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.

ANTHONY D. MCCALL
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 201200461
GENERAL COURT-MARTIAL

Sentence Adjudged: 27 June 2012.
Military Judge: CAPT Terry C. Ganzel, JAGC, USN.
Convening Authority: Commanding General, 2d Marine Division, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: Maj J.N. Nelson, USMC.
For Appellant: CDR Howard A. Liberman, JAGC, USN.
For Appellee: CDR Kevin L. Flynn, JAGC, USN; LT Ann E. Dingle, JAGC, USN.

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, pursuant to his pleas, of fifteen specifications of wrongful possession of a controlled substance, in violation of Articles 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The military judge sentenced the appellant to confinement for two years, reduction to pay grade E-1, and a dishonorable discharge. Pursuant to a pretrial agreement (PTA),

the convening authority (CA) suspended all confinement in excess of 180 days.

The appellant assigns two errors: first, that he failed to receive the benefit of his bargained-for protection against automatic forfeitures because he was past his End of Active Obligated Service (EAOS) date; and second, that his sentence to a dishonorable discharge is inappropriately severe. We find merit in the appellant's first assignment of error and set aside the findings and the sentence in our decretal paragraph. Arts. 59(a) and 66(c), UCMJ.

Background

In January 2012, the Government preferred a charge and fifteen specifications of wrongful possession of a controlled substance (prescription painkillers). The appellant unconditionally waived his Article 32, UCMJ, investigation and negotiated a PTA with the CA under which he promised to plead guilty to the charge and all specifications. In return, the CA agreed to suspend confinement in excess of 180 days, 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. Appellate Exhibit II at 1-2.

When the appellant signed the PTA on 11 April 2012, he was already beyond his EAOS date of 13 March 2012, which was accurately reflected on Block 5 of the Charge Sheet. The CA approved and signed the PTA on 12 June 2012, two months after the appellant's EAOS date. Part I of the PTA contained the standard "boilerplate" paragraph regarding automatic forfeitures, which concludes with the following sentence: "Finally, I understand that if I am held in confinement beyond my [EAOS] date, then I will not receive any pay or allowances by operation of law, regardless of the terms of this agreement. AE I at ¶ 11.

At the appellant's trial on 27 June 2012, the military judge conducted an inquiry into Part I of the PTA, during which he recited the above language from Paragraph 11, asked the appellant if he understood, and the appellant replied in the affirmative. Record at 31. The military judge did not address what was obvious on the charge sheet before him, that the appellant indeed was more than three months beyond his EAOS date. The military judge did not ascertain from the appellant that he understood his current status (presumptively one of legal-hold) and understood that he would fall into a no-pay

status upon confinement. Neither the trial counsel nor defense counsel recognized or highlighted the issue during the inquiry into Part I of the PTA.

Later in the trial, after announcing his sentence, the military judge reviewed Part II of the PTA with the appellant. Because the military judge had adjudged no forfeitures that portion of the PTA had no effect. With regard to automatic forfeitures, however, the military judge interpreted the PTA and explained as follows:

> The automatic forfeiture **will** be deferred provided that you establish and maintain an allotment, and that deferment **will** run from the date that would otherwise become effective until the date the convening authority acts on the sentence. The deferred and waived forfeitures **will** be paid to KTF in the amount of $730, and KM **will** get the remaining amount. . . .

Record at 91 (emphasis added).

The appellant acknowledged his understanding to be the same, and both trial counsel and defense counsel agreed with the military judge's interpretation. *Id*. at 91-2. No one in the courtroom appeared to recognize that the appellant was well beyond his EAOS, that he would enter within hours into a no-pay status upon his confinement, and that the "protection" he had negotiated from automatic forfeitures was meaningless.

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 nor the military judge 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. Smith*, 56 M.J. 271, 279 (C.A.A.F. 2002); *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.

The Government argues that the standard language in Paragraph 11 of Part I of the PTA distinguishes the *Perron* line of cases from this case. We might conclude that the EAOS term and the military judge's cursory inquiry into it relieves the Government of its promise if our analysis was confined to contract law. 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," *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006).

Here, the appellant has carried his burden to convince us that the protection from automatic forfeitures was a material term. *Lundy*, 63 M.J. at 302. This record as a whole makes clear that the appellant sought through the pretrial agreement to address his dependents' financial situation during his confinement by providing that adjudged or automatic forfeitures would go to his dependent children. The record amply demonstrates that all participants in the proceeding – to include the CA, the staff judge advocate, trial and defense counsel, the appellant, and the military judge – proceeded on the assumption that the appellant's pay had fairly been a matter for negotiation and had become a material term of the agreement.

Moreover, as in *Williams*, *Hardcastle*, and *Smith*, the military judge expressly stated on the record that the provision relating to automatic forfeitures would in fact apply to the appellant. As in those cases, "remedial action is required because these circumstances reflect pleas that rest in a significant degree on an agreement with the Government that was a material part of the consideration, and the Government has not fulfilled its part of the agreement." *Smith*, 56 M.J. at 279. Although there was other protection in this case, there is no requirement that the term in issue constitute the "only" reason for a pretrial agreement. *Id*.

The appellant, both personally and through counsel, raised this issue in his subsequent clemency request to the CA, and

requested an early release from confinement as a remedy. Appellant's Clemency Letter of 20 Sep 2012 at 1 and Enclosure 1. As the Court of Appeals for the Armed Forces noted in S*mith*, "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." 56 M.J. at 279. Regrettably, upon the advice of his staff judge advocate, the CA granted no additional relief and instead stated in the promulgating order that deferment of forfeitures was not possible "due to the accused being past his (EAOS)." General Court-Martial Order No. D12-42 of 22 Oct 2012.

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.

For the Court

R.H. TROIDL
Clerk of Court