UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman RONALD L. THOMPSON JR.
United States Air Force

ACM S29928

17 May 2002

Sentence adjudged 12 December 2000 by SPCM convened at Eglin Air Force Base, Florida. Military Judge: Mary M. Boone.

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for Appellant: Lieutenant Colonel Gilbert J. Andia Jr., Captain Kyle R. Jacobson, and Captain Patience E. Schermer.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Captain Matthew J. Mulbarger.

Before

YOUNG, SCHLEGEL, and BRESLIN
Appellate Military Judges

OPINION OF THE COURT

YOUNG, Chief Judge:

Court members convicted the appellant of using 3,4-methylenedioxymethamphetamine (ecstasy) on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, and sentenced him to a bad-conduct discharge, confinement for 4 months, and reduction to E-1. The convening authority approved the findings and sentence. The appellant assigns two errors: (1) Investigators failed to properly clarify the appellant's request for counsel and coerced him into waiving his right to counsel; and (2) The evidence adduced at trial does not corroborate the appellant's confession and, therefore, the evidence is legally and factually insufficient to support the finding of guilty. We heard oral argument on this case at The Judge Advocate General's

School, Maxwell Air Force Base, Alabama, on 26 March 2002. Finding no error, we affirm.

I. Voluntariness of the Confession

At trial, the appellant moved to suppress his confession. In the written motion, the appellant claimed law enforcement agents (1) apprised him of the evidence against him in an effort designed to elicit an incriminating response, before advising him of his rights, and (2) did not scrupulously honor the appellant's unequivocal request for counsel. In his argument on the motion, the appellant's counsel also asserted that the conditions under which the appellant gave the confession were coercive and that, because the investigators notified the appellant of the evidence against him, the waiver of rights was coerced rather than knowing and intelligent.

On appeal, the appellant asserts that the investigators did not properly clarify the appellant's request for counsel, "but instead coerced him into waiving his right to counsel." His brief raises three specific points on this issue: (1) The investigators improperly showed the appellant a hair-follicle test kit in an effort to have him make a statement without counsel; (2) The appellant made an unequivocal invocation of his right to counsel that was ignored by the investigators; and (3) Even if his invocation of the right to counsel was equivocal, the investigators did not properly clarify his statement.

During a drug investigation, Security Forces investigators were told that the appellant had used ecstasy. At the request of the investigators, Senior Airman (SrA) Przybysz and Mr. Chapelle, the appellant's supervisor sent him over for an interview. Prior to advising the appellant of his right to remain silent and his right to counsel, SrA Przybysz advised him that several witnesses had made statements implicating him in the use of ecstasy. What happened thereafter is a matter of dispute between the parties.

A. The Investigators' Version

During the drug investigation, the investigators interviewed at least 13 suspects. On some occasions, they showed the suspect a hair-follicle test kit and advised them that it could tell, beyond a reasonable doubt, whether the suspect had used drugs. Neither investigator was sure whether they showed the appellant the hair-follicle test kit. They are sure that if they showed the appellant the test kit, it would have been before they advised him of his rights. SrA Przybysz told the appellant that, if he cooperated in their investigation, the investigators would be willing to testify to that cooperation.

SrA Przybysz then advised the appellant of his rights using an Air Force (AF) Form 1168. As SrA Przybysz read the rights off the form, the appellant followed along on his own copy of the form. The appellant was advised that he was suspected of wrongfully using a controlled substance. As each of the rights was read to the appellant,

he was asked to acknowledge his understanding of that right by initialing the appropriate block on the AF Form 1168. SrA Przybysz then asked the appellant whether he would consent to be interviewed. The agents claim the appellant orally agreed to be interviewed, but initialed the block that said, "I want a lawyer. I will not make any statement or answer any questions until I talk to a lawyer."

