UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic ANDREA A. SWAIN
United States Air Force

ACM S31615

19 January 2010

Sentence adjudged 21 October 2008 by SPCM convened at McGuire Air Force Base, New Jersey. Military Judge: Stephen R. Woody (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 8 months.

Appellate Counsel for the Appellant: Colonel James B. Roan, Major Shannon A. Bennett, Major Tiffany M. Wagner, and Captain Michael S. Kerr.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain G. Matt Osborn, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

PER CURIAM:

In accordance with the appellant's pleas, a military judge sitting as a special court-martial convicted her of two specifications of wrongful use of marijuana, one specification of wrongful appropriation of military property, and one specification of larceny, in violation of Articles 112a and 121, UCMJ, 10 U.S.C. §§ 912a, 921. The adjudged and approved sentence consists of a bad-conduct discharge and eight months of confinement.

On appeal, the appellant asks this Court to approve only so much of the confinement as includes 240 days or grant other meaningful relief. As the basis for her request, the appellant opines the special court-martial convening authority (SPCMCA) failed to abide by his pretrial agreement promise not to approve confinement in excess of 240 days when he approved the adjudged sentence of eight months of confinement. We concur. We therefore affirm the findings and approve only so much of the sentence that calls for a bad-conduct discharge and 240 days of confinement.

Background

On 8 October 2008, the appellant and the SPCMCA entered into a pretrial agreement wherein the appellant agreed to plead guilty to two specifications of wrongful use of marijuana, one specification of wrongful appropriation of a government personal data assistant, and one specification of larceny of video games and clothing from the Army and Air Force Exchange Service in return for the SPCMCA's promise not to approve confinement in excess of 240 days.

On 21 October 2008, the appellant providently pled to and was found guilty of the aforementioned charges. The military judge sentenced the appellant to a bad-conduct discharge and eight months of confinement. During the pretrial agreement review, the military judge asked the appellant and counsel whether the SPCMCA could approve the adjudged sentence and all opined the SPCMCA could approve the adjudged sentence. On 12 February 2009, the SPCMCA approved the sentence as adjudged.

Non-Compliance with the Pretrial Agreement

"A pretrial agreement in the military justice system establishes a constitutional contract between the accused and the convening authority. . . . 'In a criminal context, the government is bound to keep its constitutional promises.'" *United States v. Smead*, 68 M.J. 44, 59 (C.A.A.F. 2009) (quoting *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006)). Interpretations of a pretrial agreement are questions of law; therefore, we review issues regarding the "meaning and effect" of such agreements de novo. *Id.* (citing *Lundy*, 63 M.J. at 301). It is a mixed question of law and fact when an appellant asserts the convening authority has not complied with a term of the pretrial agreement. *Id*. (citing *Lundy*, 63 M.J. at 301). "The appellant bears the burden of establishing that the term is material and that the circumstances establish governmental noncompliance." *Id.* (citing *Lundy*, 63 M.J. at 302). Lastly, "[i]n the event of noncompliance with a material term, we consider whether the error is susceptible to remedy in the form of specific performance or in the form of alternative relief agreeable to the appellant." *Id.* (citing *Lundy*, 63 M.J. at 305). The plea must be withdrawn and the findings and sentence must be set aside if a defect in a material term cannot be cured. *Id.* (citing *United States v. Perron*, 58 M.J. 78, 85-86 (C.A.A.F. 2003)).

The government concedes that the convening authority did not comply with the pretrial agreement that he had with the appellant, as he approved the adjudged sentence.[*] We agree and must remedy the error and provide meaningful relief. On this matter, we can set aside the action and remand the case for a new action or we can attempt to remedy the error ourselves. Both the legislative and executive intent in this area is for the appellate courts to take corrective action rather than returning a case to the convening authority for further action. S. REP. No. 98-53, at 21 (1983) ("If there is an objection to an error that is deemed to be prejudicial under Article 59[, UCMJ, 10 U.S.C § 859,] during appellate review, it is the Committee's intent that appropriate corrective action be taken by appellate authorities without returning the case for further action by a convening authority.").

The appellant asks this Court to approve only so much of the confinement that calls for 240 days of confinement or grant other meaningful relief. We grant the appellant's request and will modify the sentence. We approve the findings and only so much of the sentence that calls for a bad-conduct discharge and 240 days of confinement. This modified sentence rectifies the error made and gives the appellant the benefit of her pretrial agreement.

Conclusion

The approved findings and the sentence, as modified, are correct in law and fact. 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 the sentence, as modified, are

AFFIRMED.

OFFICIAL

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

[*] By approving eight months of confinement, the convening authority approved 243 days confinement, thereby exceeding the 240-day confinement cap of the pretrial agreement.