UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JOHNNY L. FRANCISCO
United States Air Force

ACM 36773

04 August 2008

Sentence adjudged 11 May 2006 by GCM convened at Yokota Air Base, Japan. Military Judge: Steven A. Hatfield (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 9 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, Major Matthew S. Ward, Major Donna S. Rueppell, Major Amy E. Hutchens, and Major Carrie E. Wolf.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

HEIMANN, Senior Judge:

Consistent with his pleas, the appellant was convicted of one specification of dereliction of duty for failing to prepare to deploy, two specifications of false official statements regarding deployment preparations, one specification of missing movement by design and one specification of a general violation of Article 134, UCMJ, for statements regarding his unwillingness to deploy, in violation of Articles 92, 107, 87, and 134, UCMJ, 10 U.S.C. §§ 892, 907, 887, 934. A military judge sentenced the appellant to a dishonorable discharge, confinement for 9 months, and reduction to E-1. The convening

authority approved the findings and sentence. A pretrial agreement did not impact the convening authority's action on the sentence.

The appellant raises five issues on appeal. The first issue is that a provision in his pretrial agreement requiring him to release his medical records violates public policy. Second, he argues his plea to the negligent failure to deploy is improvident. Third and fourth, he attacks the validity of and plea to the Article 134, UCMJ offense and finally, he argues that the post-trial processing of his request for deferment of forfeitures was defective.

Pretrial Agreement

For the first time, the appellant attacks a provision of his pretrial agreement (PTA). The agreement provision required appellant to "sign a release of all medical and mental health records dated between 1 July 2003 to 1 July 2004, and 20 June 2005 to 2 May 2006, once the military judge has accepted [his] guilty plea." The appellant, citing *United States v. Cassity*, 36 M.J. 759, 762 (N.M.C.M.R. 1992) and *United States v. Libecap*, 57 M.J. 611, 614 (C.G. Ct. Crim. App. 2002), argues that this provision "undermine[s] public confidence in the integrity and fairness of the disciplinary process" and thus the plea should be invalidated. While not as clearly stated, the appellant also argues he did not freely and voluntarily agree to this provision.

Unlimited access to mental health and medical records by prosecutors is a prohibited practice that is governed by numerous regulations and limitations. *See, e.g.* Mil. R. Evid. 513 and Department of Defense Directive (DODD) 6025.18-R, *DOD Health Information Privacy Regulation* (24 Jan 2003). By contrast, it is also well established that medical and mental health records are discoverable when relevant and material to the charges. Against this backdrop we are asked, does a PTA provision granting unlimited access to medical and mental health records impact the public's confidence in the integrity and fairness of the disciplinary process? Under the facts of this case, we find that it does not.

Rule for Courts-Martial (R.C.M.) 705(c) governs terms and conditions of PTAs. The rule begins by stating that a term or condition will not be enforced if the accused did not freely and voluntarily agree to it. *See* R.C.M. 705(c)(1)(A). It next outlines the prohibited and permissible terms of PTAs. *See* R.C.M. 705(c)(1)(B) & (c)(2). The list of prohibited and permissible terms is not, however, an exhaustive list. In circumstances where the list fails to adequately address a challenged clause, our superior court has provided that to the extent that a term in a pretrial agreement violates public policy, it will be stricken from the pretrial agreement and not enforced. *See* R.C.M. 705(c)(1)(B); *United States v. Clark*, 53 M.J. 280, 283 (C.A.A.F. 2000).

Criminal defendants may knowingly and voluntarily waive many rights and constitutional protections. *See, e.g.*, *Ricketts v. Adamson*, 483 U.S. 1, 10 (1987). In addition, the United States Supreme Court has held that "absent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties." *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995). In *United States v. McFadyen*, 51 M.J. 289, 290-91 (C.A.A.F. 1999), our superior court found that an accused may waive significant rights as part of a pretrial agreement. *See also United States v. Rivera*, 46 M.J. 52 (C.A.A.F. 1997) (an accused may waive evidentiary objections); *United States v. Weasler*, 43 M.J. 15, 19 (C.A.A.F. 1995) (permissible for the accused to offer to waive an allegation of unlawful command influence).

We begin by holding that we are satisfied that the appellant freely and voluntarily agreed to this provision of the PTA. When questioned by the judge, he expressly agreed that he had read the agreement, understood it and affirmed that no one had forced him to agree to it. On the public policy argument, the appellant has not presented any suggestion that his ability to defend himself or to present a full sentencing case was in any way impacted by this provision. He simply argues that the provision violates public policy, because it "infringed upon Appellant's fundamental privacy rights." While we acknowledge his argument that he was faced with the choice of giving up his "right to retain private medical and mental records" or accepting a favorable PTA, it is for this very reason we do not strike the provision. The appellant leveraged the fact that the prosecutors may have gained unauthorized access to his records as a means of obtaining a pretrial agreement in a case in which his guilt was clear. Finally, we find no indication in the record to suggest that the access granted in any way impacted or limited the presentation of the appellant's sentencing case.

While we have doubts about the utility of a PTA provision granting access to medical records, we are unwilling to strike them as contrary to public policy, *per se*. We are particularly unwilling to strike them when, like in this case, the appellant freely negotiates such a provision as a bargaining chip to obtain a favorable pretrial agreement.

Providence of Plea

The appellant alleges that his plea to the specification of Charge I is improvident. Charge I alleges the appellant was derelict in his duties because from on or about 20 June 2005 to on or about 9 September 2005 "he failed to take adequate steps to prepare for his deployment." Appellant argues that he did in fact complete out-processing by the prescribed date and thus cannot be guilty of dereliction. The appellee agrees the appellant had completed his deployment processing on 9 September 2005, but argues that is not dispositive on the charge. The appellee argues the crime was in the appellant's "failing to take adequate steps to prepare" for deployment.

We will not set aside a guilty plea on appeal unless there is "a 'substantial basis' in law and fact for questioning the guilty plea." *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (quoting *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). If the "factual circumstances as revealed by the accused himself objectively support that plea," the factual predicate is established. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996) (citations omitted). We consider the entire record in conducting our review. *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995).

We acknowledge that the appellant ultimately completed his deployment processing by the required 9 September date. We also acknowledge that the military judge was aware of that fact by virtue of both the stipulation and the *Care* inquiry. But like the appellee, we agree that is not the question. The issue is what the appellant had done to prepare for deployment during the charged time.

Both the stipulation and the *Care* inquiry establish that appellant did virtually nothing to prepare for his deployment prior to the final day. It was only through the heroic efforts of his unit personnel and numerous agencies on the installation that the appellant actually completed the necessary processing on the required date. As indicated in the stipulation, the hospital, the firing range, and the Air Force Office of Special Investigations each had to provide individualized last minute sessions for the appellant because he had done nothing in the months prior to prepare for deployment. Clearly the appellant was derelict in preparing to deploy. The fact that he ultimately was able to complete processing on the last day does not change his derelict conduct in the prior months. We find his plea provident.

Validity and Plea to the Article 134, UCMJ Charge

The appellant was charged with violating Article 134, UCMJ in that he, did, at or near Yokota Air Base, Japan, on divers occasions between on or about 20 June 2005 and on or about 16 September 2005, wrongfully make multiple statements that he would not deploy and would tell military authorities he would kill or hurt himself in order to avoid deploying, which conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

On appeal, he contests the validity of the charge itself as either void for vagueness, barred by the preemption doctrine, or an unconstitutional infringement on his free speech rights.[1] He also contends his plea to the charge was improvident, because he did not establish for the record how the conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the military.

[1] The trial defense counsel made similar attacks on the Article 134, UCMJ charge at trial.

Looking first to the validity of the charge itself, we find the appellant's claims to be without merit for two reasons. First, we find that the appellant has waived his right to complain about the specification, on appeal, when he agreed to a pretrial agreement in which he agreed to waive all waivable claims. *See United States v. Gladue*, 65 M.J. 903 (A.F. Ct. Crim. App. 2008). We acknowledge that the appellant made a similar motion at trial, but note that prior to the judge ruling on the motion, the appellant entered a PTA that waived the motion.

It is well established that defendants can waive many rights. In *Mezzanatto,* 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." Mezzanatto, 513 U.S. at 201. (Citing *Ricketts v. Adamson*, 483 U.S. 1, 10 (1987) (holding double jeopardy defense 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)).

In this case, we find that all of the appellant's claims regarding the validity of the Article 134, UCMJ charge (Charge II) are waivable. Finding his claims waivable, we conclude that the PTA waiver provision eliminates the need for this Court to consider the challenges against Charge II unless the appellant makes a claim of ineffective assistance of counsel or the assertions amount to plain error. Following the logic of *Weasler*, 43 M.J. at 19, "[t]o hold otherwise would deprive appellant of the benefit of his bargain." We have no claim of ineffective assistance before us and find no plain error.

Second, as to Charge II, we are compelled to note that even if we were to find the claim not waived we would still, in a *de novo* review, find the specification valid and constitutionally sound, particularly to the extent that it proscribes a servicemember from making claims that he would kill or hurt himself in order to avoid deploying. We agree with the appellant that the mere act of complaining about having to deploy is not a crime but in this case, the appellant's words were far more egregious. Here he told subordinates, peers, and superiors that he would assert suicidal intentions in order to avoid deployment. The impact of claims of suicide to *wrongfully* avoid deployment on unit moral and cohesion is easily recognizable in the military context as criminal when it is established that the statements are made merely to avoid the duty versus a genuine mental excuse or cause. *See generally Parker v. Levy*, 417 U.S. 733, 753 (1974); *United States v. Brown*, 55 M.J. 375 (C.A.A.F. 2001); *United States v. Sadinsky*, 34 C.M.R. 343 (C.M.A. 1964).

