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UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class NICHOLAS D. BROWN
United States Air Force

ACM 34037

10 January 2002

Sentence adjudged 8 February 2000 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Michael J. Rollinger (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 60 days, and reduction to E-1.

Appellate Counsel for Appellant: Colonel James R. Wise, Lieutenant Colonel Timothy W. Murphy, and Captain Karen L. Hecker.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Lieutenant Colonel Karen L. Manos.

Before

BURD, BRESLIN, and HEAD
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

The appellant was convicted, in accordance with his pleas, of four specifications of making worthless checks by dishonorably failing to maintain sufficient funds, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The sentence adjudged and approved was a bad-conduct discharge, confinement for 60 days, and reduction to E-1. Under the auspices of *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant now contends that his plea was improvident, because it was induced by a misunderstanding of a material term in the pretrial agreement. We find no error, and affirm.

Before trial, the appellant drafted and offered a pretrial agreement, which was accepted by the convening authority. In exchange for the appellant's guilty plea, the convening authority agreed to limit the punishment he would approve. The pretrial agreement included a provision, among others, that the convening authority would not approve any adjudged fines or forfeitures. The appellant now contends that he believed that this provision would ensure that his pay would continue while he was in confinement. The appellant also alleges that his pay stopped 14 days after his court-martial through the operation of the automatic forfeiture provisions of Article 58b, UCMJ, 10 U.S.C. § 858b, although he has not offered any evidence to substantiate that claim.

An accused is entitled to the benefit of any bargain on which his guilty plea was premised. *Santobello v. New York*, 404 U.S. 257 (1971). If there is a misunderstanding about the effect of the plea, the plea may stand if the misapprehension was not a substantial factor in the decision to plead guilty. *United States v. Mincey*, 42 M.J. 376, 378 (1995); *United States v. Hemingway*, 36 M.J. 349, 353 (C.M.A. 1993). In *United States v. Bedania*, 12 M.J. 373, 376 (C.M.A. 1982), our superior court established a test to determine whether a misunderstanding by an accused of a term in a pretrial agreement could invalidate a guilty plea.

> [W]hen collateral consequences of a court-martial conviction—such as administrative discharge, loss of a license or a security clearance, removal from a military program, failure to obtain promotion, deportation, or public derision and humiliation—are relied upon as the basis for contesting the providence of a guilty plea, the appellant is entitled to succeed only when the collateral consequences are major and the appellant's misunderstanding of the consequences (a) results foreseeably and almost inexorably from the language of the pretrial agreement; (b) is induced by the trial judge's comments during the providence inquiry; or (c) is made readily apparent to the judge, who nonetheless fails to correct that misunderstanding.

See United States v. Williams, 55 M.J. 302, 307 (2001) (applying the *Bedania* test); *United States v. Hardcastle*, 53 M.J. 299, 303 (2000); *United States v. Williams*, 53 M.J. 293, 296 (2000).

The interpretation of a pretrial agreement is a question of law, which we review de novo. *United States v. Acevedo*, 50 M.J. 169, 172 (1999). When interpreting pretrial agreements, we consider basic principles of contract law, however contract principles are outweighed by the Constitution's Due Process Clause protections for an accused. *Id.*

Considering all the circumstances of this case, we find the appellant understood the agreement, and that he knowingly and intelligently pled guilty in accordance with its terms. First, the terms of the pretrial agreement, which were drafted by the defense, were not ambiguous. The provision in question simply stated that the convening authority would not approve any adjudged fine or forfeiture. The term was not tied to any provisions regarding confinement, it did not address the automatic forfeiture provisions of Article 58b, UMCJ, and it did not assure the appellant he would continue to receive pay.

Second, the trial proceedings were sufficient to make sure there was no misunderstanding about the effect of the agreement. The military judge inquired about the appellant's understanding of the pretrial agreement, and was assured the appellant understood it. Moreover, the military judge asked the appellant if he had read and understood the post-trial rights advisement form, admitted as Appellate Exhibit IV. The appellant indicated he had read the advisement and understood it. The advisement explained the operation of Article 58b, UCMJ; it was signed by the appellant, and dated the day before trial.

Third, the appellant's conduct post-trial indicates he was not mistaken about the effect of the automatic forfeiture provisions on his sentence. Within six days after trial, defense counsel requested deferral of the reduction in rank and automatic forfeitures resulting from the operation of Article 58b, UCMJ. The convening authority denied this request by letter to the defense counsel dated 1 March 2000. The fact that this request was made shows the defense was aware that the automatic forfeiture provisions applied, notwithstanding the pretrial agreement. Also, neither the appellant nor the defense counsel ever asserted that the imposition of automatic forfeitures violated the pretrial agreement, even though the response to the staff judge advocate's recommendation was dated 10 March 2000, well after the denial of deferment of the automatic forfeitures and reduction.

Considering all these matters, we find the appellant was not mistaken about the terms of the pretrial agreement. Article 66(c), UCMJ, 10 U.S.C. § 866(c). However, even if we assume the appellant was mistaken about the effect of the pretrial agreement, we reach the same result.

Applying the *Bedania* test, we find no basis for relief. First, we are not persuaded that the forfeitures in question were a major collateral consequence. The period of automatic forfeitures was only 60 days, reduced by the 14-day delay before they went into effect. Article 58b, UCMJ. More importantly, the greatest portion of the appellant's pay was already going to involuntary garnishments by creditors—a fact stressed by the defense at trial. In light of the small amount of money at stake, it is doubtful that any misapprehension would be a substantial factor in the appellant's decision to plead guilty. *Hemingway*, 36 M.J. at 353.

Secondly, the appellant has not met the second prong of the *Bedania* test. The alleged mistake does not result "foreseeably and almost inexorably" from the language of the pretrial agreement. *Bedania*, 12 M.J. at 376. The provision in question only states that the convening authority will not approve adjudged fines or forfeitures—it does not guarantee the appellant will receive any pay during his confinement. Unlike the agreement in *Williams*, 53 M.J. at 294, it did not provide for waiver of automatic forfeitures, which might be construed to suggest that pay would continue. This case is most similar to the situation in *United States v. Albert*, 30 M.J. 331, 332 (C.M.A. 1990). The convening authority did exactly what he promised to do.

The alleged mistake was not "induced by the trial judge's comments," nor was it "made readily apparent to the judge, who nonetheless fail[ed] to correct that misunderstanding." *Bedania*, 12 M.J. at 376. To the contrary, it is clear the defense understood the terms of the pretrial agreement and the impact of Article 58b, UCMJ. As noted above, the military judge inquired whether the appellant understood the terms of the pretrial agreement. The military judge also accepted written documentation showing that the appellant was advised about the effect of Article 58b, UCMJ. As the Court explained in *Bedania*,

> In short, chief reliance must be placed on defense counsel to inform an accused about the collateral consequences of a court-martial conviction and to ascertain his willingness to accept those consequences. While the military judge may appropriately ask during the providence hearing whether appellant and his counsel have discussed any possible collateral results of a conviction on the charges to which a guilty plea is being entered, the judge need not undertake on his own motion to ascertain and explain what those results may be.

Bedania, 12 M.J. at 376. Here, the military judge did exactly what he was supposed to do.

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, SSgt, USAF
Chief Court Administrator