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

Before
J.R. PERLAK, E.C. PRICE, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ADAM W. JUCKNIEWITZ
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS

NMCCA 201200441
SPECIAL COURT-MARTIAL

Sentence Adjudged: 14 June 2012.
Military Judge: CAPT Terry C. Ganzel, JAGC, USN.
Convening Authority: Commanding Officer, 2d Marine Regiment, 2d Marine Division, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: Maj J.N. Nelson, USMC.
For Appellant: Maj Emmett S. Collazo, USMCR.
For Appellee: CDR Deborah Sue Mayer, JAGC, USN; LT Philip S. Reutlinger, JAGC, USN.

28 February 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 one specification of conspiring to sell military property and one specification of selling military property, in violation of Articles 81 and 108, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 908. The military judge sentenced the appellant to confinement for six months, forfeiture of $745.00 pay per month for six months, reduction to pay grade E-1, and a bad-conduct

discharge. The convening authority (CA) disapproved the adjudged forfeitures in accordance with a pretrial agreement (PTA), approved the remainder of the sentence, and ordered it executed.[1]

The appellant assigns two errors, both pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982): (1) that there is no rational basis for the disparity between his sentence and that of his co-conspirator, and (2) that the sentence is inappropriate in light of the illusory nature of a material term of the PTA, a defect for which he seeks "a material remedy." We find merit in the appellant's second assignment of error and therefore set aside the findings and the sentence in our decretal paragraph. Arts. 59(a) and 66(c), UCMJ.

Background

Without realizing that his prospective buyer was an undercover agent of the Naval Criminal Investigative Service, the appellant conspired with a fellow Marine to sell military protective equipment. The equipment included Small Arms Protective Insert (SAPI) plates and a vest which, when worn in combination, are designed to protect against 7.62 mm rounds.

The appellant negotiated a PTA with the CA under which he promised to plead guilty to both charges and cooperate with the Government in two other courts-martial and an unrelated law enforcement investigation. In return, the CA agreed to disapprove adjudged forfeitures and fines, and to defer and then waive any automatic forfeitures, provided that the appellant allot those funds to his spouse.

The appellant cooperated with the Government as promised. After he partially performed, the CA approved the PTA on 24 May 2012, which was more than one month *after* the appellant's End of Active Obligated Service (EAOS) date of 22 April 2012. *See* Prosecution Exhibit 2 at 2 and Charge Sheet Block 5. Therefore, as a matter of law, the appellant was placed in a no-pay status once he entered post-trial confinement.

The appellant's no-pay status while confined meant that there was no pay for him to forfeit automatically and allot to his spouse. Thus this PTA term was rendered meaningless. The

[1] To the extent that the CA's action purported to execute the bad-conduct discharge, it was a nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

colloquy on the record with the military judge, and post-trial submissions by the appellant, indicate a breakdown in the appellant's expectations under the agreement and a total frustration of his efforts to provide for his family.

Discussion

"When an appellate issue concerns the meaning and effect of a pretrial agreement, interpretation of the agreement is a question of law, subject to review under a *de novo* standard." *United States v. Smead*, 68 M.J. 44, 59 (C.A.A.F. 2009) (citation omitted).

Neither party appears to have realized that it was impossible for the appellant to benefit from the automatic forfeiture protection provision, which brings his case within a long line of military appellate cases addressing similar facts. *See, e.g., United States v. Perron*, 58 M.J. 78, 82 (C.A.A.F. 2003); *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). These cases firmly establish that a plea may be made improvident by the mutual misunderstanding of a material term. Here, the appellant has carried his burden to convince us that the protection from automatic forfeitures was a material term. *United States v. Lundy*, 63 M.J. 299, 302 (C.A.A.F. 2006). "In such instances . . . remedial action, in the form of specific performance, withdrawal of the plea, or alternative relief, is required." *Perron*, 58 M.J. at 83 (citations omitted).

The Government has argued that one fact distinguishes *Perron* from this case. Part I of the PTA contains a term related to the appellant's EAOS, not found in the earlier cases:

> I understand 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*.

