UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Cadet RAMON A. EDISON
United States Air Force

ACM 35313

18 February 2005

Sentence adjudged 13 June 2002 by GCM convened at United States Air Force Academy, Colorado. Military Judge: Patrick M. Rosenow (sitting alone).

Approved sentence: Dismissal, confinement for 3 months, and forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Frank J. Spinner (argued), Colonel Beverly B. Knott, Colonel Carlos L. McDade, Major Terry L. McElyea, and Major L. Martin Powell.

Appellate Counsel for the United States: Major James K. Floyd (argued), Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Kevin P. Stiens, and Captain C. Taylor Smith.

Before

PRATT, ORR, and GENT
Appellate Military Judges

OPINION OF THE COURT

GENT, Judge:

Like *Brown v. Illinois*, 422 U.S. 590 (1975), this case lies at the crossroads of the Fourth and Fifth Amendments to the United States Constitution. The appellant claims his conviction for stealing textbooks from fellow cadets at the United States Air Force Academy should be reversed because the government illegally obtained evidence it used

to convict him. The evidence at issue is the appellant's oral and written confession, and the books found in his gym bag. In some instances, violation of an accused's constitutional rights is remedied by suppression of the evidence. But when certain factors are present, the evidence is admissible. Those factors are present in this case.

A general court-martial composed of a military judge sitting alone found the appellant guilty, contrary to his pleas, of five specifications of theft, in violation of Article 121, UCMJ, 10 U.S.C. § 921. The adjudged and approved sentence was a dismissal, confinement for 3 months, and forfeiture of all pay and allowances. The appellant avers on appeal that the military judge erred by admitting his confession and the books contained in his gym bag. He further argues that the evidence is legally and factually insufficient to sustain his conviction for theft of a textbook belonging to Cadet C. We disagree and affirm.

I. Background

The factual setting in this case is well described by the military judge whose findings of fact we adopt as our own:

> The University of Colorado at Colorado Springs [UCCS] Bookstore buys books back from students at the beginning and end of each semester. They buy books that are not used at UCCS, earning commissions by reselling those books to other colleges. So the UCCS Bookstore will buy books from pretty much any student that comes in, as long as they can find that there's a college willing to buy those books.
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> They also buy books back during the week before the Spring break, during the spring semester. Normally, books sold back to the store during this period are smaller paperback books that instructors assign to be completed during the course of the semester, and that can be reasonably completed before Spring break. Those types of books tend to be used for humanities; for example, an English professor or a history professor might well assign a number of books to be read over the course of a semester, and those books that are completed before Spring break would often be resold to the bookstore at that time. As a result, it's highly unusual for hardcover, large semester-long textbooks to be returned during the Spring break--to be sold back to the bookstore at the Spring break buyback.
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> In the 2001 Spring break period, the buyback took place at . . . UCCS on 19, 20 and 21 March. Ms. Carla Fleury is, and was, the merchandise manager for the bookstore. She had been in that position for almost seven years at the time of that Spring break, and she had worked in the bookstore even longer. Ms. Shannon [sic] Coddington was a buyer at the UCCS

Bookstore, and she had worked there a little bit over five years at the time of Spring break of 2001. Early on during the buyback period, Mrs. Fleury was told that the buyers were running out of cash to pay for the books. This was highly unusual; she had not remembered it ever occurring before, and she wondered why they were spending so much more cash than normal. She discussed it with her buyers, and they explained there were a lot of more expensive, hardcover semester-long thick textbooks that were being brought in, and some of them were being brought in by people that appeared to be cadets. While there had been no recent reports of specific stolen books either from the Academy or from UCCS, the problem of textbook theft is a common and recurring one.

On 21 March 2001, the accused and two other cadets entered the UCCS Bookstore a little after 9 o'clock. They . . . brought with them a large quantity of books to sell, and through the course of the conversations with the buyers it became clear to Ms. Coddington that they were, in fact, cadets. The books were primarily hardcover, thick, hard science-type textbooks that were the type that would normally be used for an entire semester. The cadets were also selling multiple copies of the same textbook back. Ms. Coddington bought back from the accused someplace between 15 and 20 textbooks. The others sold--the other two cadets sold her someplace between 6 and 12 textbooks. All three cadets departed the bookstore. Mrs. Coddington told . . . Ms. Fleury that more cadets had been in selling these, quote, "out-of-season," and those are [sic] the court's definition--"out-of-season textbooks."

The accused returned with . . . a blue Air Force Academy football gym bag . . . filled with . . . books. The books were mostly hardcover textbooks, and the bag was very heavy. The accused brought the bag in . . . placed the bag on the floor, opened the bag, and began to place the textbooks on the counter. These books were . . . large, heavy textbooks; they were out-of-season textbooks, and there were more than one copy per title. Ms. Coddington asked the accused where the books came from, and he replied that they came from cadets that were too lazy to bring them, and from trashcans. Ms. Fleury saw the cadet and his bag and asked Ms. Coddington if that was an example of why they were running out of cash. Ms. Coddington replied yes, that was, and Ms. Fleury told her that it would be a good idea to get an ID from the cadet.

Ms. Fleury then went back and called the Air Force Academy, reaching [Senior Airman (SrA)] Lindsay at Security Forces Investigations. She explained to Lindsay her concerns, and the details behind those concerns. Lindsay told her to get the--identification from the individuals, and if they

were in fact cadets, to detain them. In the meantime, Ms. Coddington asked the accused for his identification. His first response was that he had a friend who had been in the day before who had not needed an ID, so why did he need one today. When Ms. Coddington replied that it was because of the number of books and the volume of the cash that he was getting. He said that he did not have an ID with him; she suggested that he could go out and get an ID, or he could get--even get one from his friends who had been with him earlier. He left to go do so, leaving the books in place.

Ms. Coddington told Ms. Fleury that the accused had said he had no ID and was going to check with his friends. At that point, Ms. Fleury called the UCCS Police reporting that they--she had suspicions of individuals who were selling stolen textbooks. The accused returned after about ten minutes, telling Mrs. Coddington that neither he nor his friends had any identification and that he would have to come back another time. He gathered up the books back into his gym bag and walked out. He had closed the gym bag at that point, zipping it up.

Lieutenant Straub of the [UCCS]—Colorado Police, who . . . [had] authority to make arrests and detain individuals for law enforcement purposes, arrived. The bookstore staff pointed out the accused to him as the accused departed. Colorado Springs--or UCCS Police Officer Spice arrived about the same time. Both he and Lieutenant Straub were in uniform, and they were clearly law enforcement police officers. They approached the accused as he was leaving . . . the store and carrying his closed, heavy gym bag with both hands. The officers identified themselves, told the accused that they were detaining him as part of an investigation to look into the possibility of someone selling stolen books. They asked the accused for his ID, and he showed his military ID and driver's license to them. They then asked him to go with them back into the store, and escorted him into that office. Although he was not under apprehension, he was not free to leave. This detention began at approximately 0945.

Ms. Fleury called Lindsay to tell her that, in fact, the individuals that they were worried about were, in fact, cadets; that the UCCS cops--or police had been called and had the cadets in their custody. Lindsay responded that . . . Air Force police officials would be coming down to the bookstore, and that the cadets in question should be detained until they arrived.

In the office, the staff told the [UCCS] Police that they, in fact, had contacted the Air Force, and the Air Force would be coming down. Lieutenant Straub opened the gym bag and inventoried its contents. He didn't ask the accused for permission, he did not believe he had probable

cause of any sort to open the gym bag, nor was he concerned for his safety. The reason that he opened the gym bag was because he . . . wanted to determine what types of textbooks they were so he could figure out whether or not they were used at the Academy, and that would help them decide whether or not this was going to be under Academy jurisdiction or UCCS jurisdiction.

After inventorying the contents of the bag, the Colorado Springs UCCS Police were notified that the two other cadets had been stopped by a third officer outside. Those two other cadets were then brought to the bookstore, and then were placed in the same room with the accused. The . . . UCCS Police then called the Air Force Security Office of Investigations and gave them the names of the two additional cadets. They also offered to give Airman Lindsay a list of the books they found in the bag, but Lindsay said that . . . she would get that when she arrived.

[Technical Sergeant (TSgt)] Robinette, Airman Lindsay and Airman Crawford arrived at the store at about 1040. They separated the cadets and they began to interview the store staff. After interviewing the staff, at approximately 1150–between 1150 and 1200, Robinette placed the cadets under apprehension. He did so by identifying himself, showing the cadets his credential, and telling them that they were under apprehension for larceny. Lindsay then . . . drove the Security Forces vehicle to the back, and the police loaded approximately 75 books, that had been released to their custody by the bookstore, and loaded the gym bag into the Security Forces vehicle. They then drove the cadets to the Security Forces offices on the Academy, which was about a 30-minute drive. Once arriving there, they unloaded the books and the bag into the lobby. During the drive and throughout the morning, the cadets and the accused, and the law enforcement officials exchanged small talk to include such subjects as football.

At approximately 1315 hours, Lindsay and Robinette began to interview the accused. Lindsay completed the personal information portion of the Air Force Form 1168 [statement of suspect/witness/complainant] . . . ensuring he understood it, and asking him to demonstrate his understanding, or initial his understanding, by initialing each block. The accused was properly advised, understood, and waived his [Article 31, UCMJ, 10 U.S.C. § 831] rights.

After completing the rights advisement and waiver portion of the interview, Lindsay asked the accused if he knew anything about, or was involved in anything having to do with larceny of the books; he said he was. At that

> point, Robinette took over the interview. The accused went on to immediately make an unprompted, full, and complete oral confession. He required no urging or leading questions from the investigators, and he was totally cooperative and forthcoming with all details. Neither the search of the bag nor the contents of the bag were mentioned at any point in the interview by Robinette or Lindsay.
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> At one point, after having discussed why the accused needed the money, Robinette asked the accused what he was going to do with the extra money since he had collected more money than he needed . . . . When asked what was going to be done with the excess money, the accused pulled the money out of his sock and gave it to Robinette, telling him he wanted to do whatever it would take to get the store its money back and the cadets . . . all their books back. Robinette accepted the money, inventoried it, and gave the accused a receipt.
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> He then asked if the accused would be willing to make a written statement summarizing what he said orally. The accused agreed to do so, completing the statement as reflected in Appellate Exhibit X. At that point, Lindsay started filling out a form that she intended . . . to give to the accused for him to consent to a search of the gym bag. Robinette told her to stop, explaining that since the accused had said he wanted to do anything--everything it took to . . . give all the . . . books back to the rightful cadets, that that was the same as consent, and that the accused actually did consent to them searching the bag, so it wasn't necessary to execute a written form. Both Lindsay and Robinette believed, in good faith, that the accused did mean for them to go into the bag, take the books out of the bag, and return them to the rightful owners. Therefore, after the accused completed his written statement, Lindsay took the accused out into the lobby, explained that she was seizing the books, went through his bag, inventoried its contents, and gave the accused a receipt.

The defense moved to suppress the appellant's oral and written confession and the results of the search of the gym bag. The defense argued the Security Forces investigators did not have probable cause to apprehend the appellant, and if probable cause existed, it was based on an illegal search by the UCCS Police. The defense asserted that since the appellant's confession and the results of the search of the gym bag were the by-product of illegal police action, they should be suppressed.

The military judge denied the motion. He concluded that the UCCS Police had a reasonable suspicion that there was criminal activity afoot and they properly detained the accused. But he also found the appellant had a reasonable expectation of privacy in his gym bag when he was detained. The military judge ruled that, given the limited

information they had, the UCCS Police did not have probable cause to apprehend the appellant; therefore, the search of his bag was not a search incident to apprehension. Since the search was without a warrant, it violated the Fourth Amendment.

In further findings, the military judge held that the Security Forces investigators had probable cause to support the appellant's apprehension. He also found that none of the information obtained during the UCCS search was passed to the Security Forces investigators. The military judge also concluded that the appellant's confession was not the result of the UCCS illegal search. Regarding the later search of the gym bag by Security Forces investigators, the military judge found that, while the government established by a preponderance of the evidence that the appellant consented to a search of his bag, the government fell short of the higher "clear and convincing" evidence standard required to prove consent. *See generally* Mil. R. Evid. 314(e)(5). He stated that the Air Force investigators' conclusion that the appellant consented to a search of his bag was made "in good faith" and was "not an irrational assumption." And finally, the military judge ruled that, although the search was not based upon a warrant supported by probable cause, nor was it incident to apprehension or done following consent, the results of the search should not be suppressed because they would have been inevitably discovered.

II. Analysis

A. Apprehension

We agree with the military judge's conclusion that the apprehension of the appellant by Security Forces investigators was proper because they had reasonable grounds to believe that the appellant had committed an offense or offenses triable by court-martial. Rule for Courts-Martial (R.C.M.) 302(c). The totality of the circumstances ascertained by Security Forces investigators through interviews of the bookstore staff, including, inter alia, the nature and number of books being sold at mid-term, together with the appellant's consciousness of guilt evinced by his contradictory behavior when asked to produce identification, fully supports a determination of probable cause to apprehend. Nevertheless, we must still evaluate the appellant's claims that the military judge erred when he denied the defense motion to suppress the appellant's written and oral confessions and to suppress evidence Security Forces investigators recovered from the appellant's gym bag.

