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

Before
J.R. PERLAK, M.D. MODZELEWSKI, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

KENNETH BELCHER II
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS

NMCCA 201200079
GENERAL COURT-MARTIAL

Sentence Adjudged: 1 December 2011.
Military Judge: Col G.W. Riggs, USMC.
Convening Authority: Commanding General, 2d Marine Division, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: Maj J.T. Leggett, USMC.
For Appellant: Maj S. Babu Kaza, USMCR.
For Appellee: LT Joseph M. Moyer, JAGC, USN.

18 September 2012

OPINION OF THE COURT

PER CURIAM:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of one specification of conspiracy to distribute a controlled substance, one specification of unauthorized absence, one specification of wrongful use of a controlled substance, one specification of wrongful possession of a controlled substance,

and one specification of wrongfully soliciting another to possess a controlled substance, in violation of Articles 81, 86, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 886, 912a, and 934. On 1 December 2011, the military judge sentenced the appellant to confinement for 12 months, reduction to pay grade E-1, and a bad-conduct discharge. A pretrial agreement had no impact on the sentence adjudged. On 7 February 2012, the convening authority (CA) approved the sentence as adjudged and ordered it executed, subject to applicable legal limitations.[1]

The appellant raises two assignments of error that: (1) in the course of negotiating a pretrial agreement the Government bound itself to the appellant's offer of a 9-month confinement cap by using him as a witness in a companion case; and, (2) in the alternative, he urges us to reduce his sentence because of the Government's conduct.

After carefully considering the record of trial, the parties' pleadings, and the post-trial declarations under penalty of perjury, we conclude that the findings and the sentence are correct in law and fact, and there is no error materially prejudicial to the appellant's substantial rights. Arts. 59(a) and 66(c), UCMJ.

Background

Between 1 September 2010 and 28 February 2011, the appellant was party to a conspiracy that created and filled fraudulent prescriptions of Oxycodone, paying for them with cash and TRICARE benefits. The appellant's role was to fill the fraudulent prescriptions and distribute the Oxycodone to his co-conspirators, keeping some tablets for himself as payment. The appellant used Oxycodone on divers occasions roughly coinciding with the period of the conspiracy. He also solicited a fellow service member to obtain the drug in the same way.

[1] To the extent that the convening authority'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).

Separately, the appellant left his unit on 8 March 2011 to return to his hometown, well-aware that he was committing the offense of unauthorized absence. His absence ended on 7 June 2011, when he was taken into custody by civilian authorities.

The appellant offered to plead guilty to these offenses by submitting a pretrial agreement to the CA dated 25 August 2011.[2] Among other terms in the offer, the appellant agreed to plead guilty to the charges and all but one of the specifications before a military judge and promised to testify against 2 of his co-conspirators if provided a grant of testimonial immunity, in exchange for a 9-month cap on confinement. He also offered to provide testimony against another co-conspirator without a grant of immunity. The trial counsel on the appellant's case indicated that he would favorably endorse the 9-month cap, but several weeks passed during which the CA took no action on the offer.

Meanwhile, in September 2011, a second trial counsel contacted the appellant's defense counsel because he was prosecuting one of the appellant's co-conspirators, and he wanted the appellant to be a Government witness in that case. The contents of the subsequent exchange are disputed by the parties, but the important fact is that, after their discussion, the second trial counsel sent a "Grant of Testimonial Immunity and Order to Testify" to the appellant's defense counsel. Appellant's Non-Consent Motion to Attach at Exhibit K. The second trial counsel did not send, or ever mention, a signed pretrial agreement. Notably, the appellant does not contend on appeal that the second trial counsel ever told him or his counsel that the offer had been accepted. Instead, the appellant argues that the first trial counsel's support for the 9-month confinement cap, plus the receipt of the grant of immunity, were "continued indicia of acceptance." Appellant's Brief at 4.

[2] The appellant submitted two earlier pretrial agreements (26 July 2011 and 3 August 2011 respectively), but the 25 August 2011 pretrial agreement is the one now at issue. Appellant's Non-Consent Motion to Attach of 24 May 2012 at Exhibit G; Appellant's Brief of 24 May 2012 at 3.

The appellant cooperated with Government agents and testified at the trial of one of his co-conspirators,[3] but the CA never accepted the 9-month offer. In October 2011, after testifying at one co-conspirator's trial, the CA made a counter-offer for 15 months. Negotiations continued and, in November 2011, the parties agreed to a 12-month cap. On 1 December 2011, the appellant was arraigned and entered an unconditional plea of guilty to the offenses listed above. Neither the appellant nor his defense counsel ever raised any issues on the record concerning the 9-month offer, the grant of immunity, or the appellant's cooperation with the Government. Instead, in Part I of the pretrial agreement, the appellant stated, "This agreement (Parts I and II) constitutes all the conditions and understandings of both the government and myself regarding the pleas in this case. There are no other agreements, written or otherwise." Appellate Exhibit I at 1. The first time the defense raised the 9-month confinement cap was in their clemency letter of 1 February 2012, making a case in equity based on the cooperation of the appellant in the absence of an approved pretrial agreement.

Discussion

The appellant's main argument is that the Government constructively accepted his 9-month offer when its agents took advantage of his cooperation in the co-conspirator's case. We find that the appellant waived this issue when he entered an unconditional guilty plea according to the negotiated 12-month pretrial agreement.

"Waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Gladue,* 67 M.J. 311, 313 (C.A.A.F. 2009) (quoting *United States v. Olano,* 507 U.S. 725, 733 (1993)). An unconditional plea of guilty waives all defects except two: jurisdictional defects and deprivations of due process. *United States v. Schweitzer*, 68 M.J. 133, 136 (C.A.A.F. 2009); *see also* RULE FOR COURTS-MARTIAL 905(e), MANUAL FOR

[3] Four companion cases are mentioned throughout the record, but the record only confirms that the appellant testified at the court-martial of Lance Corporal Richard M. Roberts, USMC. Record at 6-7; Appellant's Brief at 10; Government's Motion to Attach of 16 Jul 2012, Affidavit of Captain Kocab at 3; CA's Action at 3; and Appellate Exhibit I at 5.

COURTS-MARTIAL, UNITED STATES (2008 ed.). We have not identified any jurisdictional defects in the record, and neither party has raised one.

There being no jurisdictional defects, the appellant's unconditional guilty plea waives all defects except deprivations of due process. We find no due process violation in this case. The appellant cites *United States v. Lundy*, for the proposition that "contract principles are outweighed by the Constitution's Due Process Clause protections for an accused."[4] 63 M.J. 299, 301 (C.A.A.F. 2006) (citation and internal quotation marks omitted). After citing that case, however, the appellant fails in his burden to link the contract principles he argues to a violation of due process.[5]

Here, the military judge established that the appellant's plea was knowing and voluntary. The appellant told the military judge that the only agreement between him and the CA was AE I, which contained the 12-month confinement cap. Record at 62. There is no indication that any other agreement existed. Furthermore, the appellant stated that he was satisfied with his counsel, who had negotiated a 12-month cap where the maximum punishment was more than 31 years and convinced the Government to withdraw and dismiss one of the specifications against him. *Id*. at 14, 49, 55-56. Neither the appellant nor his counsel ever mentioned the earlier negotiations on the record, and thus there is no indication that they affected his ability to present a defense or make a knowing and voluntary plea.[6]

The Court of Appeals for the Armed Forces has found waiver, and no due process violation, where the alleged pretrial defects had much clearer constitutional dimensions than are present here. Those cases include situations where an appellant was denied access to the child pornography evidence against him,

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[4] Appellant's Brief at 7.

[5] *Id*. at 7-11; Appellant's Reply Brief of 13 Aug 2012 at 2-3.

[6] The military judge asked the appellant if he understood the meaning of the provisions in the pretrial agreement which specified his agreement to testify against his co-conspirators, including the co-conspirator against whom he had already testified. *Id*. at 57-58. Neither the appellant nor his counsel raised any issue with the military judge.

both before trial and during the providence inquiry, *United States v. Jones*, 69 M.J. 294, 299-300 (C.A.A.F. 2011); where the CA was allegedly an "accuser" under Article 1(9), UCMJ, *Schweitzer*, 68 M.J. at 137; and where an appellant's speedy-trial rights were at stake, *United States v. Tippit,* 65 M.J. 69, 75 (C.A.A.F. 2007). In each case, the appellant pled guilty and then raised a putative constitutional error on appeal, but the court held that the error was waived.

The appellant's alternative argument is that the Government's conduct below was so unacceptable that we should exercise our authority under Article 66(c), UCMJ, to reassess his sentence to 9 months, corresponding with his original offer. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *see also United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). We decline to do so, concluding that any detrimental reliance by the appellant was unreasonable; the CA never accepted his offer and no one told the appellant otherwise.

Conclusion

The findings and the sentence as approved by the CA are affirmed.

For the Court

R.H. TROIDL
Clerk of Court