UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MARCUS A. R. COLLADO
United States Air Force

ACM S30032

6 February 2003

Sentence adjudged 22 June 2001 by SPCM convened at Grand Forks Air Force Base, North Dakota. Military Judge: Kurt D. Schuman.

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of $695.00 pay per month for six months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Jeffrey A. Vires, and Major Marc A. Jones.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Lori M. Jemison (legal intern).

Before

BRESLIN, STONE, and EDWARDS
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

A special court-martial comprised of officer and enlisted members found the appellant guilty, contrary to his pleas, of taking indecent liberties with a female under 16 years of age, in violation of Article 134, UCMJ, 10 U.S.C. § 934, and acquitted him of a separate charge of having unlawful carnal knowledge of a 13-year-old girl. The appellant pled guilty to dereliction of duty, in violation of Article 92, UCMJ, 10 U.S.C. § 892, by providing alcoholic beverages to underage girls. The sentence adjudged and approved was a bad-conduct discharge, confinement for 6 months, forfeiture of $695.00 pay per month for 6 months, and reduction to E-1.

The appellant alleges the military judge erred in denying a motion to suppress the appellant's confession to taking indecent liberties with the 13-year-old girl. He contends the investigators violated his right to counsel by taking the confession after he made an unequivocal request for an attorney. We find no error, and affirm.

Facts

Officer Troy Vanyo of the Grand Forks Police Department received a report that the appellant provided alcoholic beverages to four underage girls. He contacted the Air Force Office of Special Investigations (AFOSI) and set up an interview with the appellant at the AFOSI office on Grand Forks Air Force Base (AFB). On 28 March 2001, Officer Vanyo questioned the appellant at the AFOSI office; Special Agent (SA) Jason McCollum, AFOSI, was present as an observer. Officer Vanyo advised the appellant of his rights pursuant to *Miranda v. Arizona,* 384 U.S. 452 (*Miranda* rights) using a Grand Forks Police Department form. The appellant acknowledged his understanding of his rights, and agreed to talk to the officer. The tone of the interview was conversational and friendly. The appellant first denied his involvement, but later admitted buying a case of beer and giving it to four underage girls to drink. He also admitted kissing one of the young girls while in his parked car. With the appellant's consent, Officer Vanyo then tape-recorded the appellant's oral statement concerning the incident.

The appellant's first sergeant drove the appellant back to the squadron after the interview. The appellant remarked that he thought he was in trouble, and the first sergeant advised him to contact the area defense counsel (ADC). The first sergeant took the appellant to his office, dialed the telephone number for the ADC's office, and handed the telephone to the appellant. The appellant made an appointment to see the ADC at 1300 the next day.

Officer Vanyo then interviewed the young girl in question, and learned that the appellant engaged in more sexual activity with the child than just kissing. He again called the AFOSI office, and set up another interview with the appellant for 1000 the next day. The AFOSI relayed the request to the first sergeant, who notified the appellant. The first sergeant did not inform the OSI that the appellant already had an appointment to see the ADC the next day.

The appellant returned to the AFOSI office for the second interview. Once again, Officer Vanyo advised him of his *Miranda* rights using the Grand Forks Police Department form. As part of the rights advisement, Officer Vanyo told the appellant "You have the right to talk to a lawyer and to have a lawyer present with you while you are being questioned." The appellant made a comment to the effect that his first sergeant suggested that he contact the ADC. SA McCollum explained to Officer Vanyo that "ADC" referred to the military defense counsel. The investigators told the appellant they could not advise him about what to do, but that if he requested an attorney the interview

would stop. The appellant considered it, waived his rights by signing the form, and agreed to talk to the investigators again. Thereafter, the appellant admitted that while in his parked car kissing the victim, he touched her vaginal area outside her underwear. He then wrote and signed a confession to that effect, and provided a tape-recorded oral statement to the investigators.

Based upon this confession and the testimony of the victim, the government charged the appellant with taking indecent liberties with a child under 16 years of age. At trial, the defense moved to suppress the appellant's second confession on the grounds that the appellant had made an unequivocal request to have an attorney present during questioning.

The military judge heard evidence on the motion. Officer Vanyo and SA McCollum testified about how they advised the appellant of his rights. They indicated that when the appellant mentioned the possibility of talking to a lawyer, they explained that they could not advise him about that. Officer Vanyo also remembered the appellant "saying a time and having an appointment with an attorney." SA McCollum could not recall the appellant stating that he had an appointment with the ADC.

The appellant testified for the limited purpose of the motion. He admitted commenting that his first sergeant had suggested that he contact the ADC. The appellant also testified that he told the investigators that he had an appointment with the ADC at 1300. He recalled that the investigators responded by saying they could not give him legal advice. The appellant testified that Officer Vanyo asked him if he understood his rights, and he said, "yes." Thereafter, he signed the form waiving his rights. On cross-examination, the appellant insisted that he told the investigators that he had an appointment, but admitted that he did not ask to speak to an attorney before answering questions, and did not ask to have an attorney present at that time.

The military judge entered findings of fact and determined that the appellant had not made an unequivocal request to consult counsel before answering questions or to have an attorney present during questioning. The military judge did not find as fact that the appellant had mentioned his 1300 appointment with the ADC. The military judge denied the motion to suppress the confession.

During trial on the merits, the defense attempted to convince the members the confession was involuntary. Officer Vanyo testified about advising the appellant of his right to counsel. He recalled that the appellant mentioned something to the effect of having an appointment with an attorney at 1300. Thereafter, trial defense counsel asked the military judge to reconsider his ruling on the motion to suppress. At first, the military judge indicated that he was unable to reconsider the motion on the grounds that he was not the fact-finder at that point–rather it was a matter for the members to determine.

At an out-of-court hearing the next day, trial defense counsel made a second request for reconsideration of the motion to suppress. During this session it was made clear that the military judge had the power to reconsider his earlier ruling. However, the military judge determined that the additional facts regarding the appellant's pending appointment with the ADC would not have changed his ruling on the motion. The military judge again declined to reconsider the motion.

The appellant's 29 March 2001 confession was admitted in evidence before the members, and the appellant was found guilty of taking indecent liberties with a child under 16 years of age as alleged. The appellant asserts the military judge erred in denying the motion to suppress this confession.

Law

A police officer from the state of North Dakota questioned the appellant. In that circumstance, the appellant's "entitlement to rights warnings and the validity of any waiver of applicable rights shall be determined by the principles of law generally recognized in the trial of criminal cases in the United States district courts involving similar interrogations." Mil. R. Evid. 305(h)(1).

The Fifth Amendment to the Constitution provides that, "No person . . . shall be compelled in any criminal case to be a witness against himself." In order to protect this privilege against compulsory self-incrimination, the Supreme Court fashioned a procedural safeguard in *Miranda v. Arizona*, 384 U.S. 436, 469-73 (1966), holding that a suspect in custody has the right to consult an attorney and to have counsel present during questioning, and that law enforcement officers must explain this right before questioning begins. If at any time during the questioning the suspect asserts his right to counsel, the police may not question the suspect further until a lawyer has been made available or the suspect reinitiates conversation. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).

The rule in *Edwards* only applies where "the accused actually invoked his right to counsel." *Smith v. Illinois*, 469 U.S. 91, 95 (1984) (per curiam). Police officers are not required to stop the questioning if a suspect makes a reference to an attorney that is ambiguous or equivocal. *Davis v. United States*, 512 U.S. 452, 459 (1994). The test is whether "a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.* "If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect." *Id.* The Court noted that, if a suspect makes an equivocal or ambiguous statement it may be good police practice to clarify whether the suspect wants an attorney. *Id.* at 461. However, the Court declined to adopt a ruling requiring officers to ask clarifying questions. *Id.*

We review a military judge's denial of a motion to suppress for an abuse of discretion. *United States v. Khamsouk*, 57 M.J. 282, 286 (2002). We will accept a

military judge's findings of fact regarding the voluntariness of a confession, unless they are clearly erroneous. *United States v. Ford*, 51 M.J. 445, 451 (1999). The military judge's ultimate determination as to whether a confession is voluntary is a question of law that we review de novo. *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991); *United States v. Ellis*, 57 M.J. 375, 378 (2002).

Analysis

Reviewing the facts and circumstances carefully, we are convinced the military judge did not err in denying the motion to suppress. Even assuming as true the appellant's version of the events surrounding the questioning, the appellant did not make an unequivocal or unambiguous request for the assistance of counsel prior to questioning. According to the appellant, when Officer Vanyo advised him of his right to consult an attorney, or to have an attorney present during questioning, he replied that his first sergeant "had advised me to have an appointment with the ADC," and that he had an appointment at one o'clock. Significantly, the appellant testified that the investigator's response was that "they can't give me legal advice." According to the appellant, Officer Vanyo then asked him if he understood his rights and he said "yes." The appellant then signed the form waiving his rights.

We must consider all the facts and circumstances. The appellant had his rights explained to him the day before, and had waived those rights and gave a statement to Officer Vanyo. Thereafter, the appellant never expressed his independent desire to consult counsel–to the contrary, the first sergeant made the decision for him by dialing the ADC's number and thrusting the telephone into his hand. When advised of his rights again, the appellant's statement merely reflected the fact that his first sergeant had recommended that he consult counsel, and that he had an appointment. Placed in context, the appellant's statement was not an unequivocal request to speak with a lawyer before submitting to any questioning or to have a lawyer present during questioning. A reasonable police officer hearing that response would perceive it as a comment about some advice recently received. The police officer had no duty to ask clarifying questions, but did clarify to the extent of pointing out that they could not give him legal advice. Most importantly, the appellant subsequently signed the form indicating his desire to waive his rights. "[T]he primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves." *Davis*, 512 U.S. at 460. "A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted." *Id*. at 460-61. We are convinced the appellant did not clearly assert a right to counsel prior to questioning.

The appellant's argument that the military judge applied the wrong standard of review to the request for reconsideration of the motion to suppress is without merit. At first there was some confusion about whether the military judge could exercise fact-

finding powers once the matter was before the court members. However, in the second request for reconsideration the military judge was made aware of his power to reconsider the motion, and declined to do so because the factual matters in question were insufficient to change the result.

Similarly, we find no merit in the appellant's argument that the first sergeant was obligated to inform Officer Vanyo that the appellant had an appointment with the ADC. It is important to note that the first sergeant had no involvement in the Grand Forks Police Department investigation, other than to inform the appellant of the interview, and to give him a ride back to the squadron. *See generally United States v. Pittman*, 36 M.J. 404, 407 (C.M.A. 1993). More importantly, the appellant never asserted his Fifth Amendment right to counsel–it was the first sergeant who recommended that he talk to an attorney, and then made the appellant contact the ADC's office. Therefore, the first sergeant was not an investigator, nor did he possess any knowledge that the appellant had asserted his Fifth Amendment right to counsel before submitting to interrogation. *Cf. United States v. Mitchell*, 51 M.J. 234 (1999); *United States v. Harris*, 21 M.J. 173 (C.M.A. 1985).

Conclusion

The approved findings 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 (2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator