UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JOHN J. FRELLO JR.
United States Air Force

ACM 36351

30 March 2007

Sentence adjudged 26 April 2005 by GCM convened at Buckley Air Force Base, Colorado. Military Judge: Barbara G. Brand (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Karen L. Hecker, and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Amy E. Hutchens.

Before

BROWN, FRANCIS, and SOYBEL
Appellate Military Judges

OPINION OF THE COURT

SOYBEL, Judge:

The appellant was convicted, in accordance with his pleas, of one specification of fraudulent enlistment, two specifications of absence without leave, one specification of making a false official statement, and one specification of divers wrongful uses of cocaine, in violation of Articles 83, 86, 107 and 112a, UCMJ, 10 U.S.C. §§ 883, 886, 907

and 912a.[1] A military judge, sitting as a general court-martial, sentenced the appellant to a bad-conduct discharge, confinement for 6 months, and reduction to the grade of E-1. The convening authority approved the findings and the sentence as adjudged.

On appeal, the appellant asserts that the military judge erred in denying his motion to suppress his statement concerning his drug use, because it was improperly obtained after he sought assistance for a drug problem under the protections of Air Force Instruction (AFI) 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (26 Sep 2001).

We have examined the record of trial, the military judge's findings of fact, the assignment of error, and the government's response thereto. Finding no error, we affirm.

Background

The appellant was absent without leave (AWOL) from 19-21 January 2005. On 21 January 2005, he called his aunt, who had previously been in the Air Force but was then a civilian living in Virginia. The appellant wanted her to wire him $200.00 to help with a problem related to his drug use. He apparently needed the money to get his vehicle back from his drug dealer who had possession of it. He also sought her advice for his current predicament concerning his being AWOL. She told him to turn himself in at the gate. However, the appellant said he couldn't do that because he was an "emotional wreck" that day. It was decided that she would contact the appellant's unit for him and would call him back. After she spoke with the appellant's first sergeant, she called the appellant back and had him go to a local supermarket where she would wire the money. When he arrived at the store, he was apprehended by agents from the Air Force Office of Special Investigations (OSI).

After being apprehended, the appellant immediately wanted to make a statement in the store but the apprehending agents told him to wait until they returned to base so they could properly advise him of his rights. After this was done the appellant made a 3-page statement in which he confessed to multiple drug uses before and after his enlistment, including some very recent crack cocaine usage. This confession served as the basis for his fraudulent enlistment specification, the false official statement specification, and the drug use specification.

The issue at hand revolves around several calls the appellant's aunt made to his first sergeant that ultimately led to the appellant's apprehension. At trial the appellant contended that his aunt called to help him turn himself in and get treatment for his drug

[1] The pleas to the fraudulent enlistment, false official statement, and the drug uses were conditional pleas, preserving the current appellant issue.

problem. The government's position was that the aunt's calls were made to facilitate the termination of the appellant's AWOL status.

Each side offered evidence on the motion to suppress his statement. The appellant, his aunt, the acting first sergeant, and two OSI special agents testified. The military judge's findings of fact can be summarized as follows: On the day he was apprehended the appellant was not under investigation for drugs but he was in deserter status. The accused's main concern that day was to receive money so he could get his car back from his drug dealer. His aunt called the first sergeant because she was concerned about his safety. Although she suspected the appellant was using drugs, and conveyed this concern to the first sergeant, she never requested or received any information on how the appellant could self-identify or receive treatment for his drug problem under the ADAPT program. The appellant received more than one ride that day in his attempt to obtain money and could have turned himself in had he so desired. When the appellant finally was allowed to make a statement to the OSI he said he wanted help, but gave no further explanation. He never requested drug treatment.

AFI 44-121

The Air Force's ADAPT program contains a sanctuary provision that allows Air Force members to self-identify as drug users in order to receive treatment for their problem. If made to their unit commander, first sergeant, a substance abuse evaluator, or a military medical professional, an Airman's statements of self-identification may not be used against him in any action under the UCMJ. AFI 44-121, ¶ 3.7.1.3. This provision is to encourage Airmen with drug problems to voluntarily seek assistance without fear of criminal consequence. The AFI is silent as to whether the sanctuary provision still applies when another person identifies an Airman as a drug user on that Airman's behalf. It is the appellant's position that his aunt was acting as his agent when she called his first sergeant and therefore he is entitled to the protections afforded by AFI 44-121. Appellant relies on *United States v. Avery*, 40 M.J. 325 (C.M.A. 1994), for the proposition that a close family member may invoke the sanctuary provision of the ADAPT program on behalf of an Airman.

Indeed, our superior court left that question open in *Avery*. However, the facts in this case do not require us to answer it. The military judge specifically found that the appellant's aunt did not identify him as a drug user in order to request treatment under the program. The military judge found that the purpose of the aunt's calls to the first sergeant was to assist the appellant to terminate his AWOL. Neither did the military judge find that the appellant tried to invoke the provisions of the ADAPT program himself.

As the Court in *Avery* said, the factual determinations of the military judge should not be disturbed unless they are unsupported by the evidence in the record or they are

clearly erroneous. *Id*. at 328; s*ee also United States v. Tollinchi*, 54 M.J. 80, 82 (C.A.A.F. 2000). We have reviewed the record and find there is absolutely no reason to disturb the military judge's findings in this case. Accordingly, we never reach the issue of "self-identification by an agent" because no such attempt occurred. Neither did the appellant self-identify under the ADAPT program. With these findings we hold that the military judge did not err in denying the appellant's motion to suppress his statements made to the OSI.

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 approved findings and sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator