UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class HEATH R. WARE
United States Air Force

ACM 37351

28 December 2009

Sentence adjudged on 17 August 2008 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Grant L. Kratz (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 18 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel James B. Roan, Lieutenant Colonel Frank R. Levi, Major Shannon A. Bennett, Captain Nicholas W. McCue, and Captain Tiaundra D. Sorrell.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain Michael T. Rakowski, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

OPINION OF THE COURT

HELGET, Senior Judge:

A general court-martial composed of a military judge sitting alone convicted the appellant, contrary to his pleas, of aggravated arson, in violation of Article 126, UCMJ,

10 U.S.C. § 926. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for 18 months, and reduction to E-1.[1]

The appellant asserts two assignments of error before this Court.[2] The first issue is whether the military judge erred in ruling that the appellant's confession was voluntary and allowing it to be introduced into evidence at the trial. The second issue is whether unrecorded confessions should be excluded from evidence absent a showing of good cause by the government for the failure to record the confessions. Finding no error, we affirm.

Background

At the time of trial, the appellant was 24 years old and had been on active duty for 16 months. He was in security forces training school, assigned to the 343d Training Squadron, Lackland Air Force Base (AFB), Texas (TX).

On 28 August 2007, at approximately 0158, a fire was started on the second floor of the 343d Training Squadron dormitory, Building 10504, on Lackland AFB. The appellant lived on the second floor of that dormitory. Investigators determined gasoline was used as an accelerant in the fire.

On 31 October 2007, the appellant was interviewed by Special Agent (SA) DA, Air Force Office of Special Investigations (AFOSI), Detachment 409, Lackland AFB. According to a Locklink Transfer computer readout, the appellant had entered his room at approximately 0156 on 28 August 2007, near the time the fire started. During the interview, the appellant denied setting the fire, stating that the fire alarm woke him up around 0200 so he grabbed his roommate and evacuated the building. The appellant did not have a roommate at the time. At the conclusion of his interview, the appellant agreed to take a polygraph test.

On 1 November 2007, the appellant was again interviewed by AFOSI, this time at Randolph AFB, TX. SA JS and SA KH picked him up at his dormitory around 1200 and took him to the dining facility, where he obtained lunch in a to-go box. The two agents and the appellant then drove to Randolph AFB. At approximately 1250, shortly after the appellant arrived at the AFOSI detachment at Randolph AFB, the polygraph examiner, SA OW, read the appellant his Article 31, UCMJ, 10 U.S.C. § 831, rights for arson and told the appellant he did not have to answer any questions and could discontinue the interview at any time. The appellant chose to waive his Article 31, UCMJ, rights. SA

[1] Pursuant to Articles 57(a)(2) and 58b(a)(1), UCMJ, 10 U.S.C. §§ 857, 858b, the convening authority deferred all of the mandatory forfeitures from 31 August 2008 until the date of action. Additionally, under Article 58b(b), UCMJ, the convening authority waived the mandatory forfeitures for a period of six months, release from confinement, or expiration of the appellant's term of service, whichever is sooner.

[2] Both of the issues are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

OW then explained the consent form for the polygraph, which included language that stated, "anything I say before, during, or after the examination may be used as evidence against me in a trial by courts-martial or in any other judicial or administrative proceedings." The appellant read and signed the consent form.

Following the polygraph examination, at approximately 1620, SA OW advised the appellant that he felt the appellant was not being truthful. SA OW became "direct" with the appellant in order to elicit more information from the appellant. The discussion between SA OW and the appellant continued for several hours as the appellant maintained that he did not start the fire. At times, SA OW was no more than three feet from the appellant and at some point SA OW's knees were within six inches of the appellant.

At approximately 1930 on 1 November 2007, the appellant admitted to SA OW that he started the fire. The appellant told SA OW that he was suicidal and thought about killing himself. The appellant was upset because he was not going to graduate with his classmates on the night of 27 August 2007 due to a previous shoplifting incident in the Lackland Base Exchange. He had obtained some gasoline on the morning of 27 August 2007 from a gas can underneath a truck outside his dormitory. He filled a Nalgene water bottle with the gasoline, wrapped the bottle in his PT clothes and then went to work. After work, he took the bottle of gasoline back to his room with the intent to drink it in hopes of killing himself.

Shortly before 0200 on 28 August 2007, the appellant went into the hallway of his dormitory and walked around for awhile. He walked towards Charlie Bay on the second floor where he decided to drink the gasoline and kill himself. However, he "chickened out" and instead slung the bottle of gasoline around spilling the gasoline all over the hallway. He then lit the gasoline with a lighter and ran back to his room.

After confessing orally to SA OW, at approximately 1944 the appellant orally confessed to SA JS. The appellant then personally hand-wrote a three-page statement on note paper wherein he provided a detailed account of what had happened. He completed the statement at 2129. After the appellant completed his statement, the agents reviewed it but no changes were made by the appellant after their review.

The interview room the appellant was in had a closed-circuit television system which allowed the other agents to observe the interview. The interview was not recorded, which was consistent with AFOSI policy at the time.