B. Confessions

In *United States v. Rodriguez*, 60 M.J. 239, 246-47 (C.A.A.F. 2004), our superior court set out the standards for reviewing the denial of a motion to suppress:

> We review a military judge's ruling on a motion to suppress for abuse of discretion. *United States v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000).

> "[W]e review factfinding under the clearly-erroneous standard and conclusions of law under the de novo standard." *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). On mixed questions of law and fact, such as the instant issue, "a military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *Id.* "In reviewing a ruling on a motion to suppress, we consider the evidence 'in the light most favorable to the' prevailing party." *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996).

We agree with the military judge's conclusion that the search of the gym bag by the UCCS Police violated the Fourth Amendment. The issue, then, is whether that illegal search tainted the appellant's subsequent confessions, oral and written, to Security Forces investigators.

The resolution of this issue is governed by *Brown v. Illinois*. In *Brown*, the Supreme Court addressed the issue whether a confession preceded by an illegal arrest, but with proper warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966), must be suppressed. The Court explained the intersection of the protections provided by the Fourth and Fifth Amendments:

> This Court has described the *Miranda* warnings as a "prophylactic rule," and as a "procedural safeguard," employed to protect Fifth Amendment rights against "the compulsion inherent in custodial surroundings." The function of the warnings relates to the Fifth Amendment's guarantee against coerced self-incrimination, and the exclusion of a statement made in the absence of the warnings, it is said, serves to deter the taking of an incriminating statement without first informing the individual of his Fifth Amendment rights.
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> Although, almost 90 years ago, the Court observed that the Fifth Amendment is in "intimate relation" with the Fourth, the *Miranda* warnings thus far have not been regarded as a means either of remedying or deterring violations of Fourth Amendment rights. Frequently, as here, rights under the two Amendments may appear to coalesce since "the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment." The exclusionary rule, however, when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth. It is directed at all unlawful searches and seizures, and not merely those that happen to produce incriminating material or testimony as fruits. In short, exclusion of a confession made without *Miranda* warnings might be regarded as necessary to effectuate the Fifth

> Amendment, but it would not be sufficient fully to protect the Fourth. *Miranda* warnings, and the exclusion of a confession made without them, do not alone sufficiently deter a Fourth Amendment violation.
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> Thus, even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, *Wong Sun*[1] requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be "sufficiently an act of free will to purge the primary taint." *Wong Sun* thus mandates consideration of a statement's admissibility in light of the distinct policies and interests of the Fourth Amendment.
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> . . . .
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> It is entirely possible, of course . . . that persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality. But the *Miranda* warnings, *alone* and *per se*, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession. They cannot assure in every case that the Fourth Amendment violation has not been unduly exploited.

Brown v. Illinois, 422 U.S. at 600-03 (citations and footnotes omitted).

To ensure protection under both the Fourth and Fifth Amendments, *Brown* established a four-part test to determine whether a confession is sufficiently attenuated from prior illegal police conduct to be valid. The factors to be considered are:

1. The advisement of *Miranda* warnings to the accused;
2. The temporal proximity of the arrest and confession;
3. The presence of intervening circumstances; and
4. The purpose and flagrancy of the official misconduct.

Id. at 603-04. Our superior court has applied this test for over two decades. *See generally United States v. Ravine*, 11 M.J. 325 (C.M.A. 1981).

[1] *Wong Sun v. United States*, 371 U.S. 471 (1963).

Our superior court most recently applied the *Brown* factors in *United States v. Khamsouk*, 57 M.J. 282 (C.A.A.F. 2002):

> [The Supreme] Court, relying on *Wong Sun*, noted that "the question of whether a confession is the product of free will [following an illegal arrest] must be answered on the facts of each case. No single fact is dispositive." The Court went on to explain that *Miranda* warnings, while an important factor, were not dispositive in determining whether the statements were obtained by exploitation of the illegal arrest. "The voluntariness of the statement is a threshold requirement. And the burden of showing admissibility rests, of course, on the prosecution." The Court set out three factors also relevant to the inquiry: "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct . . . ." So, while the voluntariness of the statement is a threshold requirement to vindicate the Fifth Amendment interest, the Fourth Amendment interest arising from the illegal seizure of the person is vindicated through a consideration of the three factors mentioned above.

