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

BEFORE

C.A. PRICE **M.J. SUSZAN** **R.C. HARRIS**

UNITED STATES

v.

David R. RODRIGUEZ
Seaman (E-3), U.S. Navy

NMCCA 200300208 Decided 30 January 2004

Sentence adjudged 30 May 2002. Military Judge: R.C. Adamson. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS RAINIER (AOE 7).

LCDR BRENT G. FILBERT, JAGC, USNR, Appellate Defense Counsel
CDR GEORGE F. REILLY, JAGC, USN, Appellate Defense Counsel
LT FRANK L. GATTO, JAGC, USNR, Appellate Government Counsel

HARRIS, Judge:

A special court-martial, composed of a military judge, sitting alone, convicted the appellant, pursuant to his pleas, of four unauthorized absences (one terminated by apprehension), missing the movement of his ship through neglect, and the wrongful use of both methamphetamine and cocaine, in violation of Articles 86, 87, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 887, and 912a. The appellant was sentenced to 6 months confinement, reduction to pay grade E-1, forfeiture of $700.00 pay per month for 6 months, and a bad-conduct discharge. The convening authority approved the adjudged sentence and, except for the bad-conduct discharge, ordered the punishment executed.

We have carefully considered the record of trial, the summary assignment of error, and the Government's response. The appellant asserts that the convening authority committed plain error by failing to abide by the terms of the pretrial agreement. Specifically, the appellant complains that the

convening authority failed to suspend confinement and failed to defer and waive automatic forfeitures. Not mentioned by the appellant's brief is the convening authority's failure to disapprove adjudged forfeitures.

We conclude that, except as modified, the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The following timeline summarizes the chronology of events in the appellant's case:

30 May 02 **Sentence adjudged.** The pretrial agreement (PTA) required the suspension of confinement over 45 days for six months from date of sentencing and disapproval of adjudged forfeitures. Automatic forfeitures would be deferred and waived.

26 Jun 02 **Estimated release date from confinement,**[1] including nine days credit awarded at trial, and eight days of good time; deferment of remaining confinement (to be suspended under PTA) commences.

24 Sep 02 **Convening authority takes action**, approving the sentence as adjudged, and except for the bad-conduct discharge, ordering it executed, ie., no suspension was ordered. Deferment of remaining confinement ends.

06 Feb 03 **Confinement runs out**.

Failure to Suspend Confinement

Had the convening authority suspended confinement as required by the pretrial agreement, the appellant's exposure to confinement would have ended on 30 November 2002 (6 months from the date the sentence was adjudged). As indicated above, since the convening authority deferred but did not suspend confinement, we find that the appellant's exposure to confinement did not end until 6 February 2003. However, the appellant has not claimed or demonstrated that he was subjected to confinement beyond the 45 days contemplated in the PTA. While we do not condone the convening authority's error in

[1] Neither side provided the date of actual release from confinement. This date is our estimate.

failing to suspend confinement, we conclude that the appellant suffered no prejudice. Accordingly, we decline to grant any relief as to confinement. *United States v. Caver*, 41 M.J. 556, 565 (N.M.C.M.R. 1994).

Adjudged and Automatic Forfeitures

We now turn our attention to the issue of adjudged and automatic forfeitures. As noted previously, the PTA obligated the convening authority to disapprove any adjudged forfeitures and to defer and waive any automatic forfeitures.

As to the adjudged forfeitures, the convening authority clearly erred in failing to disapprove that punishment in his action on the sentence. However, the appellant has not complained that forfeitures were taken from his pay. To eliminate any risk of prejudice, we will take corrective action in our decretal paragraph.

Concerning automatic forfeitures, the convening authority approved deferral and waiver in the pretrial agreement. Appellate Exhibit II, ¶ 3 at 2. There were no automatic forfeitures after the convening authority's action since the appellant was no longer confined. Since the appellant has not claimed or demonstrated that any automatic forfeitures were taken from his pay, no relief is warranted.

Conclusion

The findings are affirmed. Only so much of the sentence extending to confinement for 6 months, reduction to pay grade E-1, and a bad-conduct discharge is affirmed.

Senior Judge PRICE and Judge SUSZAN concur.

For the Court

R.H. TROIDL
Clerk of Court