UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ADRIAN V. NAVARRO
United States Air Force

ACM 34778

26 August 2003

Sentence adjudged 16 August 2001 by GCM convened at Peterson Air Force Base, Colorado. Military Judge: Kurt D. Schuman.

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of all pay and allowances and reduction to E-1.

Appellate Counsel for Appellant: Major Kyle Jacobson (argued) and Colonel Beverly B. Knott.

Appellate Counsel for the United States: Major Shannon J. Kennedy (argued), Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Captain Nurit Anderson.

Before

BRESLIN, STONE, and ORR, W.E.
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

A general court-martial convened at Peterson Air Force Base, Colorado, found the appellant guilty, contrary to his pleas, of the wrongful use of 3, 4 methylene-dioxymethamphetamine (commonly known as ecstasy) on divers occasions, and the wrongful possession of lysergic acid diethylamide (LSD) on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The court-martial sentenced the appellant to a bad-conduct discharge, confinement for 6 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence adjudged.

The appellant contends the military judge erred by denying the motion to suppress the appellant's confession. He also argues his sentence is inappropriately severe in comparison to the sentence imposed on another airman who abused drugs. We find the record inadequate to resolve an issue relating to the motion to suppress, and order additional fact finding.

Background

The appellant was one of several military members suspected of being involved with the use and distribution of illegal drugs. On 4 January 2001, agents from the Air Force Office of Special Investigations (AFOSI) called the appellant into their offices, advised him of his rights under Article 31, UCMJ, 10 U.S.C. § 831, and questioned him at length. The appellant denied any involvement in drug abuse, and denied knowing of others using illegal drugs. He was released to his first sergeant and returned to duty.

As the investigation continued, the agents gathered information from other suspects and witnesses. The agents decided to interview the appellant again, and called him back to the AFOSI offices on the morning of 10 April 2001.

The agents began by advising the appellant of his rights under Article 31, UCMJ, by reading them aloud. The appellant waived his rights. The interview consisted of three parts. The first part focused on the appellant's personal knowledge of his friends' involvement with illegal drugs. At the end of the first part, the appellant prepared and executed a statement denying any specific knowledge of his friends' drug abuse. After a break, the agents began the second part, which again focused on drug abuse by the appellant's friends and acquaintances. The appellant prepared and signed a second statement detailing his knowledge of drug abuse by his friends. After another break, the agents began the third part, which again focused on the appellant's involvement with drugs. The appellant confessed to possessing and using ecstasy and possessing LSD. The appellant prepared and signed a third statement, admitting to using ecstasy.

The appellant was charged with the wrongful use of ecstasy and LSD. At the outset of the trial, the defense submitted a detailed motion to suppress his confession. The defense asserted two distinct grounds for the motion: 1) that the accused was not properly advised of his rights under Article 31, UCMJ, and 2) that the appellant's confession was coerced. The defense asserted that the appellant was not properly advised of his rights because agents did not read the appellant his rights aloud after each break, and the appellant was only re-advised of his rights in writing before he executed each statement. The defense contended the appellant was coerced because of a combination of factors: he was relatively young, he had not slept the night before, the agents badgered the appellant, the agents made promises of leniency, the agents informed the appellant he could not leave until the first sergeant arrived to get him, and the agents told the appellant

that he could be convicted of a crime if he knew of criminal activity and did not come forward.

The prosecution submitted a response to the motion to suppress, and presented evidence on the issues. The defense also presented evidence, including the testimony of the appellant. The military judge made detailed findings of fact and conclusions of law addressing the matters raised by the defense and denied the motion to suppress.

The appellant pled not guilty to the charge and specifications. In trial before members, the prosecution introduced the appellant's confession along with testimony of witnesses tending to corroborate the confession. The members found the appellant guilty only of those offenses to which the appellant confessed: the wrongful use of ecstasy on divers occasions and the wrongful possession of LSD on divers occasions.

