UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JEFFERY T. SKINNER JR.
United States Air Force

ACM 34478

16 April 2002

Sentence adjudged 15 February 2001 by GCM convened at Tyndall Air Force Base, Florida. Military Judge: Mark L. Allred (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 4 years, and reduction to E-1.

Appellate Counsel for Appellant: Captain Kyle R. Jacobson.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Lori M. Jemison (legal intern).

Before

SCHLEGEL, ROBERTS, and PECINOVSKY
Appellate Military Judges

OPINION OF THE COURT

SCHLEGEL, Senior Judge:

The appellant was convicted, in accordance with his pleas, of wrongful use of 3,4-methylenedioxymethamphetamine (ecstasy) and lysergic acid diethylamide (LSD) on divers occasions, wrongful use of marijuana, and wrongful distribution of ecstasy and LSD on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. He was also convicted, contrary to his pleas, of conspiring to distribute ecstasy and wrongful possession of ecstasy and LSD with the intent to distribute, in violation of Articles 81 and 112a, UCMJ, 10 U.S.C. §§ 881, 912a. His adjudged and approved sentence included a dishonorable discharge, confinement for 4 years, and reduction to E-1. The appellant argues that the judge erred by failing to suppress oral statements he made to investigators after invoking his privilege against self-incrimination and right to consult with an attorney. We affirm the findings and sentence.

FACTS

The appellant was suspected of distributing drugs and was the subject of an investigation conducted by the Drug Enforcement Agency (DEA), the Air Force Office of Special Investigations (AFOSI), and the Bay County Sheriff's Office (BCSO), located in Bay County, Florida. On 31 July 2000, officers from the BCSO stopped a car in which the appellant was a passenger. A search of the car revealed the presence of ecstasy, LSD, and money. After being transported to the BCSO, the appellant was advised of his Article 31, UCMJ, 10 U.S.C. § 831, rights by a Special Agent (SA) from the AFOSI. The appellant invoked his privilege against self-incrimination and requested to consult with an attorney. No effort was made to question him. A short time later, he was asked for consent to provide a urine sample. On an AF Form 1364, the appellant indicated he would be willing to provide a urine sample.[1] The appellant was transported to the hospital at Tyndall Air Force Base (AFB), Florida, for the urinalysis. Upon returning to the BCSO, the appellant made incriminating statements to investigators. At trial, he moved to suppress these statements claiming they violated Article 31, UCMJ, 10 U.S.C. § 831 and the 5th Amendment because investigators induced the appellant to waive his prior assertion of rights.

After listening to the testimony from the AFOSI and the appellant, the judge entered his factual findings. The relevant portion of those findings provide,

> Six, up until the time the accused provided his urine specimen there was no conversation between the accused and Agents Hartwell and Ji about the accused's case, or involvement with drugs. After the accused provided a urine specimen, however, the accused and the agents were on a smoke break in the Tyndall Medical Center parking lot. In that parking lot the accused began to ask questions about his wife who had also been arrested. Without either of the agents prompting or requesting that he do so, the accused said that he would like to speak to the OSI without the presence of a lawyer. The OSI agents told the accused that they could not discuss the investigation with him since he had invoked his rights. And they informed him that they would have to do a cleansing procedure and readvise him of his rights prior to any further interrogation or discussion. The OSI agents told the accused that they would discuss the procedure back at the BCSO office. Because of the hour, the agents and the accused stopped for fast food at a drive-in, then returned to the BCSO. There was no further discussion of the accused's case or his willingness to make a statement on

[1] The appellant's urine revealed the presence of the metabolites of ecstasy, LSD, and marijuana. At trial, the appellant moved to suppress the results of the urinalysis on the theory that his consent was obtained involuntarily. The judge denied the motion and the appellant entered unconditional pleas of guilty to the specifications alleging use of these substances.

the ride from the Tyndall Medical Center to the BCSO.

Seven, at the BCSO, Special Agent Hartwell readvised the accused of his rights using a rights advisement card, and the accused indicated that he understood the rights read to him, that he did not want an attorney, and that he was willing to answer questions. In his own handwriting, the accused provided a cleansing statement in which the accused acknowledged that he had initially invoked his rights to silence and to legal counsel, but indicated that he now desired to answer questions without an attorney present, that he fully understood his rights under the UCMJ, and that he had decided to speak of his own free will without being subject to inducement or coercion. Then on the front of an AF Form 1168, Statement of Suspect/Witness/Complainant, the accused affirmatively acknowledged by his signature and a series of his initials that, among other things, he understood his rights, he did not want a lawyer, and he was willing to make a statement.

The interview that followed lasted from about 1940 to 2050 hours on 31 July 2000. During that time, the accused made oral statements implicating himself [sic] in illegal drug activity. At the conclusion of the interview, the OSI agents asked the accused to make a written statement, but the accused said he wanted to speak to a lawyer prior to making any written statement, and the interview was terminated.

In the present case, I find by at least a preponderance of the evidence that, after he initially invoked his rights, all questioning of the accused ceased. I find that it was the accused who, after providing a urine specimen, initiated the communication leading to the waiver. I find that the accused thereafter received all applicable warnings, that he understood his rights, and that he: one, freely, knowingly, intelligently, and affirmatively waived his privilege against self-incrimination; two, that he freely, knowingly, intelligently, and affirmatively declined his right to counsel; and three, that he freely, knowingly, intelligently, and affirmatively consented to make a statement.

Analysis

We review a trial judge's ruling to admit or exclude evidence for an abuse of discretion. *See United States v. Young*, 49 M.J. 265, 266-67 (1998); *United States v. Ayala*, 43 M.J. 296, 298 (1995). A motion to suppress evidence presents a mixed question of fact and law. We accept a judge's findings of fact unless we find them to be clearly erroneous, and review a judge's ruling on a question of law de novo. *Ayala*, 43 M.J. at 298.

Mil. R. Evid. 305(f) provides that if an accused subject to interrogation exercises his privilege against self-incrimination or right to counsel, questioning must cease. Any waiver of the privilege against self-incrimination or the right to consult with an attorney must "be made freely, knowingly, and intelligently." Mil. R. Evid. 305(g)(1). In addition, an accused who has requested an attorney may subsequently waive that right but the prosecution must show by a preponderance of the evidence that the accused "initiated the communication leading to the waiver." Mil. R. Evid. 305(2)(g)(B)(i).

The appellant asks us to find that the AFOSI special agents, who transported him to Tyndall AFB, engaged in inducements or ploys to obtain the appellant's subsequent waiver of his prior exercise of the privilege against self-incrimination and the right to an attorney. In the alternative, the appellant argues his questions about what would happen if he cooperated with investigators constituted equivocal statements about counsel, and that the agent's response that the appellant's cooperation would be known to authorities violated the prohibition that law enforcement officers, in attempting to clarify an ambiguous request for an attorney, cannot coerce or intimidate a suspect into waiving the right to an attorney. *Davis v. United States*, 512 U.S. 452 (1994).

After reviewing the record of trial, we find no basis to conclude the facts as found by the trial judge are erroneous. They are supported in the record. *United States v. Morgan*, 40 M.J. 389, 394 (C.M.A. 1994). These facts show that the appellant was properly advised of his rights pursuant to Article 31, UCMJ. His decision to remain silent and consult with an attorney was honored until he initiated a conversation with the AFOSI special agents after providing a urine sample. We find nothing coercive about an investigator truthfully answering questions from an accused about his family or what would happened if he decided to cooperate. After all, the bar to further questioning of a suspect after he exercises his privilege against self-incrimination or the right to consult an attorney applies to government interrogators, not the suspect. Although the appellant expressed a desire to talk with the agents, they told him to think about it and they would talk again at the BCSO.

After returning to the BCSO, the appellant was placed in an interview room alone and allowed to eat food the AFOSI agents obtained for him. When he was done, the agents entered the room and the appellant told them that he wanted to talk with them. He was readvised of his Article 31 rights. The appellant told the AFOSI agents that he understood the rights, did not want an attorney, and was now willing to answer questions. In his own handwriting, the appellant wrote that although he initially invoked his privilege to remain silent and consult with an attorney, he now wanted to answer questions without an attorney present. In addition, he wrote that he understood his rights, and was not induced or coerced into changing his mind. Finally, on an AF Form 1168,

the appellant acknowledged that he understood his rights, did not want a lawyer, and was willing to make a statement.

We also affirm the judge's conclusion that the prosecution showed, by a preponderance of the evidence, the appellant initiated the discussion with the AFOSI agents, waiving the privilege against self-incrimination and the right to consult with an attorney that he previously asserted. The appellant's decision was voluntary and not the product of any unlawful inducement or coercion by the AFOSI agents.

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; *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator