IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER **D.O. VOLLENWEIDER** **E.E. GEISER**

UNITED STATES

v.

Michael W. JOHNSON
Corporal (E-4), U. S. Marine Corps

NMCCA 200501307 Decided 30 March 2006

Sentence adjudged 22 December 2004. Military Judge: J.G. Meeks. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Camp Pendleton, CA.

LT JENNIE L. GOLDSMITH, JAGC, USN, Appellate Defense Counsel
CDR TED Y. YAMADA, JAGC, USNR, Appellate Defense Counsel
Capt ROGER E. MATTIOLI, USMC, Appellate Government Counsel

CARVER, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of wrongful possession of drug paraphernalia, willful dereliction of duty, wrongful disposition of military property, wrongful use of marijuana, wrongful possession of methamphetamine, wrongful distribution of methamphetamine, wrongful use of methamphetamine, wrongful introduction of methamphetamine, larceny of $27,934.00 from the U.S. Government, and graft, in violation of Articles 92, 108, 112a, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 908, 912a, 921, and 934.

The appellant was sentenced to a dishonorable discharge, confinement for 7 years, total forfeitures of all pay and allowances, and reduction to pay grade E-1. Pursuant to a pretrial agreement, the convening authority approved the sentence as adjudged, but suspended all confinement in excess of 3 years, suspended all adjudged forfeitures, deferred automatic forfeitures, and waived the automatic forfeitures for 6 months.

The appellant claims that: (1) the Government failed to comply with the terms of the pretrial agreement requiring a 6-month's waiver of automatic forfeitures; (2) he was denied a speedy review; and, (3) his plea of guilty to larceny was improvident.

After carefully considering the record of trial, the appellant's assignments of error, and the Government's response, we conclude that the findings and the sentence are correct in law and fact. As noted below, we agree that the Government failed to comply with the terms of the pretrial agreement, but that as a result of our court order, has now complied. We conclude that no other errors materially prejudicial to the substantial rights of the appellant were committed. Arts. 59(a) and 66(c), UCMJ.

Failure To Comply With PTA Regarding Waiver of Forfeitures

In the first assignment of error, the appellant alleges that the convening authority failed to comply with a material term of the pretrial agreement regarding the waiver of automatic forfeitures. The Government concedes error. We agree and previously ordered relief.

A. Background

In pertinent part, the pretrial agreement required the convening authority to suspend all adjudged forfeitures, to defer automatic forfeitures, and to waive automatic forfeitures for six months from the date of the convening authority's action. The waived forfeitures were to be paid to the appellant's two sons. In his action, the convening authority complied with the pretrial agreement. He approved but suspended the adjudged forfeitures, and waived the automatic forfeitures for six months with the proviso that the forfeitures were to be paid to the appellant's two sons. The pretrial agreement itself constituted approval of a request to defer the application of either adjudged or automatic forfeitures until the date of the action.

Despite the clear wording of the convening authority's action, the automatic forfeitures were not waived. In a post-trial affidavit attached to the record, the appellant states that after he received a copy of the convening authority's action, he requested mast and complained about the situation to his command visit representative, but was told that since he was being transferred to another unit, the new unit would have to make the correction. After transfer to the new unit, the appellant said he talked to a command visit representative who said he would fix the problem, but did not do so.

B. Discussion

"In the event of a misunderstanding as to a material term in a pretrial agreement, the remedy is either specific performance

of the agreement or an opportunity for the accused to withdraw from the plea." *United States v. Smith*, 56 M.J. 271, 273 (C.A.A.F. 2002). Alternatively, "the convening authority and an accused may enter into a written post-trial agreement under which the accused, with the assistance of counsel, makes a knowing, voluntary, and intelligent waiver of his right to contest the providence of his pleas in exchange for an alternative form of relief." *Id*. at 279. It must be emphasized that any alternative remedy must be agreeable to the appellant. "[I]mposing alternative relief on an unwilling appellant to rectify a mutual misunderstanding of a material term in a pretrial agreement violates the appellant's Fifth Amendment right to due process." *United States v. Perron*, 58 M.J. 78, 86 (C.A.A.F. 2003). *See United States v. Smead,* 60 M.J. 755, 757 (N.M.Ct.Crim.App. 2004).

As a remedy, the appellant requests specific performance. Appellant's Brief and Assignment of Errors of 28 Nov 2005 at 5. In response, the Government concedes that the automatic forfeitures were not waived nor were they paid to the appellant's sons as required by the terms of the pretrial agreement and joins in the appellant's request that we order specific performance. Answer on Behalf of the Government of 15 Feb 2006 at 3. The Government further stated that representatives in the Office of General Counsel and at the Defense Finance and Accounting Service had been contacted and "stand ready to pay the waived and deferred funds upon notice from the Government of this Court's decision." *Id.* at 4.

What is unusual about this case is that the convening authority already ordered that the automatic forfeitures be waived and paid to the appellant's sons. It is difficult to understand why the financial authorities refused to follow the clear direction of the convening authority without a court order requiring compliance with the court-martial order. Nonetheless, in order to resolve this matter, on 2 March 2006, we ordered the Government to:

> Pay all monies due to the appellant's children under the terms of the pretrial agreement and convening authority's action on or before 9 March 2006 and report compliance to this Court on or before 10 March 2006, or not later than 10 March show cause why the Court should not set aside the findings and sentence in this case.

NMCCA Court Order of 2 Mar 2006 at 2. On 9 March 2006, the Government asserted that the waived forfeitures were paid to the legal guardian for the appellant's dependent sons. Government Response to Court Order of 9 Mar 2006. To date, the appellant has <u>not</u> further complained. We will assume that the appellant is satisfied with the specific performance requested. Even so, we are still bewildered as to why the Government could not have quickly remedied this situation through appropriate administrative action without the need for a court order to enforce the convening authority's action.

Speedy Review

In his second assignment of error, the appellant alleges that he was denied his right to a speedy review of his case. In particular, he complains that there was unexplained delay of 265 days from sentencing to docketing of the record with this court. We decline to grant relief.

We conclude that there was no due process violation. We are also aware of our authority to grant relief under Article 66, UCMJ, even in the absence of specific prejudice, but we decline to do so. *United States v. Oestmann,* 61 M.J. 103 (C.A.A.F. 2005); *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey v. United States,* 60 M.J. 100, 102 (C.A.A.F. 2004); *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). In particular, we have considered the factors set forth in *United States v. Brown,* 62 M.J. 602, (N.M.Ct.Crim.App. 2005)(*en banc*).

Improvident Plea of Guilty
Larceny

In his final assignment of error, the appellant contends that his plea of guilty to larceny was improvident because the appellant did not acknowledge that he had a duty to account for the housing allowances that were improperly transferred to him. We disagree and decline to grant relief.

The standard of review to determine whether a plea is provident is whether the record reveals a substantial basis in law and fact for questioning the plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). Upon thorough review of the guilty plea inquiry, we find no substantial basis to question the plea.

Conclusion

Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Judge VOLLENWEIDER and Judge GEISER concur.

For the Court

R.H. TROIDL
Clerk of Court