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

Before
J.R. PERLAK, M.D. MODZELEWSKI, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

HECTOR Y. APARCIO
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 201200408
SPECIAL COURT-MARTIAL

Sentence Adjudged: 29 June 2012.
Military Judge: LtCol Stephen F. Keane, USMC.
Convening Authority: Commanding Officer, Headquarters and Support Battalion, Marine Corps Base, Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: Col P.J. Uetz, USMC.
Addendum: LtCol P.A. Tafoya, USMC.
For Appellant: Maj S. Babu Kaza, USMCR.
For Appellee: Maj Paul M. Ervasti, USMC; LT Philip Reutlinger, JAGC, USN.

30 April 2013

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 unauthorized absence and the 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 116 days of confinement, reduction to pay grade E-1, forfeiture of

$950.00 pay per month for five months, and a bad-conduct discharge. The convening authority (CA) approved the confinement, reduction, punitive discharge, and, as a matter of clemency, only two months of the five months of adjudged forfeitures. Pursuant to the terms of a pretrial agreement (PTA), the CA ordered all confinement in excess of two months suspended.

The appellant assigns four errors: (1) the CA's unilateral withdrawal from an earlier PTA was improper and the Government should remain bound by the terms of that agreement; (2) the appellant's pleas were improvident, as he failed to reference the earlier PTA; (3) the bad-conduct discharge is inappropriately severe in light of the appellant's combat service and his anxiety disorder; and (4) the CA's action is fatally ambiguous as it references approving forfeitures "[a]s a matter of clemency."

Factual Background

The appellant was an unauthorized absentee for 230 days. Shortly after his return to his unit on 9 February 2012, he tested positive on two urinalysis tests: those tests were conducted on 17 February and 22 February 2012. The CA first referred a charge of unauthorized absence, and shortly thereafter, an additional charge of wrongful use of marijuana with two specifications. Pursuant to a PTA signed by the appellant on 7 March 2012 and by the CA on 8 March 2012, the CA withdrew the charges from the special court-martial and referred them to a summary court martial.

On 14 March 2012, the CA informed the trial defense counsel that he was withdrawing from that first PTA based upon receipt of two additional positive urinalysis results from tests administered on 2 March 2012 and 6 March 2012. Trial Defense Counsel's Declaration of 7 Jan 2013. Trial defense counsel immediately protested the withdrawal from the first PTA to the CA, asserting that he had detrimentally relied upon the agreement and had begun performance, in that he had not begun preparing for a contested trial by, *inter alia*, interviewing witnesses, requesting expert assistance, or demanding speedy trial. Trial Defense Counsel letter of 15 Mar 2012.

On 29 March 2012, the CA referred all charges to a special court-martial: those charges included the original charge of unauthorized absence, the additional charge and two specifications of wrongful use of marijuana, and a second

additional charge with two more specifications of wrongful use of marijuana. On 17 April 2012, the appellant entered into a second PTA II with the CA.

During the guilty plea hearing on 3 May 2012, the military judge and counsel briefly discussed the procedural history and posture of the case. Trial defense counsel concurred in the military judge's summarized history, i.e., that the original charge and first additional charge had been referred to a special court-martial, were then withdrawn and referred to a summary court-martial "pursuant to some sort of a deal that is no longer before us," and then, as a result of the allegations contained in the second additional charge, were re-referred resulting in all three charges being tried in conjunction by special court martial. Record at 3-4. Later in the trial, both the appellant and trial defense counsel denied the existence of any other agreement other than the 17 April 2012 PTA. *Id.* at 53. The appellant pleaded providently to all charges and specifications, and the military judge entered findings.[1]

Enforcement of the First PTA / Providence of Pleas

The appellant now claims that the CA remains bound by the terms of the first PTA, and that his pleas were improvident as he never referenced that PTA in the course of his providence inquiry. Having reviewed the record and pleadings, we find no merit in either contention. The record is quite clear that only the 17 April 2012 PTA was in issue at the time of the trial. The appellant entered into that PTA with the CA, discussed only that PTA with the military judge, and never sought enforcement of the first PTA. Even assuming that the appellant did not waive this issue by pleading guilty unconditionally, *United States v. Bradley,* 68 M.J. 279, 281-82 (C.A.A.F. 2010), we find that the CA was well within his authority to withdraw from the first PTA upon discovery of the appellant's further misconduct, and well before the appellant began any performance of his promises under the agreement. RULE FOR COURTS-MARTIAL 705(d)(4)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). Similarly, we find no merit in the appellant's argument that his pleas were improvident because they did not reference the existence of the

[1] Because the appellant's unsworn statement and the sentencing argument of counsel focused on the appellant's anxiety disorder, the military judge ordered a RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) board prior to announcing sentence. Following completion of that board, the military judge sentenced the appellant in June 2012.

first PTA. This assertion is unsubstantiated by the record and does not merit further analysis or relief. *United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987).

Severity of Sentence

The appellant also asserts that the sentence, which included a bad-conduct discharge, was unjustifiably severe. We disagree. This court reviews the appropriateness of the sentence *de novo*. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005). Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). We engage in a review that gives "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-181 (C.M.A. 1959)). We have examined the record of trial, and the parties' briefs. Balancing the appellant's combat service against the facts of this case, in which the appellant was an unauthorized absentee for almost eight months and then regularly used marijuana in the barracks upon returning to military control, we find the sentence appropriate.

Ambiguous Action

Finally, the appellant complains that the CA's action was ambiguous regarding the adjudged forfeitures. The military judge sentenced the appellant to forfeitures of $950.00 pay per month for five months. In his action, the CA stated that as "a matter of clemency, the adjudged sentence to forfeit $950 pay per month for two months is approved." Although inartfully worded, the action clearly approves only two months of the adjudged forfeitures, and no more.

Conclusion

We conclude that the findings and the sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the

appellant. Arts. 59(a) and 66(c), UCMJ. We affirm the findings and the sentence as approved by the CA.

For the Court

R.H. TROIDL
Clerk of Court