UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Second Lieutenant MATTHEW T. JAEGER
United States Air Force

ACM 36127

14 December 2006

Sentence adjudged 26 August 2004 by GCM convened at Peterson Air Force Base, Colorado. Military Judge: Kurt D. Schuman (sitting alone).

Approved sentence: Dismissal and confinement for 15 months.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Karen L. Hecker, Major Christopher S. Morgan, 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 Kimani R. Eason.

Before

BROWN, MATHEWS, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

MATHEWS, Judge:

The appellant stands convicted, despite his pleas, of one specification each of dereliction of duty, sodomy with a child, and conduct unbecoming an officer, in violation of Articles 92, 125, and 133, UCMJ, 10 U.S.C. §§ 892, 925, 933. He also was convicted of one specification of transporting a minor in interstate commerce with the intent to engage in sexual activity, in violation of 18 U.S.C. §

2423.[1] A military judge sitting alone sentenced the appellant to dismissal from the service and confinement for 15 months.

On appeal, the appellant contends, *inter alia*, that the military judge erred by failing to suppress his confession to Air Force investigators, and that his conviction for sodomy is unconstitutional in light of recent decisions by the Supreme Court of the United States and the Court of Appeals for the Armed Forces. Finding no merit to the appellant's claims, we affirm.

Admission of the Appellant's Confession

The appellant's court-martial stemmed from his various sexual activities with JB, a 15-year-old boy the appellant met while on temporary assignment away from his duty station in Colorado. JB's family, on learning of the appellant's conduct, reported the appellant to local civilian law enforcement officials who, in turn, contacted members of the Air Force Office of Special Investigations (AFOSI). During the course of their investigation, AFOSI agents sought to search the appellant's off-base home in El Paso County, Colorado, for evidence linking him to JB. They obtained a warrant from a local magistrate and, pursuant to the warrant, seized the appellant's computer and a number of documents, including receipts from the hotel where the appellant took JB for sex.

After the agents completed their search, they took the appellant to the local AFOSI office for questioning. There, after a proper rights advisement, the appellant admitted that he engaged in sexual activity with JB, and also that he knew JB was 15 years old. The appellant insisted, however, that JB consented. The appellant declined to give a written statement.

At trial, the appellant moved to exclude the results of the search, on the grounds that the warrant was improperly obtained and executed. In particular, the appellant argued that the AFOSI agents were not authorized under Colorado law to conduct such a search because they were not recognized as law enforcement officers of the jurisdiction where the search was conducted, as required by Colorado law. COLO. REV. STAT. § 16-3-305(1) (1986). Relying in part on the Colorado Supreme Court decision in *People v. Martinez*, 898 P.2d 28 (Colo. 1995), the military judge found that AFOSI agents were not recognized as peace officers under applicable Colorado law and were therefore not authorized to execute a Colorado search warrant. As a consequence, he excluded all of the evidence seized in the search of the appellant's home.

[1] This offense was assimilated under the "crimes and offenses not capital" clause of Article 134, UCMJ, 10 U.S.C. § 934.

Following this ruling, the appellant next sought to have his confession suppressed as well, arguing that the interrogation was tainted by the AFOSI agents' search. The appellant noted that the search was conducted in front of him, shortly before the agents began their questioning, and contended that his knowledge of the search and its likely results affected his decision to waive his rights and talk to the investigators. The military judge denied the motion to suppress the appellant's confession.

We review the military judge's decision for an abuse of discretion. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). Although the appellant styles the search a violation of the Fourth Amendment,[2] it is apparent from the record that no Constitutional violation occurred. The military judge, applying a "totality of the circumstances test," found that the magistrate was "neutral and impartial" and had probable cause to issue the search warrant. We concur with the military judge's findings, and with his conclusion that the warrant was legally obtained. *See* Mil. R. Evid. 315(f)(2); *United States v. Bethea*, 61 M.J. 184, 187 (C.A.A.F. 2005); *United States v. Mason*, 59 M.J. 416, 421 (C.A.A.F. 2004); *United States v. Carter*, 54 M.J. 414, 418 (C.A.A.F. 2001).

