IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee	)	REPLY BRIEF ON BEHALF OF APPELLANT
v.	)	
Second Lieutenant (O-1) **KEVIN M. FURTH** United States Army Appellant	)	Crim. App. Dkt. No. 20180191 USCA Dkt. No. 20-0289/AR

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Issue Presented

WHETHER APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE WAS ERRONEOUSLY ADVISED THAT HIS PENDING RESIGNATION REQUEST, IF APPROVED, WOULD VACATE HIS GUILTY PLEA.

Law and Argument

The government acknowledges that 2LT Furth's defense counsel misapprehended the law and erroneously advised their client. (JA 4, 10). Thus, the government does not contest the issue of deficient performance. Instead, it focuses its argument on prejudice, asserting, incorrectly, that 2LT Furth has failed to show "that he would not have pleaded guilty but for the erroneous advice" and "that it would have been rational for him to plead not guilty." (JA 10).

1. Second Lieutenant Furth would not have pled guilty but for counsels' erroneous advice.

Second Lieutenant Furth declared, under penalty of perjury, "[he] would not have pleaded guilty prior to receiving a decision on [his] RFGOS" if he had been properly advised by counsel. (JA 34). This language is not confusing. It means what it says: but for counsels' erroneous advice, 2LT Furth would not have pled guilty when he did because he had not yet received a decision on the RFGOS. Yet the government, relying on the same language, asserts the exact opposite: "[A]ppellant does not assert that he would have pleaded not guilty but for his counsel's alleged advice regarding the effect of a RFGOS that is approved post-trial." (Appellee's Br. 11).

It is not exactly clear how the government can interpret 2LT Furth's declaration to mean the opposite of its plain meaning. Nonetheless, the government appears to rely on a mistaken belief that what 2LT Furth asserted was a factual impossibility and therefore his clear declaration should be discounted. For example, the government argues that 2LT Furth is relying on a "false premise" that he had control over the timing of his court-martial. *Id.* The government further contends that 2LT Furth only "had two options—plead guilty or not guilty." (JA 7).

Rather than 2LT Furth relying on a "false premise," the government is relying on a false dichotomy. While the government is technically correct that an

accused has only two options for how to plead, implicit in the government's argument is the false presupposition that pleading not guilty would have no impact on the timing of trial. Second Lieutenant Furth, however, had at least four options: (1) Plead guilty on April 18, 2018; (2) plead not guilty and proceed immediately to trial; (3) plead not guilty and seek a later trial date, with the reasonable expectation that he might receive a decision on his RFGOS prior to trial, or (4) request a continuance.

It is this fourth option that 2LT Furth would have chosen. If the military judge denied that request, 2LT Furth would have opted for the third option—something that it was his absolute right to do. The government simply fails to acknowledge that these courses of action would have resulted in some delay—whether the result of a continuance to await a decision on the RFGOS or simply inherent in trial preparation, e.g. arranging witness travel, obtaining admissible evidence, litigating pre-trial motions, etc. If the delay proved insufficient to receive a decision on the RFGOS, which occurred only thirty-four days after the guilty plea, 2LT Furth could have reevaluated his options.

In light of these realistic options, the unambiguous language of 2LT Furth's declaration makes clear sense and, together with the contemporaneous evidence showing the importance of this issue to 2LT Furth (Appellant's Br. 10-11), clearly

demonstrates that 2LT Furth would not have pleaded guilty on April 18, 2018 but for his counsels' erroneous advice.

2. Pleading not guilty would have been rational.

In appellant's opening brief, 2LT Furth sets forth why his decision to plead not guilty would have been rational. In response, the government flips the proper legal standard on its head and argues that 2LT Furth cannot prevail because pleading guilty was "reasonable" and "sensible." (JA 12–15).

Thus, the government's reasoning is that if accepting a guilty plea is a reasonable choice, pleading not guilty is necessarily an irrational choice. The government fails to cite any authority to support this proposition, and the premise of their argument flies in the face of one of the most sacred foundations of American criminal justice—the presumption of innocence and the right to plead not guilty for absolutely no reason whatsoever. In addition, the factors relied upon by the government to show the guilty plea was "reasonable" do not demonstrate that pleading not guilty would have been irrational.

The government's argument is that 2LT Furth received a "favorable" deal when faced with a "strong" case.[1] (Appellee's Br. 12–13). This is not dissimilar to

[1] While Appellant maintains that the strength of the government's case is irrelevant under *Lee*, the government's argument that its case was "strong" rests primarily on the stipulation of fact and providence inquiry, neither of which would have been available to the government had 2LT Furth pled not guilty. (Appellee's Br. 12–13). Beyond those sources, the government points only to 2LT Furth's bank

the argument the government made, and the Supreme Court rejected, in *Lee*: "The Government responds that, since Lee had no viable defense at trial, he would almost certainly have lost and found himself still subject to deportation, with a lengthier prison sentence to boot." *United States v. Lee*, 137 S. Ct. 1958, 1966 (2017).

The government also argues that 2LT Furth's chain of command recommended against approval of his RFGOS. (Appellee's Br. 15 n.7). Again, the rationality standard in *Lee* does not render decisions irrational merely because the odds of success are low.[2] All that said, despite the government's invitation for this court to engage in speculation, such guesswork is unnecessary in this case because we know the outcome: the RFGOS was approved. When the outcome is known, there is no reason for the Court to go back in time and engage in speculation about its likelihood. *See United States v. Lee*, 52 M.J. 51, 53 (C.A.A.F. 1999) (holding that we need not "speculate about what the convening authority might have done"

---

records. *Id.* at 13. While relevant to one element of one of the specifications, it falls well short of demonstrating the government's case was strong.

[2] Even if the chain of command recommendations were relevant, the notion that an unfavorable recommendation means a RFGOS is unlikely to be approved seems questionable. The Army court has addressed this issue a total of three times, including this case. In each case, the chain of command recommended disapproval of the RFGOS and in each case the RFGOS was nonetheless approved. *United States v. Brown*, ARMY 20180316, 2020 CCA LEXIS 190, at *2–*3 (Army. Ct. Crim. App. May 29, 2020); *United States v. Vance*, ARMY 20180011, 2020 CCA LEXIS 112, at *4, *7 (Army. Ct. Crim. App. April 8, 2020).

with a clemency request when "the record demonstrates" what the outcome would have been.). What's more, no action taken by 2LT Furth or his counsel in pleading guilty had any impact on the processing of his RFGOS, so if we could go back in time and change his decision, it is a certainty that his RFGOS would have been approved as it was in the actual timeline of events.

The government focused its argument on factors rejected by the Supreme Court in *Lee*. Whether 2LT Furth would have prevailed at trial is beside the point. What is relevant is that, like for Lee who was rationally willing to risk almost certain defeat at trial and a longer prison sentence for the highly improbable result of avoiding deportation, it was also rational for 2LT Furth to plead not guilty—even at the risk of forgoing his plea agreement—for the possibility of avoiding court-martial and the ensuing federal conviction entirely.

3. Defense counsels' failure to request a continuance was constitutionally ineffective.

The government frames the defense counsels' failure to seek a continuance as a "reasonable choice in strategy" because defense counsel did not want to risk losing the benefits of the plea agreement by delaying the court-martial. (Appellee's Br. 17). While strategic choices are "virtually unchallengeable," such choices are only afforded such deference after "thorough investigation of the law and the facts relevant to the plausible outcomes." *United States v. Akbar*, 74 M.J.

364, 371 (C.A.A.F. 2015) (citation omitted). Here, defense counsels' decision was not a matter of reasoned and informed strategy—it was simply a mistake.

