UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ADAM T. ROTHMAN
United States Air Force

ACM 36738

19 October 2007

Sentence adjudged 23 March 2006 by GCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Donald A. Plude.

Approved sentence: Bad-conduct discharge, confinement for 3 months, forfeiture of $636.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Jamie L. Mendelson.

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, the appellant was convicted of two specifications of wrongful use of cocaine in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.[1] A general court-martial comprised of officer and enlisted members sentenced the appellant to a bad-conduct discharge, confinement for 3 months, forfeiture of $636.00 pay per month for 3 months, and reduction to the lowest enlisted grade. The convening authority approved the adjudged sentence. On appeal, the appellant asserts the military judge erred by denying a motion to suppress the results of a urinalysis where the appellant only submitted to the test after his first sergeant told him he would be directed to provide a

[1] The appellant conditionally pled guilty to the second specification after filing a motion to suppress the results of a urinalysis.

sample if he refused to consent. We find the assignment of error to be without merit and affirm.

Background

The appellant was assigned to the 4th Operations Support Squadron at Seymour Johnson Air Force Base (AFB), North Carolina. On 20 September 2005, the appellant was randomly selected for a urinalysis, which was positive for the metabolite of cocaine. A single charge and specification of wrongful use of cocaine was preferred on the appellant on 29 December 2005, and subsequently referred to a general court-martial.

Shortly before 0600 on 17 January 2006, the appellant called his supervisor, Technical Sergeant (TSgt) S, and told him he had been drinking all night and could not report for duty. TSgt S notified Master Sergeant (MSgt) H, who in turn contacted MSgt B, the appellant's First Sergeant. Sometime between 1000 and 1100, MSgt H accompanied MSgt B to the appellant's residence off base. They found the appellant disheveled and smelling of alcohol, but his speech was not slurred and he was able to respond to questions and walk without difficulty. MSgt B did not feel the appellant was fit for duty or able to drive a car, however, and he decided to take the appellant to the Alcohol and Drug Abuse Prevention and Treatment Program (ADAPT) office on Seymour Johnson AFB. Personnel at the ADAPT office recommended a blood alcohol test and a drug test for the appellant.

MSgt B, along with MSgt H and the appellant, went to MSgt B's office, where he asked the appellant for consent to a blood and drug test. The appellant consented to both tests, but a short time later said he changed his mind and did not want to do a drug test. MSgt B advised the appellant to step outside the office because MSgt B needed to make a few phone calls. Over the next hour, MSgt B contacted the base legal office and military law enforcement agencies to discuss other avenues for a drug test, including obtaining a probable-cause authorization and doing a commander-directed urinalysis. During this time the appellant sat outside MSgt B's office and occasionally went outside of the building to smoke. MSgt B called the appellant into his office one or two times to keep him abreast of what was happening, advising the appellant he was looking at other ways to do the test. At one point the appellant brought up the subject of commander-directed testing, and stated that he "pretty much" was going to have to do a drug test, and MSgt B confirmed that the appellant's assessment was correct. The appellant said he would save everybody a lot of trouble and consent to the test. The appellant provided a urine sample which tested positive for the cocaine metabolite.

At trial the parties provided evidence concerning the motion to suppress, including testimony from MSgt H, MSgt B, and the appellant. After reviewing the evidence, the military judge concluded that the appellant's consent was voluntary under the totality of the circumstances.

Discussion

We review rulings on motions to suppress for abuse of discretion. *United States v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000); *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). The military judge's conclusions of law on such motions are reviewed de novo and his findings of fact will be upheld unless clearly erroneous. *Ayala*, 43 M.J. at 298. When conducting such a review, "we consider the evidence 'in the light most favorable to the' prevailing party." *Monroe*, 52 M.J. at 330 (quoting *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)).

Mil. R. Evid. 314(e)(5) provides that "[c]onsent must be shown by clear and convincing evidence." The government "has the burden of proving that . . . consent . . . was freely and voluntarily given." *United States v. Radvansky*, 45 M.J. 226, 229 (C.A.A.F. 1996) (quoting *Florida v. Royer*, 460 U.S. 491, 497 (1983)) (citations omitted). "A military judge's determination that a person has voluntarily consented to a search, including a urinalysis, is a factual determination that will 'not be disturbed on appeal unless it is unsupported by the evidence or clearly erroneous.'" *Id.* at 229 (quoting *United States v. Kosek*, 41 M.J. 60, 64 (C.M.A. 1994) (citations omitted). In analyzing the voluntariness of a person's consent, the court must look at "the totality of all the circumstances." *Id.* (quoting *United States v. Mendenhall*, 446 U.S. 544, 557 (1980)). "In evaluating the totality of the circumstances, courts should consider, among other things, such factors as the accused's age, education, experience, length of military service, rank, and knowledge of the right to refuse consent, as well as whether the environment was custodial or coercive." *Id.* (citing *United States v. Goudy*, 32 M.J. 88, 90-91 (C.M.A. 1991)).

In ruling on the suppression motion, the military judge determined that the appellant was an intelligent senior airman with more than six years of military service, who had attained the rank of staff sergeant before being reduced in rank pursuant to punishment under Article 15, UCMJ, 10 U.S.C. § 815. The military judge further found the appellant was a high school graduate who had completed fifteen college credits and was a graduate of Airman Leadership School. The military judge also found that the appellant was not physically or mentally coerced, that he was allowed numerous smoke breaks, that the atmosphere in MSgt B's office was relaxed, and that the appellant was not required to report in or stand at attention in MSgt B's office. The military judge determined that it was the appellant who raised the subject of commander-directed testing, and that MSgt B never told the appellant he would be directed to provide a urine sample if he did not consent.

The military judge concluded, based on the totality of the circumstances, that the appellant's consent was knowing and voluntary. The military judge's findings are supported by ample evidence in the record of trial, and his ruling that the appellant knowingly and voluntarily consented was based on a correct view of the law. Under the

totality of the circumstances, we also find that the appellant knew his options and made a voluntary decision to consent to the urinalysis. Neither MSgt B's informing the appellant about his exploration of options for obtaining a urinalysis nor his acknowledgement that a commander-directed search was a possibility invalidated the appellant's consent. *Radvansky*, 45 M.J. at 231. The appellant's will was not overborne, and his consent was knowing and voluntary. Accordingly, we hold the military judge did not err in denying the motion to suppress.

Conclusion

The 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 sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court