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

Before
M.D. MODZELEWSKI, R.G. KELLY, K.K. THOMPSON
Appellate Military Judges

UNITED STATES OF AMERICA

v.

CESAR CASILLAS
LOGISTICS SPECIALIST THIRD CLASS (E-4), U.S. NAVY

NMCCA 201300037
SPECIAL COURT-MARTIAL

Sentence Adjudged: 10 October 2012.
Military Judge: CAPT Andrew H. Henderson, JAGC, USN.
Convening Authority: Commanding Officer, USS CARL VINSON (CVN 70).
Staff Judge Advocate's Recommendation: LCDR M.V. Rosen, JAGC, USN.
For Appellant: CAPT Bree A. Ermentrout, JAGC, USN.
For Appellee: CAPT Franklin J. Foil, JAGC, USN; LT Ann E. Dingle, JAGC, USN.

22 May 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 conspiracy to commit larceny, making a false official statement, and larceny, in violation of Articles 81, 107, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 907, and 921. The military judge sentenced the appellant to 181 days confinement, reduction

to pay grade E-1, and a bad-conduct discharge, and the convening authority (CA) approved the adjudged sentence.

With respect to confinement, a pretrial agreement (PTA) in the case required that "[a]ll confinement in excess of seventy five [sic] (75) days will be suspended for the period of confinement served plus twelve (12) months thereafter . . . ." The CA suspended confinement in excess of 75 days and provided that "the suspension period shall begin from the date of this action and continue for the period of confinement served plus twelve (12) months thereafter." Also under the PTA, the CA was obligated to suspend the bad-conduct discharge for a period of 12 months from the date of the CA's action. Although referring to the PTA and stating that it contained conditions of suspension, the action does not explicitly state that the bad-conduct discharge was suspended or the period of suspension.

The appellant assigns three errors related to the promulgating order and CA's action: (1) the CA's action fails to identify the correct start date for the suspension of confinement; (2) the action failed to suspend the bad-conduct discharge; and (3) the promulgating order does not accurately state the specification under Charge IV.[1]

Turning to the first assigned error, the PTA allowed the appellant to delay confinement until after his wife gave birth, causing some uncertainty as to the date confinement would begin and end. In explaining the impact of the PTA on his sentence, however, the military judge stated that "[c]onfinement in excess of 75 days will be suspended for a period of 12 months from this date." Record at 121. Both counsel concurred with the military judge's interpretation of the suspension period. *Id.*

Ordinarily, and unless the parties have agreed otherwise, a suspension period begins when the convening authority takes action on the sentence. *United States v. Saylor*, 40 M.J. 715, 718 (N.M.C.M.R. 1994); RULE FOR COURTS-MARTIAL 1108(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). Here, however, the language of the PTA was modified by agreement of the parties in court, and that agreement became the law of the case. 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).

[1] Charge IV, a violation of Article 121, is erroneously numbered Charge III on the promulgating order.

Thus, in taking his action, the CA erred by failing to enforce the terms of the PTA, as modified by the military judge and agreed to by trial counsel. 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.

The appellant also contends that the CA's action fails to reflect that his bad-conduct discharge was to be suspended under the terms of the PTA. Although the action does not explicitly suspend the bad-conduct discharge, the appellant does not aver any prejudice resulting from this error. We will take corrective action in our decretal paragraph. The PTA clearly stated that the discharge was to be suspended for 12 months from the date of the CA's action. Nevertheless, the military judge erroneously stated that the "punitive discharge awarded here, the BCD will be suspended for a period of 12 months from this date." Record at 121. Once again, both counsel concurred with the military judge's interpretation of the suspension period. *Id.* The CA did not order a post-trial proceeding in revision to correct the error, and, as noted above, his action was entirely silent on the suspension of the discharge.

To avoid any possibility of prejudice to the appellant, we will establish the date of trial as the start date for the 12-month suspension period, even though that terminates the suspension period sooner than the parties agreed to under the terms of the PTA. *See United States v. Pereira,* No. 96-01840, 1997 CCA LEXIS 492, unpublished op. (N.M.Ct.Crim.App. 5 Sep 1997).

Finally, the appellant asserts that the sole specification under Charge IV erroneously reflects a plea and finding of guilty as to a larceny of military property, when in fact the words "military property" were struck from the charge sheet prior to the entry of pleas. We agree and will order corrective action in our decretal paragraph.

The supplemental court-martial order shall indicate that all confinement in excess of 75 days and the bad-conduct discharge were suspended for a period of 12 months from the date of trial. Moreover, it shall accurately reflect that the words "military property" were withdrawn prior to the entry of pleas as to the sole specification under Charge IV. Following these corrections, we are convinced that the findings and the sentence

are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ. The findings and the sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court