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

Before
M.D. MODZELEWSKI, E.C. PRICE, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ALYNN M. JACKSON
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 201200475
GENERAL COURT-MARTIAL

Sentence Adjudged: 26 July 2012.
Military Judge: Maj Nicholas A. Martz, USMC.
Convening Authority: Commanding General, 2d Marine Logistics Group, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: Capt M.C. Andrew, USMC.
For Appellant: CAPT Randy C. Bryan, JAGC, USN.
For Appellee: CDR Kevin L. Flynn, JAGC, USN; LT Philip Reutlinger, JAGC, USN; Capt Samuel C. Moore, USMC.

30 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 general court-martial, convicted the appellant in accordance with his pleas of five specifications of larceny in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. The military judge sentenced the appellant to confinement for nine months,

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

The appellant raises two assignments of error:[2] (1) that his pleas of guilty were improvident because he failed to receive the benefit of the sentence limitation portion of a pretrial agreement (PTA); and (2) that he received ineffective assistance of counsel.

After careful consideration of the record, the briefs of the parties, and the declarations of the appellant and his trial defense counsel, we conclude 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 was committed. Arts. 59(a) and 66(c), UCMJ.

I. Background

The appellant pleaded guilty, pursuant to a PTA, to stealing a number of items from the mail while serving as the noncommissioned officer in charge of a unit post office in Afghanistan.

On the date of sentencing, the appellant was beyond his end of active obligated service (EAOS) date and thus not entitled to pay when in confinement. However, a sentence limitation term of the PTA included an agreement by the CA to defer automatic forfeitures under Article 58b(a)(1), UCMJ, prior to taking action on the sentence and then to waive automatic forfeitures for a period not to exceed six months, provided that the appellant established and maintained a dependent's allotment. Appellate Exhibit IV at ¶ 3b.

Part I of the PTA also addressed automatic forfeitures under Article 58b, UCMJ, and included acknowledgement of the appellant's "understand[ing] that if I am held in confinement beyond my End of Active Obligated Service (EAOS) date, then I will not receive any pay or allowances by operation of law, regardless of the terms of this agreement." AE III at ¶ 11.

[1] To the extent that the CA's action 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).

[2] Both assignments of error are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

The military judge addressed the aforementioned PTA provision with the appellant prior to accepting his pleas of guilty, as follows: "Finally, do you understand that if you are held in confinement beyond your end of active obligated service date then you will not receive any pay or allowances by operation of law regardless of the terms of this pretrial agreement?" Record at 56. The appellant replied, "[y]es sir." *Id*.

Later, while discussing the effect of the sentence limiting provisions of the PTA on the adjudged sentence, the military judge indicated his understanding that the appellant was "past [his] end of obligated service" and the appellant responded "[y]es sir." *Id.* at 81. After briefly recounting their earlier discussion regarding automatic forfeitures, the military judge again noted "you're passed [sic] your [EAOS] and under operation of law you will not be entitled to any pay anyway during that period. Do you understand?" *Id*. The appellant responded, "[y]es, sir." *Id*. The military judge then commented "[s]o this provision of your pretrial agreement will also have no effect on [the adjudged sentence]. Do you understand that?" *Id*. Again the appellant responded, "[y]es, sir."

In his recommendation, the staff judge advocate informed the CA that "automatic forfeitures have not been deferred" as the appellant was "past his End of Active Service and in a non-pay status[.]" Staff Judge Advocate's Recommendation of 15 Oct 2012 at ¶ 10. In the combined CA's action and court-martial order the CA noted that "[a]utomatic forfeiture of pay required under Article 58b, UCMJ, was not deferred pursuant to the pretrial agreement due to the accused being past his [EAOS date]." General Court-Martial Order No. G12-30 of 05 Nov 2012.

In a declaration submitted with his appeal before this court, the appellant asserts that he informed his trial defense counsel that his top priority in any plea agreement was "to take care of [his] son financially." Appellant's Declaration of 15 Jan 2013. He declares that after his EAOS date he "executed a pre-trial agreement . . . with the understanding confirmed by [his] trial defense counsel that the specific clause in the pre-trial agreement would, if [he] was sentenced to confinement, allow [him] to continue financial support of [his] son[.]" *Id*. He also claims that, two days prior to trial and after his EAOS date, his trial defense counsel informed him that he "no longer had an [EAOS] date," that "it read indefinite" ostensibly due to his placement on legal hold. *Id*. The appellant claims that he "realized" that his son would not benefit from the specifically

negotiated provision on deferment and waiver of automatic forfeitures under Article 58b, UCMJ, "only after the military judge imposed [his] sentence and informed him that the allotment would not take effect." *Id*. He also asserts that had he known that he "would not be permitted to continue [his] financial obligation to [his] son . . . . [he] would not have agreed to plea [sic] guilty[.]" *Id*. at 2.

Additional facts necessary to resolve the assigned errors are included herein.

II. Providence of Pleas

The appellant asserts that his pleas of guilty were improvident "based on a material misunderstanding of a term in his pre-trial agreement resulting in his not receiving the benefit of his bargain [deferment and waiver of automatic forfeitures under Article 58(b), UCMJ]." Appellant's Brief of 10 Jan 2013 at 4-5. We disagree.

> A pretrial agreement in the military justice system establishes a constitutional contract between the accused and the convening authority. *See United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006).
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> . . . .
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> At trial, the military judge must ensure that the accused understands the pretrial agreement, the parties agree to the terms of the agreement, the agreement conforms to the requirements of R.C.M. 705, and the accused has freely and voluntarily entered into the agreement and waived constitutional rights." *See* Article 45(a), UCMJ, 10 U.S.C. § 845(a) (2000); R.C.M. 705; R.C.M. 910(f), (h)(2), (h)(3); [*United States v.*] *Perron*, 58 M.J. [78,] 82 [((C.A.A.F. 2003)].
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> When an appellate issue concerns the meaning and effect of a pretrial agreement, interpretation of the agreement is a question of law, subject to [de novo review]." *Lundy*, 63 M.J. at 301. When an appellant contends that the government has not complied with a term of the agreement, the issue of noncompliance is a mixed question of fact and law. *Id*. The appellant bears the burden of establishing that the term is

material and that the circumstances establish governmental noncompliance." *Id*. at 302.

United States v. Smead, 68 M.J. 44, 59 (C.A.A.F. 2009)

When we find "noncompliance with a material term, we consider whether the error is susceptible to remedy in the form of specific performance or in the form of alternative relief agreeable to the appellant." *Id*. (citing *Lundy*, 63 M.J. at 305. "If such a remedy does not cure the defect in a material term, the plea must be withdrawn and the findings and sentence set aside." *Id*. (citing *Perron*, 58 M.J. at 85-86).

We conclude that the appellant has failed to sustain his burden of establishing that the deferment and waiver of automatic forfeitures under Article 58b is a "material [term] and that the circumstances establish governmental noncompliance." *Id*.

First, the pretrial agreement includes the appellant's written acknowledgment of his understanding that if "held in confinement beyond [his EAOS that he would] not receive any pay or allowances by operation of law, regardless of the terms of this [PTA]." AE III at ¶ 11. The appellant acknowledged his understanding of that provision on the record, prior to the court's acceptance of his guilty pleas. Record at 56.

Second, the appellant acknowledged his understanding on the record, in response to several questions from the military judge, that he was past his EAOS on the date of sentencing and entitled to no pay or allowances while in confinement. *Id*. at 81.

Finally, the appellant acknowledged his understanding that the automatic forfeitures provision of the sentence limitation portion of the PTA would "have no effect [on the adjudged sentence]." *Id*. This acknowledgement occurred during the military judge's discussion of the effect of the sentence limiting provisions of the PTA on the adjudged sentence, after the appellant acknowledged understanding that he was "past [his] end of obligated service," and that "under operation of law you will not be entitled to any pay anyway during that period." *Id*.

