UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant SCOTT A. KRISELER
United States Air Force

ACM 37514

03 March 2011

Sentence adjudged 18 June 2009 by GCM convened at Elmendorf Air Force Base, Alaska. Military Judge: Dawn R. Eflein.

Approved sentence: Dishonorable discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford, Major Shannon A. Bennett, and Major Darrin K. Johns.

Appellate Counsel for the United States: Colonel Don M. Christensen, Lieutenant Colonel Jeremy S. Weber, Major Charles G. Warren, and Gerald R. Bruce, Esquire.

Before

BRAND, ORR, and WEISS
Appellate Military Judges

OPINION OF THE COURT

ORR, Senior Judge:

On 16-18 June 2009, the appellant was tried by a court-martial composed of officer members at Elmendorf Air Force Base (AFB), Alaska. Consistent with his plea, he was found guilty of one charge and one specification of wrongful distribution of heroin on divers occasions in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Contrary to his pleas, he was found guilty of a second specification of wrongful distribution of heroin in violation of Article 112a, UCMJ; one charge and specification of wrongful appropriation of a truck which was the property of the United States Air Force,

in violation of Article 121, UCMJ, 10 U.S.C. § 921, and one charge and specification of soliciting others to distribute heroin in violation of Article 134, UCMJ, 10 U.S.C. § 934. The panel of officers sentenced him to a dishonorable discharge, confinement for two years, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved the sentence as adjudged. We heard oral argument on this case at Loyola University College of Law in New Orleans, Louisiana, on 16 November 2010.

The appellant raises two issues on appeal: (1) Whether the military judge abused her discretion when she failed to suppress the appellant's statement to civilian authorities who interrogated the appellant without advising him of his *Miranda* rights, and (2) Whether the military judge abused her discretion when she denied appellant's motion to suppress statements made by appellant when Air Force Office of Special Investigations (OSI) agents failed to give appellant a cleansing statement prior to interrogation. The appellant asks this Court to set aside the findings of guilty to Charge I, Specification 3; Charge II, Specification 1; and Charge III and its Specification, and the sentence. Finding no error prejudicial to the substantial rights of the appellant, we affirm. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

Background

In November of 2008, the Anchorage Police Department (APD) began investigating several civilians who were living with the appellant for illegal drug activity and prostitution. Specifically, the APD suspected that MC, a civilian who lived with the appellant, was a "pimp" and involved in heroin distribution in the Anchorage, Alaska, area. On 12 February 2009, APD received an arrest warrant for MC and they went to the appellant's home to arrest MC. APD took MC into custody, handcuffed him, and the APD officers ultimately moved MC to a police car. No one else at the house that night was handcuffed or arrested.

After the APD took MC into custody, Detective RA started a tape recorder and began to interview the appellant. Even though Detective RA reasonably believed the appellant was also involved in illegal drug activity, he did not advise the appellant of his rights as articulated in *Miranda v. Arizona*, 384 U.S. 436 (1966). Detective RA told the appellant that he was not taking him to jail and encouraged him to be honest. During the interview, the appellant stated he was an active participant in some of his roommates' illegal drug transactions and revealed information that made Detective RA concerned for the appellant's safety and well-being, which prompted him to call the appellant's unit. Detective RA stayed at the appellant's house until members of the appellant's unit arrived.

The appellant's First Sergeant, Master Sergeant (MSgt) RM arrived at the appellant's house and took him to the base. The appellant slept on the couch outside of MSgt RM's office, was escorted to various appointments the next morning, and was

taken to the OSI for questioning the next afternoon. OSI agents advised the appellant of his rights under Article 31, UCMJ, 10 U.S.C. § 831, but they did not give a cleansing statement. The appellant waived his rights under Article 31, UCMJ, answered questions and provided a 6-page written statement.

In a preliminary court session, the appellant's defense counsel asked the military judge to suppress statements given by the appellant to the APD on 12 February 2009 and to OSI personnel located at Elmendorf AFB, Alaska, on 13 February 2009, and all derivative evidence obtained from the statements because the statements were obtained without a proper rights advisement and/or by coercion. The appellant argued that, as a result, his statements to the law enforcement officials were involuntary. The prosecution opposed the motion.

The military judge conducted an evidentiary hearing on the motion. The military judge heard testimony from Detective RA, MSgt RM, OSI Special Agent DS, and OSI Special Agent TW, and she listened to the audio recording of the conversation between Detective RA and the appellant. After hearing the arguments of counsel for both sides, the military judge entered the following findings of fact into the record using a preponderance of the evidence standard:

> First, Detective [RA] is employed by the Anchorage Police Department;
>
> During the last few months of 2008, Detective [RA] was conducting an investigation into the activities of [MC], who goes by the alias of M, and other civilians who were involved in the use and distribution of heroin. Detective [RA] was aware that these civilians were living at [the appellant's] address, using [the appellant's] car to pick up heroin, and that [the appellant] had been involved in several heroin transactions;
>
> Third, on 12 February 2009, Detective [RA] received an arrest warrant for [MC]; Detective [RA] and members of the Anchorage Police Department, Vice and Special Assignments Units, established a perimeter at [the appellant's] home at approximately ten after 8:00 p.m. on 12 Feb[ruary] 2009;
>
> Detective [RA] knocked on the door and identified himself to [the appellant] as Anchorage Police Department and asked him if he could come in and speak with him;
>
> Detective [RA] was accompanied by another detective in civilian clothing;
>
> Although Detective [RA] was armed with a pistol, it was not visible at that time;

Two officers wearing soft police uniforms who were armed with weapons visible on their uniforms remained upstairs while Detective [RA] and [the appellant] walked downstairs approximately 20 steps to a foyer;

Next, Detective [RA] informed [the appellant] that he was there to arrest [MC] and asked if [the appellant] knew where [MC] was;

[The appellant] said he didn't know;

Detective [RA] asked if [the appellant] knew where M was and, at this point, [the appellant] indicated with his body language that M was in an adjacent room to where the conversation was taking place;

Next, Detective [RA] moved [the appellant] behind his body, drew his weapon, and ordered [MC] out of the bedroom;

Detective [RA] was talking in loud voice commands to MC. He took [MC] into custody, handcuffed [MC] and [MC] was then moved to a police car;

Two other women came out of the same bedroom that [MC] had been in. One of them eventually left the home that evening and one of them stayed at the home after the police left. Her name was [MH] and she lived there;

No one else at the house was handcuffed that evening; no one else that night was arrested; and the police did not execute a search warrant;

After [MC] had been taken into custody, Detective [RA] re-holstered his weapon and covered it . . . put it back in the original position that it had been in. He asked [the appellant] if they could go somewhere to talk and [the appellant] indicated that they could go to his bedroom;

[The appellant] led Detective [RA] down the hall to his bedroom and [the appellant] and Detective [RA] went into [the appellant's] bedroom;

During the questioning in [the appellant's] bedroom, the door remained opened. The two men remained standing throughout the conversation in the bedroom and [the appellant] was nearest the door of the two individuals that were in the bedroom;

Detective [RA] told [the appellant] he was not under arrest; did tell him to be truthful; and during the course of the conversation, did not raise his voice at [the appellant], did not yell at him, and did not use his size to intimidate him;

> Detective [RA] did interrogate [the appellant] that night and, during the questioning, [the appellant] revealed some information that made Detective [RA] concerned for [the appellant's] physical safety and physical and mental well-being, which prompted Detective [RA] to call [the appellant's] unit and basically stay at the house until the unit . . . the First Sergeant and supervisor had arrived, at which time Detective [RA] turned [the appellant] over to them.

The military judge concluded as a matter of law that *Miranda* warnings are required for custodial interrogations. She determined that the appellant was interrogated that night, but he was not in custody while he was in his home. She stated, "Therefore, since there was no custody, there was no requirement that Detective [RA] give him *Miranda* warnings." Additionally, she determined that even though Detective RA was a reserve OSI agent, he was acting on behalf of the APD and not on behalf of the OSI because "the military was neither guiding nor advising the events of that evening." The military judge ruled that no coercion was used by the APD to overcome the appellant's will, and "[t]herefore, the statements made by [the appellant] to the Anchorage Police Department were voluntary and will not be suppressed."

Appellant's Admissions to the Anchorage Police Department

The first question before us is whether the military judge erred in denying the defense motion to suppress the appellant's statements to the Anchorage Police Department and any evidence derived therefrom. Generally, we review the military judge's ruling on the suppression motion for an abuse of discretion. *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996); *United States v. Young*, 49 M.J. 265, 266-67 (C.A.A.F. 1998). *See United States v. Barrick*, 41 M.J. 696 (A.F. Ct. Crim. App. 1995). We will reverse for an abuse of discretion if the military judge's findings of fact are clearly erroneous or if her decision is influenced by an erroneous view of the law. *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995). Whether a suspect is in custody, and therefore entitled to *Miranda* warnings, is a mixed question of law and fact qualifying for independent review. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). This issue involves two distinct inquiries: (1) what were the circumstances surrounding the interrogation, and (2) given these circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. *Id.* While we may give deference to the military judge's findings of fact on the first inquiry, we must resolve the second inquiry de novo.

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. In *Miranda*, the Supreme Court established four warnings that must be read to a suspect prior to custodial interrogation in order to protect the suspect's Fifth Amendment privilege against self-incrimination: (1) the right to remain silent; (2) that anything said can be used in a court

of law; (3) that he has a right to the presence of an attorney; and (4) that if he cannot afford an attorney, one will be provided. *Miranda*, 384 at 467-73. An interrogation is considered custodial in nature when "questioning [is] initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* Without question, Detective RA interrogated the appellant without giving him *Miranda* warnings. The appellant asserts that such warnings were required because the interrogation was custodial. The appellant further contends that the military judge erred when she concluded that he was not in custody when Detective RA questioned him inside his residence on 12 February 2009. We disagree.

In order to determine whether *Miranda* warnings were required, we must first decide whether the appellant was in custody during the interrogation. In the case sub judice, Detective RA questioned the appellant in the appellant's residence and told the appellant several times that he was not under arrest. Our superior court adopted an objective test rather than a subjective test to determine whether a person is in custody. *United States v. Meeks*, 41 M.J. 150, 161 n.3 (C.M.A. 1994) (citing *Stansbury v. California*, 511 U.S. 318 (1994)). Where the intent to make a seizure has not been communicated to the suspect, a number of federal courts have held that an interrogation in a suspect's home is non-custodial. *See, e.g.*, *United States v. Rith*, 164 F.3d 1323, 1332 (10th Cir. 1999); *United States v. Mitchell*, 966 F.2d 92, 98 (2d Cir. 1992); *United States v. Lanni*, 951 F.2d 440, 442-43 (1st Cir. 1991).

During oral argument, the appellant's counsel averred that the appellant was in custody at least three times on 12 February 2009. The first time was as Detective RA ordered the appellant to stand behind him as he arrested MC. The next time was when Detective RA frisked the appellant inside his bedroom after saying "we are going to talk," and lastly when Detective RA told him to stand by because he was going to release him to his First Sergeant. The government argues alternatively that the appellant was never in custody in his residence and even though Detective RA told the appellant to stand by until someone from his unit arrived, this occurred after he completed questioning the appellant. The facts that Detective RA told the appellant that he was not under arrest and questioned the appellant in his residence give us a clear indication of Detective RA's subjective intent to conduct a non-custodial interrogation. Nevertheless, we considered all of the facts of this case from the view of a reasonable person situated in the appellant's position as we applied the objective test used to determine whether a person is in custody. *Meeks*, 41 M.J. at 161 n.3; *United States v. Chatfield*, 67 M.J. 432, 437 (C.A.A.F. 2009). Because the circumstances surrounding the interrogation leave us unconvinced that the appellant was actually in physical custody, we must now determine

whether a reasonable person would have felt that he or she was at liberty to terminate the interrogation and leave. *See Thompson*, 516 U.S. at 112.

The Supreme Court has addressed the issue of interrogations conducted outside of a police stationhouse. In *Beckwith v. United States*, 425 U.S. 341 (1976), the Court held that the interrogation of the defendant in his private residence, even after he was warned that he could not be compelled to answer questions, did not constitute a custodial interrogation. *Cf. Minnesota v. Murphy*, 465 U.S. 420 (1984) (holding that an interrogation at the defendant's office was not a custodial interrogation). Generally, these interrogations are considered non-custodial even in the absence of full *Miranda* warnings. However, the Supreme Court has also found that in some circumstances a suspect is under arrest even when "interrogated on his own bed, in familiar surroundings" and "not free to leave." *Orozco v. Texas*, 394 U.S. 324, 326-37 (1969). In *Chatfield*, 67 M.J. at 438, our superior court, relying on *California v. Beheler*, 463 U.S. 1121, 1125 (1983), and *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977), listed several factors to consider in determining whether a person has been restrained, including: (1) whether the person appeared for questioning voluntarily, (2) the location and atmosphere in which the questioning occurred, and (3) the length of the questioning.

As stated earlier, we conclude, as did the military judge, that the appellant was not in physical custody during the interrogation on 12 February 2009. After reviewing the testimony of Detective RA and listening to the audiotape, the evidence supports the facts found by the military judge and her conclusion that the appellant was not in custody. We first examine the voluntariness of the appellant's appearance for questioning. In this case, Detective RA told the appellant he was there to arrest the appellant's roommate MC. After two APD officers took MC into custody and left the scene, Detective RA told the appellant "we're going to talk." In response, the appellant led Detective RA down the hall to his bedroom where they talked in a conversational tone. The two men remained standing and the appellant was nearest to the door. Later, the conversation continued in another room in the presence of the appellant's female roommate. The appellant did not give Detective RA an indication that he did not want to answer questions or that he wanted to leave the premises, nor at any time did he ask Detective RA to leave his home.

Next, we examine the location and atmosphere of the interrogation. After Detective RA frisked the appellant, he questioned the appellant alone in the appellant's bedroom with the door open. Even though there were three other police officers in the appellant's residence during the questioning, only one interrogated the appellant in his bedroom and the appellant was closest to the bedroom door and was not physically restrained. After the APD interviewed another witness to MC's arrest, she was permitted to leave the residence upon her request. Finally, we examine the length of the interrogation. Detective RA questioned the appellant for over 90 minutes. The appellant was offered comfort breaks, time to eat dinner and was free to move around inside the house. Detective RA did ask the appellant where he was going as he moved around the

house, citing officer safety as his reason for asking. Portions of the interview included time for rapport-building and much of the conversation focused on the criminal activities of the appellant's current and former roommates. Given the conversational tone of the interrogation, we are not persuaded by the defense counsel's assertion that the length of this interrogation made it coercive in nature. While Detective RA told the appellant he needed to stand by until members of the appellant's unit arrived, this statement has no bearing on the voluntariness of his confession for two primary reasons: First, Detective RA made the statement after the questioning pertinent to the charged offenses was finished. Second, Detective RA made the statement out of a concern for the appellant's physical safety and well-being.

The facts of this case show that the appellant's interrogation did not have the police-dominated atmosphere that would give rise to the compelling pressures that would make his confession involuntary. We believe that when faced with the atmosphere of this interrogation, a reasonable person in the appellant's position would not believe that he was subject to "'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Beheler*, 463 U.S. at 1125 (quoting *Mathiason*, 429 U.S. at 495).

In the event that it is later determined that the appellant's statement to the APD was involuntary because of a failure to provide *Miranda* warnings and/or coercion sufficient to overcome his will, we now examine whether his statements to the OSI would nevertheless be admissible. In doing so, we must address whether the appellant's statement to the APD was given after a technical violation of his rights or was the product of actual coercion.

Appellant's Statements to the OSI Agents

During the preliminary court session, the appellant's trial defense counsel asked the military judge to suppress statements given to OSI agents located at Elmendorf AFB on 13 February 2009. The military judge conducted an evidentiary hearing on this motion and entered the following findings of fact by a preponderance of the evidence:

> Furthermore, after [the appellant] went back to the base with his unit, the court finds that, as both sides presented the information, [the appellant] slept for a couple of hours at least on the couch in the First Sergeant's either office or office area, and the following morning was escorted around to various appointments until he was ultimately escorted to the OSI at approximately 1400 [hours] at the request of the OSI.
>
> The OSI agents properly advised [the appellant] of his rights under Article 31 of the Uniform Code of Military Justice for the variety of Article 112(a) offenses of which he was suspected. There is no evidence before the court

> that the statement made by [the appellant] to the OSI was involuntary or was obtained in violation of his rights.

Given the uncontested fact that Detective RA did not give *Miranda* warnings, the appellant argues that his admissions to the APD on 12 February 2009 were involuntary because they were obtained by coercion. As a result, he contends that the statement he gave to the OSI the following day was presumptively tainted, rendering it inadmissible. The appellant claims that the military judge erred when she failed to suppress his written statement to the OSI because the OSI failed to give him a cleansing statement prior to interrogation. We disagree.

As stated earlier, we are not convinced that the appellant's statements to the APD were involuntary. Even if we assume, *arguendo*, that the appellant was in custody while at his residence thereby making *Miranda* warnings required, the facts of this case do not render the appellant's subsequent confession to the OSI involuntary. In *Oregon v. Elstad*, 470 U.S. 298 (1985), the Supreme Court emphasized that the failure of law enforcement personnel to give *Miranda* warnings without proof of coercion did not automatically taint subsequent admissions if *Miranda* warnings were properly given prior to the subsequent statement. "We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Elstad*, 470 U.S. at 318. This Court, relying on *Brown v. Illinois*, 422 U.S. 590 (1975), has provided guidance for determining whether the presumptive taint caused by the failure to give required *Miranda* warnings in a first statement requires the exclusion of a subsequent statement:

> If the appellant's first statement was involuntary only because of a technical violation of *Miranda*, . . . the second statement [is] admissible so long as it was voluntary under the totality of the circumstances. On the other hand, if the first statement was involuntary because it was the product of actual coercion, duress, or unlawful inducement, then the second statement is presumptively tainted, and is admissible only if the government proved by a preponderance of the evidence that this taint was sufficiently attenuated at the time the statement was made.

United States v. Torres, 60 M.J. 559, 567-68 (A.F. Ct. Crim. App. 2004).

The circumstances, location, length and atmosphere of questioning show that the interrogation on 12 February 2009 was not coercive. First, the appellant, who is 35 years old, of reasonable intelligence, and has served over 16 years in the military, made admissions to Detective RA without being advised of his *Miranda* rights. Next, the interrogation occurred in the appellant's bedroom, was conducted in a conversational tone and the appellant did not indicate that he was unwilling to answer Detective RA's questions or that he wanted to leave. Additionally, Detective RA testified that he was

aware of the requirement to provide *Miranda* warnings but did not give them because he did not believe that the appellant was actually in custody and told the appellant that he was not under arrest. Moreover, the appellant's assertion that the APD interrogation on 12 February 2009 was coercive in nature is not consistent with the examples of coercion cited by the Supreme Court where overtly or inherently coercive methods were used to obtain the first of consecutive confessions or where "suspects whose invocation of their rights to remain silent and to have counsel present were flatly ignored while police subjected them to continued interrogation." *Elstad*, 470 U.S. at 31 n.3. Even if we assume *arguendo* that the appellant was in custody and the failure to provide such warnings in this case is a *Miranda* violation, it is, at most, a technical violation.

Given our assumption[1] that Detective RA's failure to provide the appellant his *Miranda* rights is a technical violation, we must now examine whether such a technical violation renders the appellant's subsequent confession to the OSI inadmissible. The Supreme Court noted that because *Miranda* sweeps broader than the constitutional protection itself and creates a conclusive presumption of involuntariness, it requires the exclusion of unwarned statements that are otherwise voluntary. *Elstad*, 470 U.S. at 307. *Accord Dickerson v. United States*, 530 U.S. 428 (2000).

In order to determine whether the appellant's statement to the OSI is admissible based upon our assumption of an earlier technical violation, we must decide whether the appellant's statement to the OSI was voluntary under the totality of the circumstances.

> [W]here the earlier confession was "involuntary" only because the suspect had not been properly warned of his panoply of rights to silence and to counsel, the voluntariness of the second confession is determined by the totality of the circumstances. The earlier unwarned statement is a factor in this total picture, but it does not presumptively taint the subsequent confession.

United States v. Cuento, 60 M.J. 106, 108-09 (C.A.A.F 2004) (citing *Elstad*, 470 U.S. 298).

The voluntariness of a confession is a question of law which we review de novo. *United States v. Benner*, 57 M.J. 210, 217 (C.A.A.F. 2002). We review any findings of fact on the basis of voluntariness and will accept them unless they are clearly erroneous. *Id.* We review a military judge's denial of a motion to suppress a confession for an abuse of discretion. *Chatfield*, 67 M.J. at 437.

[1] As stated earlier in this opinion, the Court does not find there was a *Miranda* violation. We assume so at this point in our analysis only to determine the admissibility of the appellant's subsequent statement to the Office of Special Investigations had there, in fact, been such a violation.

The record shows that the appellant was questioned in his home and his First Sergeant took him to Ellsworth AFB for various appointments. The following day, Detective RA notified personnel at the OSI at Elmendorf AFB, Alaska, that he had executed an arrest warrant at the appellant's home the previous night but did not give the OSI agents many of the specific details of his interrogation. On 13 February 2009, two OSI agents interviewed the appellant after advising him of his rights under Article 31, UCMJ. They did not give him a "cleansing statement" to inform him that they would not use his prior admissions to the APD against him. The appellant waived his rights under Article 31, UCMJ, was very cooperative and answered questions for approximately 90 minutes. The agents left the appellant alone in an office and the appellant provided a 6-page confession in his own handwriting.

Even if we take the additional step of accepting the appellant's argument that his confession to the APD was the result of coercion, we are still not convinced that the presumptive taint requires the exclusion of the second statement. This Court has identified three factors we use to determine whether coercion carries over into a subsequent confession: "Under *Brown* and *Elstad*, we look to the temporal proximity of the coercive conduct to the second confession, the presence of intervening circumstances attenuating the coercive effects of the police misconduct, and the nature of the misconduct to determine whether the taint carried over to the second statement." *Torres*, 60 M.J. at 568.

First, the fact that there was a close temporal proximity between the two statements is a factor that weighs in the appellant's favor. Detective RA waited at the appellant's residence until the appellant's First Sergeant arrived. The appellant was transported to the base and questioned by OSI agents in the afternoon of the following day. Even though the OSI agents were not aware of the details of the appellant's admissions to the APD, it was reasonable for the appellant to think that the OSI agents were aware. On appeal, the appellant argues his confession to the OSI agents was involuntary because denying his criminal activity to them would be pointless because "the cat was out of the bag." *See United States v. Bayer*, 331 U.S. 532, 540 (1947).

On the other hand, the two factors that weigh in the government's favor are the change of interrogators and the change of the location of the interrogation. These two factors reasonably put the appellant on notice that this interview was substantially different from the questioning by Detective RA in his residence.[2] Unlike the custody requirement that triggers a *Miranda* rights advisement, the OSI agents must read the appellant his Article 31, UCMJ, rights once they suspect him of committing any offense

[2] We note there was no requirement for Detective RA, acting in his capacity as civilian police officer, to advise the appellant of his Article 31, UCMJ, 10 U.S.C. § 831, rights. *United States v. French*, 38 M.J. 420, 426 (C.M.A. 1993); Mil. R. Evid. 305(h)(1). However, Detective RA would be required to advise the appellant of his *Miranda* rights prior to initiating a custodial interrogation of him. *Miranda v. Arizona*, 384 U.S. 436 (1966); Mil. R. Evid 305(h)(1).

under the Uniform Code of Military Justice. Although the appellant is not asserting a violation of Article 31, UCMJ, he contends that the OSI agents should have given him a cleansing statement letting him know that the previous statements he made to the APD would not be used against him. We disagree.

The OSI agents interrogated the appellant in their office and read him his Article 31, UCMJ, rights prior to questioning him. Specifically, they told the appellant of the crimes they suspected him of committing; that he had a right to remain silent; that any statement he made oral or written may be used against him; that he could consult with a lawyer; a lawyer could be present during the interview; if he wanted a military lawyer, one would be appointed free of charge; that he could obtain a civilian lawyer at no expense to the government; that he could request a lawyer at any time during the interview, and that if he decided to answer questions, he could stop the questioning at any time. After the OSI agents advised the appellant of his Article 31, UCMJ, rights, the appellant initialed and signed a form that states "I have read my rights as listed above and I fully understand my rights. No promises, threats, or inducements of any kind have been made to me. No pressure or coercion has been used against me." The appellant also initialed the form indicating that he did not want a lawyer and was willing to answer questions. Furthermore, our superior court has held that a "cleansing statement," while a factor to consider in evaluating the voluntariness of a statement made following a prior, unwarned statement, is not a precondition to the admission of a properly obtained statement. *Cuento*, 60 M.J. at 109 (quoting *United States v. Wimberly*, 16 C.M.A. 3, 9 (1966)). After reviewing his detailed written confession coupled with the absence of any evidence of misconduct by the OSI agents, we are not persuaded by the appellant's argument that his confession was obtained as a result of coercion.

After considering the totality of the circumstances of the two interrogations, we find that the government has met its burden of proof that the second confession was voluntary and not tainted by the asserted violation of the appellant's Fifth Amendment privilege against self-incrimination. Given the factors distinguishing the two interrogations, we find that the OSI agents were not required to give the appellant a cleansing statement prior to questioning him. Accordingly, we find that the military judge did not abuse her discretion when she denied the appellant's motion to suppress his confession to the OSI.

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, 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

STEVEN LUCAS
Clerk of the Court