On 5 November 2007, the appellant was again interviewed by AFOSI agents at Lackland AFB to see if anyone else was involved in the fire. The appellant spent the first 30 minutes of the interview confirming that he had set the fire alone. He then changed his story indicating that he had made the whole story up. When asked why he had lied,

the appellant admitted that the AFOSI agents did not pressure or coerce him to confess but said that he had lied to please the agents, that he was a pathological liar, and that his mother taught him how to lie.

Subsequent to the 1 November 2007 interview, the appellant admitted to his girlfriend, supervisor, and father that he had started the fire. After the 5 November 2007 interview, he contacted these three individuals and recanted his statements to them.

Voluntariness of the Confession

We review a military judge's decision to deny a motion to suppress evidence for an abuse of discretion. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). "An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law." *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008) (citing *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007)).

The voluntariness of a confession is a question of law that we review de novo. *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991); *United States v. Bresnahan*, 62 M.J. 137, 141 (C.A.A.F. 2005). "A confession is involuntary, and thus inadmissible, if it was obtained 'in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, [UCMJ, 10 U.S.C. § 831,] or through the use of coercion, unlawful influence, or unlawful inducement.'" *Freeman*, 65 M.J. at 453 (quoting Mil. R. Evid. 304(a), (c)(3); citing Article 31(d), UCMJ).

In determining whether a confession is involuntary, we assess the totality of the surrounding circumstances, considering both the characteristics of the accused and the details of the interrogation. *Id*. (citations omitted). Some of the factors taken into account include: the accused's age; the accused's education; the accused's intelligence; whether any advice was given to the accused concerning his constitutional rights; the length of any detention; the length and nature of the questioning; and the use of any physical punishment such as the deprivation of food or sleep. *Id*. When an accused objects to the admission of his confession at trial, the government must show by a preponderance of the evidence that the confession was voluntary. *Id*.

At trial, the appellant submitted a motion to suppress his 1 November 2007 confession on voluntariness grounds. The appellant testified on the motion along with AFOSI investigators SA OW, SA JS, SA DA, and SA KH. The military judge made specific findings of fact, to include: (1) Prior to the polygraph examination on 1 November 2007, the appellant was advised of his Article 31, UCMJ, rights, and was advised he could discontinue the interview at any time; (2) The appellant was advised concerning the consent form which included language that stated "anything that I say

before, during, or after the examination may be used as evidence against me in a trial;" (3) During the questioning after the polygraph examination, SA OW did raise his voice approximately 20 percent of the time but never made physical contact with the appellant during the interview; (4) The appellant was provided at least four comfort breaks, was provided water and snacks, and was never refused any request to use the restroom or for refreshments; (5) The appellant was not threatened during the interview, but SA OW did use direct and assertive questioning techniques; (6) At no point did the appellant ask to stop the interview or ask to leave, although at one point the appellant was told if he did leave, those "of higher rank would make decisions for him;" and (7) The appellant's demeanor while testifying on the motion was respectful, assertive, and confident, and he seemed to be of above-average intelligence.

After personally observing all of the witnesses, reviewing the documentary submissions, and considering the pertinent case law, the military judge held that the government established by a preponderance of the evidence that the appellant's confession was voluntary and denied the motion to suppress. The military judge specifically stated in his ruling:

> While there is substantial evidence to the contrary, and while I find that this is a close case, the burden on the government is not beyond a reasonable doubt, but by a preponderance of the evidence, and utilizing that burden, I do find that the statement by the accused was made voluntarily.

On appeal, the appellant asserts that since the military judge found there was substantial evidence to the contrary and the issue was a close call, the military judge was wrong in concluding that the confession was still voluntary by a preponderance of the evidence. We disagree. After stating that he felt this was a close case, the military judge went on to say, "the burden on the government is not beyond a reasonable doubt, but by a preponderance of the evidence, and utilizing that burden, I do find that the statement by the accused was made voluntarily." Accordingly, the military judge applied the correct standard.

Considering our review of the record of trial, we find that the military judge's findings of fact were amply supported by the evidence and we concur with his determination that the appellant's statement was voluntary.

New Evidentiary Rule

The appellant's second issue is centered on the fact that his confession was not electronically recorded. The appellant requests this Court adopt a new rule of evidence that unrecorded confessions should be excluded from evidence absent a showing of good cause by the government for the failure to record the confession.

At trial, notwithstanding his denial of the motion to suppress, the military judge included in his ruling the following cautionary statement:

> I write additionally to provide a note of caution to the government. In a modern world, where technology is available and installed in an interrogation room, and fully capable of recording the interview of an accused, and the government elects to not record such interview, an inference may be drawn that the government does not wish the details of that interview to be fully known. While I did not draw that inference in this case, it is an issue of concern to the military judge, and it was a matter that weighed against the government in my consideration of the evidence.

In support of his position, the appellant highlights that in the last 15 years at least nine states and the District of Columbia have created rules, either judicially or through the legislative branches, that either support recording interviews or specifically require it. He asserts that this Court should follow the states of Alaska and Minnesota, wherein their supreme courts adopted rules requiring that confessions be recorded. In a previous decision, this Court declined to apply such a rule to military courts-martial. *United States v. Jarvis*, ACM 36502 (A.F. Ct. Crim. App. 31 May 2007) (unpub. op.). Furthermore, we have no authority to establish such a rule. Accordingly, we again decline to adopt such a rule.

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, YA-02, DAF
Clerk of the Court