Khamsouk, 57 M.J. at 290-92 (citations omitted).

We are persuaded that the government has met its burden to prove the *Brown* factors weigh in favor of admission of the confession. First, the appellant does not dispute that Security Forces investigators properly advised him of his rights under Article 31, UCMJ. Second, in this instance, we view "temporal proximity" as a factor that weighs slightly in favor of the appellant because while about two hours passed between the initial detention and confession, the appellant was in the presence of law enforcement officials the entire time. For the last hour or so, he was under apprehension.

On the other hand, there were significant intervening circumstances. Security Forces investigators drove the appellant from the UCCS campus to their office on the Academy grounds. During the transportation, the appellant and TSgt Robinette engaged in friendly conversation about football. There is also nothing in the record to suggest the appellant was subjected to any type of coercion upon arrival at the Security Forces building. It is also obvious that the appellant had an independent motive to confess. His brother was also a cadet. The appellant wanted to make sure that investigators understood that his brother had no part in the theft. Thus, in his written confession, he answered "no" when asked if his brother or other cadets had knowledge of his thefts. *Cf. Ravine*, 11 M.J. at 331 (confession motivated by desire to exonerate brother was an intervening circumstance).

Finally, we are convinced there was no flagrant police misconduct. Appellate defense counsel argued in their brief that SrA Lindsay instructed UCCS Police to search

the bag. The civilian appellate defense counsel fervently repeated this claim during oral argument.[2] Indeed, Lieutenant Straub said in an affidavit that "to the best of his recollection," an Air Force member asked him to make an inventory of the book bag. But Lieutenant Straub did not identify that person. Lieutenant Straub's assertion was at first corroborated by another UCCS Police Officer, Sergeant Spice, who said that he discussed with Lieutenant Straub whether the Air Force had authority to instruct a state police officer to conduct a search. But in answers to questions from the military judge, Sergeant Spice retreated from that position. Sergeant Spice said he might have been mistaken about whether he and Lieutenant Straub discussed whether the Air Force could instruct Lieutenant Straub to search the bag.

During oral argument, appellate defense counsel agreed that the UCCS search may have simply been the result of miscommunication between the two law enforcement agencies. The weight of the evidence suggests that is what happened. In any event, the record is clear that SrA Lindsay denied asking the UCCS Police to obtain an inventory of the books. She also refused to take such an inventory when offered one by the UCCS police. Based upon a careful review of the record before us, we find that SrA Lindsay did not instruct the UCCS Police to conduct a search of the appellant's bag. After carefully weighing the *Brown* factors, we hold that the military judge did not abuse his discretion by declining to suppress the appellant's confession.

C. Bag Search

The appellant next argues that the military judge abused his discretion by failing to suppress evidence recovered from the appellant's gym bag. We disagree.

Security Forces investigators put the appellant's gym bag, plus other books given to them by UCCS officials, in the waiting room of the Security Forces building. The appellant knew they were there. Investigators spoke to the appellant in an interview room, but made no reference to the books until after the appellant confessed to stealing them. Before the interview began, however, the appellant more than once asked TSgt Robinette what would happen to him. TSgt Robinette testified, "I explained to him that I cannot get into the punishment. My job as an investigator is to do a non-biased police report to the commander, and basically that was our goal, to make sure the commander gets the facts. And as far as punishment, I have no idea what's going to happen to him." TSgt Robinette also told the appellant, "we don't do cadet issues, we do--we only involve ourselves in criminal issues underneath the UCMJ."

TSgt Robinette was present when SrA Lindsay advised the appellant of his rights under Article 31, UCMJ. The appellant waived his right to counsel and agreed to make a

[2] We heard oral argument in this case on 27 October 2004 at the United States Air Force Academy as part of our Project Outreach program.

statement. TSgt Robinette testified that, "From the get-go, he was honest, he confessed that he did take the books." When TSgt Robinette asked about the money he got from selling the books, the appellant pulled $511 dollars from his sock and said, "Here, take this," as he placed the money on the table in the interview room.

TSgt Robinette testified that, when he asked the appellant what he wanted him to do with the money, the appellant told him he wanted the other cadets to get their money back or the books back—"whatever it took." TSgt Robinette also testified, "He wanted me to take the money either to the bookstore, or whatever I needed to do to make sure that the cadets received, restitution is a good word, and ensure that they got their books back and the bookstore got their money back."

