

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman CHRISTOPHER L. JARVIS
United States Air Force

ACM 36502

31 May 2007

Sentence adjudged 11 May 2005 by GCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Kevin P. Koehler.

Approved sentence: Dishonorable discharge, confinement for 1 year, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, 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, and Major John P. Taitt.

Before

BROWN, FRANCIS, and SOYBEL
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

SOYBEL, Judge:

The appellant was charged with one specification of indecent acts with a minor in violation of Article 134, UCMJ, 10 U.S.C. § 934. Contrary to his pleas, a panel of officer and enlisted members, sitting as a general court-martial convicted the appellant of the lesser included offense (LIO) of indecent acts with another. His approved sentence consists of a dishonorable discharge, confinement for 1 year, and reduction to the grade of E-1.

The appellant asserts the military judge erred by not granting his motion to suppress his confession because it was not voluntarily given and was not electronically recorded in violation of his due process rights. Finding no error, we affirm.

Background

This was a contested case. Despite having confessed during an interview with the Air Force Office of Special Investigations (OSI) to having his sister-in-law (who was 7 years old at the time of the offense) touch his penis, the appellant pled not guilty to the charge of indecent acts with a minor. His pretrial motion to suppress his confession and his effort to convince a jury that the confession was coerced, and thus unreliable, were both unsuccessful. After a litigated trial, he was found guilty of the LIO of indecent acts with another.

The appellant was married and had three children. Also living with the appellant and his family were his mother-in-law and his 7-year-old sister-in-law, MC. According to MC, one afternoon when all of the adults were out of the house, the appellant called her to the bathroom where he had just taken a shower, lowered his pants to expose his genitals and told her to "touch it." MC ran back to the living room where two other children were watching television, got a piece of newspaper in which to wrap her hand, returned to the appellant and "poked it." While testifying at trial, she initially had trouble remembering if she grabbed it or poked it but then remember that she poked it. After the incident, she returned to the other room to watch television with the other children. When MC got home from school the next day, she told the appellant's wife about the incident and the appellant's wife confronted the appellant. The appellant's version of the incident was that she had walked in on him in the bathroom just before he took a shower, saw him, and ran off after he yelled at her about the necessity of knocking first.

Initially, the appellant's wife believed the appellant's version and chastised her younger sister for lying. However, after discussing the incident further with her own mother, the appellant's wife ultimately called the OSI who interviewed the appellant and obtained the confession in question.

A base exercise was underway the day the OSI initially decided to question the appellant. During the pretrial motion hearing, he testified that he awoke at 0330 that day to participate in the exercise, worked a long shift and went to bed that night at around 2030 hours. After approximately 45 minutes of sleep, he was awakened by OSI agents at his door. He was then handcuffed and taken by the agents to the Security Forces' building where he sat in an interrogation room for 2 hours before he was released without being questioned.

That evening he was taken to a dorm where he was given a room and was told the OSI would be talking to him the next morning. He was also given \$5.00 for food but was

not permitted to return home or contact his family. The appellant testified that after a poor night's sleep and little to eat, he was finally brought to the OSI office at approximately 1600 hours the next day. He did not eat prior to being questioned because he was afraid to leave the room and have the OSI erroneously conclude he had run away. After being advised of his rights, he was questioned by the OSI for the offense of indecent acts with a minor. The appellant testified that he told the OSI he was hungry, tired, and wanted to leave so he could see his children, but was told he could leave after he confessed. He testified that he finally confessed to having the victim touch his penis, both verbally and in writing after a second rights advisement, so he could leave the interrogation.

After hearing the OSI version of the interrogation, the military judge made findings of fact that differ from the appellant's account. The military judge found that the appellant was apprehended at home after working a long shift for a base exercise. He was handcuffed, placed in a police car, and brought to the Security Force's building where, after 2 hours of waiting, he was released but given a no-contact order and not allowed to return home. He was put up in a dormitory "hospitality suite" and given \$5.00 to get something to eat as there were eating facilities within walking distance of the dorm. He had a restless night's sleep and was finally questioned by OSI agents at 1545 hours the next day, after being informed of his rights.

The military judge further found that at 1819 hours the appellant verbally confessed, then at 1837 hours, the appellant provided a written confession after being advised of his rights under Article 31, UCMJ, 10 U.S.C. § 831, a second time. At 1950 hours, he made a second written statement clarifying certain aspects of the first written statement. He was allowed several breaks and was offered water, soda, and snacks during the interview process. The military judge found that the OSI agents observed the appellant to be alert and coherent during the questioning. The military judge specifically found that the appellant never complained to the OSI that he was tired and hungry, nor did he tell them he wanted to leave. He also found that the OSI never told him he could not see his children until he confessed, nor did they tell him he could leave or eat only after he confessed.

Notably, the military judge found the appellant did not unequivocally invoke his right to remain silent and did not exercise his right "not to incriminate himself." In viewing the totality of the circumstances surrounding the taking of the appellant's confession, the military judge found that the appellant's confession was given voluntarily, without punishments, threats or "deprivation of physical necessities." He further found that the government met its burden of proof by proving by a preponderance of the evidence that the appellant's confession was voluntary.

The Confession

Recognizing that this Court reviews the voluntariness of a confession de novo, and having done so, there is no reason to overturn the military judge's determinations. *Arizona v. Fulminate*, 499 U.S. 279, 287 (1991); *United States v. Martinez*, 38 M.J. 82, 86 (C.A.A.F. 1991). Likewise, the law applied by the military judge was proper, following the standards set out in *United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005) and *United States v. Bubonics*, 45 M.J. 93 (C.A.A.F. 1996). In those cases our superior court confirmed that the voluntariness of a confession is something an appellate court must review independently. The first step is to recognize that the government, as the proponent of admission of the evidence, has to prove by a preponderance of the evidence that the confession was voluntary. Also, when doing our inquiry into the voluntariness of a confession, our scrutiny should focus on whether it was the product of an essentially free and unconstrained choice by the appellant, bearing in mind that if his will was overborne and his capacity for self-determination was critically impaired, use of his confession would offend due process. In making this determination, we consider the totality of the circumstances recognizing that the significance of every factor need not be considered equally, but rather given a degree of importance in accordance with the circumstances and the state of mind of the appellant. Some of the factors we look at are the appellant's age, his mental condition, his education and intelligence, the character and conditions of the detention, and the manner of the interrogation, such as its length, and the use of force, threats, promises, or deceptions. See *Bresnahan*, 62 M.J. at 139; *Bubonics*, 45 M.J. at 94-96.

Looking at the totality of the circumstances surrounding the appellant's confession we are convinced it was voluntarily given. While it was true that the appellant was apprehended after a long, hard day at work and after only 45 minutes of sleep, he was not questioned that night. He was given a room, some money for food, and was not questioned until the next day. Besides the no-contact order applicable to his family, his movements were not restricted. It is understandable that he did not sleep well after being apprehended and told to await questioning the next day; however, the only alternative would have been for the OSI to begin questioning him the evening of his apprehension. Between the two choices, waiting for the next day was the better choice from a due process standpoint. It gave the appellant time to consider his situation, prepare himself for the interrogation, and, even though he was not yet advised of his rights under Article 31, UCMJ, it gave him time to consider seeking the advice of an attorney.

The appellant was 21 years old, had three children, and had been in the Air Force for over two years. There was no indication of any problem with his intellect or his cognitive skills. He was advised of and knowingly waived his rights under Article 31, UCMJ. He was not threatened and was offered food, drinks, and several breaks during the course of the interview process, which lasted just a few hours. While the OSI agents did tell him that child interviews were designed to ensure that the child could not lie, a

deceptive statement, this one bit of artifice does not render the appellant's confession involuntary. See *Bresnahan*, 62 M.J. at 142. Given the totality of the circumstances, the government met its burden of showing the confession was voluntary by a preponderance of the evidence.

Recording the Confession

The appellant's second issue is centered on the fact that his confession was not electronically recorded. It is his position that failure to record his confession violates his right to due process. Trial defense counsel filed an exceptional motion at trial arguing that "[t]o fully protect a service member's Fifth and Sixth Amendment rights, the time has come to apply a bright line, constitutionally based, prophylactic rule: an unreasonable failure to electronically record the entirety of a suspect's interrogation violates the suspect's constitutional rights and renders any statement purportedly obtained from such interrogation inadmissible." In the motion filed by trial defense counsel at trial, the appellant cited *State v. Scales*, 518 N.W. 2nd 587 (Minn. 1994) and *State v. Stephan*, 711 P2d 1156 (Alaska 1985), exhorting the court below and this Court to follow the states of Minnesota and Alaska in adopting a rule requiring that confessions be recorded.

Minnesota and Alaska based their rules on their respective state requirements. No equivalent requirements exist under either federal law or the United States Constitution. We therefore decline to extend such a rule to military courts-martial.

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



MARTHA J. COBLE BEACH, TSgt, USAF
Court Administrator