The decision not to seek a continuance was not a strategic decision for two reasons. First, to the extent that defense counsel was concerned about losing the benefit of the plea agreement, such concern was unfounded. The plea agreement was approved on April 5, 2018. (JA 69).[3] The plea agreement sets forth the conditions under which the convening authority may withdraw from the agreement. Seeking a continuance is not among those listed. (JA 68–69). Thus, to the extent such a concern drove defense counsels' decision not to seek a continuance between April 5 and April 18, 2018, it was not a valid strategy decision because it was based on an erroneous understanding of the law and facts.

Second, all parties agree that defense counsel did not thoroughly investigate the law and therefore they did not understand the factual consequence that pleading guilty would have on the pending RFGOS. Thus, defense counsel never weighed the decision not to seek a continuance against the fact that such decision would foreclose the possibility of a favorable outcome on the RFGOS. In fact, it would be more accurate to say that defense counsel never even made a decision, much

[3] The plea agreement was added as a supplement to the Joint Appendix by government motion, granted by this Court on October 13, 2020. It appears as well at Appellate Exhibit V.

less a strategic one, because they never understood the necessity of delaying trial until a decision had been made on the RFGOS.

The government further argues that even if a continuance had been requested, "Appellant cannot carry his burden to show" that the motion would have been successful. (Appellee's Br. 16). That "burden" requires showing a "reasonable probability," which in turn means a "probability sufficient to undermine confidence in the outcome." *Akbar*, 74 M.J. at 379. (citation omitted).

Here, confidence in the outcome is shaken to its core. Only thirty-four days after 2LT Furth pled guilty, the DASA approved his RFGOS, which would have vacated any pending court-martial proceedings. While it is impossible to know how the military judge would have ruled, as already discussed (Appellant's Br. 14), the standard for granting a continuance is low, and this court-martial had not been subject to prior delays. In light of this low standard and the fact that the RFGOS was approved only thirty-four days later, confidence in the proceeding is clearly undermined by defense counsels' failure to seek a continuance.[4]

Finally, the government asserts, in a footnote, that defense counsels' failure to seek a continuance is beyond the scope of the granted issue in this case.

---

[4] The government suggests that the defense here would have required an "indefinite" delay. (Appellee Br. 17). But that is not the case. Trial defense counsel could have simply contacted the office of the DASA and asked when a decision was expected.

(Appellee's Br. 16 n.8). The government's belief stems from the false dichotomy, discussed above, through which the government attempts to frame this case—that 2LT Furth's only options were to plead guilty on April 18, 2018 or go to trial on that day.

Once again, those were not the only options available to 2LT Furth in this case. As discussed above, 2LT Furth, had he been properly advised, would have sought a later trial date sufficiently far into the future to allow for a decision on his RFGOS request. One rational course of action to achieve that goal would have been to plead not guilty on April 18, 2018 and rely on the logistical and procedural steps necessary to prepare for trial and the time those steps would take—obtaining evidence, arranging witness travel, litigating pre-trial motions, finding trial dates that accommodate the schedules of all involved, etc. Another rational course of action would have been for defense counsel to seek a continuance. Thus, the decision by 2LT Furth's defense counsel fits squarely within the granted issue before this Court.

Conclusion

Wherefore, 2LT Furth requests that this Honorable Court find that he received constitutionally ineffective assistance of counsel and accordingly set aside and dismiss the charges and specifications.

SCOTT A. MARTIN
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0725
USCAAF Bar No. 37052

PAUL T. SIHRK
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
USCAAF Bar No. 37224

ANGELA D. SWILLEY
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar No. 36437

MICHAEL C. FRIESS
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar No. 33185

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Furth, Crim App. Dkt. No. 20180191, USCA Dkt. No. 20-0289/AR was electronically filed brief with the Court and Government Appellate Division on November 3, 2020.

MICHELLE L. WASHINGTON
Paralegal Specialist
Defense Appellate Division
(703) 693-0737

Appendix A: Unpublished Opinions

United States v. Brown

United States Army Court of Criminal Appeals

May 29, 2020, Decided

ARMY 20180316

Reporter
2020 CCA LEXIS 190 *

UNITED STATES, Appellee v. Second Lieutenant JOSEPH L. BROWN, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: **[*1]** United States Army Combined Arms Support Command. Andrew J. Glass, Military Judge. Colonel James D. Levine II, Staff Judge Advocate.

Outcome
The findings were affirmed. As the adjudged dismissal was the only approved portion of the sentence, the sentence was set aside.

Core Terms

military, court-martial, sentence, Recommendation, post-trial, pretrial, advice

Case Summary

Overview
HOLDINGS: [1]-Appellant did not receive ineffective assistance of counsel when he was advised that his pending Resignation For the Good of the Service (RFGOS) could still be approved if he pleaded guilty and was sentenced to be dismissed, as he did not assert that he would have pleaded not guilty but for his counsel's advice regarding the effect of a RFGOS approved post-trial and he made no showing that if he had been advised properly, it would have been rational for him not to plead guilty; [2]-Appellant's guilty plea was not improvident because his guilty plea did not preclude approval of his previously submitted RFGOS post trial, and the military judge was not obligated to walk appellant through the process of administrative separation or the General Court-Martial Convening Authority's post-trial authority in order to find his pleas provident.

LexisNexis® Headnotes

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN1[] **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice. A military court of criminal appeals may address these prongs in any order

because the appellant must meet both in order to prevail. When it is apparent that the alleged deficiency has not caused prejudice, it is not necessary to decide the issue of deficient performance.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pleas

HN2[] **Effective Assistance of Counsel, Pleas**

To establish prejudice within the context of a guilty plea, an appellant bears the burden of establishing he would not have pleaded guilty but for his counsel's allegedly deficient advice. To make such a showing, appellant's affidavit must not only assert that he would not have pleaded guilty but for the erroneous advice, but he must also satisfy a separate, objective inquiry; he must show that if he had been advised properly, it would have been rational for him not to plead guilty.

Military & Veterans Law > ... > Trial Procedures > Pleas > Providence Inquiries

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN3[] **Pleas, Providence Inquiries**

An abuse of discretion occurs when a military judge fails to obtain from an accused an adequate factual basis to support the plea or has an erroneous view of the law.

Military & Veterans Law > ... > Courts Martial > Sentences > Discharge, Resignation & Retirement

HN4[] **Sentences, Discharge, Resignation & Retirement**

Administrative discharges, to include those resulting from a discharge in lieu of a court-martial, are collateral administrative matters.

Military & Veterans Law > ... > Trial Procedures > Pleas > Providence Inquiries

HN5[] **Pleas, Providence Inquiries**

To show that a military judge erred in accepting his guilty plea, an appellant must demonstrate his misunderstanding of the consequence (a) results foreseeably and almost inexorably from the language of a pretrial agreement; (b) is induced by the trial judge's comments during the providence inquiry; or (c) is made readily apparent to the judge, who nonetheless fails to correct that misunderstanding.

Counsel: For Appellant: Lieutenant Colonel Tiffany D. Pond, JA; Captain Benjamin A. Accinelli, JA; Captain Zachary A. Gray, JA (on brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Dustin B. Myrie, JA; Major Anne Savin, JA (on brief).

Judges: Before ALDYKIEWICZ, SALUSSOLIA, and WALKER, Appellate Military Judges. Senior Judge ALDYKIEWICZ and Judge WALKER concur.

