

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

BEFORE

Charles Wm. DORMAN

C.A. PRICE

E.B. HEALEY

UNITED STATES

v.

**Mark R. ELLIOTT, Jr.
Lance Corporal (E-3), U.S. Marine Corps**

NMCCA 200201946

Decided 28 February 2005

Sentence adjudged 18 January 2002. Military Judge: S.M. Immel. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding Officer, 2d Battalion, 1st Marine Regiment, 1st Marine Division (Rein), FMF, Camp Pendleton, CA.

Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
LtCol WILLIAM RODGERS, USMCR, Appellate Defense Counsel
LT CRAIG A. POULSON, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRICE, Senior Judge:

This is our second review of this case. Based on the remand from our superior court, we will grant the appellant the sentencing relief he requests to ensure that he obtains the benefit of his bargain under the pretrial agreement.

We first summarize the procedural background of this case:

- 20 Nov 01 Appellant placed in pretrial confinement.
- 18 Jan 02 Pursuant to his pleas, appellant sentenced to confinement for six months, reduction to pay grade E-1, forfeiture of \$650.00 pay per month for six months and a bad-conduct discharge. The pretrial agreement required the convening authority (CA) to suspend confinement in excess of 120 days for 12 months from the date of sentencing.
- 27 Feb 02 Appellant released from confinement.

09 Apr 02 Appellant returned to confinement for suspicion of wrongful use of marijuana based on a positive urinalysis.

15 Apr 02 CA held hearing under RULE FOR COURTS-MARTIAL 1109, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) and vacated the suspended portion of confinement. Appellant continued in confinement.

30 Apr 02 Appellant released from confinement.

27 Aug 02 CA approved the sentence as adjudged, without suspension of confinement.

09 Oct 02 Case docketed at this court.

17 Mar 03 Appellant defense counsel submitted case on its merits without assignment of error.

31 Mar 03 This court summarily affirmed the findings and sentence as approved by the CA.

17 Dec 03 Before the Court of Appeals for the Armed Forces (CAAF), the appellant's petition for review was granted on this specified issue: **WHETHER THE CONVENING AUTHORITY'S ATTEMPT TO ORDER VACATION OF SUSPENDED PUNISHMENT WAS A NULLITY PRIOR TO HIS ACTING TO APPROVE THE SENTENCE AND ORDERING THE SUSPENSION.** CAAF affirmed this court's decision on findings, but reversed as to sentence, citing *United States v. Saylor*, 40 M.J. 715 (N.M.C.M.R. 1994) and *United States v. Perlman*, 44 M.J. 615 (N.M.Ct.Crim.App. 1996), *aff'd*, 48 M.J. 353 (C.A.A.F. 1997). Record of trial remanded to this court so that we 'may provide alternative relief if it will achieve the objective of the [pretrial] agreement.'" CAAF Order of 17 Dec 03.

In response to the remand, both parties suggest that this court can provide alternative relief that will achieve the objective of the pretrial agreement. To do so, appellate defense counsel argues that "the forfeitures imposed should now be set aside in their entirety to atone for his loss of his liberty and to approximate the intent of his pretrial agreement," or a total of \$3900.00. Appellant's Brief of 21 Jun 2004 at 3. The Government argues that we should disapprove only those forfeitures equivalent to the 21 days of confinement improperly served, or a total of \$774.00.

While the parties focus solely upon relief in terms of *adjudged* forfeitures, we will grant additional relief to ensure that *automatic* forfeitures do not vitiate the requested relief. Accordingly, we affirm only so much of the sentence extending to

confinement for 120 days, reduction to pay grade E-1, and a bad-conduct discharge.

Chief Judge DORMAN concurs.

For the Court

R.H. TROIDL
Clerk of Court

Judge HEALEY did not participate in the decision of this case.