The investigators left the room to decide what to do about the conflict between the appellant's oral waiver of his right to counsel and his statement on the form. When they returned, SrA Przybysz told the appellant about the discrepancy between his oral and written answer. The appellant said he wanted a lawyer if he went to court, but would talk to them about his use of ecstasy. The agents asked him to write a statement explaining the discrepancy. The appellant wrote that he was confused about what the statement on the AF Form 1168 meant and that he was willing to talk to the investigators before he talked to a lawyer. He then crossed out his election to speak to a lawyer before being questioned, agreed to be interviewed, and confessed both orally and in writing to using ecstasy on five occasions.

B. The Appellant's Version

On the way into the investigator's building, the appellant saw one of his friends exiting. She told him that she didn't know what it was about, but she had requested a lawyer and refused to answer any questions. The investigators took him to a small room (5 feet by 5 feet), containing a table and three chairs. The investigators were seated between the appellant and the door. The investigators introduced themselves and told the appellant that several people had made statements implicating him in the use of ecstasy. They told the appellant that if he cooperated, they would talk to his commander about leniency. The investigators then went line-by-line over the AF Form 1168 with the appellant. The appellant did not want to talk to the investigators. He initialed the block on the AF Form 1168 demanding an attorney. He did not tell the investigators that he was willing to talk to them. After he initialed that he wanted a lawyer, the agents told him they did not understand why he wanted a lawyer. Mr. Chapelle left the room and returned with the hair-follicle test kit. Mr. Chapelle put his fingers up to the appellant's head, near his ear, and said that they could take hair and it would show whether the appellant used ecstasy. The investigators said the test kit cost $500, the money to pay for it would be taken from squadron funds, and that his commander wouldn't be pleased about spending the money. The agents also offered him a polygraph. The appellant felt "pressured. Just kind of scared, I guess." He had just come out of correctional custody because of a nonjudicial punishment and was afraid of facing severe punishment. "I confessed to get myself out of trouble." He thought he might be able to avoid punishment if he confessed. So, he changed his election on the AF Form 1168 and wrote out a statement. He didn't write the cleansing statement until after he wrote out his confession. The cleansing statement was dictated to him. The agents offered him breaks

to get something to drink and to use the restroom, and they did not physically intimidate him.

C. The Military Judge's Findings

The military judge found that the appellant knew that another airman had been interviewed about using ecstasy and had requested counsel, and that the appellant was not sure what he was going to do when he went into the interview. She substantially adopted the testimony of the two investigators concerning the actual interview. She concluded that the prosecution had met its burden of proving by a preponderance of the evidence that the appellant's confession was voluntary and the investigators did not coerce the appellant into making the statement. She held that the discrepancy between the appellant's oral and written statements concerning invocation of his right to counsel created an ambiguity that the investigators were authorized to clarify. The appellant waived his rights to silence and counsel and agreed to speak to the investigators. The military judge refused to decide whether the investigators showed the appellant the hair-follicle test kit, but did adopt a proposed finding of fact that the investigators advised the appellant "that they had the ability to take a hair sample from him for the purpose of drug testing." "But, even if they did [show the appellant the test kit], I don't find that that was coercion, per se, for them to have said, 'Yes, here's a kit. Here's what we use.' That in and of itself was not coercive in terms of making the accused give a statement."

D. The Law

An involuntary statement is generally inadmissible against the accused who made it if the accused makes a timely motion to suppress. Mil. R. Evid. 304(a). A statement is involuntary if "obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement." Mil. R. Evid. 304(c)(3).

A military law enforcement agent may not interrogate a military suspect without first advising him of the nature of the accusation, his right to remain silent, his right to counsel, and that any statement he makes may be used as evidence against him. Mil. R. Evid. 305(c) and (d). "'Interrogation' includes any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning." Mil. R. Evid. 305(b)(2).

