

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

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

UNITED STATES OF AMERICA

v.

**JOSEPH J. GILLESPIE
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 201200024
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 20 October 2011.

Military Judge: LtCol Stephen Keane, USMC.

Convening Authority: Commanding Officer, Headquarters and Support Battalion, Marine Corps Base, Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: LtCol P.A. Tafoya, USMC.

For Appellant: CDR Christopher Geis, JAGC, USN.

For Appellee: Mr. Brian Keller, Esq.

12 April 2012

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 unauthorized absence and two specifications of wrongful use of marijuana, in violation of Articles 86 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 912a. The appellant was sentenced to confinement for five months, reduction to pay grade E-1, forfeitures of \$970.00 pay per month

for five months, and a bad-conduct discharge. Pursuant to a pretrial agreement, the convening authority (CA) approved the sentence as adjudged, but suspended the awarded forfeitures and confinement in excess of time served.

Although submitted without assignment of error, we note that the CA erred in taking his action by suspending confinement from the date of action rather than the date of release from confinement. The pretrial agreement provided that confinement "may be approved as adjudged. However, all confinement in excess of time served will be suspended for the period of confinement served plus six months thereafter, at which time, unless sooner vacated, the suspended portion will be remitted without further action." Appellate Exhibit II.

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 time served, and stated "[t]he suspension period shall begin from the date of this action and continue for the remainder of the accused's confinement plus 6 months thereafter." This is inconsistent with the terms of the pretrial agreement as detailed above. 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 will take corrective action in our decretal paragraph.

Additionally, we note two errors in the court-martial order (CMO) that require correction. First, the CMO provides for the incorrect number of days of pretrial confinement credit. Second, the date the sentence was adjudged is incorrect. Service members are entitled to records that correctly reflect the results of court-martial proceedings. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). We do not find any prejudicial error from these scrivener's errors.

Conclusion

The findings and the sentence are affirmed. The supplemental court-martial order shall indicate the following:

(1) The period of suspension for the appellant's confinement runs for six months from 20 October 2011;

(2) The number of days awarded to the appellant for pretrial confinement is 63; and

(3) The date the sentence was adjudged is 20 October 2011.

Having ordered these corrections, 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