Opinion by: SALUSSOLIA

Opinion

MEMORANDUM OPINION

SALUSSOLIA, Judge:

We review this case under *Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 [UCMJ]*. On appeal, appellant asserts two assignments of error: (1) whether appellant received ineffective assistance of counsel when he was advised that his pending Resignation For the Good of the Service (RFGOS) could still be approved if he pleaded guilty and was sentenced to be dismissed; and (2) whether appellant's guilty plea was improvident because he did not understand the consequences of his pleas and pretrial agreement. These alleged errors merit discussion, but no relief pursuant to appellant's arguments. We grant relief in our decretal paragraph **[*2]** pursuant to this court's

reasoning in *United States v. Vance, ARMY 20180011, 2020 CCA LEXIS 112 (Army Ct. Crim. App. 8 Apr. 2020)* (mem. op.).

BACKGROUND

Appellant commissioned into the Army from the Reserve Officers' Training Corps (ROTC) and incurred a service obligation as a result of the college scholarship he received. On 9 November 2017—long before he completed his initial service obligation—appellant was apprehended for shoplifting from various on-post stores at Fort Lee, Virginia.

On 26 February 2018, the government preferred charges against appellant. On 1 March 2018, appellant submitted a RFGOS pursuant to Army Reg. 600-8-24, Personnel-General: Officer Transfers and Discharges, para. 3-13 (12 Apr. 2008; Rapid Action Revision 13 September 2011) [AR 600-8-24]. Appellant's chain of command, including the General Court-Martial Convening Authority (GCMCA) recommended disapproval of the RFGOS.

On 28 March 2018, appellant's military defense counsel submitted a delay request asking that the GCMCA not refer charges to a general court-martial "for ninety (90) days or before the Secretary of the Army or its delegate acts on the [RFGOS]. . . ." The request explained appellant's RFGOS had been submitted on 1 March and was still pending a decision. **[*3]** The GCMCA effectively denied this request by referring the charges to a general court-martial on 4 April 2018. On 24 April, appellant was arraigned by the military judge who scheduled the court-martial for 4 June 2018. Appellant submitted an offer to plead guilty on 27 April 2018.[1]

On 4 June 2018, a military judge sitting as a general court-martial convicted appellant, consistent with his pleas, of three specifications of larceny and one specification of obstruction of justice, in violation of Articles 121 and 134, UCMJ. The military judge sentenced appellant to forfeit all pay and allowances, and to be confined for seventy-five days and dismissed from the service.

On 12 July 2018, the Deputy Assistant Secretary of the Army (Review Boards), (the "DASA") approved appellant's RFGOS, directing that any court-martial proceedings—both findings and sentence—be vacated and appellant be administratively discharged with a General (Under Honorable Conditions) (GEN) characterization of service. On 12 July 2018, appellant received orders directing the issuance of his administrative discharge under GEN conditions. Appellant was released from confinement the same day.

On 16 October 2018, the GCMCA took **[*4]** initial action and disapproved the findings and sentence in appellant's case.[2] On 20 November 2018,[3] the Staff Judge Advocate (SJA) provided the GCMCA a Post-Trial Recommendation that specifically referenced an initial post-trial action taken by the GCMCA on 16 October 2018. According to the SJA's Post-Trial Recommendation to the GCMCA:

> On 16 October, you took initial action in this case and dismissed all charges and specifications IAW the directive of the [DASA]. In light of the recent decision by the Army Court of Criminal Appeals, *In re Vance, no. Army 20180011, 78 M.J. 631, 2018 CCA Lexis 532 (A. Ct. Crim. App. Nov. 5, 2018)*, that action was void ab initio.

In accordance with the SJA's Recommendation, the GCMCA approved the findings and only so much of the sentence as provided for dismissal from the service.

LAW AND DISCUSSION

Appellant's Effective Assistance of Counsel

Appellant asserts that he received ineffective assistance of counsel when he received "out-of-date and erroneous legal advice that led him to proceed with his court-martial without waiting for action on his [RFGOS]." Having ordered and received affidavits from appellant's civilian and military defense counsel and considering appellant's own affidavit, we find appellant has failed

[1] While awaiting his court-martial, appellant contacted the United States Army Human Resources Command (HRC) to inquire about the estimated processing time for his RFGOS request and request that it be expedited to receive a decision before his June trial date. HRC advised appellant that it would be two to three months as his RFGOS was pending a decision regarding his ROTC scholarship recoupment.

[2] The original post-trial action dated 16 October 2018 is not included in the record of trial but is referred to by the Staff Judge Advocate's post-trial recommendation.

[3] Corrected

to **[*5]** demonstrate any alleged deficiency in his counsel's performance resulted in prejudice.

HN1[] "In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010)* (citing *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*). Appellate courts may address these prongs in any order because "[a]ppellant must meet both in order to prevail." *Green, 68 M.J. at 362* (citing *Strickland, 466 U.S. at 697*; *Loving v. United States, 68 M.J. 1, 6 (C.A.A.F. 2009)*). When it is apparent that the alleged deficiency has not caused prejudice, it is not necessary to decide the issue of deficient performance. *See Loving, 68 M.J. at 2*.

HN2[] To establish prejudice within the context of a guilty plea, appellant bears the burden of establishing he would not have pleaded guilty but for his counsel's allegedly deficient advice. *See United States v. Bradley, 71 M.J. 13, 17 (C.A.A.F. 2012)*. To make such a showing, appellant's affidavit must not only assert that he would not have pleaded guilty but for the erroneous advice, but he must also satisfy a separate, objective inquiry; he must show that if he had been advised properly, it would have been rational for him not to plead guilty. *See id*. (citing *Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)*.

Here, appellant made no such showing. First, he has not asserted that he would have pleaded not guilty but for his counsel's **[*6]** advice regarding the effect of a RFGOS approved post-trial. Rather appellant asserts in his affidavit, "I would not have pleaded guilty if I had known that doing this would void an approved resignation by the Department of the Army. I would have waited for the Department of the Army to make a decision regarding my resignation." This was not a viable option. *See Vance, 2020 CCA LEXIS 112, at *8*. In other words, appellant had two choices: to plead guilty or to plead not guilty. It was not appellant's prerogative to delay entry of his plea at a court-martial or otherwise delay a court-martial proceeding to wait for the DASA's action on his pending RFGOS.[4]

Appellant has also made no showing that if he had been advised properly, it would have been rational for him not to plead guilty. Rather, the record indicates the opposite in that it was objectively reasonable for appellant to have pleaded guilty for the benefit of a favorable pretrial agreement with the GCMCA.[5] The government's case was strong and included video surveillance capturing some of appellant's criminal activity. Additionally, appellant had no reason to believe his RFGOS would be approved given that his entire chain of command recommended against approval. **[*7]**

Accordingly, we find appellant has failed to establish that he would not have pleaded guilty but for his counsel's allegedly deficient advice and therefore, he has suffered no demonstrable prejudice.

The Military Judge's Acceptance of the Guilty Plea

In appellant's second assignment of error, he asserts that his guilty pleas were not provident because he did not understand the consequences of his pleas and pretrial agreement. Appellant alleges the military judge should have advised him that the GCMCA could not disapprove a finding of guilty of two specifications to which he pleaded guilty because their associated maximum punishment includes confinement exceeding two years. Based on this alleged error, appellant

---

[4] Appellant also contends his defense counsel were ineffective because they should have requested a continuance from the military judge and, if they had, appellant "could have delayed his guilty plea until secretarial action." We reject appellant's claim because he has not carried "his burden to show that his counsel would have been successful if he had filed . . . [a] timely motion" for a continuance. *United States v. Jameson, 65 M.J. 160, 164 (C.A.A.F. 2007)*. In his affidavit, appellant suggests that his counsels' performance was deficient asserting they advised him not to submit his RFGOS in January 2018, and that if he "had submitted [his] resignation in January, [the] resignation would have been approved before [he] made a guilty plea at a court-martial (this is based on the actual amount of time the Department of the Army took to approve my resignation)." Appellant's assertion—which is largely based on hindsight and speculation—is without merit. First, there is no set time upon which the DASA must act on a RFGOS. *See* AR 600-8-24, para. 3-13(e); AR 27-10, para. 5-26(c). Second, had appellant submitted his RFGOS in January 2018, it would likely have been rejected as being in contravention of AR 600-8-24, para. 3-13(a), because appellant's case was not preferred until 26 February 2018. This paragraph indicates in pertinent part that an officer may submit a RFGOS once court-martial charges have been preferred against the officer.

[5] Appellant bargained for a pretrial agreement that reduced his total number of potential convictions from seven to four and significantly capped the amount of confinement time to which he could be sentenced.

requests we find his plea improvident and set aside the findings and sentence.

The issue before this court is whether the military judge abused his discretion in accepting appellant's plea. *United States v. Murphy, 74 M.J. 302, 305 (C.A.A.F. 2015)* (citing *United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008)*). ***HN3***[] An abuse of discretion occurs when a military judge fails to obtain from an accused an adequate factual basis to support the plea or has an erroneous view of the law. *Id.*

We find no merit to appellant's assertion that the military judged erred. First, appellant's guilty plea did *not* ***[*8]*** preclude the DASA's approval of his previously submitted RFGOS post trial. *See Vance, 2020 CCA LEXIS 112, at *16* (citing *United States v. Woods, 26 M.J. 372, 375 (C.M.A. 1998)*).

Second, the military judge was not obligated to walk appellant through the process of administrative separation or the GCMCA's post-trial authority in order to find his pleas provident. As we recently noted in *Vance*, ***HN4***[] "administrative discharges, to include those resulting from a discharge in lieu of a court-martial, are collateral administrative matters."[6] *See Vance, 2020 CCA LEXIS 112, at *12*. ***HN5***[] To show the military judge erred in accepting his guilty plea, appellant must demonstrate his "misunderstanding of the consequence (a) results foreseeably and almost inexorably from the language of a pretrial agreement; (b) is induced by the trial judge's comments during the providence inquiry; or (c) is made readily apparent to the judge, who nonetheless fails to correct that misunderstanding." *United States v. Bedania, 12 M.J. 373, 376 (C.M.A. 1982)*.

Nothing in the record supports that one of these conditions has been met. Appellant clearly understood and accepted the terms of his pretrial agreement, which was not conditioned upon his RFGOS. Moreover, during the providence inquiry, the military judge neither induced a misunderstanding nor failed to correct a misunderstanding on the part **[*9]** of appellant regarding the acceptance of his RFGOS. Having thoroughly reviewed the record, we find appellant completed a knowing, voluntary, and intelligent plea of guilty to the charged offenses, including a proper inquiry pursuant to *United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (1969)*.

Effecting the Secretary's Approval of the RFGOS

Although we reject appellant's assertions, our analysis continues in order to determine how to give effect to the DASA's approval of appellant's RFGOS. The GCMCA properly approved the findings and sentence, in accordance with the SJA's sound post-trial recommendation. The DASA also properly executed her authority, approving appellant's RFGOS and ordering an administrative discharge just as she did in *Vance*. *See 2020 CCA LEXIS 112, at *21*; *see also* Army Reg. 600-8-24, para. 3-13h. As such, we have a valid court-martial conviction and a valid administrative discharge issued by a proper authority. Following the rationale in *Vance*, we set aside appellant's dismissal to give effect to the administrative discharge. *See 2020 CCA LEXIS 112, at *18-19*.

CONCLUSION

Having thoroughly reviewed the record and in light of the reasons set forth above, the findings are hereby AFFIRMED. As the adjudged dismissal is the only approved portion of the sentence, the sentence is SET **[*10]** ASIDE. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of his sentence set aside by this decision are ordered restored. *See UCMJ arts. 58(b)(c)* and *75(a)*.

Senior Judge ALDYKIEWICZ and Judge WALKER concur.

End of Document

[6] As we did in *Vance*, we decline appellant's invitation to treat action on appellant's RFGOS in the same fashion as the requirement to register as a sex offender. *Vance, 2020 CCA LEXIS 112, at *12* (this court distinguishing *United States v. Riley, 72 M.J. 115 (C.A.A.F. 2013)*. Likewise, we reject appellant's notion that the effect of a guilty plea on a pending administrative discharge is analogous to the direct collateral consequence of deportation as a result of a guilty plea. *See Lee v. United States, 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017)*. Whereas a guilty plea to a sexual offense brings about the direct consequence of the obligation to register as a sex offender and a guilty plea by those in certain immigration statuses may directly result in deportation by operation of law, appellant's guilty plea bore no effect on the DASA's prerogative to approve or deny his RFGOS.

United States v. Vance

United States Army Court of Criminal Appeals

April 8, 2020, Decided

ARMY 20180011

Reporter
2020 CCA LEXIS 112 *

UNITED STATES, Appellee v. Captain ELMO E. VANCE, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, U.S. Army Fires Center of Excellence and Fort Sill. Robert L. Shuck and Jacob D. Bashore, Military Judges. Colonel Maureen A. Kohn, Staff Judge Advocate.

In re Vance, 78 M.J. 631, 2018 CCA LEXIS 532 (A.C.C.A., Nov. 5, 2018)

Core Terms

sentence, court-martial, military, resignation, designee, collateral, ineffective, adjudged, pretrial, disapprove, offender, abate, sex, effectuate, promulgate, waiting

Case Summary

Overview
HOLDINGS: [1]-Appellant did not show that his counsel would have been successful had he filed a timely motion for a continuance; [2]-As to appellant's argument that his counsels' deficient legal advice precluded him from deciding what risks to incur in deciding when to plead guilty, he failed to demonstrate a reasonable probability that, absent the alleged error, he would not have pleaded guilty; [3]-He completed a knowing, voluntary, and intelligent plea of guilty to the charged offense; [4]-The convening authority approved the findings and sentence. That action was correct in law and the court affirmed findings of guilty; [5]-The court had before it a valid court-martial conviction, a valid administrative discharge, and documentation purporting to rescind an otherwise valid administrative discharge unsupported by any law or authority. The court was compelled to set aside his dismissal.

Outcome
The findings were affirmed. The sentence was set aside. All rights, privileges, and property, of which appellant had been deprived by virtue of that portion of his sentence set aside by this decision were ordered restored.

LexisNexis® Headnotes

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1[] Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel

The court reviews assertions of ineffective assistance of counsel de novo. In Strickland, the Supreme Court established a two-pronged test to determine whether counsel provided ineffective assistance. The U.S. Court of Appeals for the Armed Forces has adopted this two-pronged test. In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient and (2) that this deficiency resulted in prejudice. When it is apparent that the alleged deficiency has not caused prejudice, it is not necessary to decide the issue of deficient performance.

Military & Veterans Law > Military Justice > Courts Martial

Military & Veterans Law > Servicemembers

HN2[] Military Justice, Courts Martial

The tender of a Resignation for the Good of the Service (RFGOS) does not preclude or suspend court-martial procedures. Army Reg. 600-8-24, para. 3-12. Additionally, the Deputy Assistant Secretary of the Army (Review Boards) had complete discretion to act on the RFGOS, to include when to act. While the command must expeditiously process an RFGOS, the court does not find a set time upon which the Secretary's designee must act on a tendered resignation; refer to Army Reg. 600-8-24, para. 3-13e; Army Reg. 27-10, para. 5-26c.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Pleas

HN3[] Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel

In the guilty plea context, the prejudice prong of the Strickland test asks whether there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. A mere post-trial allegation is insufficient. According to Padilla, an appellant also must satisfy a separate, objective inquiry--he must show that if he had been advised properly, then it would have been rational for him not to plead guilty.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Pleas

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN4[] Trial Procedures, Pleas

The court reviews a military judge's acceptance of a guilty plea for an abuse of discretion and questions of law arising from the plea de novo. An abuse of discretion occurs when a military judge fails to obtain from an accused an adequate factual basis to support the plea or has an erroneous view of the law. A military judge's duties with respect to plea inquiries include: (1) ensuring there is a basis in law and fact to support the plea and offense charged; (2) ensuring the accused understands and accepts the terms of the pretrial agreement; and (3) ensuring the terms of the agreement comply with the law and fundamental notions of fairness. The court will not disturb a guilty plea unless appellant demonstrates a substantial basis in law or fact for questioning the plea.

Military & Veterans Law > ... > Trial Procedures > Pleas > Voluntariness

HN5[] Pleas, Voluntariness

A guilty plea can be knowing and voluntary even if the defendant did not correctly assess every relevant factor entering into his decision, so long as it is entered by a defendant fully aware of the direct consequences of his plea. Generally, a court must only advise the defendant of the direct consequences of his plea and need not advise him of all possible collateral consequences.

Military & Veterans Law > Servicemembers > Administrative Discharge

Military & Veterans Law > ... > Trial Procedures > Pleas > Voluntariness

HN6[] Servicemembers, Administrative Discharge

Military appellate courts have long recognized that administrative discharges, to include those resulting from a discharge in lieu of a court-martial, are collateral administrative matters.

Military & Veterans Law > ... > Trial Procedures > Pleas > Voluntariness

HN7[] Pleas, Voluntariness

When challenging a guilty plea because of an unforeseen collateral consequence, appellant must demonstrate that the collateral consequence is major, and that appellant's misunderstanding of the consequences (a) results foreseeably and almost inexorably from the language of a pretrial agreement; (b) is induced by the trial judge's comments during the providence inquiry; or (c) is made readily apparent to the judge, who nonetheless fails to correct that misunderstanding.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN8[] Judicial Review, Courts of Criminal Appeals

The court may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved; refer to Unif. Code Mil. Justice art. 66(c), 10 U.S.C.S. § 866(c).

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > Servicemembers

HN9[] Posttrial Procedure, Actions by Convening Authority

Although Unif. Code Mil. Justice art. 60, 10 U.S.C.S. § 860, prevents a convening authority, in most cases, from vacating the findings and sentence upon the Deputy Assistant Secretary of the Army (Review Boards) (DASA's) acceptance of a resignation for the good of the service, it does not divest the DASA of the authority to effectuate the administrative discharge. Once charges are preferred, an administrative discharge certificate is "void until the charge is dismissed, the Soldier is acquitted at trial by court-martial, or appellate review of a conviction is complete." Army Reg. 27-10, para. 5-16b. However, the Secretary or "delegate," may approve an exception at the request of the soldier.

Military & Veterans Law > Military Justice > Jurisdiction > In Personam Jurisdiction

HN10[] Jurisdiction, In Personam Jurisdiction

The U.S. Court of Appeals for the Armed Forces has identified three criteria to consider when determining whether a servicemember's discharge has been finalized for jurisdictional purposes: (1) the delivery of a discharge certificate (a DD Form 214); (2) a "final accounting of pay"; and (3) the completion of the "clearing" process that is required under service regulations.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > Servicemembers

HN11[] Posttrial Procedure, Actions by Convening Authority

Discharge only affects execution of the sentence; specifically, unexecuted portion, of the sentence.

Counsel: For Appellant: Lieutenant Colonel Tiffany D. Pond, JA; Jonathan F. Potter, Esquire; Lieutenant Colonel Christopher D. Carrier, JA (on brief); Lieutenant Colonel Tiffany D. Pond, JA; Lieutenant Colonel Christopher D. Carrier, JA (on reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Dustin B. Myrie, JA; Captain Lauryn D. Carr, JA (on brief).

Judges: Before ALDYKIEWICZ, SALUSSOLIA, and WALKER, Appellate Military Judges. Senior Judge ALDYKIEWICZ and Judge WALKER concur.

Opinion by: SALUSSOLIA

Opinion

MEMORANDUM OPINION ON FURTHER REVIEW

SALUSSOLIA, Judge

A military judge sitting as a general court-martial, convicted appellant, consistent with his pleas, often specifications of violating a general regulation, one specification of absence without leave, and one specification of conduct unbecoming an officer and gentleman, in violation of *Articles 92*, *86*, and *133*, *Uniform Code of Military Justice, 10 U.S.C. §§ 892*, *886*, *933 (2012 & Supp. II 2015)* [UCMJ]. The military judge sentenced appellant to a dismissal from the service and forfeiture **[*2]** of $1000 per month for three months.

The general court-martial convening authority (GCMCA) originally set aside the findings of guilty and the sentence pursuant to the direction of the Deputy Assistant Secretary of the Army (Review Boards), (the "DASA"). Previously, in *In Re Vance*, this court determined the GCMCA's action violated *Article 60, UCMJ*, and such action "was invalid at the time it was signed and void *ab initio*" *78 M.J. 631, 636 (Army Ct. Crim. App. 2018)*. We also issued a writ of mandamus directing the GCMCA to take action in this case in the manner as required under *Article 60, UCMJ* . *Id.* The GCMCA subsequently took action approving the adjudged findings and sentence in this case.

Appellant's case is now pending review before this court pursuant to *Article 66, UCMJ*. On appeal, appellant asserts two assignments of error: (1) whether appellant received effective assistance of counsel when he was advised that his pending resignation for the good of the service (RFGOS) in lieu of court-martial could still be approved even if he pleaded guilty and was sentenced to a dismissal; and (2) whether appellant's pleas of guilty were not provident. Appellant asserts that given either error, this court should set aside the findings and sentence. Having ordered **[*3]** and received affidavits from appellant's military defense counsel,[1] we address each assigned error below. In the end, we affirm the findings of guilty but set aside the sentence.

BACKGROUND

On 26 September 2017, the government preferred charges against appellant. On 10 October 2017, appellant, pursuant to advice from his trial defense counsel, CPT LA, submitted a Resignation for the Good of the Service (RFGOS) pursuant to Army Reg. 600-8-24, Personnel-General: Officer Transfers and Discharges, para. 3-13 (12 Apr. 2008; Rapid Action Revision 13 Sept. 2011) [AR 600-8-24]. Although appellant requested the GCMCA hold the referral of his charges in abeyance until action was taken on his RFGOS, the GCMCA referred the charges on 13 October 2017. Approximately a week later, the GCMCA recommended disapproval of appellant's RFGOS in lieu of court-martial.

