UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman MOISE J. LOUIS
United States Air Force

ACM S31598

19 January 2010

Sentence adjudged 11 December 2008 by SPCM convened at Nellis Air Force Base, Nevada. Military Judge: Ronald A. Gregory.

Approved sentence: Bad-conduct discharge, confinement for 30 days, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Jennifer J. Raab, and Major Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain Michael T. Rakowski, and Gerald R. Bruce.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

PER CURIAM:

Contrary to the appellant's pleas, a panel of officers sitting as a special court-martial convicted him of one specification of wrongful use of ecstasy, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence consists of a bad-conduct discharge, 30 days of confinement, and reduction to the grade of E-1.

On appeal, the appellant asks this Court to set aside the findings and sentence. As the basis for his request, the appellant opines the military judge improperly admitted evidence of his interview with the Air Force Office of Special Investigations (AFOSI)

agents when it was clear his statements were improperly influenced.[1] We disagree, and finding no prejudicial error, we affirm.

Background

On 30 May 2008, the appellant was subjected to a unit-wide urinalysis inspection. Pursuant to the inspection, the appellant submitted a urine sample, the sample was sent to the Air Force Drug Testing Laboratory, and the sample subsequently tested positive for ecstasy. On 22 June 2008, AFOSI agents summoned the appellant to their office for an interview. After a proper rights advisement, the appellant waived his rights and confessed to using ecstasy while engaged in sexual intercourse.

At trial, the government's evidence consisted of testimony from AFOSI agents alleging the appellant orally confessed to using ecstasy and a stipulation of fact wherein the appellant acknowledged his urine sample tested positive for ecstasy. During his trial, the appellant did not challenge the admissibility of his confession. For the first time on appeal, the appellant asserts AFOSI agents educated him about ecstasy and, in so doing, improperly influenced his interview.

Admissibility of the Appellant's Confession

"A military judge's decision to admit or exclude evidence is reviewed under an abuse of discretion standard." *United States v. Michael*, 66 M.J. 78, 80 (C.A.A.F. 2008) (quoting *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)). Under an abuse of discretion review, we examine a military judge's findings of fact using a clearly-erroneous standard and conclusions of law de novo. *United States v. Larson*, 66 M.J. 212, 215 (C.A.A.F. 2008); *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).

The voluntariness of a confession is a question of law that we review de novo. *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991); *United States v. Bresnahan*, 62 M.J. 137, 141 (C.A.A.F. 2005). A confession is involuntary, and thus inadmissible, if it was obtained, inter alia, through the use of coercion, unlawful influence, or unlawful inducement. Mil. R. Evid. 304(c)(3); Article 31(d), UCMJ, 10 U.S.C. § 831(d).

Motions to suppress involuntary confessions should be made before the submission of the pleas. Mil. R. Evid. 304(d)(2)(A). "Failure to so move or object constitutes a waiver of the objection" absent plain error. *Id*. At trial, the appellant did not object to the admission of his confession; thus, any objection is waived absent plain error. Mil. R. Evid. 103(d) and 304(d)(2)(A); Rule for Courts-Martial 905(e); *see also United States v. Gray*, 51 M.J. 1, 25-26 (C.A.A.F. 1999). To find plain error, we must be convinced that: (1) there was error; (2) the error was plain or obvious; and (3) the error

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

materially prejudiced a substantial right of the appellant. *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998). When plain error is asserted, the appellant "bears the burden of persuasion with respect to prejudice." *United States v. Olano*, 507 U.S. 725, 734 (1993).

"In determining whether [an appellant's] will was over-borne in a particular case" and whether a resulting confession is involuntary, this Court examines "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)). Some of the factors we consider include the appellant's age, education, and intelligence; whether any advice was given to the appellant concerning his constitutional rights; the length of any detention; the length and nature of the questioning; and the use of any physical punishment, such as the deprivation of food or sleep. *Id.* (internal citations omitted).

In the case at hand, we find no error. Both the appellant's characteristics and the details of the AFOSI interrogation favor a finding of voluntariness. With respect to the former, we note that: (1) the appellant was a twenty-one year old airman who had served in the United States Air Force for approximately 23 months and (2) there is no evidence that the appellant was not of average intelligence, did not complete high school, could not read or write, or was otherwise mentally impaired. Concerning the interrogation, we note that: (1) the AFOSI agents read the appellant his rights; (2) the appellant waived his rights and agreed to answer questions; (3) the interview was relatively short, lasting approximately three hours, and the appellant was offered smoke and food breaks during the interview; (4) there is no evidence that the AFOSI agents coerced, made promises to, unlawfully influenced, yelled at, threatened, or touched the appellant; and (5) prior to this appeal, there is no evidence that the appellant complained about his AFOSI interrogation.

Put simply, we find that the appellant's confession was voluntary and that the military judge did not err in admitting the appellant's confession. Moreover, assuming, arguendo, that the military judge erred, the error was not plain or obvious and the appellant has fallen woefully short in establishing prejudice. Finding no plain error, we hold the military judge did not abuse his discretion in admitting the appellant's confession.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred.[2] Article 66(c), UCMJ, 10

[2] This Court notes that the court-martial order (CMO), dated 15 January 2009, incorrectly identifies the appellant as Mouise J. Louis, whereas the correct spelling of the appellant's first name is Moise. Therefore, we order the promulgation of a corrected CMO.

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