the already approved waiver of all automatic forfeitures.

In this regard, we note that both the staff judge advocate's recommendation (SJAR) and trial counsel's results of trial correctly summarize the terms of the PTA as they pertain to the

¹ Article 58b(b) addresses forfeitures of pay during confinement and states that waiver of automatic forfeitures is "not to exceed six months". Since the appellant's sentence was capped under the terms of the PTA at six months, and action was taken on 26 Jul 2011, which was three months after the date of trial and the date the appellant's sentence to confinement commenced, waiver of automatic forfeitures would have only been in effect for approximately three months.

forfeitures. See SJAR of 30 Jun 2011 and Results of Trial of 25 Apr 2011. The appellant acknowledges that all monies owed have, in fact, been received pursuant to the PTA.² Further, he does not allege that he suffered any prejudice as a result of the CA's error. We conclude that the appellant has received the benefit of the bargain notwithstanding the misstatement in the CAA. The appellant claims no prejudice and we find none. However, the appellant is entitled to have his official records correctly reflect the results of this court-martial proceeding. *United States v. Crumpley*, 49 M.J. 538, 539. (N.M.Ct.Crim.App. 1998). We will order corrective action in our decretal paragraph. *Id.*

Although not assigned as error, to the extent that the CAA purported to execute the bad-conduct discharge, it is a nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009). Furthermore, to the extent that the CAA purports to direct that the punitive discharge will be executed after final judgment, it is a legal nullity. See *United States v. Tarniewicz*, 70 M.J. 543 (N.M.Ct.Crim.App. 2011).

Conclusion

The supplemental court-martial order shall indicate that all automatic forfeitures were waived for a period of six months. The findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

² Although the appellant asserts in his brief that "he has been paid all monies owed," we recognize that the appellant was required to have designated his dependent wife as the recipient of the automatic forfeitures.