A person may waive his rights to remain silent and have an attorney present. Mil. R. Evid. 305(g). "The waiver must be made freely, knowingly, and intelligently." Mil. R. Evid. 305(g)(1). The Supreme Court test for voluntariness—in the sense of coercion, unlawful influence, or unlawful inducement—is whether an examination of all the circumstances disclosed that the conduct of "law enforcement officials was such as to

overbear [the accused's] will to resist and bring about confessions not freely self-determined." *Rogers v. Richmond*, 365 U.S. 534 (1961)). *Accord United States v. Murphy*, 18 M.J. 220, 225 (C.M.A. 1984). *See also United States v. Ford*, 51 M.J. 445, 451 (1999) (citing *Colombe v. Connecticut*, 367 U.S. 568, 602 (1961) (opinion of Frankfurter, J.)). In applying the totality of the circumstances test to determine if the appellant's will has been overborne, we must consider the characteristics of the accused, the conditions of the interrogation, and the conduct of law enforcement officials. *United States v. Vandewoestyne*, 41 M.J. 587, 590 (A.F. Ct. Crim. App. 1994) (citing *Green v. Scully*, 850 F.2d 894, 901-02 (2d Cir. 1988)). *See Gallegos v. Colorado*, 370 U.S. 49 (1962)).

In waiving his rights to silence and to consult with an attorney, "the suspect must acknowledge affirmatively that he or she understands the rights involved, *affirmatively* decline the right to counsel and *affirmatively* consent to making a statement." Mil. R. Evid. 305(g)(1). *But see Davis v. United States*, 512 U.S. 452 (1994) (at least when accused previously waived rights, an equivocal invocation of rights does not require law enforcement agents to stop questioning).

"An appellate court reviews the denial of a motion to suppress a confession under an abuse of discretion standard." *United States v. Simpson*, 54 M.J. 281, 283 (2000). The appellate court accepts the judge's finding of facts unless they are clearly erroneous, but reviews the judge's conclusions of law de novo. *United States v. Ayala*, 43 M.J. 296, 298 (1995). Of course, this Court is authorized to determine controverted issues of fact on its own. Article 66(c), UCMJ, 10 U.S.C. § 866(c).

Whether the accused was advised of his rights is a matter of fact. Appellate courts have labeled all other confession issues as mixed question of law and fact that require the appellate court to exercise independent review. 2 Steven A. Childress & Martha S. Davis, *Federal Standards of Review* § 11.13 (3d ed. 1999). *See Simpson*, 54 M.J. at 284 (holding appellate courts review de novo whether the accused was appropriately notified of the offense of which he was suspected); *United States v. Young*, 49 M.J. 265, 267 (1998) (holding appellate courts review de novo whether there has been an interrogation). The military judge's determination that a confession is voluntary is one of those issues requiring an appellate court to exercise "independent, *i.e., de novo*, review." *United States v. Ford*, 51 M.J. 450, 451 (1999) (citing *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991)).

E. Discussion

Neither counsel nor the judge discussed the three-pronged test for voluntariness and how it applied to the appellant's case. *Vandewoestyne*, 41 M.J. at 590. We will do so here:

(1) The Characteristics of the Appellant: The evidence of record shows that, at the time of the interview, the appellant was 20 years old and had been in the Air Force approximately 18 months. He performed duties as a Test, Measurement, and Diagnostic Equipment Apprentice in an excellent manner and was a highly effective leader. His duties included aligning, inspecting, repairing, troubleshooting, overhauling, calibrating, and certifying test, measurement, and diagnostic equipment in compliance with the National Institute of Standards and Technology. He had several prior dealings with the military justice system, having received a letter of reprimand for using a government telephone to place long distance personal calls, nonjudicial punishment for drinking alcohol while under the legal age limit, and vacation of the suspended reduction in grade from E-3 to E-2 resulting from that nonjudicial punishment, for failing to go to his appointed place of duty. He had seen legal counsel on other issues and had been advised, both orally and in writing, not to talk to law enforcement agents.

(2) The Conditions of the Interrogation: The interrogation room was small, but the appellant was not intimidated by the agents. He was offered bathroom breaks and an opportunity to get something to eat. The interview lasted a total of three hours. There was no evidence that the appellant was tired, ill, or physically mistreated.

