

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

D.A. WAGNER

R.E. VINCENT

E.B. STONE

UNITED STATES

v.

**Robert L. PERSON, Jr.
Dentalman (E-3), U. S. Navy**

NMCCA 200600076

Decided 19 December 2006

Sentence adjudged 22 June 2005. Military Judge: D.J. Daugherty. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Camp Smedley D. Butler, Okinawa, Japan.

LCDR DEREK C. HAMPTON, JAGC, USN, Appellate Defense Counsel
LT AIMEE SOUDERS, JAGC, USN, Appellate Defense Counsel
MAJ KEVIN C. HARRIS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Senior Judge:

The appellant was convicted, pursuant to his pleas, by a military judge sitting as a general court-martial, of conspiracy to commit murder, premeditated murder, larceny, and wrongfully endeavoring to impede a criminal investigation.¹ The military judge sentenced the appellant to confinement for life without the possibility of parole, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority agreed, in a pretrial agreement, to suspend all confinement in excess of 60 years for a period of 20 years from the date of trial. In taking his action, the convening authority properly approved the sentence as adjudged and suspended all confinement in excess of 60 years, but erroneously stated that the suspension was to run from the date of his action vice the date of trial.² The appellant claims, in his sole

¹ The offenses violated Articles 81, 118, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 918, 921, and 934.

² We will correct this error in our decretal paragraph. *United States v. Castillo*, 59 M.J. 600, 603 (N.M.Ct.Crim.App. 2003)(citing *United States v.*

assignment of error, that the pretrial agreement, which contained a provision requiring him to waive consideration for clemency or parole before the Naval Clemency and Parole Board for 20 years, was violative of public policy and RULE FOR COURTS-MARTIAL 705(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) because it deprived him of the complete and effective exercise of post-trial and appellate rights.

Background

The appellant and several other shipmates were involved in extensive shoplifting from the Army-Air Force Exchange Service. The appellant and two of his companions came to suspect that one of the other members of their group had cooperated with authorities investigating the thefts. The appellant entered into a conspiracy with his two companions to murder the victim. They executed their plan by luring him to a place where all three repeatedly stabbed the victim and slit his throat, leaving his body in a drainage tunnel. The autopsy report concluded that the victim's throat had been slashed almost to the point of decapitation and that the victim had been stabbed 14 times.

The appellant, through trial defense counsel, successfully negotiated a pretrial agreement that eliminated the death penalty as a possible punishment and required the convening authority to suspend any adjudged confinement exceeding 60 years. In exchange for the sentence limitations, the appellant agreed to enter pleas of guilty to designated charges and specifications, cooperate as a witness against his co-conspirators, and waive consideration for clemency and parole before the Naval Clemency and Parole Board for 20 years.

Waiver of Clemency and Parole

An accused is free to negotiate and enter into a pretrial agreement with the convening authority to avoid a contested trial. R.C.M. 705; *see United States v. McFadyen*, 51 M.J. 289, 290 (C.A.A.F. 1999). Either party is free to propose "any term or condition not prohibited by law or public policy." *McFadyen*, 51 M.J. at 209 (quoting R.C.M. 705(d)(1)). When entering into a pretrial agreement, an accused may waive "many rights and Constitutional protections," so long as the waiver is knowing and voluntary. *United States v. Edwards*, 58 M.J. 49, 52 (C.A.A.F. 2003). A term or condition, however, that violates appellate case law or public policy is not enforceable. A pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to complete sentencing proceedings; the complete and effective exercise of post-trial and appellate

Cox, 46 C.M.R. 69, 72 (C.M.A. 1972)).

rights; the right to a speedy trial; or the complete and effective exercise of post-trial and appellate rights. *Id.* at 51-52; R.C.M. 705(c)(1)(B).

The appellant relies on the language from R.C.M. 705(c)(1)(B) as support for his claim that the provision in his agreement waiving consideration for clemency and parole violates public policy and may not be enforced. Specifically, the appellant argues that his eligibility for clemency and parole before the Naval Clemency and Parole Board is a post-trial right envisioned in the prohibition contained in R.C.M. 705(c)(1)(B). This court, however, has previously held that the availability of clemency and parole is a valid provision not violative of public policy. *United States v. Thomas*, 60 M.J. 521 (N.M.Ct.Crim.App. 2004); *United States v. Nicholson*, 13 M.J. 928 (N.M.C.M.R. 1982). We reaffirm those holdings in the instant case. Moreover, we observe that the drafters' analysis of R.C.M. 705(c)(1)(B) states that the Rule was created with the goal of preventing the bargaining away of rights which "would leave no substantial means to ensure judicially that the accused's plea was provident, that the accused entered the pretrial agreement voluntarily, and that the sentencing proceedings met acceptable standards." R.C.M. 705(c)(1)(B), Analysis. Therefore, as the Naval Clemency and Parole Board exercises an administrative, vice a judicial, function and does not in any way serve to ensure the providence of pleas, propriety of the pretrial agreement, or lawfulness of the sentencing proceedings, application to the Board is not a "right" covered by the Rule. *See also* Secretary of the Navy Instruction 5815.3J of June 12, 2003, *Department of the Navy Clemency and Parole Systems*, § 308(clemency and parole are not rights, but discretionary decisions of the Naval Clemency and Parole Board or the Secretary of the Navy).

In summary, (1) it is clear from a plain reading of the Manual for Court-Martial and the Departmental regulation that clemency and parole before the Naval Clemency and Parole Board is not a post-trial right envisioned by the prohibition contained in R.C.M. 705(c)(1)(B); (2) the provisions in question are not prohibited by statute or appellate law, and (3) we find that the provisions do not violate public policy. *See United States v. Cummings*, 38 C.M.R. 174 (C.M.A. 1968).

Conclusion

The findings of guilty and sentence, as approved by the convening authority, are affirmed. All confinement in excess of 60 years is suspended for a period of 20 years from the date of trial. The supplemental court-martial order shall correctly

reflect the findings and sentence, including the inception date of the period of suspension.

Judge VINCENT and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court