While we have grave reservations about the military judge's decision to rely on Colorado law to evaluate the lawfulness of the search warrant's execution, *see, e.g., United States v. Birbeck*, 35 M.J. 519, 521 (A.F.C.M.R. 1992) (courts-martial apply federal, not state, law to determine whether a search is unlawful), we agree with his ultimate conclusion: irregularities in that execution did not require suppression of the appellant's confession, even under state law. The *Martinez* case, cited by the appellant to justify exclusion of the evidence seized in the search and the appellant's subsequent confession, does not actually stand for the proposition that such evidence must be suppressed. "Where 'a law enforcement officer obtains evidence in violation of a statute or regulation, the exclusionary rule is not triggered unless the unauthorized conduct also amounts to a constitutional violation.'" *Martinez*, 898 P.2d at 31-32 (citing *People v. Hamer*, 689 P.2d 1147, 1150 (Colo. Ct. App. 1984)). The military judge did not abuse his discretion.

Even were we to find otherwise, we would find the error harmless. JB testified extensively at trial, establishing each and every element of the charged offenses. His account of events was corroborated by the appellant in an internet chat session during which an AFOSI agent pretended to be JB reminiscing about his sexual encounters with the appellant. Considering the entire record, we are satisfied that admission of the appellant's confession, even if error, was harmless

[2] U.S. CONST. amend. IV.

beyond a reasonable doubt. *United States v. Hall,* 58 M.J. 90, 94 (C.A.A.F. 2003); *United States v. Walker,* 57 M.J. 174, 178 (C.A.A.F. 2002).

Constitutionality of the Appellant's Sodomy Conviction

The appellant next contends that, at the time of his sexual encounters with JB, he honestly and reasonably believed JB to be an adult, suggesting that he did not learn the truth until confronted by the AFOSI agents. Relying on the guidance of our superior appellate court in *United States v. Zachary,* 63 M.J. 438 (C.A.A.F. 2006), the appellant argues that such a mistake would absolve him of criminal liability for the offense of sodomy with a child. He further argues that under *Lawrence v. Texas,* 539 U.S. 558 (2003), adult sodomy exists within a constitutionally-protected zone of privacy and may not form the basis for a criminal prosecution.

Unfortunately for the appellant, the facts do not support his contentions. The appellant admitted to the AFOSI agents that he *already knew* JB was 15 years old. One of the appellant's adult friends, JE, testified that the appellant told her he knew JB was 15 before he left Mississippi and returned home to Colorado. In addition, although JB admitted claiming to be an adult in order to set up a web page accessed by the appellant, that web page listed JB's age as 15, identified JB as a sophomore in high school, and displayed several photographs of JB on campus and in class. Furthermore, JB testified that prior to their first sexual encounter, he told the appellant he had "just turned 15," and that the appellant expressed concern about being "too old" for JB.

JB also described a scheme the appellant carried out so that they could spend the night together. JB explained to the appellant that he couldn't stay out all night without his grandmother's permission. The appellant then placed a call to her, pretending to be the father of one of JB's classmates, and tricked the grandmother into believing JB would be staying at the classmate's home. JB's testimony on this point was corroborated by JB's grandmother.

We find JB's testimony candid and credible. Even without considering the appellant's admissions during interrogation, we are convinced beyond a reasonable doubt that the appellant did not labor under an honest and reasonable mistake of fact as to JB's true age. Article 66(c), UCMJ, 10 U.S.C. § 866(c). The appellant's conduct therefore remains outside the liberty interest in *Lawrence,* and we resolve this assignment of error adversely to the appellant.

Remaining Assignments of Error

We considered the remaining issues raised by the appellant and find them to be without merit. *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator