

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

E.E. GEISER

F.D. MITCHELL

J.G. BARTOLOTTA

UNITED STATES

v.

**Trixie R. ROWE
Hospital Corpsman Third Class (E-4), U. S. Navy**

NMCCA 200600046

Decided 27 February 2007

Sentence adjudged 09 June 2005. Military Judge: J.D. Bauer.
Review pursuant to Article 66(c), UCMJ, of General Court-Martial
convened by Commander, Navy Region Northeast, Groton, CT.

CAPT SRIDHAR KAZA, USMC, Appellate Defense Counsel
CAPT JAMES WEIRICK, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BARTOLOTTA, Judge:

A general court-martial, composed of officer and enlisted members, convicted the appellant contrary to her pleas, of destruction and larceny of non-military property, in violation of Articles 109 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 909 and 921. The appellant was sentenced to reduction to pay grade E-1 and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

We have considered the record of trial, the appellant's sole assignment of error asserting that the military judge erred by admitting her confession into evidence,¹ the Government's response, and the appellant's reply. 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.

¹ Whether the military judge erred in allowing the appellant's confession to be admitted as evidence when it was obtained after prior unwarned statements.

Background

On 19 August 2004, Hospitalman (HN) Hopwood discovered his 1995 Honda Accord missing and reported it stolen. The gate guard, HN Young, told HN Hopwood that he saw the appellant drive HN Hopwood's car off the base earlier that day and then walk back onto base. Shortly thereafter, HN Hopwood's car was found by local police at the bottom of a nearby boat-ramp, floating partially submerged in the Narragansett Bay. HN Young later saw HN Hopwood's car pass by the gate on a flatbed wrecker. Both HN Hopwood and HN Young provided written statements to the Naval Criminal Investigative Service (NCIS). In his statement, HN Hopwood stated he suspected the appellant based on what HN Young told him and because she did not take their week-old breakup well. Most of what HN Young reported was included in HN Hopwood's statement. NCIS Special Agent (SA) Graf took HN Hopwood's statement and Lieutenant Commander (LCDR) Yopp took HN Young's.

The next day, NCIS SA Surwilo was assigned to the case. Before going to the scene or examining the car, SA Surwilo "glanced over" HN Hopwood's statement and spoke to her supervisor; she did not read HN Young's statement, nor did she speak with HN Young, HN Hopwood, or the appellant at that time. SA Surwilo knew HN Hopwood suspected the appellant and was aware of the information included in HN Young's statement. As a result, SA Surwilo knew the appellant was someone who may have been "involved with," and "potentially" someone SA Surwilo wanted to question about, the theft of HN Hopwood's car.

When SA Surwilo returned to the NCIS office, she was told the appellant was there alone waiting to report the theft of her own car. The appellant was neither ordered nor asked to report to NCIS. At approximately 1100, SA Surwillo, LCDR Yopp, and an intern invited the appellant into a conference room to discuss her stolen vehicle and fill out the required form. The appellant was not taken to an interrogation room because, according to SA Surwilo, she was a complaining victim. For the same reason, SA Surwilo questioned the appellant about the theft of her car; she did not ask about HN Hopwood's car. SA Surwilo did not advise the appellant of her Article 31(b), UCMJ, rights at this time. Completing the report took approximately 15-20 minutes. At 1115 the appellant signed the completed "Complaint of Stolen Vehicle."

"In an effort to develop leads" with regard to the appellant's stolen vehicle, SA Surwilo commented that "[t]his is the second vehicle that's been stolen from the NACC lot," or words to that effect. Record at 264. The appellant responded with something to effect of, "Yes, I was thinking about the guy from yesterday." *Id.* SA Surwilo immediately stopped the appellant and advised her of her Article 31(b) rights, which the appellant read, initialed, and signed. The appellant waived her right to remain silent and agreed to answer SA Surwilo's questions. She did not request an attorney, nor did she

terminate the interview. No cleansing warning was given regarding any statements the appellant made up to that point.

The appellant initially denied taking HN Hopwood's car but confessed approximately two hours later, admitting she took and drove HN Hopwood's car into the bay to get back at him for breaking off their relationship. She signed a typed statement to that effect. At the time SA Surwilo did not suspect that the appellant was lying about the theft of her own car. The post-rights interview lasted until approximately 1400. After the interview SA Surwilo was informed that the appellant's car was found a few blocks from base, undamaged.

Trial defense counsel moved to suppress all the appellant's statements to SA Surwilo because SA Surwilo knew the appellant was a suspect and failed to provide an Article 31(b) rights warning before asking the appellant any questions about the appellant's stolen car. The Government argued SA Surwilo's pre-rights advisement questioning of the appellant did not require a rights warning because the appellant was not considered a suspect for that questioning and the interview was limited to completing the report of the appellant's stolen car.

The military judge determined the appellant voluntarily showed up at NCIS to report the theft of her own car; there was no interrogation of the appellant with regard to the suspected offenses prior to the rights advisement; SA Surwilo properly advised the appellant of her Article 31(b) rights at the appropriate time; and the appellant knowingly waived those rights and voluntarily confessed. *Id.* at 320-22. The military judge denied the appellant's motion and allowed the pre-rights statements and post-rights confession to be admitted.

Motion to Suppress the Unwarned Statements and Post-Rights Confession

A military judge's ruling on a motion to suppress is reviewed for an abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004)(citation omitted). 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's ruling on admissibility of evidence will only be overturned if it is "'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)(quoting *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)). In conducting our review, we are required to consider the evidence "in the light most favorable" to the "prevailing party." *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)(citations omitted)); *Rodriguez*, 60 M.J. at 246. A military judge's decision whether a person is a suspect

is also reviewed *de novo*. *United States v. Muirhead*, 51 M.J. 94, 96 (C.A.A.F. 1999)(citing *United States v. Miller*, 48 M.J. 49, 54 (C.A.A.F. 1998)).

Our superior court has generally held that 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)). These factors are determined by considering and assessing "'all the facts and circumstances at the time of the interview.'" *Id.* (quoting *United States v. Good*, 32 M.J. 105, 108 (C.M.A. 1991)). Whether a person is a suspect is an objective question. *Id.*; *Muirhead*, 51 M.J. at 96. "In some cases," however, "a subjective test may be more appropriate." *Muirhead*, 51 M.J. at 96.

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)(citation omitted). The necessary inquiry is whether the confession is the product of an essentially free and unconstrained choice by its maker. *Id.* Ploys intended to mislead a suspect or lull him into a false sense of security do not render a statement involuntary provided the ploys do not rise to the level of compulsion or coercion. *United States v. Jones*, 34 M.J. 899, 907 (N.M.C.M.R. 1992)(citation omitted). To be voluntary, a confession must be the product of the suspect's own balancing of competing considerations. *Id.* at 907. If, however, the suspect's will was overborne and his capacity for self-determination was critically impaired, the use of his confession would offend due process. *Cuento*, 60 M.J. at 108. We apply a totality of circumstances test considering the appellant and the details of the interrogation. *United States v. Ford*, 51 M.J. 445, 451 (C.A.A.F. 1999). Earlier, unwarned statements, if any, are but a factor to consider in determining voluntariness of a later statement. *Cuento*, 60 M.J. at 108-09.

In the instant case, we find that the appellant's "unwarned" statements to SA Surwilo and her post-rights confession were voluntary and that the military judge did not abuse his discretion when he denied the appellant's motion to suppress. The appellant arrived at NCIS voluntarily to report being the victim of a crime. Even though SA Surwilo may have considered the appellant a potential suspect concerning the theft of HN Hopwood's car, under the applicable standards and the totality of circumstances, SA Surwilo was not required to advise the appellant of her rights at that time because the appellant was not in custody, she was questioned as a victim rather than a suspect during that interview, and she was interviewed solely about the theft of her own car which was not part of the HN Hopwood investigation. Moreover, the appellant's unwarned statements, in particular her statement about "the guy from

yesterday" upon which the appellant rests her assignment of error, were not incriminating obviating the need for a cleansing warning.

When SA Surwilo wanted to question the appellant about the suspected offenses, she immediately and properly advised the appellant of her Article 31(b) rights. The appellant read and indicated an understanding of her rights, which she then waived. During the interview the appellant was offered breaks and opportunities to correct her statements. No promises were made or inducements offered. The appellant does not assert that she was coerced or forced into confessing, nor does the court find any evidence of such. Based upon these facts, the appellant's assignment of error that her waiver and confession were "not valid because they were tainted by prior unwarned statements and were involuntary" lacks merit. Appellant's Reply Brief of 31 Oct 2006 at 2.

Conclusion

Accordingly, the approved findings and sentence are affirmed.

Senior Judge GEISER and Judge MITCHELL concur.

For the Court

R.H. TROIDL
Clerk of Court