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.

Joshua J. ORZECHOWSKI
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200300711 Decided 18 January 2005

Sentence adjudged 28 November 2001. Military Judge: C.H. Wesely. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Marine Division (Rein), Camp Pendleton, CA.

GREG D. MCCOMACK, Civilian Appellate Defense Counsel
Capt JAMES VALENTINE, USMC, Appellate Defense Counsel
Capt WILBUR LEE, USMC, Appellate Government Counsel

HEALEY, Judge:

The appellant was tried before a general court-martial composed of members. In accordance with his pleas, the appellant was convicted of disobedience of a lawful order, drunken operation of a vehicle, involuntary manslaughter, and three aggravated assaults, in violation of Articles 92, 111, 119, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 911, 919, and 928. The appellant was sentenced to 15 years confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged, however he, suspended all confinement in excess of 13 years.

We have carefully considered the record of trial, the appellant's six assignments of error,[1] the appellant's attached

[1] The appellant asserts that: (1) his pleas were not voluntary and were improvident because the PTA is vague and uncertain in its terms and the Government breached its obligation as set forth in the pretrial agreement (PTA); (2) the PTA is not in accord with public policy and contrary to a reasonable interpretation of fairness under law; (3) the military judge

declarations, the Government's response, the appellant's reply to the Government's answer, the excellent oral arguments heard on 10 December 2004, and the Government's motions to correct errata and to cite supplemental authority. We conclude that the first assignment of error asserting the Government breached its obligation as set forth in the pretrial agreement (PTA), has merit. We will take corrective action in our decretal paragraph. Arts. 59(a) and 66(c), UCMJ.

The Government Breached its PTA Obligation

In his first assignment of error the appellant avers, in part, that his guilty pleas submitted in accordance with the PTA were not voluntary and were improvident because: (a) the PTA was vague and uncertain in its terms; and (b) the government breached its obligation as set forth in the PTA. As such, the appellant argues that he was misled into signing the PTA and did not receive the full benefit of his bargain. Specifically, he asserts that the Government objected to an unsworn statement in letter form in contravention of a PTA provision stating that no such objection would be made. Defense Exhibit K for identification.[2]

The appellant avers that this Court should set aside the findings of guilt and the sentence. We concur that the sentence must be set aside. We will not address the appellant's contention concerning vagueness in the PTA.

The interpretation of a PTA is a question of law, which is reviewed under a *de novo* standard. *United States v. Sunzeri*, 59 M.J. 758, 760 (N.M.Ct.Crim.App. 2004). A PTA is created through the process of bargaining, similar to that used in creating any commercial contract. As a result, the court looks to the basic principles of contract law when interpreting PTAs. However, when interpreting PTAs, contract principles are outweighed by the Constitution's due process clause protections for an accused. To analyze a PTA, the courts look first to the language of the agreement. When the terms of the contract are unambiguous, the intent of the parties is discerned from the four corners of the contract. When ambiguous on its face because a provision is open to more than one interpretation, extrinsic evidence is admissible

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improperly allowed presentation of evidence, questioning of witnesses and argument by Government counsel that was inflammatory and unduly prejudicial; (4) the military judge erred to the material prejudice of the substantial rights of the appellant by refusing to admit into evidence the unsworn statement of the appellant that included the federal sentencing guidelines; (5) the military judge erred in failing to grant sentence credit for illegal pretrial confinement in violation of Article 13, UCMJ; and (6) the sentence is inappropriately severe.

[2] The letter the Government objected to attached portions of the federal sentencing guidelines and included a statement referencing the PTA, that said, "There is no pretrial agreement between myself and the Convening Authority which would limit any part of the sentence that you adjudge."

to determine the meaning of the ambiguous term. *United States v. Acevedo*, 50 M.J. 169, 172, (C.A.A.F. 1999).

The Government argued that the provision of the PTA requiring the Government not to object is subject to interpretation in that a reasonableness standard should be applied as to what evidence is admissible by the appellant on sentencing. Government Brief of 25 Jun 2003 at 7. We do not concur.

Paragraph 10d of the PTA says,

> In return for my pleas of guilty, the convening authority agrees: . . . To not object to, *on any evidentiary or other legal basis,* the introduction of letters, photographs, or other media from me, my family members, friends, and/or acquaintances for the purpose of extenuation and/or mitigation.

Appellate Exhibit X at 3 (emphasis added). That language is followed by a provision that favored the Government in that it permitted the Government to introduce, without objection from the appellant, extensive aggravation delineated in paragraph 11(a)-(h).[3] The list included photographs of the crime scene, two

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[3] During the discussion of the terms of the PTA, the military judge discussed, in some detail, paragraphs 10 and 11. Record at 162-66. After the judge covered subparagraph (d) of paragraph 10, the following dialogue occurred:

> MJ: When – in the law when an agreement is made, there is and [sic] offer and there is consideration. "Consideration" is basically the benefit that a person gets why [sic] they ought to be bound by an agreement.
> Do you understand?
> Acc: Yes, ma'am.
>
> MJ: So in paragraph 10, these things that the government has promised to do is that the benefit that you are getting out of this agreement?
> Acc: Yes, ma'am.
>
> MJ: There is also an unnumbered paragraph that those items listed in paragraph 10 do not preclude or limit the introduction of any other evidence that would normally be admissible under Rule for Court-Martial 1001.
> Do you understand that?
> Acc: Yes, Ma'am.
>
> MJ: Paragraph 11 talks about inducement. An "inducement" means really when two people make an agreement what are you going to do to make the other person want to agree.
> Do you understand that?
> ACC: Yes, Ma'am.
>
> ...
>
> MJ: Okay. Lance Corporal Orzechowski, in subparagraph d you've agreed not to object to the government offering letters from family members, friends, and acquaintances of Vivian Runyon;

forensic photographs of the deceased, letters from acquaintances, funeral programs, service record book entries, or other previous misconduct. Appellate Exhibit X at 3. Paragraph 14 of the PTA says that all the provisions of this agreement are material. Appellate Exhibit X at 4.