With a trial set for 30 January 2018, appellant submitted an offer to plead guilty on 17 November 2017, which the GCMCA accepted on 22 December 2017. On 17 January 2018, appellant was found guilty pursuant to his pleas and sentenced. On 19 January 2018, appellant's command forwarded appellant's RFGOS to the United States Army Human Resources Command, **[*4]** which in turn, forwarded the case to the Army Review Boards Agency for action by the DASA, operating under a delegation of authority from the Secretary of the Army (the Secretary). On 20 March 2018, the DASA accepted appellant's resignation and directed that he be administratively discharged with an under Other Than Honorable Conditions (OTH) characterization of service. The DASA also directed that "the entire court-martial proceedings, both the findings and sentence, if any, be vacated."

On 29 March 2018, after receiving advice from his staff judge advocate, the GCMCA disapproved the findings and sentence pursuant to the DASA's direction. On 10 April 2018, appellant received orders directing the issuance of his administrative discharge and received a DD 214 that characterized appellant's discharge as under OTH conditions.

This court issued its opinion in *In Re Vance* on 5

[1] The appellant was represented by MAJ RM and CPT LA, both of whom were assigned to the U.S. Army Trial Defense Service.

November 2018. Subsequently, the DASA, in an undated memorandum, rescinded her prior approval of appellant's RFGOS. Her memorandum reasoned, "I have now been informed that my action was in contravention of *Article 60, Uniform Code of Military Justice*, which has recently been amended to limit my authority to act on Resignations **[*5]** for the Good of the Service in lieu of General Court-Martial after trial." On 25 February 2019, the Army revoked the order that served to discharge appellant and later, revoked his DD 214. On 22 March 2019, pursuant to this court's directive to take action in accordance with *Article 60, UCMJ*, the GCMCA approved appellant's findings and sentence.

LAW AND DISCUSSION

Effective Assistance of Counsel

Appellant asserts his military defense counsel were ineffective in their: (1) failure to seek a continuance to delay appellant's guilty plea until after secretarial action on his resignation occurred, and 2) deficient legal advice precluding appellant from deciding what risks to incur when deciding to enter a plea of guilty. For the reasons stated below, we find no ineffective assistance of counsel.

HN1[] We review assertions of ineffective assistance of counsel de novo. *United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011)* (citing *United States v. Mazza, 67 M.J. 470, 474 (C.A.A.F. 2009)*). In *Strickland v. Washington*, the Supreme Court established a two-pronged test to determine whether counsel provided ineffective assistance. *466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. Our superior court has adopted this two-pronged test. *United States v. Green, 68 M.J. 360 (C.A.A.F. 2010)*. "In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient **[*6]** and (2) that this deficiency resulted in prejudice." *Id.* (citing *Strickland, 466 U.S. at 687*). When it is apparent that the alleged deficiency has not caused prejudice, it is not necessary to decide the issue of deficient performance. *See Loving v. United States, 68 M.J. 1, 2 (C.A.A.F. 2009)*.

Appellant first asserts that his military defense counsel were ineffective for failing to request a continuance. He contends that the military judge "should" have granted a continuance had counsel merely articulated to the military judge that once findings and sentence had been adjudged, the DASA would no longer have the authority to accept appellant's RFGOS.[2] Appellant argues that had his counsel appreciated and articulated this consequence as the basis for a continuance, he could have delayed the court-martial until the Secretary's designee took action. Appellant indicates that the period of delay would have only been two months—the time from the date of trial, 17 January 2018, until secretarial action approved the RFGOS on 20 March 2018.

We reject appellant's claim because he has not carried "his burden to show that his counsel would have been successful if he had filed . . . [a] timely motion" for a continuance. *United States v. Jameson, 65 M.J. 160, 164 (C.A.A.F. 2007)*. ***HN2***[] "The tender of a RFGOS does not **[*7]** preclude or suspend [court-martial] procedures." AR 600-8-24, para. 3-12. Additionally, the DASA had complete discretion to act on the RFGOS, to include when to act.[3] Lastly, the entire chain of command recommended denial of appellant's RFGOS. Even appellant acknowledges this latter fact and admits that he believed the RFGOS would be denied based on his command's recommendations. Given that a motion for a continuance filed by appellant at the time of trial would have sought an indefinite delay on a discretionary collateral matter, we find it unlikely that the military judge would have granted the motion and ordered a continuance. *See Jameson, 65 M.J. at 163-64* (citing *United States v. McConnell, 55 M.J. 479, 482 (C.A.A.F. 2001)*); *see also United States v. Wiest, 59 M.J. 276, 279 (C.A.A.F. 2004)* (listing factors relevant for a

---

[2] Appellant cites to our decision in *In Re Vance*. To clarify *In Re Vance*, we determined that in appellant's case, the CA lacked the authority under *Article 60, UCMJ*, "to dismiss or set aside a finding of guilty or disapprove, commute, suspend, certain parts of the sentence." *Id. at 634*. We did not address whether the DASA had the authority to accept a RFGOS post-trial, because any resolution of that issue would have been nothing more than an advisory opinion at that juncture, and this court should "adhere to the prohibition on advisory opinions as a prudential matter." *United States v. Chisholm, 59 M.J. 151, 152 (C.A.A.F. 2003)*. In fact, we noted that nothing in that opinion "should be construed as limiting the Secretary's authority to act under *Article 74, UCMJ*, or any other authority." *In Re Vance, 78 M.J. at 635, n.12*.

[3] While the command must expeditiously process a RFGOS, we do not find a set time upon which the Secretary's designee must act on a tendered resignation. *See* AR 600-8-24, para. 3-13e; AR 27-10, para. 5-26c.

continuance); Rule for Court-Martial [R.C.M.] 906(b)(1).

We next address appellant's argument that his counsels' deficient legal advice precluded appellant from deciding what risks to incur in deciding when to plead guilty. ***HN3***[] In the guilty plea context, the prejudice prong of the *Strickland* test asks whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *United States v. Rose, 71 M.J. 138, 144 (C.A.A.F. 2012)* (quoting *Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985))*. A mere post-trial allegation is insufficient. **[*8]** *See United States v. Bradley, 71 M.J. 13, 17 (C.A.A.F. 2012)* (citing *Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284, (2010)* (the court finding appellant's affidavit alleging he would not have pleaded guilty was insufficient to demonstrate prejudice, and finding "Appellant also must satisfy a separate, objective inquiry — he must show that if he had been advised properly, then it would have been rational for him not to plead guilty.")

Appellant fails to demonstrate a reasonable probability that, absent the alleged error, he would not have pleaded guilty. Appellant had two choices: to enter a plea of guilty or to enter a plea of not guilty. Appellant did the former and his affidavit makes no mention that he would have done the latter. Rather appellant's affidavit states: "I would not have pleaded guilty if I had known that the plea would make it impossible for the resignation, if approved to take effect. I would have waited for a final answer." His claim that he "would have waited for a final answer" clearly refers to waiting for secretarial action on his RFGOS. By making such a statement, appellant assumes that waiting for a final answer was a viable option. It was not. Nothing in the record before us shows that waiting was one of appellant's options. There is no statutory nor regulatory authority **[*9]** requiring the DASA to take action on appellant's RFGOS within a certain period. Moreover, the granting of an indefinite continuance on such a collateral matter was unlikely.

Appellant also makes no showing that it would have been objectively rational for him to plead not guilty. The government had a strong case, to include documentary evidence demonstrating appellant's wrongdoing, as well as numerous admissions by appellant. In the face of these facts, appellant entered into a pretrial agreement with the CA, which limited any period of adjudged confinement to sixty days and deferred adjudged or automatic forfeitures until action. Appellant received no confinement, but benefitted from the deferral of the adjudged forfeiture of $1000 per month from the date of his sentence, 17 January 2018, until the CA's initial, but flawed, action on 29 March 2018. Had appellant not agreed to plead guilty and proceed to trial in January 2018, he may not have received such favorable terms in a pretrial agreement.

The Military Judge's Acceptance of the Guilty Plea

In appellant's second assignment of error, appellant asserts the military judge erred by accepting appellant's plea because he failed to discuss **[*10]** with appellant the consequence that the findings and sentence, once adjudged, would have had on the DASA's authority to accept appellant's RFGOS in lieu of court-martial.

HN4[] We review a military judge's acceptance of a guilty plea for an abuse of discretion and questions of law arising from the plea de novo. *United States v. Murphy, 74 M.J. 302, 305 (C.A.A.F. 2015)* (citing *United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008))*. An abuse of discretion occurs when a military judge fails to obtain from an accused an adequate factual basis to support the plea or has an erroneous view of the law. *Id.* A military judge's duties with respect to plea inquiries include: (1) ensuring there is a basis in law and fact to support the plea and offense charged; (2) ensuring the accused understands and accepts the terms of the pretrial agreement; and (3) ensuring the terms of the agreement comply with the law and fundamental notions of fairness. *United States v. Soto, 69 M.J. 304, 306-07 (C.A.A.F. 2011)*. We will not disturb a guilty plea unless appellant demonstrates a substantial basis in law or fact for questioning the plea. *Inabinette, 66 M.J. at 305*.

HN5[] A guilty plea can be knowing and voluntary even "if the defendant did not correctly assess every relevant factor entering into his decision," *Brady v. United States, 397 U.S. 742, 757, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970)*, so long as it is "entered by [a defendant] fully aware of the direct consequences" of his plea. *Id. at 755* (internal **[*11]** quotations omitted). Generally, a court must only advise the defendant of the direct consequences of his plea and need not advise him of all possible collateral consequences. *See United States v. Delgado-Ramos, 635 F.3d 1237, 1239 (9th Cir. 2011)*.

In part, appellant asserts we "could find" that his plea was not provident, applying the decision in *United States v. Riley, 72 M.J. 115 (C.A.A.F. 2013)*. In *Riley*,

the Court of Appeals for the Armed Forces (CAAF) stated that sex offender registration is not merely a collateral consequence of a guilty plea. 72 M.J. at 122. In arriving at this conclusion, the CAAF acknowledged that the consequence of sex offender registration, like deportation, is an automatic result, which while not a criminal sanction, is a particularly severe penalty. The CAAF went on to explain "it is the military judge who bears the ultimate burden of ensuring that the accused's guilty plea is knowing and voluntary." *Id.* The court found "that the military judge abused his discretion when he accepted [the appellant]'s guilty plea without questioning defense counsel to ensure [the appellant]'s knowledge of the sex offender registration consequences of her guilty plea." *Id.* Sex offender registration is now recognized as a direct consequence of a guilty plea, imposing upon the military judge the requirement **[*12]** to advise on the matter prior to acceptance of the plea.

We decline appellant's invitation to treat any action on appellant's RFGOS in the same fashion as the requirement to register as a sex offender. ***HN6***[↑] Military appellate courts have long recognized that administrative discharges, to include those resulting from a discharge in lieu of a court-martial, are collateral administrative matters. *See* United States v. Bedania, 12 M.J. 373, 376 (CM.A. 1982); United States v. Johnson, 76 M.J. 673, 686 (A.F. Ct. Crim. App. 2017). Appellant offers nothing to convince us to depart from this long-standing acknowledgment and treat a RFGOS—a purely discretionary administrative matter—in the same manner as a post-conviction requirement to register as a sex offender.

To the extent appellant asserts the military judge was still required to address any post-trial action on his RFGOS, though it constitutes a collateral administrative matter, we find such an assertion meritless. ***HN7***[↑] When challenging a guilty plea because of an unforeseen collateral consequence, appellant must demonstrate that the collateral consequence is major, and that "appellant's misunderstanding of the consequences (a) results foreseeably and almost inexorably from the language of a pretrial agreement; (b) is induced by the trial judge's comments during the providence **[*13]** inquiry; or (c) is made readily apparent to the judge, who nonetheless fails to correct that misunderstanding." United States v. Bedania, 12 M.J. 373, 376 (C.M.A. 1982). In the case at hand, appellant makes no showing that one of these conditions has been met. Additionally, we find nothing in the record to support such a conclusion.

First, appellant clearly understood and accepted the terms of his pretrial agreement. Second, the pretrial agreement was not conditioned upon nor did it otherwise reference appellant's RFGOS. As such, any claimed misunderstanding by appellant regarding this alleged consequence did not result inexorably from his pretrial agreement. We find nothing in the record demonstrating any misunderstanding of a collateral consequence was made readily apparent to the military judge. Accordingly, having reviewed the entire record we find the appellant completed a knowing, voluntary, and intelligent plea of guilty to the charged offense, including a proper inquiry pursuant to United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (1969).

United States v. Woods

HN8[↑] This court may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as we find correct in law and fact and determine, on the basis of the entire record, should be approved. Article 66(c), UCMJ. **[*14]** Although not addressed by the parties, this court next addresses the applicability of our superior court's decision in United States v. Woods, 26 M.J. 372 (C.M.A. 1998). In that case, Captain (CPT) Woods was charged with drunk and reckless driving and involuntary manslaughter, in violation of Articles 111 and 119, UCMJ. Pursuant to his pleas, CPT Woods was found guilty, and sentenced to confinement for seven months and a dismissal. Prior to his guilty plea, however, CPT Woods submitted a RFGOS in lieu of court-martial in accordance with applicable regulations.[4] For some unknown reason, his tendered resignation was not forwarded to the Secretary's designee until almost three months after it was tendered and nearly two months after the CA took final action approving the findings of guilty and sentence. Id. at 373. The CA recommended denial of the RFGOS on the same day he approved the findings and sentence. After initial action by the CA, the Secretary's designee accepted CPT Woods' RFGOS and administratively discharged him with a discharge characterized as under OTH conditions. *Id.*

We take judicial notice of the record of trial in *Woods* and note the following: (1) the Secretary's memorandum

[4] In *Woods*, the service member submitted his RFGOS in accordance with Army Reg. 635-120, Personnel Separations: Officer Resignations and Discharges, para. 5-1, 5-2 (8 Apr. 1968)(C. 16, 1 Aug. 1982) [AR 635-120].

accepting the service member's RFGOS was silent **[*15]** as to its effect on the court-martial proceedings; and (2) the Secretary's designee submitted an affidavit indicating that his acceptance of the resignation was done with the intent to abate all court-martial proceedings. *Id.* at Supplement to Appellant's Pet., App. C, D.

On appeal, this court seemingly treated CPT Wood's RFGOS as a request for clemency under *Articles 71* and *74, UCMJ*, and concluded that while the Secretary had the power to grant clemency pursuant to these articles of the UCMJ, and discharge CPT Wood's administratively, such action did not abate the court-martial proceedings. Accordingly, we approved the findings, in part, but declined to affirm the adjudged dismissal. *Id. at 373*. Our superior court reversed our decision in *Woods*, concluding the case should be abated. *Id. at 375*.

First, our superior court recognized the Secretary's authority to grant clemency pursuant to *Article 71* and *74 of the UCMJ* was distinct from his statutory power to approve a resignation in lieu of a court-martial. The court determined that the exercise of this latter statutory power pursuant to promulgated regulatory procedures permitted an agreement between CPT Woods and the Secretary's designee "which provides **[*16]** for some action other than a court-martial be taken with respect to criminal charges." *Id. at 373-74*. Our superior court found this court erred by not enforcing the agreement. *Id. at 374*.

Our superior court clarified that the power of the Secretary or his designee to act on resignations and the power of a CA to convene courts-martial "harmoniously coexist." *Id. at 375*. The court also determined that an administrative action cannot divest a court-martial of its judicial power, and "a court-martial can neither deprive the Secretary of his powers nor defeat a lawful agreement between an accused and the Secretary." *Id.* The court reasoned that the secretarial authority to approve the RFGOS in lieu of a court-martial should not depend upon a race between the Secretary's acceptance of the resignation and the CA's action in accordance with *Article 60, UCMJ*. *Id. at 374*.

In light of these considerations, our superior court concluded that the agreement between CPT Woods and the Secretary's designee, which resulted in appellant's administrative discharge from the Army, required abatement of the criminal proceedings, a set aside of the court-martial's findings and sentence, and a dismissal of the underlying charges and specifications with **[*17]** prejudice. *Id. at 374-75*.

We distinguish appellant's case from *Woods*. Here, as in *Woods*, the Secretary's designee approved appellant's resignation post-trial pursuant to her statutorily vested authority, and appellant was separated from the service with an administrative discharge. *See generally 10 U.S.C. §§ 1181*, *7013*, and *14902*. The distinction between these cases lies in what the CA could or should have done.

Had the Secretary accepted the resignation in *Woods* prior to action, the CA would have been compelled by the regulatory scheme in AR 635-120 to disapprove the findings and sentence in order to effectuate the Secretary's designee's decision. The regulatory scheme allowed for a rush to action, which, if taken before a decision on a RFGOS, could thwart the Secretary's designee's statutory authority to discharge an officer and abate the proceedings. Unlike in *Woods*, the CA here had no discretion over the findings and sentence in appellant's case. Here, the CA attempted to effectuate the DASA's wishes by initially setting aside the findings and sentence; it was a statutory change to *Article 60, UCMJ*, that rendered the CA's initial action invalid.

As we previously noted, amendments to *Article 60* upset a regulatory scheme **[*18]** that previously allowed the Secretary's designee, by virtue of his or her decision, to approve a RFGOS, direct the CA to disapprove the findings and sentence of a court-martial once reached, and to abate the proceedings, with prejudice. *See In Re Vance, 78 M.J. at 633-34*; Army Reg. 27-10, Legal Services, Military Justice, para. 5-18 *b*. (11 May 2016). As applied to this case, *Article 60* required the CA to approve the findings and sentence, prohibiting the CA from acting in accordance with Army Reg. 27-10 to disapprove the findings and sentence to effectuate appellant's approved RFGOS. Consequently, this court found the GCMCA's action in disapproving both findings and sentence to be void *ab initio*. *Id. at 636*. Based on this court's directive, the GCMCA approved the findings and sentence. We find that action is correct in law and we affirm the findings of guilty.

What About the Sentence?

What we did not address in *In Re Vance* was the effect of appellant's administrative discharge resulting from the DASA's approval of his RFGOS. In our view, appellant was administratively discharged, and later efforts to

recall appellant to active duty had no legal effect.

As our superior court noted in *Woods*, the RFGOS process involved two **[*19]** separate but coexistent authorities: the authority of the CA under Article 60, UCMJ; and the Secretary's statutory authority under 10 U.S.C. § 3012 to promulgate regulations allowing for an officer to resign in lieu of court-martial. 26 M.J. at 374-75. The amendment to Article 60, UCMJ, impacted one part of this scheme—the ability of the CA to comply with a directive from the Secretary's designee to vacate the findings and sentence. The amendment did not invalidate the Secretary's statutory authority to promulgate and act under regulations concerning military personnel, to include acceptance of an officer's resignation. *See generally* 10 U.S.C. § 7013.

The RFGOS process, as it existed, consisted of two parts, one involving a purely administrative act of effectuating the officer's discharge, and one of vacating the findings and sentence. *See* AR 600-8-24, para. 3-13; AR 27-10, para. 5-18b. **HN9**[↑] Although Article 60, UCMJ, prevents a CA, in most cases, from vacating the findings and sentence upon the DASA's acceptance of a RFGOS, it does not divest the DASA of the authority to effectuate the administrative discharge.

Once charges are preferred, an administrative discharge certificate is "void until the charge is dismissed, the Soldier is acquitted **[*20]** at trial by court-martial, or appellate review of a conviction is complete." Army Reg. 27-10, para. 5-16b. However, the Secretary or "delegate," may approve an exception at the request of the soldier. Here, we have such a request in the form of the RFGOS. And we have action by the DASA (the Secretary's delegate) directing Army Human Resources Command to discharge appellant. *See* Army Reg. 600-8-24, para. 3-13h. The DASA's decision resulted in the promulgation of orders that administratively separated appellant from the service on 10 April 2018. Pursuant to the DASA's decision, appellant received orders directing his discharge, cleared the installation, and received final pay and accounting and a DD 214.

HN10[↑] Our superior court has "identified three criteria to consider when determining whether a servicemember's discharge has been finalized for jurisdictional purposes: (1) the delivery of a discharge certificate (a DD Form 214); (2) a 'final accounting of pay'; and (3) the completion of the 'clearing' process that is required under service regulations." United States v. Christensen, 78 M.J. 1, 4 (C.A.A.F. 2018) (quoting United States v. Hart, 66 M.J. 273, 276-79 (C.A.A.F. 2008)). Under this rubric, appellant was, by any definition, discharged.[5] Nothing in the appellate record suggests rescission of the DASA's **[*21]** approval of the RFGOS would invalidate appellant's administrative discharge. Appellant's discharge was obtained by following a validly promulgated Army regulation, without fraud or deceit by appellant.

Assuming appellant was discharged from the Army and not validly recalled to active duty, we nonetheless have jurisdiction to review the findings and sentence in his case. United States v. McPherson, 68 M.J. 526, 530-31 (Army Ct. Crim. App. 2009) (citing Steele v. Van Riper, 50 M.J. 89, 91 (C.A.A.F. 1997). *See also* United States v. Woods, 26 M.J. 372, 373 (citing United States v. Speller, 8 C.M.A. 363, 24 C.M.R. 173, 179 **HN11**[↑] (discharge only affects execution of the sentence; specifically, unexecuted portion, of the sentence).

On the record before us we have: 1) a valid court-martial conviction; 2) a valid administrative discharge issued by proper authority; and 3) documentation purporting to rescind an otherwise valid administrative discharge unsupported by any law or authority. We are compelled to set aside appellant's dismissal.[6]

CONCLUSION

For the foregoing reasons, we find appellant's counsel were not ineffective and his pleas were not improvident. The findings are hereby AFFIRMED. The sentence is SET ASIDE. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of his sentence set aside by this decision are ordered

---

[5] On 31 January 2020, we issued an order directing the government to, *inter alia*, provide the legal authority relied upon by the DASA in rescinding her acceptance of the RFGOS almost a year after it was accepted. While the government provided the documents purporting to rescind the RFGOS, cancel appellant's DD214, and place appellant on appellate leave, the government did not provide the legal authority relied upon by the DASA in rescinding her acceptance of the RFGOS and triggering the actions that purportedly restored appellant to active duty.

[6] Appellant's approved sentence included forfeiture of $1000 per month for three months. As the CA initially vacated this punishment and appellant was supposedly reinstated on appellate leave before the CA's second action, there were no pay and allowances against which to execute this part of the sentence.

restored.

Senior Judge ALDYKIEWICZ and **[*22]** Judge WALKER concur.

End of Document