UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman STACY JO SHIELDS
United States Air Force

ACM S31018

30 January 2008

Sentence adjudged 22 September 2005 by SPCM convened at Pope Air Force Base, North Carolina. Military Judge: William Burd.

Approved sentence: Bad-conduct discharge, confinement for 1 month, reduction to E-1, forfeiture of $823.00 for 1 month, and a reprimand.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, Major Matthew S. Ward, Major John P. Taitt, and Captain Jamie L. Mendelson.

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

JACOBSON, Senior Judge:

The appellant was convicted, in accordance with her conditional plea, of one specification of use of cocaine on divers occasions in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A special court-martial composed of officer members sentenced her to confinement for 1 month, forfeitures of $823.00 pay per month for 1 month, reduction to E-1, and a bad-conduct discharge. On appeal, the appellant alleges four errors.[1] Finding no merit in these assignments of error, we approve the findings and sentence.

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[1] The appellant assigned the following specific assignments of error:

Background

On 16 April 2005, the appellant called TSgt H and told him that "she hadn't slept in 24 or 48 hours" and that "she felt like hurting herself." TSgt H was a noncommissioned officer assigned to the appellant's squadron, but was not the appellant's supervisor nor was he in her direct chain of command. Prior to the phone call, the appellant had, on several occasions, worked under TSgt H at the billeting front desk while he acted as the front desk supervisor. During the 16 April 2005 phone call, the appellant told TSgt H that she was upset because she found out a man she had been involved in a relationship with was married to another woman, and had had a big argument with her roommates. According to TSgt H's testimony during motion practice, he attempted to calm the appellant down by saying "You know, these two things aren't that bad, what you said to me. It's not worth hurting yourself over with [sic]. You act like you did drugs or something." The appellant responded that she had in fact used cocaine. TSgt H did not ask any follow-up questions in regard to the appellant's admission. Later in the conversation, the appellant also told TSgt H that she had recently been raped. At no time during the conversation did TSgt H read the appellant her rights under Article 31, UCMJ, 10 U.S.C. § 831.

TSgt H testified that he eventually got the appellant calmed down and then immediately called his supervisor, MSgt R, who directed TSgt H and another noncommissioned officer to take the appellant to the Emergency Room at Womack Army Medical Treatment Center. According to the testimony of TSgt H, the main reasons for the trip to the medical facility were to get the appellant assistance for her suicidal statements and the alleged rape. Nothing in the record of trial indicates that the appellant made further incriminating statements while at the hospital, nor is there any indication that any physical evidence related to drug use was collected from her that evening.

The appellant's First Sergeant subsequently informed Security Forces personnel that the appellant had been involved in a sexual assault and admitted to using cocaine. Investigators obtained a statement from TSgt H on 18 April 2005 and then interviewed

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I. Whether the military judge erred when he denied suppression of appellant's statements for failure to read appellant her Article 31 rights.

II. Whether in light of Issue I, the military judge erred in failing to suppress all evidence derived from appellant's statement to Technical Sergeant H because AFOSI did not give appellant a cleansing warning prior to its interrogation of appellant.

III. Whether the military judge erred when he ruled that Air Force Instruction 44-121, *Alcohol Drug and Treatment (ADAPT) Program* [sic], ¶ 3.7, *et seq.*, did not apply to appellant.

IV. Whether appellant's sentence is inappropriately severe. (Submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

the appellant on 19 April 2005. During the interview she was advised of her Article 31, UCMJ rights, waived them, and admitted that she used cocaine with her roommate and another individual during the late hours of 15 April 2005. The appellant also consented to provide blood and urine samples for testing. While her blood tested negative for the presence of cocaine, her urine tested positive.

Issue I: Article 31 Rights Advisement

When analyzing a military judge's ruling on a motion to suppress evidence on the grounds that rights advisements were not given, we review the military judge's findings of fact on a clearly erroneous standard and his conclusions of law de novo. *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000) (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). While Article 31(b), UCMJ, requires persons "subject to [the code]" to advise service members of the nature of an accusation and their rights against self-incrimination prior to attempting to elicit such information from them, it does not require rights warnings in every situation where a person senior in rank questions his or her junior. Our superior court has long held that Article 31(b), UCMJ, applies only to the questioning of a suspect or an accused pursuant to an official "law enforcement investigation or a disciplinary inquiry." *United States v. Moses*, 45 M.J. 132, 136 (C.A.A.F. 1996). In *Swift*, our superior court explained:

> Article 31(b) requires rights' warnings if: (1) the person being interrogated is a suspect at the time of the questioning, and (2) the person conducting the questioning is participating in an official law enforcement or disciplinary investigation or inquiry.

53 M.J. at 446. When a question of whether Article 31(b) arises it is necessary to:

> determine whether: (1) a questioner subject to the Code was acting in an official capacity in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation.

United States v. Duga, 10 M.J. 206, 210 (C.M.A. 1981).

In the case sub judice, the military judge considered extensive testimony, the written briefs and attached documentary evidence, and argument of counsel before announcing his detailed findings of fact on the record. We find the military judge's findings of fact to be clear and well grounded in the evidence and therefore not clearly erroneous. Thus we adopt them as our own. In considering the findings of fact in conjunction with our independent review of the evidence and arguments of appellate counsel, our de novo review leads us to hold that the military judge did not err when he held that the appellant's statements to TSgt H were admissible. The facts and

circumstances surrounding the phone call between the appellant and TSgt H clearly demonstrate that TSgt H was not acting in a law enforcement capacity and had no reason to believe or even suspect that his statement to the appellant would elicit incriminating information. *See United States v. Good*, 32 M.J. 105, 108 (C.M.A. 1991). TSgt H's focus during the course of the phone conversation with the appellant (which was initiated by her) was the appellant's mental health and safety, not on law enforcement. His specific statement to the effect of "it's not like you did drugs or something" was an attempt to help the appellant put her problems in perspective and, unfortunately for her, prompted an unexpected response which TSgt H was obligated to report to his superiors.

Because TSgt H was not acting in a law enforcement capacity and had no reason to consider the appellant a suspect, no Article 31(b) rights advisement was required. Thus, the military judge did not err in ruling the appellant's statement to TSgt H was admissible at trial. The appellant's first assignment of error is without merit.

Issue II: Admissibility of Derivative Evidence

Based on our ruling above, we find the military judge did not err in admitting the evidence obtained from the appellant by law enforcement investigators. The investigators properly informed the appellant of her Article 31(b) rights prior to obtaining her statement and urinalysis consent. Because no prior violation of her Article 31(b) rights occurred, investigators were not required to give the appellant a "cleansing statement" prior to questioning her. The appellant's second assignment of error is without merit.

Issue III: Self-Identification

We review a military judge's denial of a motion to suppress for an abuse of discretion. *United States v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000). The military judge's fact-finding is reviewed under a clearly erroneous standard and his conclusions of law are reviewed de novo. *Id.*

As the appellant points out, a regulation may be asserted by an accused if it was prescribed to protect an accused's rights. *United States v. Sloan*, 35 M.J. 4, 9 (C.M.A. 1992). The provision of Air Force Instruction (AFI) 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (26 September 2001), relied upon by appellant is such a regulation. Paragraph 3.7 of that AFI creates a process through which Air Force members with substance abuse problems can identify themselves to their chain of command for the purposes of obtaining treatment without fear of criminal prosecution. To qualify for the protections of the AFI, the individual seeking assistance must self-report to his or her "unit commander, first sergeant, substance abuse counselor, or a military medical professional" with the "intention of entering treatment." *Id.* at ¶¶ 3.7., 3.7.1.2. The issue of whether an individual self-reported with the intent to enter a

treatment program is a question of fact. *See United States v. Avery*, 40 M.J. 325, 327 (C.M.A. 1994). Such a factual determination by a military judge will not be disturbed on appeal unless unsupported by the evidence in the record. *United States v. Waterman*, 47 M.J. 53, 55 (C.A.A.F. 1997).

As previously discussed, the military judge made detailed findings of fact after considering the testimony, evidence, and arguments presented on the appellant's motion to suppress.[2] We again find the military judge's findings of fact to be clear and well grounded in the evidence, and therefore not clearly erroneous. We adopt his findings as our own. In conducting our de novo review, we have examined these findings, conducted our own independent review of the evidence, and considered argument of appellate counsel. We hold the military judge did not abuse his discretion in ruling the protections of AFI 44-121 ¶ 3.7 did not apply to the appellant's admissions and, as a result, the appellant's admissions and evidence derived from them were admissible against her. As the government pointed out at trial and before this Court, the self-reporting provisions of AFI 44-121 are very specific. First, as noted above, an Air Force member must self-report to her commander, first sergeant, a substance abuse counselor, or a military medical professional in order for the protection to apply. TSgt H did not fit into any of these categories. Second, the individual must self-report with the intention of entering treatment. While the military judge found the appellant was asking for help by calling TSgt H, he also found her comments about drug use were "incidental to the real purpose of her phone call" and that the appellant was not seeking treatment specifically for her drug problem. Given these findings, which we cannot say are clearly erroneous, a reading of the plain language of the AFI indicates that its protections do not apply to the appellant's situation and will not serve as a barrier to the admissibility of her statement and the evidence derived from it. The appellant's third assignment of error is without merit.

Issue IV: Sentence Appropriateness

We have reviewed the record of trial, the error assigned by the appellant, and the government's reply. In determining the appropriateness of a sentence, this Court exercises its "highly discretionary" powers to assure that justice is done and the appellant receives the punishment he deserves. *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999). Performing this function does not authorize this Court to exercise clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). The primary manner in which we discharge this responsibility is to give "individualized consideration" to an appellant "on the basis of the nature and seriousness of the offense and the character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United*

[2] The suppression motion included both attacks by the defense on the admissibility of the prosecution's evidence – the Article 31 rights advisement argument and the self-reporting argument. The military judge's findings of fact included some facts applicable to both theories of inadmissibility as well as facts unique to each.

States v. Mamaluy, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). After a careful review of the appellant's case, we hold that the appellant's sentence is not inappropriately severe.

Conclusion

We have examined the record of trial, the assignment of error, and the government's reply thereto. We conclude the findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant was committed. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). On the basis of the entire record, the findings and sentence are

AFFIRMED.

OFFICIAL

CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court