The Government bargained for the terms of the PTA. The plain language of the agreement granted the appellant broad latitude in presenting extenuation and mitigation and gave the Government a reciprocal, broad and practically unfettered opportunity to present aggravation evidence. We find these provisions of the PTA to be unambiguous.[4]

"[W]hen a plea rests in any significant degree on a promise or an agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (following remand, the state court held that due process and the interests of justice will be fully served by a remand to the trial court for re-sentencing with specific performance of the prosecutor's promise. *People v. Santobello*, 39 A.D.2d 654, 655 (N.Y. App. Div. 1972)). The accused is entitled to the benefit of any bargain on which his guilty plea was premised. *United States v. Bedania,* 12 M.J. 373, 375 (C.M.A. 1982). We conclude that the appellant was entitled under the terms of the PTA to present letters and media of his choosing without objection from the Government. Therefore, the Government is required to abide by its agreement. Accordingly the appellant is entitled to specific performance of the unambiguous terms of his PTA.

PTA is in Accord with Public Policy

In his second assignment of error the appellant asserts the PTA is not in accordance with public policy and is contrary to a reasonable interpretation of fairness under the law. He asserts that the supposed benefits to him from the pretrial agreement were in essence illusory and his substantial rights were violated in that he was prevented from objecting to cumulative,

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except for any portions of those letters that would invade the province of the sentencing authority.

In other words, if there is language in the letters that suggests a particular sentence, then you can still object to that sort of thing. And in other proper objections under Rule of Evidence 403, you have preserved those objections. Do you understand that provision?
ACC: Yes, ma'am.

Record at 163-64; 166.

[4] The military judge during discussion of the "no objection" provisions of the pretrial agreement expressed concern, but obtained affirmations from the appellant and his counsel of their intent to be bound by the terms of the agreement. Record at 166.

irrelevant, and unduly prejudicial evidence. Appellant's Brief of 17 Nov 2003 at 18. We do not concur.

In determining whether a provision of a PTA is contrary to public policy, our superior court focused on whether the provision deprived the appellant of a complete sentencing proceeding – specifically, whether the PTA limited the accused's rights to present matters in extenuation, mitigation, or rebuttal. *United States v. Edwards*, 58 M.J. 49 (C.A.A.F. 2003). RULE FOR COURTS-MARTIAL 705, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) deals with pretrial agreements and is, itself, a statement of public policy. In addition to pretrial agreement provisions that substitute the agreement for the trial – in effect rendering the trial an empty ritual – this court has disapproved those conditions that it believes are clearly misleading or abridge fundamental rights of the service member. Despite the mutual assent of the parties to a particular pretrial agreement provision, a provision would be contrary to public policy if it would, "'interfere with court-martial fact-finding, sentencing, or review functions or undermine public confidence in the integrity and fairness of the disciplinary process.'" *United States v. Thomas*, 60 M.J. 521, 529 (N.M.Ct.Crim.App. 2004)(quoting *United States v. Cassity*, 36 M.J. 759, 762 N.M.C.M.R. 1992)).

We concluded above that those controverted portions of the pretrial agreement are unambiguous. In exchange for the liberal admission of evidence on sentencing, the appellant knowingly and voluntarily chose to waive his objections to the government's aggravation evidence. Appellate Exhibit X at 3-4, ¶¶ 10 and 11. Further, the exact implications of these terms were discussed during the appellant's trial. Record at 162-64.

Without enumerating the appellant's specific assertions that various provisions of this PTA lacked "benefit" to him, the appellant, in essence, concedes paragraph 10d is beneficial to him. Appellant's Brief at 19. The appellant does not challenge the meaning of the provision at issue nor does he assert that his waiver was not knowing and voluntary. Assuming that the Government performs in accordance with the PTA, we do not find, and the appellant does not assert, that he was misled. In fact, paragraph 10, the Government's agreement "not to object to, on any evidentiary or other legal basis, to the introduction of letters, photographs, or other media from the appellant. . ." is an expansive grant to the appellant.

Assuming future specific performance by the Government on the bargained for provisions, we find the appellant was not deprived of a complete sentencing proceeding, and that the PTA does not violate public policy.

Denial of Credit for Illegal Pretrial Confinement

In his fifth assignment of error the appellant claims the military judge erred to the substantial prejudice of the appellant in failing to grant sentence credit for illegal pretrial confinement in violation of Article 13, UCMJ. This motion was fully litigated at trial. We find no merit in this argument particularly in view of the appellant's repeated declination to take an upgrade in confinement status offered by brig personnel.

Remaining Assignments of Error

In view of our resolution of the first assignment of error, it is not necessary to resolve the remaining assignments of error.

Conclusion

Accordingly, the findings are affirmed. The sentence is set aside. The record of trial is returned to the Judge Advocate General of the Navy for remand to an appropriate CA for action consistent with this decision. A rehearing on the sentence under the auspices of the PTA may be ordered. The record shall then be returned to this court for further review. *Boudreaux v. United States Navy-Marine Corps Court of Military Review*, 28 M.J. 181 (C.M.A. 1989).

Chief Judge DORMAN and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court