On appeal, the defense argues the military judge erred in denying the motion to suppress. The appellant again relies on two grounds: 1) that the appellant was not properly advised of his rights under Article 31, UCMJ, and 2) that the appellant was coerced into confessing. Regarding the allegation of coercion, the appellant renews the arguments presented at trial.

Regarding the adequacy of the Article 31, UCMJ, rights advisement, however, the defense relies upon two new theories not raised at trial. The defense maintains that although the agents properly advised the appellant of his Article 31, UCMJ, rights, their subsequent conduct vitiated the original advisement. The appellant contends that advising the appellant that he could not leave until the first sergeant came to pick him up was tantamount to telling him he could not terminate the interview, contrary to Article 31, UCMJ. The appellant also contends that by advising the appellant that he could be punished for failing to provide information about the criminal activity of others, the agents improperly suggested that the appellant was only protected by Article 31, UCMJ, if he was actually guilty of a crime. *See United States v. Peebles*, 45 C.M.R. 240 (C.M.A. 1972); *United States v. Hundley*, 45 C.M.R. 94 (C.M.A. 1972); *United States v. Elliott*, 35 C.M.R. 153 (C.M.A. 1964); *United States v. Williams*, 9 C.M.R. 60 (C.M.A. 1953).

Law

Article 31(b), UCMJ, provides, "No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense" without first informing that person of the nature of the allegation and of his or her right to remain silent.[1] A confession is deemed to be "involuntary" if it is obtained in violation of Article

[1] Also, interrogators must advise service members of their right to counsel as provided in Mil. R. Evid. 305(d). *See United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967).

31, UCMJ, or through the use of coercion, unlawful influence, or unlawful inducement. Mil. R. Evid. 304(c)(3).

If an appellant makes a timely motion to suppress, a confession determined to be involuntary may not be received in evidence. Mil. R. Evid. 304(a). If the defense moves to suppress a confession, the prosecution has the burden of establishing that the evidence is admissible by a preponderance of the evidence. Mil. R. Evid. 304(e)(1). A military judge may require the defense to state specifically the grounds upon which the defense moves to suppress a confession. Mil. R. Evid. 304(d)(3). In that circumstance, the burden upon the prosecution extends only to the grounds upon which the defense moved to suppress the evidence. Mil. R. Evid. 304(e). Failure to object or to move to suppress constitutes waiver. Mil. R. Evid. 304(d)(2). However, this Court may notice an issue not raised at trial. *United States v. Powell*, 49 M.J. 460, 464 (1998).

In our consideration of a military judge's ruling on a motion to suppress, we review the military judge's findings of fact under a "clearly erroneous" standard of review. *United States v. Norris*, 55 M.J. 209, 215 (2001) (citing *United States v. Moses*, 45 M.J. 132, 135 (1996); *United States v. Ayala*, 43 M.J. 296, 298 (1995)). The voluntariness of a confession is an issue we review de novo. *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991); *United States v. Ellis*, 57 M.J. 375, 379 (2002). In determining whether a confession is voluntary, we consider the "totality of all the surrounding circumstances–both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *United States v. Ford*, 51 M.J. 445, 451 (1999).

Analysis

We are faced with the problem of reviewing a legal theory not addressed by the military judge below. As noted above, the appellant now contends that the agents vitiated the earlier Article 31, UCMJ, rights advisement by telling the appellant that he had no right to remain silent if he was not criminally involved. The appellant raised at trial the issue of whether the appellant was properly advised of his Article 31, UCMJ, rights, but it was based upon an entirely different theory. The appellant also presented at trial some limited evidence about the agent's alleged comments regarding the scope of Article 31, UCMJ, but it was aimed at the issue of whether the appellant was coerced.

We first consider whether the appellant waived this issue by failing to raise it below. When an appellant objects or moves to suppress a confession as involuntary, the government has the burden of proving, by a preponderance of the evidence, that the confession is voluntary and admissible. Mil. R. Evid. 304(e). If a military judge requires the defense to state the grounds with specificity under Mil. R. Evid. 304(d)(3), the prosecution's burden extends only to the grounds specifically raised by the defense. Mil. R. Evid. 304(e). In this case, the appellant did more than merely object or move to

suppress the confession–he stated the grounds for his motion specifically in a detailed motion.[2] Arguably, this limited the burden of the prosecution to addressing only those grounds specifically raised, *see United States v. Vangelisti*, 30 M.J. 234, 241 (C.M.A. 1990), and waived grounds that were not raised. However, considering the significant impact on the allocation of the burden of proof in this matter, we will not presume that it occurred where the military judge did not specifically invoke Mil. R. Evid. 304(d)(3). Thus, the government had the burden of showing the voluntariness of the appellant's confession.

As a general rule, federal appellate courts do not review issues not decided in the trial court. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). The logic behind the rule is obvious–an appellate court can only properly review matters that have been adequately developed in the record of trial.

Because the allegation relating to the agent's advice on the applicability of Article 31, UCMJ, was raised only as an aspect of the larger coercion issue, the parties below did not explore the facts in depth. The prosecution called Special Agent (SA) Darryl Murphy, AFOSI, as a witness on the motion. The witness addressed this allegation summarily.

> Q: Did you tell him that he could be convicted of a crime if he knew about criminal activity and did not come forward?
>
> A: No, I did not.

On cross-examination, the defense counsel explored that further.

> Q: Did you ever talk to him about, you know, "We have responsibility as, you know, disciplinarians in the military, that sometimes you have to go out there and do the tough thing and discipline other people and to get bad people out of the military?"
>
> A: No.
>
> Q: You never used that with him?
>
> A: No.
>
> Q: Have you used that theme with people before?

[2] In oral argument, appellate defense counsel conceded that trial defense counsel undertook the burden of stating the grounds for the motion with specificity.

A: With witnesses, I will. I mean if a witness comes in-- If I understand your question correctly, you're asking me have we ever asked anybody that, you know, "You're duty bound to tell us," type of stuff or what?

Q: Right.

A: Okay. I never use that with a subject because he's not a witness. But if a witness comes in and he's not being cooperative, you know, the first time I'll say to him, "Look, you're a military member. You know you are compelled to tell the truth, compelled to be cooperative, compelled to see the rights of the Air Force, etcetera." And sometimes it works, sometimes it doesn't. But in this interview, I did not use that with him.

Unfortunately, SA Murphy was not asked whether the other agent in the interview said that to the appellant, or whether, if he had heard that said, he would have corrected it.

The appellant called SA Rodney Pacheco, AFOSI, as a witness on the motion to suppress. In response to questions by the defense counsel the witness testified:

Q: Do you remember any of the tactics or themes that you used during this interview?

A: One of the themes we used during the third interview was we said that, you know, his father raised him, his parents raised him to be truthful. His father was in the Army prior. And basically to be truthful to himself, be truthful to everybody, be the best you can be. And that's the theme we used.

Q: There are a couple of different techniques that you use in a lot of different interviews, aren't there?

A: Yes, sir.

Q: Isn't one of them that you use frequently, when you tell people that they--that if they're holding back information that they can be court-martialed for withholding that information?

A: Umm, I would tell them that they can be court-martialed, like you said, they can be punished under the UCMJ.

Q: Okay. So if they don't provide testimony and evidence to you, then they can be punished under the Uniform Code of Military Justice?

A: Yes, sir.

Q: You don't remember whether you did that in this case or you didn't do that?

A: I really don't remember, sir.

Q: But in about three-quarters of your interviews, you do that?

A: Yes, sir.

Q: It's a frequent occurrence?

A: Yes, sir.

Q: Another tactic that you frequently use is, "an honor the Air Force" tactic. Isn't that true?

A: Yeah, we challenge their duty as an Air Force–or as a military member that if they know of a crime, that they're compelled to let us know of any illegal activity.

Q: So they can help you get rid of a bad egg?

A: Yes, sir.

Trial counsel did not explore this testimony on cross-examination. Notably, SA Pacheco was never asked whether he distinguished between witnesses and suspects when advising interviewees of their "duty to speak," nor was SA Pacheco asked whether he employed his version of the "honor the Air Force" tactic in this case.

The appellant also testified on the motion. He related how he was notified to report to AFOSI, and the progress of the interview. The appellant testified:

Q: Did they ever talk to you about a court-martial?

A: Yes. I don't know exactly which one stated it, as to whether or not it was Special Agent Pacheco or Special Agent Bryant–or Murphy, but I do know that they mentioned the fact of, "You do know that if you don't come forward now with this information, that later on when your friends, even though they're testifying against themselves, if they're saying that you said it and we have eight of them in a room and they're all saying that you saw them take this, no matter if you say you didn't or not, you're going to get hurt in the end of this. You're going to get punished for it," and that I could be court-martialed at a later date for it.

Q: Did they ever tell you that you could be punished under the UCMJ if you didn't give them testimony against the other people?

A: Yes.

The appellant never specifically indicated when the agent made the alleged statement about his duty to speak. The defense averred in the formal motion to suppress that it occurred during the second phase of the interview, but there was no evidence of that. More importantly, the appellant's somewhat rambling narrative does not indicate the context of the agent's comments. Specifically, it is not clear whether the agents were telling him he could get in trouble for lying in his first sworn statement (which denied specific knowledge of his friends' drug abuse), or whether they were telling him he had no right to remain silent. Trial defense counsel's leading question does not clarify this issue. Trial counsel did not follow-up on this matter in cross-examination.

The military judge made detailed findings of fact on the issues raised at trial. However, the military judge did not make any specific findings of fact addressing whether the agents told the appellant he had a duty to speak.

We conclude the record before us is insufficient to determine what actually occurred during the interview. We cannot tell from the matters before us whether the agents improperly advised the appellant that he had a duty to speak, even though he was a suspect. Nor can we determine what impact that advice, if given, had on the appellant.

We have considered obtaining affidavits from those involved. However, the limitations imposed upon our ability to resolve issues based upon affidavits make them unsuitable in this case. *United States v. Ginn*, 47 M.J. 236, 242 (1997). Also, these matters are of a nature best explored in the process of direct and cross-examination. Finally, we are convinced that a trial judge is best suited to resolve such issues in a trial setting.

The record of trial is returned to The Judge Advocate General for referral to a convening authority for purposes of directing a hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). The specific issue is whether the appellant's confession was involuntary because the interviewers vitiated the earlier Article 31, UCMJ, rights advisement by telling the appellant that he had no right to remain silent if he was not criminally involved.

The government will return the record of trial, together with the record of the *DuBay* hearing and any additional matters, to this Court for further review within 180 days from issuance of this opinion, unless an enlargement of time has been granted. Thereafter, Article 66(c), UCMJ, 10 U.S.C. 866(c), shall apply.

STONE, Judge (dissenting):

Because the government failed to meet its burden of proof, I would respectfully dissent.

The appellant's confession was challenged on both Article 31(b) and (d), UCMJ, grounds. Admittedly, the appellant went with a "shotgun" approach, but this is understandable since voluntariness is determined under the totality of the circumstances and the military judge did not require greater specificity pursuant to Mil. R. Evid. 304(d)(3). Despite the appellant's broad-brush approach, however, the circumstance that causes the most concern is the allegation that one of the OSI agents threatened the appellant with court-martial if he withheld information about the criminal conduct of others, a tactic disapproved in *Peebles* and *Hundley*.

In my view, this issue was fairly raised at trial. Specifically, the appellant's motion stated agents made "threats that [the appellant] may be court-martialed if he did not talk." It further states, "The agents told SrA Navarro that if he did not give testimony against the people they were investigating then he may be court-martialed himself." It goes on to state, "They kept confronting SrA Navarro with allegations that he knew more [than] he was telling them, and then they told SrA Navarro that he could be convicted of a crime if he knew of criminal activity and did not come forward."