The appellant subsequently wrote a three-page confession detailing his theft of 20-25 books worth approximately $600. In the confession, the appellant said, "I would like for the money that I gave Sgt Robinette to be given back to the store for the books. I am very sorry for what I did, and I am willing to do whatever it takes to make right out of what I have done wrong." SrA Lindsey began to prepare a form that would have been used to request that the appellant consent to a search of his bag. Based upon the appellant's comments during the interview, however, TSgt Robinette concluded that the appellant had already consented to a search of his bag. TSgt Robinette told SrA Lindsay that such a form would not be necessary. The record is unclear whether this conversation took place in the presence of the appellant.

TSgt Robinette testified about why he thought the appellant consented to a search of his bag:

> Pretty much with the money, I think at one point Airman Lindsay tried to do a 1364 [consent for search form], but my understanding is that--and I've always done it--is get the verbal in writing. The understanding with the money is, he's like, "Here's the money. Do whatever you have to do, take the books, do what you have to do to get this matter resolved." At that point, he was just wanting a conclusion to it, he wanted to get it over.

TSgt Robinette further testified that although he did not expressly ask the appellant for consent to search his gym bag, he believed the appellant had given consent because the appellant made statements about giving the money back to the bookstore and the books back to the cadets, he was open and honest about the thefts, and the appellant may have been crying when he said he wanted to return the books to the cadets from whom he took them.

SrA Lindsay testified that she specifically remembered the appellant saying that he wanted to give "all the books" back to the cadets from whom they had been stolen. Her testimony also indicates that, throughout the interview, the appellant was cooperative.

He made no objection when she informed him that she was going to inventory the contents of his gym bag. Further, he made no attempt to regain control of the bag when he accompanied her to the room where the bag was located.

We review a military judge's evidentiary ruling for an abuse of discretion. *United States v. McMahon*, 58 M.J. 362, 366 (C.A.A.F. 2003). A military judge's "findings of fact will not be overturned unless they are clearly erroneous or unsupported by the record." *Id*. (quoting *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)). Conclusions of law, however, we review de novo. *Id. See also United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).

Mil. R. Evid. 314(e) permits the admission of evidence obtained during a search conducted with the consent of the property owner. "Consent must be shown by clear and convincing evidence." Mil. R. Evid. 314(e)(5). Consent is valid only if it is "freely and voluntarily given." *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). *See also* Mil. R. Evid. 314(e)(4). "The determination as to whether consent is voluntarily given 'is a question of fact to be determined from the totality of all the circumstances.'" *McMahon*, 58 M.J. at 366 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)). "Considerations include age, intelligence, experience, length of military service, whether the environment was custodial or coercive, and knowledge of the right to refuse consent." *McMahon*, 58 M.J. at 366.

The military judge found that, although the Security Forces investigators acted rationally and in good faith when they concluded the appellant had consented to a search of the gym bag, the government had proven the appellant's consent only by a preponderance of the evidence. He said the government had not met its burden to prove consent by clear and convincing evidence. We cannot agree.

Although the exact words the appellant used in his oral interview and confession were not recorded, both TSgt Robinette and SrA Lindsay credibly and consistently recount words that clearly amounted to an expression of consent to retrieve and return the books to their rightful owners. Indeed, in the context attending his remarks, it is difficult to attribute any other meaning to the appellant's words. The appellant, a second-year cadet at the United States Air Force Academy, was obviously an intelligent young man. While he was under apprehension, he was not in an overly coercive environment. By the time he made the expression of consent, he had fully and freely confessed, tearfully exclaiming genuine remorse for his acts and his desire, in the words of his written confession, "to do whatever it takes to make right out of what I have done wrong." His words of consent, as related by TSgt Robinette and SrA Lindsay, were unequivocal in their import. With all due respect to the conclusion reached by the military judge, we hold, as a de novo conclusion of law, that the evidence of consent met the clear and convincing standard of Mil. R. Evid. 314(e)(5).

Having found valid consent, we need not rely upon the doctrine of inevitable discovery. However, we note our concurrence with the military judge's conclusion that, in the absence of consent, this evidence would be admissible under that doctrine. In either event, whether by the same or a separate rationale, we agree with the trial judge's ultimate conclusion and hold that he did not abuse his discretion by denying the motion to suppress the contents of the gym bag. *McMahon*, 58 M.J. at 366.

After carefully considering the evidence in the record before us, we find that the appellant's remaining assignment of error is without merit. *United States v. Matias*, 25 M.J. 356 (C.M.A. 1987).

III. 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

ANGELA M. BRICE
Clerk of Court