In addition, the appellant has failed to establish "governmental noncompliance" with the PTA's deferral and waiver of automatic forfeitures provision. On the contrary, he acknowledged understanding, both in the written agreement and on

the record that if he was confined beyond his EAOS that, by law, he would not be entitled to receive any pay or allowances. *Smead*, 68 M.J. at 59 (citation omitted). Notably, the appellant raised no question or objection at trial before the military judge, did not request to withdraw his guilty pleas, and did not raise this issue in clemency. Accordingly, the appellant's pleas were provident.

III. Ineffective Assistance of Counsel

The appellant also alleges that his trial defense counsel provided ineffective assistance by failing to properly apprise him of the ineffectiveness of the deferment of automatic forfeitures provision of his PTA. We disagree.

We analyze the appellant's claim of ineffective assistance of counsel under the test outlined by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, "an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010) (citing *Strickland*, 466 U.S. at 687) (additional citation omitted). In reviewing for ineffectiveness, the court "looks at the questions of deficient performance and prejudice *de novo*." *United States v. Gutierrez*, 66 M.J. 329, 330-31 (C.A.A.F. 2008) (citations omitted).

When assessing *Strickland's* first prong, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 689 (citation omitted). When challenging the performance of trial defense counsel, the appellant "bears the burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance." *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (citation omitted). "When there is a factual dispute, we determine whether further factfinding is required under *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997). If, however, the facts alleged by the defense would not result in relief under the high standard set by *Strickland*, we may address the claim without the necessity of resolving the factual dispute." *Id*. (citing *Ginn*, 47 M.J. at 248).

To demonstrate prejudice, the 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.'" *Gutierrez*, 66 M.J. at 331 (quoting *Strickland*, 466 U.S. at 694). In a guilty plea case, the defense must also "show specifically 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." *Tippit*, 65 M.J. at 76 (citations and internal quotation marks omitted). "'[W]e need not determine whether any of the alleged errors [in counsel's performance] establish[] constitutional deficiencies under the first prong of *Strickland* . . . [if] any such errors would not have been prejudicial under the high hurdle established by the second prong of *Strickland*.'" *Id*. (quoting *United States v. Saintaude*, 61 M.J. 175, 183 (C.A.A.F. 2005)).

After careful consideration of the record of trial, the parties' pleadings, the appellant's declaration under penalty of perjury, and trial defense counsel's declaration under penalty of perjury, we conclude that the appellant's claim of ineffective assistance of counsel is without merit.

The appellant's claims that his trial defense counsel assured him that even after his EAOS date he was "still entitled to the protection from automatic forfeitures," and that had he known that he "would not be permitted to continue [his] financial obligation to [his] son . . . [he] would not have agreed to plea (sic) guilty" are contradicted by the record. Appellant's Declaration of 15 Jan 2013.

The pretrial agreement includes the appellant's written acknowledgment of his understanding that if "held in confinement beyond [his EAOS that he would] not receive any pay or allowances by operation of law, regardless of the terms of this [PTA]." AE III at ¶ 11. He also acknowledged his understanding of that provision on the record, prior to the court's acceptance of his guilty pleas. Record at 56. He later acknowledged his understanding on the record that he was past his EAOS on the date of sentencing and that he was entitled to no pay or allowances while in confinement. *Id*. at 81. Most significantly, the appellant acknowledged his understanding on the record that the automatic forfeitures provision of the PTA subject of his declaration would "have no effect [on the adjudged sentence]." *Id*. Notably, the appellant raised no question or objection at trial before the military judge, did not request to withdraw his guilty pleas, and did not raise this issue in clemency.

We conclude that further fact-finding is not required under the fourth *Ginn* factor. Based upon the aforementioned, we conclude that the record, as a whole "compellingly demonstrate[s]" the improbability of the facts asserted in the appellant's declaration. *Ginn*, 47 M.J. at 248.

We find the appellant's declaration insufficient to "establish[] the truth of the factual allegations that would provide the basis for finding deficient performance." *Tippit*, 65 M.J. at 76. We also find the appellant's claims that his trial defense counsel improperly advised him regarding the impact of his EAOS on the automatic forfeitures provision of the pretrial agreement unsupported by the record and insufficient to establish that his "counsel's performance was deficient." *Strickland*, 466 U.S. at 687.

IV. Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the CA.

For the Court

R.H. TROIDL
Clerk of Court