Finally, applying the law outlined above regarding guilty pleas, we turn to the appellant's claim that his plea to Charge II was improvident. Here the appellant contends that he did not establish that his words had a "direct and palpable" impact on good order and discipline or that his speech was of a nature to bring discredit upon the armed forces.

During his plea inquiry, the appellant told the military judge that he had told other members of his unit that he would "do anything not to deploy" and that he told a senior non-commissioned officer (NCO) that he would go to "Life Skills and tell them I wanted to kill myself . . . and I would not deploy." He was an NCO himself and admitted that he made his claims to junior enlisted members. He further indicated he understood the statements "went against the orders of my commander which was to deploy" and "if any civilian had heard me make those statements they would have thought less of the Air Force or the Armed Services in general." Finally, he told the judge that his words were "wrongful."

Having reviewed the plea colloquy, we conclude that there is no "substantial basis" in law or fact to question the providence of the appellant's guilty pleas. *Prater*, 32 M.J. at 436. The appellant was correctly advised of the elements under Clauses 1 and 2 of Article 134, UCMJ and admitted that his misconduct met those elements for the charge. Therefore, the military judge did not abuse his discretion when he found the appellant's plea to Charge II provident.

Deferment of Automatic Forfeitures

The appellant contends that the convening authority received incomplete and delayed advice on his request for *deferment* of automatic forfeitures and reduction, to the appellant's prejudice. We disagree. However, we do find that the convening authority action incorrectly states the convening authority's decision on the appellant's request for deferment of forfeitures requiring correction pursuant to R.C.M. 1107(g) and direct a corrected action below.

The appellant's trial concluded on 11 May 2006. Automatic forfeiture of pay and reduction in grade went into effect on 25 May 2006. On 30 May 2006, trial defense counsel submitted a request for the convening authority to defer and waive automatic forfeitures under Article 57(a)(2), UCMJ, 10 U.S.C. § 857(a)(2).[2] The Special Court-Martial Convening Authority (SPCMCA) forwarded the request to the General Court-Martial Convening Authority (GCMCA) on 2 June 2006 recommending deferment of the automatic forfeitures but not the reduction in grade. The GCMCA's Staff Judge Advocate (SJA), agreeing with this recommendation, forwarded the request to the GCMCA on 13 June 2006. All agreed that the appellant's request fit within the deferment criteria outlined in R.C.M. 1101(c)(3).

On 19 June 2006, the convening authority took action on the request. In his approval of the deferment, he states,

[2] The Court recognizes that the defense attorney submitted an earlier request but we consider that request a nullity because defense counsel expressly states that this later request "supersedes all previous requests."

> "I have considered your 30 May 2006 request that I defer until action your adjudged reduction to E-1 and all automatic forfeitures and thereafter waive all automatic forfeiture for the maximum period allowed by law. I hereby approve your request to defer automatic forfeitures until I take action on your case and approve waiver of automatic forfeitures thereafter until 5 August 2006.[3] I deny your request to defer the adjudged reduction in rank until I take action on your case."

The action signed the same day provides, "On 19 June 2006, pursuant to Article 57(a), UCMJ, I deferred the Accused's forfeitures of pay and allowances until I took action." As written, this sentence in the action has no legal effect. Clearly, the convening authority's separate letter, on the deferment request, shows he intended to approve deferment of the forfeiture and deny deferment of the reduction. It is also clear that both the SPCMCA and his SJA recommended that the deferment apply from the point the forfeitures automatically took effect until the action. Considering the recommendations and the language of the convening authority's approval of the deferment, we conclude that the action of 19 June 2006 incorrectly reflects his approval of the deferment and will direct a new action in the decretal paragraph to reflect that all forfeitures were deferred for the period extending from the date of automatic forfeitures until the action.

Appellate Processing

In this case, the overall delay of 24 months between the time this Court received the record of trial and completed review is facially unreasonable.[4] Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we need not engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances and entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt and that no relief is warranted.

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[3] The appellant's end of term of service date (ETS) was 6 August 2006.

[4] The appellant's case is only subject to *Moreno* presumptions for the period of our review. *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). It arrived at this Court on 13 July 2006.

Conclusion

We conclude the findings are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Therefore, on the basis of the entire record, the findings are affirmed. Because the convening authority's action fails to reflect the convening authority's decision to defer automatic forfeitures until action, the action is incorrect. Further, we note that the sentence-adjudged date in the Court-Martial Order is incorrect. Accordingly, we return the record of trial to The Judge Advocate General for remand to the convening authority to withdraw the erroneous action and substitute a corrected action and promulgating order. Thereafter, Article 66, UCMJ, 10 U.S.C. § 866, shall apply.

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court