UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JOHN W. KEYES
United States Air Force

ACM 36621

29 August 2007

Sentence adjudged 27 October 2005 by GCM convened at RAF Lakenheath, United Kingdom. Military Judges: Adam Oler, Gordon R. Hammock (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction in grade to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major John N. Page III and Major Anniece Barber.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Captain Daniel J. Breen, and Captain Ryan N. Hoback.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

PER CURIAM:

Contrary to his pleas, the appellant was convicted of one specification of willful dereliction of duty and one specification of possessing child pornography, in violation of Articles 92 and 134, UCMJ, 10 U.S.C. §§ 892, 934. His approved sentence consists of a bad-conduct discharge, confinement for 3 months, and reduction to E-1.

On appeal, the appellant asserts two errors. The first is whether the military judge erred by not suppressing the appellant's verbal and written statements to investigators made after he invoked his right to remain silent by declaring he wished to leave and speak to his wife. The second is that the military judge erred by not suppressing all

derivative evidence obtained after the appellant was questioned about possessing child pornography by a family advocacy counselor, who did not provide an Article 31 rights advisement in accordance with *United States v Brisbane,* 63 M.J. 106 (C.A.A.F. 2006) and informed investigators of the substance of the interview.[1]

In January 2005, the appellant and his wife were directed to go to the local family advocacy office because of a domestic dispute. Within a week, another dispute occurred and they went back to the office. Both times, the appellant was classified as the victim. At the second visit, Mrs. A interviewed the appellant's wife and during the interview questioned her as to what precipitated the violence. Mrs. Keyes indicated that, among other things, her husband viewed child pornography. When Mrs. A interviewed the appellant, she never advised him of his rights nor did she question him about the pornography. She did inform the appellant that, according to his wife, his viewing child pornography was one of the problems they faced. He indicated he was aware his wife thought he viewed child pornography, but he didn't. According to standard operating procedures, Mrs. A briefed her immediate supervisor upon the completion of her sessions with the Keyes. The supervisor called the Office of Special Investigations (OSI), and a statement was taken from Mrs. A. The Keyes continued therapy with Mrs. A for a number of months after this session.

On 27 January 2005, the appellant was escorted to the OSI where he was advised of his Article 31, UCMJ, rights, which he verbally acknowledged. He waived those rights and answered questions denying involvement with child pornography. The appellant then agreed to provide a written statement after acknowledging his rights for a second time. While fingerprinting and photographing the appellant, one of the agents learned the appellant had two cars.[2] He confronted the appellant and informed him that he (the agent) did not believe the appellant had been truthful with him. The appellant asked that the lead agent, a female, leave the room and she did. At that point, he asked if he could go see his wife and then he'd come back. The agent suggested that they finish the interview first. The appellant apparently asked to see his wife about three times. The agent said you wear the pants in the family and the appellant said you don't know my wife. He then became emotional and confessed. The appellant accomplished a second written statement, again acknowledging his rights. At no time did the appellant request that the questioning stop or state that he wanted an attorney.

If an individual indicates in any manner, at any time, that he wishes to remain silent, the interrogation must stop. *Unites States v. Traum,* 60 M.J. 226, 230 (C.A.A.F. 2006) (citing *United States v. Sager,* 36 M.J. 137, 145 (C.M.A. 1992)). The invocation must be unequivocal before all questioning must stop. *Id.* The trial judge in this case cited *United States v. Hurt,* 40 C.M.R. 830, 834 (A.C.M.R. 1969) (reversed on other

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[1] Raised pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982).

[2] Previously when consenting to a search, the appellant had indicated he had one car.

grounds at 41 C.M.R. 206, (C.M.A. 1970)) which states these rights do not include the right to consult with a non-lawyer member of the appellant's family at any time of his own choosing.

In *United States v. Brisbane,* the Court of Appeals for the Armed Forces determined that in some circumstances a family advocacy social worker should advise individuals of their rights. *Brisbane,* 63 M.J. at 112. This case is distinguishable from *Brisbane.* Unlike the social worker in the *Brisbane* case, Mrs. A was not acting in furtherance of any military investigation. There wasn't an OSI investigation pending. Mrs. A was acting in her clinical capacity during her session with the appellant.

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. 2004) (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)). We find no error here. The military judge's findings of fact[3] were thorough, detailed, and amply supported by the evidence, and we adopt them as our own. Considering the military judge's application of the law, de novo, we concur in his conclusions as to both suppression motions. *See Rodriguez,* 60 M.J. at 246 (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). The military judge did not abuse his discretion.

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; *United States v Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

U.S. AIR FORCE COURT OF CRIMINAL APPEALS

STEVEN LUCAS, GS-11, DAF
Clerk of Court

[3] The Findings, Conclusions and Rulings by the trial judge are found at Appellate Exhibit XVIII in the Record of Trial, and are 22 pages in length.