UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	**)**	**Misc. Dkt. No. 2010-08**
Appellant	**)**	
	)	
v.	**)**	
	)	**ORDER**
Staff Sergeant (E-5)	**)**	
BENJAMIN J. KNELL,	**)**	
USAF,	**)**	
Appellee	**)**	**Panel No. 1**

On 17 May 2010, counsel for the United States Air Force filed an appeal under Article 62, UCMJ, 10 U.S.C. § 862. This case is before this Court after the military judge granted the trial defense counsel's motion to suppress the appellee's 24 August 2009 written and oral statements to agents with the Air Force Office of Special Investigations (AFOSI).

The issue is whether the military judge abused his discretion by suppressing the appellee's written and oral statements because the appellee unambiguously invoked his right to counsel.

Background

On 24 August 2009, AFOSI agents interviewed the appellee on the suspicion of use and possession of a controlled substance, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. After a rapport building session, the appellee was read his Article 31, UCMJ, 10 U.S.C. § 831, rights. The appellee waived his right to counsel and said he was willing to answer questions. After about 50 minutes, the appellee requested and was granted a bathroom break. Upon his return, he slumped in his chair, put his face in his hands, and stated one of two things—that he wanted "counsel" or that he wanted "counseling."

The lead agent, Special Agent (SA) TK, heard the appellee state that he wanted "counsel." The note-taking agent, SA GB, heard the appellee request "counseling." Prior to the request there had been conversations regarding counseling through the Health and Wellness Center, the chaplains' office, and other counseling services. SA TK called for a break because he was not sure what the appellee meant by "counsel." The interview was being monitored by a third agent, SA JG. SA TK and SA GB left the interview room, locking the appellee inside. Upon leaving the room, the appellee was asked for his

consent to search his blood and urine, which is standard operating procedure when a suspect invokes his rights.

The agents then discussed the situation with their supervisor, SA MP, and the observing agent, SA JG. After about 25 minutes, the agents returned to the interview room to have the appellee clarify his request. SA TK started to read the appellee his rights again, and was interrupted by the appellee. The appellee wanted to know why he was being read his rights again. When he was told that they were clarifying his request, the appellee told the agents that he was requesting "counseling" like a chaplain off base because he did not trust the on-base chaplains. The appellee said he did not want an attorney and the interview continued, resulting in further admissions and written statements.

The Interview Record, AF Form 3985, which was filled out by SA GB, notes that at 1055 "Interviewee requested counsel" and the action taken was "SA [TK] asked for clarification. [Subject] wanted an off-base chaplain." The appellee was "willing to continue talking" at 1120.

On 7 April 2010, the trial defense counsel made a motion to suppress the appellee's 24 August 2009 statements to AFOSI. The military judge heard testimony from SA TK, SA GB, and SA MP. Additionally, the appellee testified. The appellee testified that he requested "counsel" and by that he meant "attorney." When he was asked for clarification, he was scared and because he had asked for "counsel" and hadn't received it, he thought that he should ask for something different.

On 7 April 2010, the military judge announced his Findings of Fact and Conclusions of Law, and he granted the trial defense counsel's motion to suppress. He also reduced them to writing. On 8 April 2010, the government trial counsel requested reconsideration, which was granted, and the original ruling stood.

Law

We review de novo matters of law in an Article 62, UCMJ, appeal. *United States v. Terry*, 66 M.J. 514, 517 (A.F. Ct. Crim. App.), *review denied*, 66 M.J. 380 (C.A.A.F. 2008). On factual determinations, we are bound by those of the military judge unless they are unsupported by the record or are clearly erroneous. *Id.* "On questions of fact, [we ask] whether the decision is *reasonable*; on questions of law, [we ask] whether the decision is *correct*." *Id*. (alterations in original) (citing *United States v. Baldwin*, 54 M.J. 551, 553 (A.F. Ct. Crim. App. 2000), *aff'd*, 54 M.J. 464 (C.A.A.F. 2001) (quoting 2 Steven A. Childress & Martha S. Davis, *Federal Standards of Review* § 7.05 (3d ed. 1999))).

This Court reviews a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). "A military

judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law." *United States v. Seay*, 60 M.J. 73, 77 (C.A.A.F. 2004) (quoting *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004)).

"[L]aw enforcement officers may continue to question a suspect until and unless the suspect clearly requests an attorney." *Davis v. United States*, 512 U.S. 452, 461 (1994). If a suspect invokes that right at any time, questioning must cease. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). An accused, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* When determining whether the suspect invoked his rights, there is an objective inquiry. There must be some statement that can reasonably be construed as a request for an attorney. *Davis*, 512 U.S. at 461-62. If a suspect does not unambiguously invoke his rights, permissible questioning may include clarification of ambiguities. *Id.* at 461; *United States v. Delarosa*, 67 M.J. 318, 320 (C.A.A.F. 2009).

As a threshold matter, we have authority to hear this appeal under Article 62, UCMJ, because the military judge's ruling excluded the appellee's written and oral confession, evidence that is substantial proof of a fact material to the court-martial. Article 62(a)(1)(B), UCMJ. In contrast with our powers of review under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we "may act only with respect to matters of law" in this appeal submitted pursuant to Article 62, UCMJ. Article 62(b), UCMJ. We cannot make findings of fact in addition to those adduced by the military judge, and may only disturb the military judge's findings of fact if they are unsupported by the record or are clearly erroneous. *United States v. Fling*, 40 M.J. 847, 849 (A.F.C.M.R. 1994) (citing *United States v. Burris*, 21 M.J. 140, 144 (C.M.A. 1985); *United States v. Pacheco*, 36 M.J. 530, 533 (A.F.C.M.R. 1992)).

Discussion

After a careful review of the entire record, we hold that the military judge abused his discretion in suppressing the appellee's AFOSI statement. In his Conclusions of Law, he specifically stated that because the agents cannot agree on exactly what transpired, *Davis* is not controlling. To the contrary, *Davis* clearly states that "[An accused] must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." 512 U.S. at 459. The very situation in this case is that the AFOSI agents did not understand exactly what the appellee was requesting and, as a result, his request was ambiguous and the agents proceeded appropriately by requesting clarification.

On consideration of the United States Appeal Under Article 62, UCMJ, it is by the Court on this 30th day of June, 2010,

ORDERED:

That the United States Appeal Under Article 62, UCMJ, is hereby **GRANTED**. The ruling of the military judge is vacated and the record is remanded for further proceedings consistent with this opinion.

(BRAND, Chief Judge; JACKSON, Senior Judge; and GREGORY, Judge participating).

FOR THE COURT

OFFICIAL

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