UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class SEAN M. GRAY
United States Air Force

ACM 35919

27 December 2005

Sentence adjudged 17 March 2004 by GCM convened at Eglin Air Force Base, Florida. Military Judge: John J. Powers (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 11 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Sandra K. Whittington, Captain David P. Bennett, and Captain Christopher S. Morgan.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major John C. Johnson, and Major C. Taylor Smith.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

SMITH, Judge:

In accordance with his pleas, the appellant was convicted at a general court-martial, by a military judge sitting alone, of using ecstasy, marijuana, and cocaine, and of distributing marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for 11 months, and reduction to E-1.

On appeal, the appellant asserts there was a failure of a material term in his pretrial agreement with the convening authority. Specifically, he contends there was no "meeting of the minds" regarding forfeitures of pay. The appellant also contends his trial defense counsel was ineffective by failing to properly advise him on the distinction between mandatory[1] and automatic forfeitures. Finding no error that materially prejudiced the substantial rights of the appellant, we affirm the findings and sentence.

"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). Further, "[w]e begin any analysis of a pretrial agreement by looking first to the language of the agreement itself. When the terms of a contract are unambiguous, the intent of the parties is discerned from the four corners of the contract." *Id*. There was no ambiguity in the appellant's pretrial agreement; the "contract" very clearly addressed both adjudged and mandatory forfeitures. The appellant's complaint is that he thought he would receive some pay, even if his sentence resulted in mandatory forfeiture of pay under Article 58b, UCMJ, 10 U.S.C. § 858b. However, the pretrial agreement explicitly noted that the convening authority was not bound to take any action with respect to mandatory forfeitures.[2] We find no failure of a material term in the appellant's pretrial agreement.

In support of his ineffective assistance of counsel claim, the appellant submitted his own declaration, an affidavit from his trial defense counsel, and email exchanges (pre and post-trial) between his trial defense counsel and government counsel.

The gist of the problem was that appellant's counsel negotiated what amounted to a special court-martial "cap" on punishment, but he apparently lost sight of the fact the case was being tried in a general court-martial forum. Had the case been tried as a special court-martial, with a sentence activating the mandatory forfeiture provisions of Article 58b, UCMJ, forfeitures would have been limited to two-thirds of all pay due the appellant during the period of confinement. Article 58b(a)(1), UCMJ. However, in the case of a general court-martial with a qualifying sentence, all pay and allowances are forfeited during the period of confinement. It appears appellant's trial defense counsel believed that mandatory forfeitures would not exceed two-thirds pay because the pretrial agreement reflected the agreed-upon "special [court-martial] cap."

The test for ineffective assistance of counsel is whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Further, "a court must indulge a

[1] Article 58b, UCMJ, 10 U.S.C. § 858b.

[2] The pretrial agreement provided that the convening authority "[w]ill not approve any adjudged forfeiture in excess of two-thirds (2/3) pay per month for twelve (12) months." As to mandatory forfeitures, "[t]his pretrial agreement does not require the Convening Authority to take any action with regard to automatic forfeiture of pay and allowance under Article 58b, UCMJ, nor does it limit his ability to take any other actions allowed by law."

strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). In determining whether this presumption of competence has been overcome, our superior court has established a three-pronged test:

> (1) Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions?";
>
> (2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers?"; and
>
> (3) If defense counsel was ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result?

United States v. Grigoruk, 56 M.J. 304, 307 (C.A.A.F. 2002) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)).

Appellate government counsel concede that trial defense counsel's advice on mandatory forfeitures was "faulty." We agree. The question is whether the appellant was materially prejudiced; that is, is there a "reasonable probability that, absent the errors," there would have been a different result?

The appellant does not contend that, absent trial defense counsel's error, he would have pled not guilty. Indeed, the appellant's explanation during the plea inquiry and the detailed stipulation of fact he signed reveal that he was one of a number of airmen engaged in repeated illegal drug use. In the face of the government's evidence, the appellant waived the investigation required by Article 32, UCMJ, 10 U.S.C. § 832, entered into a pretrial agreement and pled guilty – all consistent with his approach at trial to apologize and emphasize his willingness to take responsibility. It is clear that the government was not inclined to dispose of the charges in a special court-martial. Pretrial agreement or not, the appellant's case was going to be tried by a general court-martial.

On appeal, the appellant contends his expectation that he would receive at least one-third of his pay while in confinement "was the most important factor to me in entering into the pretrial agreement." Had he realized that the pretrial agreement did not protect against total forfeitures under Article 58b, UCMJ, the appellant now declares he would not have entered into it. That declaration appears especially self-serving in light of the record otherwise: he submitted no financial information at trial or to the convening authority during the post-trial clemency process. Further, there was no issue of waiver of

mandatory forfeitures, since the appellant had no qualifying dependents for waiver purposes. Article 58b(b), UCMJ.

We conclude that, absent trial defense counsel's deficient performance, the appellant still would have pled guilty at a general court-martial and, with or without a pretrial agreement, would have received a sentence triggering mandatory forfeitures under Article 58b, UCMJ. In short, we do not find a reasonable probability that, absent the errors, there would have been a different result.

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

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator