

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
D.O. VOLLENWEIDER, J.E. STOLASZ, V.S. COUCH
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**AKYME T. ROBINSON
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 200600974
GENERAL COURT-MARTIAL**

Sentence Adjudged: 15 July 2005.
Military Judge: Maj Charles Hale, USMC.
Convening Authority: Commanding General, 3d Marine
Division (-)(Rein), Okinawa, Japan.
Staff Judge Advocate's Recommendation: LtCol D.J. Bligh,
USMC.
For Appellant: LT R.H. McWilliams, JAGC, USN.
For Appellee: LT Tyquili BOOKER, JAGC, USN.

18 September 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

STOLASZ, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of making a false official statement and larceny in violation of Articles 107 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 921. The appellant was sentenced to confinement for twenty-four months, total forfeiture of pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant raised two assignments of error: (1) whether the military judge abused his discretion by admitting two written statements, one on 10 March 2004¹ and one on 8 April 2004, given by the appellant to a Naval Criminal Investigative Service (NCIS) Special Agent (SA); and (2) whether there was clear and convincing evidence to show that the appellant voluntarily consented to a search of his barracks room on 8 April 2004. We have carefully considered the record of trial, the appellant's two assignments of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts 59(a) and 66(c), UCMJ.

A. Facts

In early March 2004, the appellant placed a call to the Navy Federal Credit Union (NFCU) member service center in Okinawa, Japan when he discovered that his Visa credit card was closed out. Shortly thereafter, the appellant met with a representative from NFCU, and was advised that the card was closed out for failure to make payment on transactions totaling \$40,000. The appellant denied placing the transactions on his credit card, and the matter was referred to the Criminal Investigation Division (CID) as a case of credit card fraud.

On 9 March 2004, the appellant met with NCIS Special Agent Boyd McAlexander who was assigned to investigate the case. SA McAlexander asked for the appellant's consent and authorization for access to his financial information, and also requested that the appellant provide a written statement regarding his recollection of events concerning the fraudulent use of his credit card. Appellate Exhibit IX, encl. (2) at 10. The appellant signed a consent form for access to his financial information, and agreed to provide a written statement.

On 10 March 2004, the appellant delivered his written statement to the office of NCIS. In his statement, the appellant claimed that he lost his wallet in February 2003 while on leave in Providence, Rhode Island. He indicated that the wallet contained his military identification card, Visa classic card, Visa platinum card (which had not been activated) and a share check card. The appellant stated that after the wallet was lost, he immediately contacted NFCU to cancel the cards. He further indicated that he ordered replacement cards after returning to Jacksonville, North Carolina. The evidence at trial showed that the replacement cards were picked up at the NFCU member service center in Jacksonville, North Carolina, on 7 March 2003 and activated on that same day. Record at 383, 402.

¹ For clarification purposes, the appellant was asked to write a statement on 9 March 2004; he wrote and delivered the statement on 10 March 2004; he was sworn to the statement on 12 March 2004.

The appellant wrote in his statement that his wallet was recovered and eventually returned to him on or about 4 July 2004 while he was stationed in Okinawa, Japan. When the wallet was returned, the appellant claimed that it contained his cancelled Visa classic card and his military identification card. AE IX, encl. (3) at 13, 14. He further indicated that he subsequently lost his wallet again, but did not report his credit card as lost or stolen because he thought they were cancelled when he first lost the wallet in Providence, Rhode Island. *Id.*

On 12 March 2004, SA McAlexander took possession of the written statement and had the appellant provide handwriting exemplars. He also asked the appellant for permission to search his barracks room. The appellant voluntarily consented and signed a permissive authorization for search and seizure (PASS) form. The search was conducted on 12 March 2004 from 1412 until 1433.² *Id.*, encl. (5) at 19. During the search, the appellant voluntarily produced a small gym-type bag which contained documents pertinent to his NFCU account. SA McAlexander also observed and photographed a substantial amount of clothing in the room, specifically shoes, sports jerseys, and baseball caps, many of which still had the original tags on them. SA McAlexander testified at the court-martial that he considered the appellant as "transitioning from a victim to a suspect," at this point. Record at 117, 118, 133.

One week after the search, on 19 March 2004, SA McAlexander spoke to store owners at shops on Gate Two Street in Okinawa where the credit card was being used to make many of the purchases. He also showed the appellant's picture to the store owners. They recognized the appellant from the picture and told SA McAlexander that he frequently purchased clothing items for himself and another individual. Thereafter, on 8 April 2004, the appellant signed a military suspect acknowledgement and waiver of rights form, and provided a written statement in which he denied any involvement in the fraudulent use of his credit card. *Id.*, encl. 7 at 23, 24.

B. Standard of Review

Plain error

The appellant's first assignment of error asserts that the military judge abused his discretion when he admitted the appellant's 10 March 2004 written statement. Since the appellant did not move to suppress his written statement of 10 March 2004 at trial, the proper standard of review is a plain error analysis. MILITARY RULE OF EVIDENCE 103(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.); *see United States v. Riley*, 47 M.J. 276, 279 (C.A.A.F. 1997). In order to find plain error, an error must be obvious and substantial, and had such a prejudicial impact

² Chief Warrant Officer (CWO) Brett Jorgenson, the officer in charge of the appellant's platoon, was also present during the search.

that a miscarriage of justice would result if the error were not corrected. *United States v. Jackson*, 38 M.J. 106, 111 (C.M.A. 1993).

Abuse of discretion

The appellant further asserts as assignments of error, that the military judge erred by denying his motion to suppress his written statements of 8 April 2004 and the search of his barracks room on 12 March 2004. We review the military judge's ruling admitting or excluding evidence for an abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). This is a strict standard requiring more than a mere difference of opinion. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law. *United States v. Seay*, 60 M.J. 73, 77 (C.A.A.F. 2004)(quoting *U.S. v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004)). In considering our review, we are required to consider the evidence "in the light most favorable" to the "prevailing party." *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007)(quoting *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)). A military judge's findings of fact are reviewed under the clearly erroneous standard and conclusions of law are reviewed *de novo*. *United States v. Brisbane*, 63 M.J. 106, 110 (C.A.A.F. 2006)(quoting *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000)); *Rodriguez*, 60 M.J. at 246.

C. Analysis

1. Was the appellant a suspect when he gave his written statement on 10 March 2004?

The appellant argues that he: (1) was a suspect at the time he delivered his written statement to SA McAlexander on 10 March 2004; or (2) he became a suspect prior to being sworn to his 10 March 2004 written statement on 12 March 2004, and thus should have been afforded his Article 31(b) rights. Appellant's Brief of 5 Dec 2006 at 8. The Government argues that the appellant was not a suspect when he wrote his statement on 10 March 2004, and thus was not entitled to a rights advisement. The Government does not address the appellant's second theory. Government's Brief of 27 Dec 2006 at 1.

Article 31(b) warnings are required if: "(1) the person being interrogated is a suspect at the time of the questioning, and (2) the person conducting the questioning is participating in an official law enforcement or disciplinary investigation or inquiry." *Swift*, 53 M.J. at 446 (citing *United States v. Moses*, 45 M.J. 132, 134 (C.A.A.F. 1996)). SA McAlexander was clearly acting in an official law enforcement capacity when he requested a written statement from the appellant during their initial meeting on 9 March 2004, and thus our focus is on when the

appellant became a suspect. The determination of whether a person is considered a suspect is a question of law. *United States v. Muirhead*, 51 M.J. 94, 96 (C.A.A.F. 1999). A military judge considering the question of whether a person is a suspect uses an objective standard. *Id.* The question is whether a reasonable person would consider someone to be a suspect under the totality of the circumstances. *Id.* On appeal, the military judge's decision on whether the person being questioned is a suspect is reviewed *de novo*. *Id.* In some cases, a subjective test may be appropriate which requires us to look at what the investigator, in fact, believed, and decide if the investigator considered the interrogated person to be a suspect. *Id.*

We have reviewed the military judge's findings of fact, and find that they are not clearly erroneous thus we adopt them. The military judge's essential findings further indicate that NCIS should have considered the appellant a suspect when he was sworn to the 10 March 2004 written statement on 12 March 2004 immediately after the consent search ended. AE XXIII. The military judge further ruled that since SA McAlexander did not provide Article 31(b) warnings to the appellant prior to swearing him to his 10 March 2004 written statement, he would not consider it as a sworn statement, but would consider it as a prior consistent or prior inconsistent statement depending upon how the evidence played out. Record at 170-71.

We find that the appellant was not a suspect on 9 March 2004 when SA McAlexander asked him to write out a statement regarding the fraudulent use of his Visa credit card, nor on 10 March 2004 when the statement was delivered to NCIS. The investigation was in its preliminary stages and the available factual information suggested that the appellant was a victim not a perpetrator of credit card fraud.³ The appellant also portrayed himself as a victim.

SA McAlexander's first meeting with the appellant was brief, and focused on information gathering. He asked for the appellant's consent to allow access to his financial records from NFCU, and suggested the appellant provide a written statement concerning the circumstances of the fraud. *Id.* at 114. He testified that he considered the appellant to be a victim, and his investigative actions support his testimony. He did not interrogate the appellant.

This view changed on 12 March 2004, when SA McAlexander conducted a permissive search of the appellant's barracks room and saw a large amount of sports clothing, shoes, and caps, and the appellant began to transition from "victim to suspect."

³ One piece of factual information showed that a purchase was made on the appellant's credit card at the Los Angeles airport during a time period when the appellant had already reported to Okinawa suggesting that appellant was not the person making the purchases on his credit card.

Record at 133. On 19 March 2004, SA McAlexander investigated purchases on the card made at the Gate Two street shops, and distributed a photograph of the appellant to the store owners who recognized the appellant from purchases he made at their shops. The store owners stated that the appellant purchased sports clothing on numerous occasions for himself and for his "cousin" Jordan.⁴

We find that the military judge's decision that the appellant became a suspect on 12 March 2004 to be a correct view of the law, and not an abuse of his discretion. We find that a reasonable person viewing the sheer amount of clothing, caps and shoes stored in the appellant's barracks room, and purportedly purchased on the salary of a private first class (PFC), as was the appellant, would likely have considered him a suspect after the 12 March 2004 search. At the very latest, the totality of the circumstances pointed to the appellant as the primary suspect on 19 March 2004 after SA McAlexander spoke to the Gate Two street shop owners. Thus, it was not an abuse of discretion to admit the appellant's 10 March 2004 written statement.

2. Was the appellant's waiver of his rights involuntary?

On 8 April 2004, SA McAlexander, considered the appellant to be his primary suspect, and properly advised him of his Article 31(b) rights. The appellant read the form, indicated that he understood his rights by initialing next to each right, and then waived his rights. The appellant then wrote out a statement in which he denied culpability regarding the fraudulent use of his credit card. AE IX, encl. (7) at 23, 24.

The appellant asserts that his waiver was involuntary because he invoked his right to counsel. Appellant's Brief of 5 Dec 2006 at 11. We find no merit in the appellant's contention that he invoked his right to counsel or that his rights waiver was involuntary.

The voluntariness of a confession is a question of law that an appellate court independently reviews *de novo*. *United States v. Cuento*, 60 M.J. 106, 108 (C.A.A.F. 2004). We apply a totality of the circumstances test considering both the characteristics of the appellant and the details of the interrogation. *United States v. Ford*, 51 M.J. 445, 451 (C.A.A.F. 1999)(quoting *Schneckloth v. Bustamante*, 412 U.S. 218, 226 (1973)). Here, we do not find the appellant's claim that he requested an attorney prior to providing his 8 April 2004 written statement to be credible. SA McAlexander testified that the appellant never requested an attorney. He further indicated that, if the appellant had requested an attorney, the interrogation would have

⁴ Corporal Jerold J. Jordan also reported having his credit cards stolen, and claimed it was being fraudulently used around the same time frame as the appellant. He was investigated by NCIS in April 2005. Corporal Jordan was acquitted of all charges and specifications.

ended. Record at 120, 126. The appellant wrote a brief four paragraph statement in which he denied culpability. He indicated he did not know who was using his credit card, and stated that purchases he made at stores located on Gate Two street were paid for with cash or his share check card. AE IX, encl. (7) at 23, 24.

The totality of the circumstances leads us to the conclusion that the appellant's 8 April 2004 statement was voluntary. He was not in custody when he wrote the statement, and does not assert that he was forced or coerced into making the statement. We further agree with the military judge that there was no credible evidence that the waiver was involuntary. AE XXIII. We find no abuse of discretion in admitting the statement.

3. Was the appellant's consent to a search of his room voluntary?

The appellant claims that there is not clear and convincing evidence that he voluntarily consented to the search of his barracks room. We disagree.

The Fourth Amendment protects the "security of one's privacy against arbitrary intrusion by the police." *Bustamonte*, 412 U.S. at 242 (quoting *Wolf v. Colorado*, 338 U.S. 25, 27 (1949)). A search of a residence conducted without a warrant based on probable cause is "'per se unreasonable... subject only to a few specifically established and well-delineated exceptions,'" one of which is a search conducted with a resident's consent. *Id.* at 219 (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

The prosecution has the burden of proving that consent was freely and voluntarily given. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). We look to the totality of the circumstances to determine if consent was voluntarily given. *Bustamonte* 412 U.S. at 248-49; MILITARY RULE OF EVIDENCE, 314(e)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). Consent "is a factual determination that will 'not be disturbed on appeal unless it is unsupported by the evidence or clearly erroneous.'" *United States v. Radvansky*, 45 M.J. 226, 229 (C.A.A.F. 1996) (quoting *United States v. Kosek*, 41 M.J. 60, 64 (C.M.A. 1994)).

Here, it is clear from the totality of the circumstances that the appellant's consent was voluntary. The appellant signed a permissive authorization for search and seizure prior to the search of his barracks room. AE IX, encl. (5) at 19. The form advised the appellant that he could refuse to permit the search in the absence of a search warrant. SA McAlexander testified that he advised the appellant that he did not have a warrant and that he did not have to consent to the search. He advised the appellant that he was asking for the appellant's permission to search the appellant's barracks room. Record at 116. SA McAlexander testified that, after the permissive authorization for search and seizure form was signed, he drove the appellant to

the barracks room and conducted the search. He further testified that the appellant did not request an attorney before or during the search. *Id.* at 120.

CWO Brett Jorgenson, the appellant's officer in charge, testified that he accompanied the appellant and SA McAlexander during the short drive to the appellant's barracks room. He indicated that they engaged in basic polite conversation. *Id.* at 151. He described the appellant as cooperative. He testified that the appellant did not request an attorney either before or during the search, and further testified he would have remembered such a request if it had been made by the appellant. *Id.* at 152.

We do not find any merit to the appellant's claim that he requested an attorney, and thus the search of his room and the fruits of that search are admissible. Nor do we believe that the appellant provides any persuasive evidence to support his implied assertion that he acquiesced to the search because of the presence of his officer in charge, CWO Jorgenson. The military judge did not abuse his discretion in determining that the appellant's consent was voluntary considering the totality of the circumstances.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Senior Judge VOLLENWEIDER and Judge COUCH concur.

For the Court

R.H. TROIDL
Clerk of Court