

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

**Before
J.K. CARBERRY, E.C. PRICE, J.E. STOLASZ
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MICHAEL S. HODGE
GAS TURBINE SYSTEMS TECHNICIAN THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 200601124
GENERAL COURT-MARTIAL**

Sentence Adjudged: 12 July 2005.

Military Judge: CAPT Daniel O'Toole, JAGC, USN.

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

Staff Judge Advocate's Recommendation: CAPT E.S. White, JAGC, USN (27 Jun 2006); CDR T. Riker, JAGC, USN (14 Sep 2007 and 25 Oct 2007).

For Appellant: LT Michael Torrissi, JAGC, USN; LT Ryan Santicola, JAGC, USN.

For Appellee: LT Ritesh Srivastava, JAGC, USN.

28 July 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.**

STOLASZ, Judge:

A military judge sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of making a false official statement, three specifications of rape, two specifications of sodomy, and obstruction of justice in violation of Articles 107, 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 920, 925, and 934. The military judge sentenced the appellant to confinement for 60 years, forfeiture of all pay and allowances, reduction in pay grade to E-1, and a dishonorable discharge. In his initial action, the convening

authority (CA) approved the sentence as adjudged. Pursuant to a pretrial agreement (PTA), the CA suspended all confinement in excess of 18 years, suspended adjudged forfeitures in the amount of \$508.00 pay per month and waived automatic forfeitures of \$508.00 pay per month for a period of six months from the date of his action, provided that the appellant establish and maintain a dependent's allotment.

Background

This is the third time this case is before this court. On 8 August 2007, we set aside the initial convening authority's action (CAA) of 20 July 2006, and returned the record to the Judge Advocate General for remand to an appropriate CA for proper post-trial processing, after finding that the appellant's trial defense counsel failed to submit matters in clemency. *United States v. Hodge*, No. 200601124, unpublished order (N.M.Ct.Crim.App. 8 Aug 2007). Following receipt of matters in clemency submitted by substitute defense counsel and recommendations from his staff judge advocate, the CA approved the adjudged sentence, suspended adjudged forfeitures in the amount of \$508.00 pay per month and waived automatic forfeitures of \$508.00 pay per month for a period of six months from the date of his action, provided that the appellant establish and maintain a dependent's allotment. In addition, the CA suspended confinement in excess of 16 years, vice the 18 years agreed upon in the PTA, in an apparent act of clemency. CAA of 25 Oct 2007.

On 3 March 2009, we affirmed the approved findings and sentence. *United States v. Hodge*, No. 200601124, unpublished op., 2009 CCA LEXIS 78 (N.M.Ct.Crim.App. 3 Mar 2009). On 22 September 2009, the United States Court of Appeals for the Armed Forces (CAAF) remanded the case to this court for consideration of two issues raised by the appellant in his petition for grant of review. *United States v. Hodge*, 09-519/NA, slip ord. at 1 (C.A.A.F. Sep. 22, 2009).¹ On 28 September 2009, we advised the parties of their right to file additional briefs on the remanded issues. *United States v. Hodge*, No. 200601124, unpublished order (N.M.Ct.Crim.App. 28 Sep 2009). The additional briefs submitted by the parties raised several factual questions as to the first remanded issue.

On 3 June 2010, we returned the record to the Judge Advocate General for remand to an appropriate convening authority to order a hearing pursuant to *United States v DuBay*, 37 C.M.R. 411 (C.M.A. 1967) to make findings of fact and conclusions of law related to remanded issue I; we specified six questions related

¹ I. WHETHER APPELLANT'S PLEAS ARE PROVIDENT WHERE THE DEFERRED/WAIVED FORFEITURE PROVISIONS OF THE PRETRIAL AGREEMENT ALLEGEDLY WERE NOT FULFILLED.

II. WHETHER TRIAL DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL FOR ALLEGEDLY FAILING TO SET UP AN ALLOTMENT FOR APPELLANT IN ACCORDANCE WITH THE PRETRIAL AGREEMENT.

to that issue.² That hearing was conducted on 26 July 2010; the military judge issued findings and conclusions on 25 August 2010, and the CA returned the record to this Court on 28 September 2010. On 1 December 2010, the appellant filed a supplemental brief, that the Government answered on 1 March 2011. The appellant replied to that answer on 8 March 2011.

We have considered the record of trial, the parties' pleadings and the issues specified by the CAAF, 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 Voluntariness of Pleas and Pretrial Agreement

The military judge presiding at the *DuBay* hearing answered the six questions posed by our 3 June 2010 order, and provided written findings of fact and conclusions of law in an opinion dated 25 August 2010. We review the findings of fact under a clearly erroneous standard, and conclusions of law are reviewed *de novo*. *United States v. Wean*, 45 M.J. 461, 462-63 (C.A.A.F. 1997).

1 Did the appellant establish and maintain an allotment on behalf of his son? If so, when was the allotment established and what were the terms of that allotment?

2. Can the Government send deferred or waived automatic forfeitures to a dependent in the absence of an allotment initiated by the sponsor? If answered in the affirmative, was the Government obligated under the terms of the pretrial agreement to send deferred and or waived automatic forfeitures to the appellant's dependent in the event he did not establish and maintain the allotment.

3. Can the Government send deferred or suspended adjudged forfeitures to a dependent in the absence of an allotment initiated by the sponsor? If answered in the affirmative, was the Government obligated under the terms of the pretrial agreement to send deferred and or suspended adjudged forfeitures to the appellant's dependent in the event he did not establish or maintain the allotment?

4. What pay and military allowances have been disbursed to, or on behalf of, the appellant since July 2005? When were the funds disbursed? Who were the recipients of each payment and how were the funds disbursed? Example, check, electronic transfer to a bank account.

5. What military pay and allowances was the appellant entitled to after 12 July 2005, assuming that the Government was obligated to execute the terms of the pretrial agreement related to automatic and adjudged forfeitures, taking into consideration the appellant's EAS, and that the court set aside the first CA's action?

6. Did the appellant receive the benefit of his bargain with respect to automatic and adjudged forfeitures?

We find the military judge's findings of fact supported by the record and adopt them as our own. We agree with the military judge's ultimate conclusion that the appellant received greater benefit than he bargained for because he received pay in excess of \$27,600.00 since his conviction and sentencing, despite his failure to establish and maintain a dependent's allotment as required by the terms of the PTA.

The military judge answered the six questions we posed as follows: (1) the appellant did not establish and maintain an allotment on behalf of his son; (2) that the Government may not send deferred or waived automatic forfeitures to a dependent absent an allotment or court order; (3) that the Government may not send deferred or suspended adjudged forfeitures to a dependent absent an allotment; (4) that the appellant received military pay in excess of \$27,684.24 directly deposited in his bank account since 12 June 2005 (date of sentencing), and an additional \$6,987.57 paid to the state of South Carolina for the benefit of the appellant's minor child; (5) that the appellant was entitled to receive \$17,272.00 after 12 June 2005 provided that the Government complied with the terms of the pretrial agreement; (6) that the appellant received more than the benefit of his bargain with respect to automatic and adjudged forfeitures.

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, 47 (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). 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, 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 in the amount of \$508.00 per month until the CA acted on sentence and waiver of automatic forfeitures in that amount for a period of six months following the CA's action. Appellate Exhibit II 3b. The PTA included a deferment of adjudged forfeitures in the amount of \$508.00 per month until the CA acted on sentence and suspension of adjudged forfeitures in the same amount for a period of six months from the date of that CA's action. Appellate Exhibit II 3a.

The PTA required that both automatic and adjudged forfeitures be paid to C.W. for the benefit of the appellant's

minor dependent. AE II at paragraphs 3a and 3b. A condition precedent to deferral of automatic forfeitures was that the appellant "establishes and maintains a dependent's allotment in the total amount of the deferred forfeiture amount during the entire period of deferment." AE II at 3b. The deferral and waiver of adjudged forfeitures provision did not explicitly require establishment of such an allotment. AE II at 3b.

However, the appellant failed to provide the necessary paperwork to establish and maintain an allotment for his minor son as required by the PTA as a condition precedent to the Government's waiver of automatic forfeitures. Notwithstanding the appellant's failure to initiate the allotment, the CAA waived automatic forfeitures and suspended adjudged forfeitures in the amount of \$508.00 per month for a period of six months from the date of that action. CAA of 20 Jul 2006.

Simply put, under the terms of the PTA the appellant was not entitled to deferment of automatic forfeitures until he satisfied the condition precedent, establishment of the dependent allotment, which he failed to do prior to the CAA. Although, the PTA did not require the appellant to establish an allotment with respect to adjudged forfeitures, the *DuBay* military judge concluded the Government lacked the ability to pay the deferred and suspended adjudged forfeitures to C.W. for the benefit of the appellant's minor dependent absent an allotment or court order, and we agree. *DuBay* Summary of 25 Aug 2010 at Answers 2 and 3.

Thus, this case does not involve a mutual misunderstanding between the parties regarding the terms of the PTA, but a failure of one of the parties, the appellant, to fulfill his obligations under that agreement. See *Smead* 68 M.J. 44, 48.

In addition, the evidence developed at the *DuBay* hearing established that the Government was unable to provide the suspended adjudged forfeitures to the appellant's son without an allotment in place, in the absence of court order. Therefore those funds were paid directly to the appellant.

We disagree with the appellant's primary contention that the suspension and waiver of forfeitures was to be implemented independent of any action by the appellant.³ The terms of the PTA required the appellant to establish and maintain an allotment. The appellant indicated on the record at his court-martial that he understood the terms of the PTA. Record at 123. The evidence at the *DuBay* hearing showed that the appellant did not establish an allotment, and that the Government is unable to provide payment of deferred or waived forfeitures to a dependent absent an allotment initiated by the service member. *DuBay* record at 74. Affirmative action was required by the appellant to establish the allotment. This did not happen.

³ The appellant's brief of 22 October 2009 admits he had an affirmative obligation to initiate an allotment.

We further disagree with the assertion by the appellant that he did not benefit from continued receipt of military pay directly deposited in his bank account because it did not go to his minor son. Despite failing to initiate an allotment, the appellant continued to receive military pay directly deposited in his bank account until at least 31 July 2010. The appellant received in excess of \$27,694.00 directly deposited in a bank account subject to his control. The appellant was actually entitled to receive \$17,272.00, for the benefit of his dependent, as a result of the suspended forfeiture provisions in the PTA. Yet the appellant apparently made no attempt to ensure that the money being directly deposited into his bank account was provided to his minor son.

We conclude that 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).

Ineffective Assistance of Counsel

The appellant claims his trial defense counsel, Lieutenant (LT) K, was ineffective because he informed the appellant he would "take care" of the allotment paperwork, but failed to do so. Unsworn Declaration of Michael S. Hodge of 12 May 2009. LT K avers that he never made any promises to the appellant that he would take care of, complete, or file the allotment paperwork. Affidavit of LT K of 12 Nov 2009.

We review ineffective assistance of counsel claims *de novo*. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001); *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997). An appellant is entitled to effective post-trial representation by the same standard as representation at trial. *Wiley* 47 M.J. at 159. The standard for an appellant to prevail on an ineffective assistance claim is two pronged: (1) deficient performance by his counsel and (2) resultant prejudice from the deficient performance. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009). We may address the prongs in any order as the appellant must meet both in order to prevail on his claim. *Strickland*, 466 U.S. at 687; *Loving v. United States*, 68 M.J. 1, 6 (C.A.A.F. 2009).

To satisfy the second prong, "[t]he [appellant] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Loving*, 68 M.J. at 6-7. 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." *Strickland*, 466 U.S. at 694.

The *Strickland* test governs ineffective assistance of counsel claims in cases involving guilty pleas. *United States v. Osheskie*, 63 M.J. 432, 434 (C.A.A.F. 2006) (citing *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000)). The appellant must show not only that his counsel was deficient but also that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Alves*, 53 M.J. at 289 (quoting *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)).

Even were we to assume that LT K's failure to file the allotment paperwork constituted deficient performance, we do not find any prejudice to the appellant. It is uncontested that the allotment paperwork was not submitted to the proper pay personnel by either the appellant, who clearly was required to do so by the terms of the PTA, or by the defense counsel. Regardless, the appellant continued to receive pay directly deposited into his bank account. As previously discussed, the appellant actually received more money by continuing to draw pay over a number of years than his minor son was entitled to receive pursuant to the forfeiture provisions of the PTA.

We conclude that the appellant was not prejudiced by any deficiency in his counsel's post-trial performance.

Conclusion

Having complied with the CAAF order to conduct "further appellate inquiry" on the issues granted by that court, we see no basis for disturbing our decision dated 3 March 2009 affirming the findings and the sentence in this case.

Senior Judge CARBERRY and Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court