UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ADRIAN V. NAVARRO
United States Air Force

ACM 34778 (f rev)

25 October 2004

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 R. Jacobson (argued), Colonel Beverly B. Knott, and Major Andrew S. Williams.

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

Before

STONE, GENT, and SMITH
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

STONE, Senior Judge:

This case is before us for further review upon completion of a post-trial hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). *See United States v. Navarro*, ACM 34778 (A.F. Ct. Crim. App. 26 Aug 2003) (unpub. op.). Having received no additional pleadings from the parties within the established time limits set by the rules of this Court, we have reviewed this case to determine whether the appellant's confession to drug use and possession was involuntary.

At the post-trial hearing, the military judge heard testimony from the appellant and the two agents who investigated the case. Based upon all the evidence before him and in light of the totality of the circumstances, the military judge concluded, "[T]he government . . . failed to show, by a preponderance of the evidence, that A1C [Airman First Class] Navarro's confession was voluntary."

We review a military judge's findings of fact and conclusions of law for an abuse of discretion. Military judges abuse their discretion when their findings of fact are clearly erroneous, when they are incorrect about what law applies, or when they improperly apply the law. *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004); *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).

Pretrial statements of an accused are inadmissible if they are involuntary. Mil. R. Evid. 304(a). Based upon our own review of the testimony from the post-trial hearing and evidence from the record of trial, we conclude that the military judge's findings of fact are not clearly erroneous. Reviewing the military judge's conclusions of law de novo, we agree that the government failed to meet its burden of establishing the voluntariness of the appellant's confession. Article 31, UCMJ, 10 U.S.C. § 831; Mil. R. Evid. 304(e). *See generally United States v. Heyward*, 22 M.J. 35 (C.M.A. 1986) (privilege against self-incrimination may excuse duty to report drug abuse of others when the servicemember is already an accessory or principal to the illegal activity).

Having found error, we now assess whether admission of the confession was harmless error. Article 59(a), UCMJ, 10 U.S.C. § 859(a). Other than the confession, the government's case rested entirely on the testimony of an airman previously convicted of distributing and using drugs and sentenced to five years of confinement. Because of the witness's ubiquitous drug activities, his testimony often lacked certainty and was of questionable integrity. Having considered this testimony with great caution, we conclude that admission of the appellant's pretrial statements materially prejudiced the appellant's substantial rights. *Id*.

Accordingly, the findings and the sentence are set aside. The record of trial is returned to The Judge Advocate General for submission to a convening authority who may, in his or her discretion, direct a rehearing, or if deemed impracticable, dismiss the charge and specifications. *See* Article 63, UCMJ, 10 U.S.C. § 863; Rule for Courts-Martial 1107(e)(1).

OFFICIAL

ANGELA M. BRICE
Clerk of Court