The issue was also addressed in the defense counsel's argument on the motion. Defense counsel stated:

> Airman Navarro was within a catch-22. He just shuts up, and everything about them court-martialing him, prosecuting him under the UCMJ, because, you know, he's not providing testimony against other people, that's all weighing down on him, dragging him down to where he basically doesn't have a will, himself, to where the agents tell him, "This is what you need to say."

The government was not misled about the import of the allegation. Trial counsel elicited testimony on the matter from SA Murphy. In addition, the allegation was addressed head-on in the government's written response as evident by the citation to *United States v. Bubonics*, 40 M.J. 734 (N.M.C.M.R. 1994), *aff'd,* 45 M.J. 93 (1996), a Navy case very closely on point.

In sum, the factual basis to the motion was very clearly raised while the legal basis was more generally raised. *Cf. United States v. Gray*, 51 M.J. 1 (1999) (no plain error when an appellant's initial motion to suppress was vague in its reference to Article 31, UCMJ, the trial defense counsel explicitly stated the motion was based on the Fifth

Amendment and not Article 31, UCMJ, and the appellant made "no attempt to establish a factual basis for Article 31 grounds").

So, then, what evidence do we have as to whether the agents told the appellant he would be court-martialed if he withheld information? First, we have the appellant's affirmative response to a leading question from his attorney asking if the agents had threatened him with criminal action if he withheld information. Second, we have a denial from SA Murphy that he said it. And, third, we have the testimony from SA Pacheco indicating he does not recall if he made such a statement to the appellant, but revealing he said it in about 75 percent of his interviews. I find it noteworthy that SA Pacheco testified that when he made statements of this sort, he told interviewees "they're compelled" to tell agents of illegal activity--a very broad overstatement of the law as it applies to airmen.

I also find an entry to the agent's notes for the January interview very disturbing. The agent's notes states: "SUBJECT understood responsibility to report criminal activity." While it is not relevant as to what the agents told the appellant in April, it is relevant, in assessing appellant's understanding of his rights in April. It could also support a conclusion that this AFOSI detachment used that tactic routinely when dealing with criminal suspects.

The military judge simply did not address this issue, even though it was clearly raised as a factual matter. He concluded the agents used "various techniques intended to get to the truth, including stating to the accused that they knew he was lying" and "referencing the honor of the accused's family, honoring the Air Force and Air Force values." His findings, however, were ambiguous as to whether he considered the specific technique of advising the appellant he could not withhold information about the criminal activities of others. The military judge did not reconcile the differences in the testimony on this critical point, and thus we should review the record de novo. Although it is indeed a close call, I am more inclined to believe that SA Pacheco, the lead investigator, did say something to the effect that the accused would risk a court-martial if he withheld information about his friends.

A *DuBay* hearing is a waste of time. It is more than two years since this interview took place. SA Pacheco's testimony would not be helpful because it is unlikely he is going to remember any more now than he did then. The only people who could testify on the issue would be the accused and SA Murphy, and the testimony of either one is likely to be unconvincing given the passage of time and the credibility problems each of them will face. Both sides would be given a second chance to do what they should have done at trial--I do not think that ought to be encouraged.

It is uncomfortable to have to make decisions based upon a record such as this. However, the government had the burden to establish the voluntariness of the appellant's

confession. Mil. R. Evid. 304(e). *See also* Gilligan and Lederer, *Court-Martial Procedure* § 20-12.00 (1991 ed.) (burdens of proof are a substitute for evidence). Consequently, I would find that the appellant was improperly told he could not withhold information about the criminal activities of others. Given he was a suspect himself, this advice conflicts with Article 31(b), UCMJ. I would also conclude that in conjunction with the appellant's lack of sleep and the length of the interrogation, this tactic led to a violation of Article 31(d), UCMJ. The most appropriate action for this Court is to set aside the findings and sentence and return the record to The Judge Advocate General for possible rehearing.

OFFICIAL

HEATHER D. LABE
Clerk of Court