UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant MARKUS E. NEWHOUSE
United States Air Force

ACM 38019

05 April 2013

Sentence adjudged 9 August 2011 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Matthew D. Van Dalen.

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-3.

Appellate Counsel for the Appellant: Captain Zaven T. Saroyan.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Jason S. Osborne; Major John M. Simms; and Gerald R. Bruce, Esquire.

Before

GREGORY, SOYBEL, and SANTORO
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of abusive sexual contact, in violation of Article 120, UCMJ, 10 U.S.C. § 920. The adjudged and approved sentence was a bad-conduct discharge, confinement for three months, and reduction to E-3. The appellant asserts that the military judge erred by denying a defense motion to suppress statements he made to a civilian police detective. Finding no error, we affirm.

Background

The appellant and CAO, both married to others, were co-workers. On 1 August 2010, while CAO was separated from her husband, the appellant volunteered to take her out to celebrate her birthday. Although initially planned as a larger group of friends, as the day went on everyone canceled, leaving just the appellant and CAO. They went to a dance club for several hours. Both the appellant and CAO drank throughout the night. The appellant drove CAO back to her off-base apartment and walked her inside. At some point later, CAO went to sleep in her bedroom while the appellant remained in the living area.

Later that evening, the appellant entered her bedroom, repositioned her on the bed, touched her breasts, kissed her body, removed her clothing, and performed cunnilingus. CAO testified that she never consented to the activity and awoke only after the appellant began cunnilingus. The appellant testified that he believed the activity was consensual.

CAO did not initially report the incident. However, on 20 September 2010, when she learned that a new duty roster had her scheduled to work with the appellant, she notified her supervisor of what had occurred. Her supervisor notified OSI. Both OSI and the San Antonio Police Department (SAPD) conducted investigations. The SAPD interviewed the appellant and recorded his statement. The Air Force Office of Special Investigations (OSI) also sought to interview the appellant after the local district attorney ceded jurisdiction to the Air Force, but the appellant declined to speak with military investigators.

Motion to Suppress

As indicated above, OSI was the first law enforcement agency notified of the incident. OSI interviewed CAO and, with CAO's consent, went to her apartment and seized her bed covers. Two days later OSI notified the SAPD. Detective RD was assigned the case and SAPD took over primary investigative responsibility. OSI placed its case in a "monitor" status, meaning that OSI would monitor the status of the civilian investigation and provide updates to military commanders as appropriate.

At the outset of his investigation, Detective RD met with OSI agents and received a copy of CAO's statement. He requested the physical evidence (the bedding) from OSI, but OSI declined to release it.[*] Detective RD did not re-interview CAO. His first and only investigative activity was to interview the appellant. To facilitate the interview, Detective RD asked OSI to provide him the appellant's contact information. OSI did not.

[*] The Air Force Office of Special Investigations' declination was based on the staff judge advocate's recommendation that they retain the evidence because the Air Force was attempting to obtain jurisdiction from local authorities.

Instead, Detective RD received the appellant's telephone number from the appellant's first sergeant.

Detective RD called the appellant and invited him to the police station for an interview. The appellant agreed. Detective RD's interview with the appellant was recorded. At no time during the interview was the appellant under arrest. He was not read his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), or Article 31, UCMJ, 10 U.S.C. § 831. At the conclusion of the interview and in response to a question from the appellant, Detective RD said that he wasn't sure what would happen with the case because it would need to be coordinated with the military. Detective RD wrote his investigative report and submitted it to prosecutors, who thereafter agreed to release jurisdiction to the Air Force.

As part of its "monitor" investigation, OSI agents conducted background checks and interviewed additional witnesses. These investigative steps were not coordinated with or requested by the SAPD. Rather, they were done because OSI policy requires certain investigative tasks be conducted, even in "monitor" cases, to establish a "sufficient" investigation.

Trial defense counsel moved to suppress the appellant's statement to the SAPD, arguing that the status of the OSI and SAPD investigations required the SAPD detective to advise the appellant of his Article 31, UCMJ, rights. Because the detective did not, the appellant urged, the statement should have been suppressed.

In *United States v. Quillen*, 27 M.J. 312 (C.M.A. 1988), the Court of Military Appeals provided at least two scenarios in which a civilian investigator must provide Article 31(b), UCMJ, warnings: "(1) When the scope and character of the cooperative efforts demonstrate 'that the two [military and civilian] investigations merged into an indivisible entity,' . . . [or] (2) when the civilian investigator acts 'in furtherance of any military investigation, or in any sense as an instrument of the military.'" *Id.* at 314 (citations omitted).

In his ruling on the motion to suppress, the military judge cited several of the applicable cases on the issue, including *United States v. Brisbane*, 63 M.J. 106 (C.A.A.F. 2006); *United States v. Cohen*, 63 M.J. 45 (C.A.A.F. 2006); *Quillen; United States v. Penn*, 39 C.M.R. 194 (C.M.A. 1969); and *United States v. Grisham*, 16 C.M.R. 268 (C.M.A. 1954). He concluded that the SAPD was not an instrument of the military. He did, however, believe that the investigations had "merged" and that the law enforcement organizations had coordinated the investigation. He therefore granted the motion to suppress.

The Government asked the military judge to reconsider his ruling. After hearing additional argument, the military judge reconsidered his ruling and denied the motion to suppress. In his ruling upon reconsideration, the military judge concluded that his initial

ruling was based on an erroneous application of the "merger" test. The military judge stated, in part:

> Apart from notifying SAPD and providing them with SrA [CAO's] statement and contact information, as well as indirectly coordinating contact between SAPD and the Accused, no other investigatory matters were coordinated. . . . OSI never provided any of [its] evidence to SAPD. Likewise, none of the background checks or databases reviewed by OSI on the Accused or SrA [CAO] was [sic] ever shared with SAPD. This court acknowledges that SAPD and OSI did have open lines of communication and could have contacted each other readily, but there is scant evidence that any of the investigative efforts relied in any significant measure on that coordination. . . .
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> . . . Therefore, [the] court . . . finds that no evidence exists that guidance or advice was actually provided to SAPD in the course of their investigation.

Acknowledging that his initial definition of "merger" was overbroad, the military judge found that the investigations had not "merged" and that the SAPD was not required to advise the appellant of his Article 31, UCMJ, rights prior to the interview. Accordingly, he admitted the statements.

Before us, the appellant first argues that the military judge "abuse[d] his discretion when he reversed his finding that the military and civilian investigations merged." Rule for Courts-Martial 905(f) states that upon "request of any party or *sua sponte*, the military judge may . . . reconsider any ruling, other than one amounting to a finding of not guilty." The appellant has not cited any authority for the proposition that the military judge did not have the authority to reconsider his ruling. Rather, the appellant appears to argue that the military judge's ultimate ruling was an abuse of discretion.

In reviewing a ruling on a motion to suppress, we consider the evidence in the light most favorable to the prevailing party. "We will reverse for an abuse of discretion if the military judge's findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law." *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995). The Court of Appeals for the Armed Forces has "left open the question of whether . . . a civilian investigation was 'conducted, instigated, or participated in' . . . by military authorities should be reviewed *de novo* or under a 'clearly erroneous' standard." *United States v. Pinson*, 56 M.J. 489, 494 (C.A.A.F. 2002) (quoting Mil. R. Evid. 305(h)(2)). Put another way, military law is unsettled on whether this is a finding of fact or a conclusion of law.

The fact that a ruling upon reconsideration differs from an initial ruling does not necessarily compel a finding that either was an abuse of discretion. Here, however, the

military judge found (and we concur) that his initial ruling was premised on an erroneous view of the law.

As in *Pinson*, we need not determine whether "participation" is a factual or legal conclusion, as we uphold the military judge's ruling upon reconsideration under either test. The record supports the military judge's finding that, although the military initially notified SAPD of the allegation, nothing that occurred between the military and SAPD resulted in a merged investigation.

The appellant next argues, citing *United States v. Holder*, 28 C.M.R. 14 (C.M.A. 1959), that, because there was "evidence of subterfuge or an attempt to avoid the Code," the military judge should have suppressed the appellant's statement. While *Holder* can be read to suggest that evidence of an attempt to avoid the Code's protections should result in suppression of unwarned statements, the facts in *Holder* are easily distinguishable from the facts in the instant case, and the Court ultimately upheld the admission of the unwarned statements.

In *Holder*, the FBI arrested the accused based on an Army-issued warrant for desertion, a purely military offense. Without receiving an Article 31, UCMJ, rights advisement, the accused was interrogated by the FBI about his military status and his absence. The Army later sought to use those statements in his court-martial. The Court of Military Appeals affirmed the admission of those statements. In its analysis, the Court noted that, when offenses are violations not only of the UCMJ but of the law of the civilian jurisdiction, civil authorities may have "a legitimate interest in interrogating the accused apart from building a case for prosecution in military courts." *Id.* at 16.

The military judge's ruling upon reconsideration did not address whether there was any evidence of subterfuge or an attempt to avoid the Code. However, the military judge was mindful of the significance of such evidence, if it existed, because in his initial ruling he acknowledged the issue by saying, "[i]ntentionally circumventing the requirement to provide Article 31 rights by allowing civilian authorities to conduct the questioning of the Accused *is never condoned*" (emphasis added). In the absence of any finding that such evidence existed—and we ourselves discern none from the record—we consider the evidence in the light most favorable to the prevailing party and find that it supports the conclusion that the military judge found no evidence that there was subterfuge or an attempt to avoid the requirements of Article 31, UCMJ. The military judge's findings and conclusions upon reconsideration are amply supported by the record, so we find no error in the military judge's decision to admit the appellant's statements.

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 findings and the sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court