UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JASON D. MORRISON
United States Air Force

ACM S30359

18 August 2004

Sentence adjudged 28 February 2003 by SPCM convened at Nellis Air Force Base, Nevada. Military Judge: Jack L. Anderson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Andrea M. Gormel, and Captain Jennifer K. Martwick.

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

Before

STONE, MOODY, and JOHNSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JOHNSON, Judge:

In accordance with his plea, the appellant was convicted of one specification of wrongful marijuana use in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A special court-martial composed of a military judge sitting alone, sentenced the appellant to a bad-conduct discharge, confinement for 3 months, and reduction to E-1. The convening authority approved the sentence as adjudged. The appellant raises two errors for our consideration: (1) Whether this Court should take appropriate action under *United States v. Perron*, 58 M.J. 78 (C.A.A.F. 2003) to remedy the failure of a material term in the pretrial agreement (PTA); and (2) Whether the staff judge advocate's recommendation

(SJAR) failed to properly advise the convening authority of his obligation to comply with the material terms of the PTA. We find error and set aside the findings and sentence.

Background

On 26 February 2003, the convening authority and the appellant entered into a PTA.[1] The appellant agreed to have his case heard before a military judge sitting alone, to enter into and sign a reasonable stipulation of fact, and to plead guilty to the charge[2] and its specification. Furthermore, the appellant agreed to waive his rights to a trial of the facts, to be confronted by witnesses against him, and to avoid self-incrimination. In exchange, the convening authority agreed to the following:

> (1) If confinement is adjudged, he [would] approve no confinement in excess of **four (4) months**,
>
> (2) Defer any adjudged forfeitures until action; upon action suspend execution of the first four months of that part of the sentence extending to adjudged forfeitures for four months, waive the mandatory forfeitures applicable to the accused's sentence for a period of four months or release from confinement, whichever is sooner and direct payment of the waived mandatory forfeitures to the accused's spouse, for the benefit of herself and the accused's dependent child.
>
> (3) Permit the accused's dependent wife and child to remain in base housing for the duration of any adjudged confinement.

On 10 March 2003, the trial defense counsel submitted a request to the convening authority entitled "Request for Deferment of Forfeitures and Reduction in Grade -- *U.S. vs. SSgt Jason D. Morrison.*" She requested the convening authority defer the reduction in grade. She did not request a deferment of forfeitures, but she did mention the automatic forfeitures and the PTA. She stated: "Under the Pretrial Agreement in this case, any automatic forfeitures are to be waived and given to his dependent wife. In that same spirit. [sic] SSgt Morrison requests the deferral of reduction in grade in order to provide for his family." The convening authority denied the request on 24 March 2003. There was no reference to the PTA or any action on mandatory forfeitures in his memorandum.

[1] Although the convening authority neglected to select the "approved and accepted" language at the bottom of the Appendix A, it is clear from the last page of the Offer for Pretrial Agreement, as reflected by the signature of the convening authority, that the Offer, "including Appendix A," was approved and accepted.

[2] A single charge and specification of a violation of Article 112a, UCMJ, 10 U.S.C. § 912a, was preferred on 6 January 2003 and referred on 9 January 2003. On 28 January 2003, the additional charge and its specification were preferred and referred. On 18 February 2003, the original charge was dismissed. As throughout the court-martial, this Court will refer to the additional charge as "the charge."

The SJAR, dated 11 March 2003, did not mention the PTA. Hence, the convening authority was not advised of his obligation to waive the automatic forfeiture of pay. The appellant and his defense counsel submitted matters, but failed to comment on the staff judge advocate's (SJA) failure. Also, there was no mention of waiver of automatic forfeitures in the addendum. On 14 March 2003, the general court-martial convening authority's legal office sent a memorandum to the Defense Finance and Accounting Service (DFAS) that read, in part, "[a]utomatic forfeitures in this case are deferred until the convening authority takes action in this case under Rule for Courts-Martial (R.C.M.) 1107. We will forward a follow-up memorandum when that occurs." The convening authority took action on 4 April 2003 and did not waive the automatic forfeitures. On 10 April 2003, the legal office sent another memorandum to DFAS, requesting that it update appellant's pay data based on the convening authority's action. This document did not mention any automatic forfeitures. On 23 May 2003, the legal office again sent another memorandum to DFAS that read, in part, "[p]ursuant to a Pretrial Agreement, payment of the waived mandatory forfeitures should have been directed to the accused's spouse, for the benefit of herself and the accused's dependent child from the time of confinement (28 Feb 03) until his release date of 12 May 03." The appellant's dependents did not receive the waived mandatory forfeitures during the appellant's incarceration. On 27 May 2003 and 16 July 2003, the forfeitures were refunded to the appellant's pay account.[3]

Discussion

The standard of review for determining whether post-trial processing was properly completed is de novo. *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000).

R.C.M. 1106(d)(3)(E) requires the SJA to advise the convening authority of his or her obligations pursuant to a PTA. Clearly, the SJA here failed to do so in that he did not tell the convening authority that he was required to waive the automatic forfeiture of the appellant's pay. Defense counsel received the SJAR, but did not comment on the SJA's failure. Failure of defense counsel to comment on any matter in the SJAR in a timely manner waives a later claim of error in the absence of plain error. R.C.M. 1106(f)(6); *Kho*, 54 M.J. at 65. To prevail under a plain error analysis, the appellant has the burden of persuading the court that (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right. *Id.* In the case sub judice, we conclude the SJA's failure to adequately advise the convening authority of his obligation to waive forfeiture of the appellant's pay for the benefit of his dependents during his confinement is plain error. The government concedes this point.

Moreover, because the government failed to waive the forfeitures of pay during appellant's confinement and his family did not receive the agreed-upon payments, the

[3] All documentation and correspondence with DFAS was submitted by the appellant's defense counsel on appeal.

appellant did not receive the benefit of his bargain. We find that such plain error materially prejudiced the appellant's rights.

In light of the plain error, and the fact that the appellant has made a colorable showing of prejudice, the issue before us now is to fashion an appropriate remedy for the error. The appellant requests that we disapprove the adjudged bad-conduct discharge, or in the alternative, allow him to withdraw his plea. The government argues that specific performance is the appropriate remedy—simply pay the appellant what is owed now.

"It is fundamental to a knowing and intelligent plea that where an accused pleads guilty in reliance on promises made by the Government in a pretrial agreement, the voluntariness of that plea depends on the fulfillment of those promises by the Government." *Perron*, 58 M.J. at 82. This Court applied the law set forth in *Perron* to *United States v. Sheffield*, ACM S30384 (A.F. Ct. Crim. App. 22 Jul 2004), a case with a factual scenario almost identical to the one in the case sub judice. In *Sheffield*, the Court determined that the issue was not whether there was money to waive, but instead whether waiving the forfeitures after confinement affords the appellant the benefit of his bargain. There, as in this case, the appellant wanted his dependents taken care of while he was incarcerated and entered into a PTA for that express purpose. Furthermore, as in *Sheffield*, appellant here was denied the benefit of having his dependents receive pay while he was unable to provide other income due to incarceration. For these reasons, the appropriate remedy for this appellant "is to nullify the original pretrial agreement, returning the parties to the status quo ante." *Perron*, 58 M.J. at 86.

Conclusion

Accordingly, the findings and sentence are set aside. A rehearing is authorized.

OFFICIAL

ANGELA M. BRICE
Clerk of Court