UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MICHEAL L. BROWN
United States Air Force

ACM 37560

09 November 2010

Sentence adjudged 01 October 2009 by GCM convened at Tinker Air Force Base, Oklahoma. Military Judge: William M. Burd (sitting alone).

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

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Major Marla J. Gillman.

Appellate Counsel for the United States: Colonel Don M. Christensen, Lieutenant Colonel Jeremy S. Weber, Major Naomi N. Porterfield, Captain Matthew F. Blue, and Gerald R. Bruce, Esquire.

Before

BRAND, ORR, and WEISS
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, the appellant was convicted of one specification of divers wrongful use of OxyContin and one specification of divers wrongful distribution of OxyContin in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for one year, and reduction to E-1.

The issue on appeal is whether the military judge abused his discretion by denying the defense counsel's motion to compel appointment of a forensic psychologist.

Background

On 9 September 2009, the defense counsel filed a motion to compel the appointment of a forensic psychologist as a confidential expert consultant. The government responded in opposition on 11 September 2009. On 21 September 2009, after receiving an e-mail from the defense counsel inquiring about the status of the motion, the military judge responded via e-mail, "The subject motion is denied."

Thereafter, on 23 September 2009, the appellant, through his counsel, submitted a pretrial agreement. In addition to agreeing to proceed to trial by military judge alone, the appellant also agreed to "waive all waivable motions." The convening authority accepted the agreement on 25 September 2009.

Trial was held on 1 October 2009. The appellant pled guilty to the Charge and its Specifications. During the plea inquiry, the appellant explained to the military judge that he was injured in a motorcycle accident and then a snowboarding accident in 2002. As a result, he underwent three surgeries in 2006 and 2007. Beginning in 2006, he was prescribed OxyContin, and he was directed to take one to three pills a day. The appellant began taking more than the prescribed dosage in September 2008. He started taking eight to nine pills a day to deal with his mental anguish due to severe marital problems, not increased physical pain.

By taking more than the prescribed amount, the appellant ran out of his prescription so he had to buy more. He spent about $500 per month on illegally purchased OxyContin. Further, the appellant distributed OxyContin to five civilians. The Air Force Office of Special Investigations (AFOSI) learned of the appellant's crimes through a civilian informant. AFOSI agents set up a controlled buy and caught the appellant selling OxyContin to the informant. During the first controlled buy, the appellant was in uniform. After his apprehension, the appellant agreed to assist AFOSI and civilian authorities with their investigations.

Law and Discussion

The issue in this case revolves around the provision of the appellant's pretrial agreement which states that the appellant agrees to "waive all waivable motions;" the parties' understanding of the agreement; the effect of the appellant's unconditional guilty plea; and potentially whether the military judge abused his discretion in denying the defense request for a confidential expert consultant.

When an appellant has intentionally waived a known right at trial, "it is extinguished and may not be raised on appeal." *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (citing *United States v. Harcrow*, 66 M.J. 154, 156 n.1 (C.A.A.F. 2008) (citing *United States v. Olano*, 507 U.S. 725, 733-34 (1993))). In *Gladue*, the

Court further held that "[t]he text of the [pretrial agreement] unambiguously agrees to 'waive *any* waiveable [sic] motions.'" *Id.* at 314 (alteration in original). In *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995), the United States Supreme Court agreed that a criminal defendant "may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution."[1]

"The interpretation of a pretrial agreement is a question of law, which is reviewed under a de novo standard." *United States v. Acevedo*, 50 M.J. 169, 172 (C.A.A.F. 1999) (citing *United States v. Van Thournout*, 100 F.3d 590, 594 (8th Cir. 1996); *United States v. Coleman*, 895 F.2d 501, 505 (8th Cir. 1990)). "[W]e look to the basic principles of contract law when interpreting pretrial agreements." *Id.* (citing *Cooper v. United States*, 594 F.2d 12, 16 (4th Cir. 1979)). "When the terms of a contract are unambiguous, the intent of the parties is discerned from the four corners of the contract." *Id.* (citing *United States v. Liranzo*, 944 F.2d 73, 77 (2d Cir. 1991)).

However, "[w]hen the contract is ambiguous on its face because a provision is open to more than one interpretation, extrinsic evidence is admissible to determine the meaning of the ambiguous term." *Id.* (citing *United States v. Ingram*, 979 F.2d 1179, 1184 (7th Cir. 1992)). In determining the parties' understanding of an ambiguous pretrial agreement term, this Court will give the greatest weight to the parties' stated understanding at trial because disagreements about a provision of a pretrial agreement can better be resolved at the pretrial and trial stages.[2] We also will consider the parties' stated understanding, if any, in the Rules for Courts-Martial 1105 and 1106 submissions, for this stage provides the next best venue for resolving pretrial agreement disputes.[3]

An unconditional plea of guilty waives all nonjurisdictional defects at earlier stages of the proceedings. *United States v. Bradley*, 68 M.J. 279, 281 (C.A.A.F. 2010) (citations omitted).

