UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DUSTIN W. CAHALL
United States Air Force

ACM S31458

30 March 2009

Sentence adjudged 19 December 2007 by SPCM convened at Dyess Air Force Base, Texas. Military Judge: Maura T. McGowan (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 100 days, forfeiture of $700.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Grover H. Baxley (argued), Colonel Nikki A. Hall, Major Shannon A. Bennett, and Captain Tiffany M. Wagner.

Appellate Counsel for the United States: Captain Michael T. Rakowski (argued), Colonel Gerald R. Bruce, Major Jeremy S. Weber, Major Donna S. Rueppell, and Captain Ryan N. Hoback.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

BRAND, Senior Judge:

In accordance with his plea, the appellant was convicted of one specification of wrongful possession of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Contrary to his plea,[1] the appellant was convicted of one specification of divers wrongful uses of marijuana, in violation of Article 112a, UCMJ. The approved sentence consists of a bad-conduct discharge, 100 days of confinement, forfeitures of $700.00 pay per month for three months, and reduction to E-1.

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[1] The appellant pled to one use of marijuana.

The issues on appeal are whether the appellant's statements to the Air Force Office of Special Investigations (AFOSI) should have been suppressed when they followed his invocation of his rights to remain silent and to consult an attorney, and his requests were not "scrupulously honored"; and whether a new staff judge advocate recommendation (SJAR) and Action are necessary where the addendum to the SJAR failed to reply to a claim of error raised in the defense counsel's post-trial submission.[2] We heard oral argument on the first issue. Finding no prejudicial error, we affirm.

Background

In October 2007, the smoke alarm in the appellant's dormitory room sounded. When the fire department responded, so did members of the Security Forces Squadron (SFS). It was determined the alarm was coming from a particular room. Staff Sergeant (SSgt) EH, a SFS member, went to the day room and asked whose room it was. The appellant acknowledged it was his room. Upon request, he showed his identification card to SSgt EH. Upon opening the room, SSgt EH noticed remnants of alcoholic beverages. Realizing the appellant was underage, SSgt EH asked for and received consent from the appellant to search his room.

At approximately 0142, after searching the room, SSgt EH read the appellant his Article 31, UCMJ, 10 U.S.C. § 831, rights for a violation of Article 92, UCMJ, 10 U.S.C. § 892. The appellant declined to answer questions and requested an attorney. Thereafter, SSgt EH detained the appellant, handcuffed him, and did a pat down search. During the search, SSgt EH found two baggies of what appeared to be marijuana. The appellant, who was impaired but did not appear to be drunk, was transported to the Law Enforcement (LE) Desk. Once there, SFS waited for assistance from the AFOSI.

A couple hours later, the appellant was released to the AFOSI, specifically Investigator NM and Special Agent (SA) BW. The AFOSI agents were informed that the appellant had requested an attorney. After the AFOSI did a field test on the material in the baggies to confirm it was marijuana, the AFOSI obtained consent from the appellant to search his room and his vehicle but not his urine.[3]

The acting first sergeant, Master Sergeant (MSgt) RM, and the appellant's flight chief, MSgt WC, met up with the AFOSI and the appellant at the LE Desk. They then accompanied the appellant to his dormitory room. MSgt RM, MSgt WC, and the appellant stayed on the balcony while the room was searched. While on the balcony, MSgt RM asked the appellant "what was going on." The appellant told the acting first sergeant about the fire alarm and how it was pinpointed to his room. The appellant told

[2] The addendum to the staff judge advocate recommendation (SJAR) actually stated "the defense has not alleged an error affecting the legality of the findings or sentence."

[3] The Air Force Office of Special Investigations sought and received probable cause authorization to seize the appellant's urine. His sample tested positive for the metabolite of marijuana.

him there were folks smoking in there. When MSgt RM asked who was in there, the appellant said he was not going to "rat them out." Later on, the appellant stated, "If the Air Force thinks that [I am] solo in this, if [I am] the only one – guilty party so to speak, that they are crazy." He was advised by his flight chief to stop talking and wait until he spoke with an Area Defense Counsel.

At some point while at the appellant's room, SA BW queried MSgt RM as to what crime the appellant had previously been advised he was suspected of committing. SA BW found out it was only a violation of Article 92, UCMJ. SA BW, while still at the dormitory room, advised the appellant of his rights, informing him he was suspected of a violation of Article 112a, UCMJ. Once again, the appellant requested an attorney.

While leaving the dormitory room and getting ready to search the appellant's vehicle, Investigator NM was approached by the appellant. The appellant said he was willing to answer questions. After the search of the car was completed at about 0600, the appellant was escorted to the office of the AFOSI and questioned. He answered questions for awhile and then requested an attorney and questioning stopped. The appellant was released from custody at approximately 0844.

Discussion

Article 31, UCMJ, Rights Violation

We review a military judge's ruling on a motion to suppress under an abuse of discretion standard, considering the evidence in the light most favorable to the prevailing party. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2204) (citing *United States v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000); *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)). Further, the voluntariness of a confession is a question of law which is reviewed de novo. *United States v. Ellis*, 57 M.J. 375, 378 (C.A.A.F. 2002). If the appellant requests counsel, "any subsequent waiver of the right to counsel obtained during a custodial interrogation concerning the same or different offense is invalid unless the prosecution can demonstrate by a preponderance of the evidence that – (i) the [appellant] initiated the communication leading to the waiver . . . ." Mil. R. Evid. 305(g)(2)(B). Further, an explicit waiver of the right to counsel is not required but can be based upon the background, experience, and conduct of the appellant. *North Carolina v. Butler*, 441 U.S. 369, 374-75 (1979); *see also United States v. McLaren*, 38 M.J. 112, 115-16 (C.M.A. 1993).

The military judge made extensive findings of fact and conclusions of law which are clearly supported by the record and are not an erroneous view of the law. Although the second recitation of the appellant's Article 31, UCMJ, rights was erroneous under the circumstances of this case, the appellant invoked his rights and made no incriminating statements. The appellant had successfully previously invoked his rights on two separate

occasions and was advised to quit talking on a third before he re-initiated communication with the AFOSI. The appellant re-initiated communication with the AFOSI agents freely, knowingly, intelligently, and voluntarily after the agents had searched his room and on the way to the vehicle search. He implicitly waived his right to counsel by his actions. His will was not overborne and the confession that ensued was voluntary. The military judge did not abuse her discretion in denying the defense motion to suppress the appellant's voluntary statements.

Post-Trial Processing

We review post-trial processing issues de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). Prior to taking final action, the convening authority must consider clemency matters submitted by the accused under Rule for Courts-Martial (R.C.M.) 1105. R.C.M. 1107(b)(3); *United States v. Craig*, 28 M.J. 321, 324-25 (C.M.A. 1989). The staff judge advocate is required to minimally address legal errors raised by the defense. *See* R.C.M. 1106(d)(4). Generally, failure to do so "will be prejudicial and will require remand of the record to the convening authority for preparation of a suitable recommendation." *United States v. Welker*, 44 M.J. 85, 88 (C.A.A.F. 1996) (quoting *United States v. Hill*, 27 M.J. 298, 296-97 (C.A.A.F. 1988)). But if the reviewing authority is "convinced that, under the particular circumstances, a properly prepared recommendation would have no effect on the convening authority's exercise of his discretion–the burden in this regard being on the Government–remand to the convening authority is unnecessary." *Hill*, 27 M.J. at 296. Further, if this Court determines the alleged error to be without merit, we can determine there is no prejudice. *United States v. Green*, 44 M.J. 93, 95 (C.A.A.F. 1996)

The addendum to the SJAR[4] erroneously stated that the "defense has not alleged an error affecting the legality of the findings or sentence." But the addendum does list the Motion to Suppress as an attachment to the clemency submission, which the convening authority indicated he had reviewed before taking action. In the clemency submission, the trial defense counsel states,

> Lastly, the defense believes that the judge errored [sic] in denying the defense's motion to suppress at trial (See Attachment 4). Based upon case law and the Manual for Courts-Martial, A1C Cahall's Article 31 rights were violated when OSI agents approached A1C Cahall after he previously invoked his right to counsel. The military judge denied the motion thereby affecting the sentence he was adjudged. It is possible that the judge's ruling will be reviewed on appeal. Granting clemency makes it more likely that if

[4] The SJAR does state that the evidence upon which the conviction is based is legally sufficient.

overturned on appeal, the courts will find that A1C Cahall wasn't prejudiced by the error.

Clearly from the record and more importantly the post-trial submissions, the convening authority was aware of the appellant's contention that the military judge erred when he did not suppress the appellant's admissions. Under the circumstances of this case, this Court is convinced a properly prepared recommendation would have no effect on the convening authority's exercise of his discretion.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court