Appellate Exhibit I at 3, ¶ 11 (emphasis added). During his inquiry concerning Part I, the military judge asked the appellant whether he understood that this term meant that he would receive no pay if held in confinement past his EAOS, and the appellant replied that he understood. Record at 35. The military judge did not recognize that the appellant was already past his EAOS despite the fact that the EAOS was listed on page 1 of the charge sheet.

We might conclude that the EAOS term and the military judge's inquiry about it relieves the Government of its promise if our analysis was confined to contract law, as the Government's pleadings on this issue appear to have been. But contract law principles are outweighed by the Constitution's Due Process Clause. *United States v. Acevedo*, 50 M.J. 169, 172 (C.A.A.F. 1999). In order to assure that an appellant who has waived "bedrock constitutional rights and privileges," *United States v. Soto*, 69 M.J. 304, 307 (C.A.A.F. 2011), receives the benefit of his bargain, we look beyond the terms of the PTA itself and consider "the accused's understanding of the terms of an agreement as reflected in the record as a whole," *Lundy*, 63 M.J. at 301.

This record as a whole makes clear that the appellant understood the PTA to obligate the Government to pay his spouse an amount equal to that which he would have automatically forfeited during confinement. The military judge's understanding appears to have been the same. Once he saw Part II of the PTA, he advised the appellant that the adjudged forfeitures would be disapproved and that "with regards to the automatic forfeiture, you are requesting that that be deferred and that that money would go to your wife."[2] Record at 93. Both counsel immediately agreed with his assessment of Part II, and no one mentioned the passage of the appellant's EAOS.

Even more compelling is the fact that the appellant, through counsel, aggressively raised this issue for the first time in his third clemency request, wherein the appellant asked the CA to disapprove the punitive discharge or, in the alternative, defer and suspend his remaining confinement, stating that "when the government bargains for something that it cannot deliver by operation of law, it must remedy that through some other means." Appellant's Clemency Letter of 10 Sep 2012 at 1-2. Here the PTA was ill-conceived *ab initio* because of the impossibility of performance of a material term; the deferral/waiver of the automatic forfeitures provision. As the Court of Appeals for the Armed Forces said in *United States v.*

[2] In other cases, the military judge more affirmatively misstated the appellant's entitlement to pay. *See, e.g., United States v. Mitchell*, 50 M.J. 79, 80 (C.A.A.F. 1999); *Hardcastle*, 53 M.J. at 301. Here, the military judge merely noted that the appellant was requesting deferment and waiver of automatic forfeiture, without actually stating that the appellant would receive the money. While his language may have been accurate by its literal terms, in context it likely promoted the misunderstanding that everyone in the courtroom shared. In any case, military judges must do more than avoid misstatements. They must be proactive to fulfill their "responsibility to scrutinize pretrial provisions." *Soto*, 69 M.J. at 307 n.1.

Smith, 56 M.J. 271, 279 (C.A.A.F. 2002), "where there has been a mutual misunderstanding as to a material term, the convening authority and an accused may enter into a written post-trial agreement under which the accused, with the assistance of counsel, makes a knowing, voluntary, and intelligent waiver of his right to contest the providence of his pleas in exchange for an alternative form of relief." Instead, upon the advice of his staff judge advocate, the CA denied the appellant's request.[3]

Conclusion

Based on the foregoing, we find the appellant's pleas improvident due to a mutual misunderstanding of a material term of the PTA. Since "alternative relief" has not been agreed to by the parties, we set aside the findings and the sentence and authorize a rehearing.[4]

For the Court

R.H. TROIDL
Clerk of Court

[3] The CA had denied two earlier clemency requests by the appellant when he asked the convening authority to disapprove the bad-conduct discharge, or in the alternative, defer his confinement. *See* Appellant's Clemency Letters of 9 and 16 Jul 2012 and Staff Judge Advocate letter of 14 Sep 2012.

[4] Our action on the second assigned error renders the appellant's first assigned error moot.