In the case sub judice, the appellant explained to the military judge that he entered into the pretrial agreement freely and voluntarily, that he understood all the provisions of

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[1] *See, e.g.*, *Ricketts v. Adamson*, 483 U.S. 1, 10 (1987) (holding that the double jeopardy defense is waivable by pretrial agreement); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (finding that a knowing and voluntary guilty plea waives the privilege against compulsory self-incrimination, the right to a jury trial, and the right to confront one's accusers); *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) (concluding that the Sixth Amendment right to counsel may be waived). Likewise, absent some affirmative indication of Congress's intent to preclude waiver, statutory rights and provisions are subject to waiver by voluntary agreement of the parties. *See also Evans v. Jeff D.*, 475 U.S. 717, 730-32 (1986) (finding that the prevailing party in a civil rights action may waive its statutory eligibility for attorney's fees).

[2] *See United States v. Acevedo*, 50 M.J. 169, 173 (C.A.A.F. 1999) (citing *United States v. Passini*, 10 M.J. 108, 109 (C.M.A. 1980); *United States v. Crowley*, 3 M.J. 988 (A.C.M.R. 1977), *aff'd*, 7 M.J. 336 (C.M.A. 1979)) (noting that a trial defense counsel is "under a continuing duty to reveal in open court any discrepancy between the defense understanding of the potential sentence [under the terms of the pretrial agreement] and that adjudged by the court").

[3] *See id.* (noting that one of the options an appellant and his trial defense counsel have to resolve pretrial agreement disputes is through their staff judge advocate recommendation response and clemency submissions).

his agreement, and that he entered into the agreement not only to get a lighter sentence but also because he was, in fact, guilty. The provision regarding the waiver of all waivable motions was explained to the appellant two different times during the trial. Moreover, the provision originated with the defense.

Originally, it appears that the defense counsel thought the motion for appointment of the expert consultant was not waived because the military judge had already ruled on the motion. To the contrary, the military judge opined that the "impact of this provision, even though I've already ruled on the motion, is that your client is waiving appellate consideration of the correctness of my decision." The defense counsel then stated, "[F]or whatever reason, the defense decided not to ask for reconsideration of the motion, we waived any future motions and I believe that's the position the defense is going to take." The military judge went on to clarify the provision as he found that there was no clear meeting of the minds on the interpretation.[4] The defense counsel then unequivocally stated on the record, with the appellant's concurrence, "if a motion that's already been made and ruled upon is then thereafter waivable, then we waive." The military judge further clarified by stating, "So even if the provision applies to the motion that I denied, and it means that you are giving up appellate consideration of my ruling on that motion, you still want to go forward with your pretrial agreement?" The appellant responded, "Yes, sir."

In his pretrial agreement, the appellant waived all waivable motions, to include the motion for appointment of an expert consultant. If that was not what the appellant wanted, he did not have to sign a pretrial agreement. First, the appellant could have requested reconsideration by the military judge and then the appellant could have presented evidence upon which the military judge could base his decision.[5] He also could have requested the opportunity to enter a conditional guilty plea to preserve the issue, or he could have withdrawn from the pretrial agreement when it became clear that his motion for the expert consultant would not receive further review. There has been no allegation of ineffective assistance of counsel and the issue of the expert consultant was not even mentioned in post-trial submissions. Further, the unconditional plea waives appellate review of the motion for the expert consultant.

As previously stated, "[t]he interpretation of a pretrial agreement is a question of law, which is reviewed under a de novo standard." *Acevedo*, 50 M.J. at 172 (citing *Van Thournout*, 100 F.3d at 594; *Coleman*, 895 F.2d at 505). Applying the de novo standard of review to this case, we find that the appellant willing agreed to the terms of his pretrial

[4] The government counsel clearly believed that the motion was waived pursuant to the pretrial agreement, stating, "[I]t's the government's position that in agreeing to the waiver position [sic] that the motion not be able to be reconsidered on appeal."

[5] However, this would have been contrary to the pretrial agreement unless the defense counsel who originated this provision had requested the option to ask for reconsideration in the pretrial agreement.

agreement. As noted, "[a]n unconditional guilty plea waives all nonjurisdictional defects at earlier stages of the proceedings." *Bradley*, 68 M.J. at 281 (citations omitted).

The appellant intentionally waived a known right at trial by waiving all waivable motions. The appellant specifically understood that he was getting the benefit of the pretrial agreement by waiving the waivable motions. As we agree with the military judge's assessment that the pretrial agreement provision encompassed the defense motion to appoint an expert consultant and find that the appellant knowingly waived all waivable motions, we hold that the issue raised by the appellant in this appeal is moot.

Conclusion

The approved 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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court