UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman RYAN P. MCCOMAS
United States Air Force

ACM 35974

31 October 2006

Sentence adjudged 18 March 2004 by GCM convened at Moody Air Force Base, Georgia. Military Judge: William M. Burd.

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

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Sandra K. Whittington, Major James M. Winner, Major Karen L. Hecker and Captain Christopher S. Morgan.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Michelle M. L. McCluer, and Major Jin-Hwa L. Frazier.

Before

MOODY, MATHEWS, and PETROW
Appellate Military Judges

OPINION OF THE COURT

PETROW, Judge:

The appellant was convicted, contrary to his pleas, of the wrongful use of cocaine and 3,4 methylenedioxymethamphetamine, commonly known as "ecstasy," in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A general court-martial, consisting of officer members, sentenced the appellant to a bad-conduct discharge, confinement for 30 days, and reduction to E-1. On appeal, the appellant asserts two errors: first, that his confession to the Air Force Office of Special Investigations (AFOSI) was involuntary and

should have been suppressed by the military judge; and that the military judge erred by not granting a mistrial after trial counsel made references to uncharged misconduct before the members. We find no merit in either contention and affirm.

Suppression of Statement to AFOSI Investigators

At trial, the appellant moved to suppress his confession to the AFOSI. The military judge denied the request. The appellant's objection to the AFOSI interview of 15 September 2003, is premised on the threatening conduct of the interviewing agent, Special Agent (SA) Sian; which included a threat to charge the appellant with obstruction of justice. According to SA Sian's testimony, prior to the interview the appellant was apprised of his rights under Article 31, UCMJ, 10 U.S.C. § 831, acknowledged them, and stated that he did not wish to speak to an attorney at that time. The discussion turned to appellant's use of ecstasy and cocaine. The interview lasted approximately one hour, during most of which the appellant denied taking the drugs. At one point during the interview, SA Sian began raising his voice – yelling "Stop f**king with me." He was about two to three feet away from the appellant at that time. He used that phrase two or three times. SA Sian also told the appellant that, if he didn't talk to him about the drug allegations, he would have to charge him with obstruction of justice for impeding another investigation.

The appellant testified that he requested an attorney, about ten minutes into the interview, once he realized he was suspected of illegal drug use. Both SA Sian and the assisting interviewer, SA Daniels, denied that the appellant requested counsel during the interview. The interview of the appellant lasted approximately 45 minutes before he ultimately confessed to the use of ecstasy and cocaine.

This was followed by the preparation of appellant's written statement, which occurred over a period of approximately 1 1/2 hours. The appellant explained that the final version of his statement was actually the third draft. After taking the appellant's original statement out of the interview room, SA Daniels returned to the interview room twice to have the appellant add some additional information; first, identifying who he was with, times and dates, and on the second occasion, how the drugs made him feel.

The military judge issued findings of fact and concluded, based on his assessment of the relative maturity and mental strength of the accused, that it would "strain rationality beyond any fair conclusion" to find that SA Sian's aggressive interview techniques rendered the appellant's statements unreliable or involuntary as defined by Mil. R. Evid. 304(c)(3).

When there is a motion to suppress, appellate review of the military judge's findings of fact are on a clearly-erroneous standard, and conclusions of law are reviewed de novo. *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000); *United States v.*

Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995). Voluntariness of a confession is a question of law and therefore subject to de novo review. *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991).

Whether a confession is voluntary requires examining the totality of all the surrounding circumstances, both the characteristics of the accused and the details of the interrogation. *United States v. Ellis*, 57 M.J. 375, 378 (C.A.A.F. 2002); Mil. R. Evid. 304(a). Factors to consider in determining whether a confession is voluntary include: the condition of the accused, his health, age, education, and intelligence; the character of the detention, including the conditions of the questioning and rights warning; and the manner of the interrogation, including the length of the interrogation and the use of force, threats, promises, or deceptions. *Ellis*, 57 M.J. at 379. In applying the totality of the circumstances test, a "necessary inquiry is whether the confession is the product of an essentially free and unconstrained choice by its maker." *United States v. Sojfer*, 47 M.J. 425, 429 (C.A.A.F. 1998) (*quoting United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F. 1996)).

The record clearly provides sufficient evidence to support the military judge's findings, and we are not persuaded that they are clearly erroneous. Likewise, our own review of the facts convinces us that the length of the interview was reasonable; the conditions under which the interview was conducted were well within acceptable parameters, the appellant had been duly advised of his rights, and he was clearly aware of the nature of the charges against him prior to making any incriminating statements. *See United States v. Washington*, 46 M.J. 477, 482 (C.A.A.F. 1997).

While the record reflects that the appellant asserted at trial that he had requested counsel during the interview, both SA Sian and SA Daniels steadfastly denied under oath that such a request was made. The record also reflects that errors were made in the completion of the rights advisement checklist pertaining to counsel rights, first by SA Daniels on the witness interview log sheet and, secondly by the appellant on the suspect statement form. As in *Washington*, a case plagued by a similar clerical error, the appellant in this case reviewed his written statement, signed it, and took an oath as to its truth. Our review of the record satisfies us that these were merely clerical errors, stemming primarily from SA Daniels' inexperience.

As to SA Sian's threat to have the appellant charged with obstruction of justice if he did not cooperate, we share the trial judge's concern that this comes close to crossing the line. However, based on our reading of the appellant's responses throughout the trial, and assisted by the military judge's assessment of the appellant's relative maturity and mental strength, we conclude that neither the threat nor SA Sian's loud and vulgar inducements to confess were unduly coercive under the circumstances. *See United States v. Morgan*, 40 M.J. 389, 394 (C.M.A. 1994).

Accordingly, we find that the decision of the military judge to admit the appellant's confession was not an abuse of discretion.

Prosecutor's Reference to Uncharged Misconduct

During the cross-examination of the appellant before the members, trial counsel asked the appellant whether he had previously been convicted of interfering with a police officer. He also asked whether the appellant had an assault charge from 1998. The trial defense counsel objected and an Article 39(a), UCMJ, 10 U.S.C. § 839, session was held. The trial counsel informed the military judge that the accused had been convicted of simple assault in 1998. The military judge determined that neither charge was relevant, concluding that the probative value was outweighed by the danger of unfair prejudice. The appellant's trial defense counsel then asked the military judge to declare a mistrial. The request was denied.

The military judge instructed the members that the two references to uncharged misconduct were irrelevant to the allegations and must not be considered by them as evidence in any way. The president of the court martial panel asked whether the misconduct mentioned by trial counsel, had any bearing on the appellant's credibility. The military judge advised the members that the misconduct had no bearing on the appellant's credibility and that the members should disregard the information presented. The president then asked whether the members could ask questions about those matters. The military judge responded by instructing the members that they must completely disregard all of the information about any prior convictions, stating, "it has nothing to do with the charges in this case and must be totally disregarded as any evidence whatsoever that has anything to do with whether or not the accused is guilty."

The decision to grant a mistrial lies within the discretion of the military judge; an appellate court must not reverse the decision absent clear evidence of abuse of that discretion. *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000). A mistrial is a drastic remedy, which a military judge should only grant in extraordinary cases to prevent a manifest injustice against the accused. *United States v. Barron*, 52 M.J. 1, 4 (C.A.A.F. 1999). A curative instruction is the "preferred" remedy for correcting error when the court members have heard inadmissible evidence, as long as the instruction is adequate to avoid prejudice to the accused. *Taylor*, 53 M.J. at 198. Absent evidence to the contrary, an appellate court may presume that members follow a military judge's instructions. *Id*.

Although the appellant argues that the dialogue between the military judge and the president of the court-martial panel illustrates that the military judge's instruction was inadequate to compensate for the prejudicial impact of the uncharged misconduct, we disagree. First, we note that the trial defense counsel did no object to the military judge's curative instruction. Secondly, we believe this exchange helped to reinforce the members' understanding that they were not to consider the inadmissible information in

their deliberations on the appellant's innocence or guilt. As our superior court did in *Taylor*, when considering the impact of the panel members' questions regarding inadmissible evidence, we find the questions posed by the president in this case are insufficient to rebut the presumption that the members followed the military judge's instructions. *Id.* at 199. Accordingly, we find that the military judge did not abuse his discretion by refusing to grant appellant a mistrial.

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.

Senior Judge MOODY participated in this decision prior to his retirement.

OFFICIAL

JEFFREY L. NESTER
Clerk of Court