(3) The Conduct of the Agents:

(a) The agents appear to have engaged in what our has been criticized by our superior court as "premature questioning." *See United States v. Steward*, 31 M.J. 259, 263-64 (C.M.A. 1990); *United States v. Byers*, 26 M.J. 132, 134-35 (C.M.A. 1988). They advised the appellant of the evidence against him, preached the benefits of cooperation, and may have told him they could establish his use of ecstasy with the hair-follicle test kit. However, such "premature questioning" does not presumptively taint a confession which follows a complete rights advisement. *Steward*, 31 M.J. at 264-65. "The appropriate legal inquiry in such a case is whether his subsequent confession was voluntary *considering all the facts and circumstances of the case* including the earlier technical violation of Article 31(b)." *Id.* at 265. The agents never yelled at the appellant or threatened him with physical abuse.

(b) The military judge found that (1) the appellant made an oral statement agreeing to talk to the investigators without an attorney, at the same time he initialed the block on the AF Form 1168 demanding to speak with an attorney first, and (2) the investigators then clarified whether the appellant wanted an attorney or would agree to speak to them. The agents may have shown the appellant the hair follicle test kit during the clarification of his equivocal invocation of his rights.

Under the totality of circumstances, the appellant's confession was voluntary. The appellant's will was not overborne. The fact that the evidence against him may have convinced the appellant it was in his best interests to waive his rights and confess does

not make the confession involuntary. *Cf. Vandewoestyne*, 41 M.J. 590-91. This appellant understood that cooperating with law enforcement agents could result in a more lenient punishment for his transgressions. In answering his own counsel's question, the appellant clearly expressed the true reasons for his fear—the possible consequences of his criminal conduct. He confessed because he was hoping to avoid punishment, not because he was coerced by the investigators. His confession was knowing, intelligent, and voluntary.

II. Legal and Factually Sufficiency and Corroboration

After the prosecution presented its case-in-chief, the appellant moved for a finding of not guilty, claiming the prosecution failed to corroborate the appellant's confession. The military judge denied the motion. On appeal, the appellant claims the findings of guilty are legally and factually insufficient because the prosecution's evidence fails to adequately corroborate his confession.

A. The Evidence

In his confession, the appellant admitted to using ecstasy on five occasions. The appellant's confession and the corresponding corroboration the prosecution presented are summarized as follows:

(1) The appellant confessed to using ecstasy (a green "aspirin" with a four-leaf clover printed on it) around the beginning of February 2000 in Airman (Amn) Ohman's room in dorm 18. It took an hour to feel the effects—he felt "real good" and his sensitivity to touch and feel was enhanced, his vision blurry, and he saw "tracers."

Amn Ohman testified that, in early February, he received two white ecstasy pills from Amn Evans, one of which was for the appellant. Amn Ohman left the appellant's pill in the bathroom. When the appellant arrived, Amn Ohman told him the pill was in the bathroom. The appellant went into the bathroom, came out, said he had taken the ecstasy and, when Amn Ohman checked, the pill was gone.

(2) The appellant confessed to using ecstasy with Airman Basic (AB) Timothy Walters in Walters' hometown in Mississippi around the end of February. It had the same effects as his first use.

AB Walters testified that, when he and the appellant went to Walters' hometown in early February, they purchased ecstasy. Although AB Walters did not see the appellant put the ecstasy pill in his mouth, he saw it in the appellant's hand.

(3) The appellant confessed to using ecstasy in the Galaxy Club in March. In the bathroom, Amn Evans sold two ecstasy pills to the appellant for $50. The appellant

swallowed one pill and gave the other away to a civilian girl. The pill made him feel good and had effects similar to the previous times he used ecstasy.

Amn Schneider testified that she saw the appellant and several of the other people the appellant named at the Galaxy Club, but she wasn't sure of the exact dates. The appellant pointed out someone who could get ecstasy for her. Amn Schneider got ecstasy from that individual. It made her throw up all night long. The appellant got sick on the way home, threw up, and asked if he could sleep in her bed.

Amn Simmons testified that around Dec 1999, he visited Amn Schneider. The appellant was there asleep. The appellant later told Amn Simmons that he took some "bad stuff."

(4) In his confession, the appellant wrote that he went to a club called the Undertow around April 2000 with Amn Davis, Amn Diddio, and Amn Diddio's girlfriend. Before he entered the Undertow, the appellant purchased ecstasy from Amn Davis for $25. He used the ecstasy and it affected him the same way the drug had on previous occasions, except he felt "more hyper."

Amn Diddio testified he went to the Undertow only once, around Mar 2000. He saw the appellant there.

(5) The appellant confessed to using ecstasy with his girlfriend at end of April in Pensacola. She bought the ecstasy at the mall. The appellant felt some effects from the drug, although they were not as intense as he had felt on other occasions.

In addition, the prosecution presented the expert testimony of Captain Garten, chief, clinical pharmacy services. He testified about ecstasy, its pharmacological properties, and its effects on humans. Amn Ohman, Amn Schneider, and Amn Simmons testified about the effects ecstasy had on them. They were similar to the effects noted by the appellant in his confession.

B. The Law

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we may approve only those findings of guilty we determine to be correct in both law and fact. The test for legal sufficiency is whether, when the evidence is viewed in the light most favorable to the government, any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Davis*, 56 M.J. 299, 300 (2002). The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

Mil. R. Evid. 304(g) provides that,

> An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. . . . If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence. Corroboration is not required . . . for statements made prior to or contemporaneously with the act

The United States Court of Appeals for the Armed Forces has summarized the applicable law on corroboration as follows:

> The corroboration requirement for admission of a confession at court-martial does not necessitate independent evidence of all the elements of an offense or even the *corpus delicti* of the confessed offense. *See United States v. Maio*, 34 M.J. 215, 218 (C.M.A. 1992). Rather, the corroborating evidence must raise only an inference of truth as to the essential facts admitted. *Id.*; *United States v. Rounds*, 30 M.J. 76, 80 (C.M.A. 1990). Moreover, while reliability of the essential facts must be established, it need not be done beyond a reasonable doubt or by a preponderance of the evidence. *Maio*, *supra* at 218 n.1; *see United States v. Melvin*, 26 M.J. 145, 146 (C.M.A. 1988) (quantum of corroboration needed "very slight"); *United States v. Yeoman*, 25 M.J. 1, 4 (1987) (corroboration needed "slight").

United States v. Cottrill, 45 M.J. 485, 489 (1997). *Accord United States v. Baldwin*, 54 M.J. 464, 465 (2001). The purpose of the corroboration requirement is "to guard against conviction of an accused on a false or untruthful confession." Stephen A. Salzburg et al., *Military Rules of Evidence Manual* 906 (4th ed. 1997).

C. Discussion

The appellant confessed to using ecstasy on five separate occasions. He was charged with using ecstasy on "divers"—two or more—occasions. The prosecution's corroborating evidence established a continuing course of conduct involving the use of ecstasy. Whether each particular incident to which the appellant confessed was specifically corroborated is not important. The corroborating evidence was sufficient to

corroborate the appellant's confession. *See United States v. Grant*, 56 M.J. 410 (2002) (holding that one urinalysis showing the presence of marijuana metabolites was sufficient to corroborate the accused's confession to numerous uses of marijuana over a six-week period); *United States v. Hall*, 50 M.J. 247, 251-52 (1999) (suggesting that evidence independently showing a continuous course of conduct may be sufficient to corroborate a confession to specific charged acts of misconduct). The fact that no one testified to actually seeing the appellant ingest the ecstasy is also of no consequence. The prosecution witnesses established that the "appellant had both access and the opportunity to ingest the very drugs he admitted using in his confession. This is enough." *Rounds*, 30 M.J. at 80. We are convinced the evidence established beyond a reasonable doubt that the appellant used ecstasy on two or more occasions.

III. 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; *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator