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

Before
J.A. MAKSYM, J.R. PERLAK, R.E. BEAL
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JOHN CUMMINGS, JR.
INTERIOR COMMUNICATIONS ELECTRICIAN
THIRD CLASS (E-4), U.S. NAVY

NMCCA 201000623
GENERAL COURT-MARTIAL

Sentence Adjudged: 29 July 2010.
Military Judge: CDR Sherry King, JAGC, USN.
Convening Authority: Commander, Navy Region Northwest, Silverdale, WA.
Staff Judge Advocate's Recommendation: LCDR T.M. O'Neil, JAGC, USN.
For Appellant: LT Michael Hanzel, JAGC, USN.
For Appellee: Maj William C. Kirby, USMC.

30 August 2011

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

PER CURIAM:

A general court-martial composed of members with enlisted representation convicted the appellant, contrary to his pleas, of possessing and distributing N-benzylpiperazine (BZP), a schedule I controlled substance, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The members sentenced the appellant to 24 months of confinement, reduction

to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged and, except for the discharge, ordered it executed.

The appellant advances two assignments of error: (1) That the military judge erred by denying the appellant's pretrial motion to suppress his statement to the Naval Criminal Investigative Service (NCIS); and (2) That the evidence was factually insufficient to support a conviction.[1] After considering the pleadings of the parties and the entire record of trial, we conclude that the findings and the 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.

Background

The salient facts for the appellant's first assignment of error relate to his interrogation by NCIS Special Agent (SA) JH on 21 November 2009. Prior to trial, the defense moved to suppress the appellant's sworn statement, arguing that he fabricated the confession so as to avoid more serious consequences he claimed SA JH threatened would result if the appellant refused to confess. The Government argued in opposition that the appellant voluntarily confessed minus threat and intimidation.

The defense's motion to suppress avers that two masters-at-arms (MAs) approached the appellant onboard USS JOHN C. STENNIS (CVN 74) during working hours and ordered him to follow them. Appellate Exhibit VIII. The defense claimed that he was then brought to a room where he was interrogated by SA JH who allegedly threatened to refer the appellant's case for drug related offenses to civilian court, where the appellant would face five to seven years imprisonment and the loss of his family unless he cooperated. *Id*. The appellant claimed that SA JH told him that if he confessed, disciplinary action would be handled onboard the STENNIS. *Id*.

An Article 39(a), UCMJ, session was held on 21 June 2009 where evidence was submitted on the motion to suppress. SA JH testified and disputed the appellant's account of the one hour and forty-seven minute interrogation. He said he never told the appellant his cooperation would keep the case out of civilian courts or discussed possible separation from his family. Record

[1] Both assignments of error were raised by the appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

at 37. SA JH also testified that it was the appellant who raised the topic of sentencing – and only after confessing. *Id.* at 29. SA JH stated that he told the appellant what he knew about civilian courts based upon past personal observations of what had happened to other suspects. *Id.*

Master-at-Arms First Class (MA1) EA was the only other person present during the interrogation and took notes to assist SA JH. At the motions hearing, he said that he could not remember whether SA JH told the appellant he would refer the case to civilian authorities if the appellant did not confess. Record at 51, 56. However, he did testify that he remembered the topic of civilian courts being discussed before the appellant confessed, possibly while SA JH was explaining concurrent jurisdiction. *Id.* at 55-56. He also said that SA JH addressed possible sentences and the appellant's separation from his family, but only after the appellant asked about penalties. *Id.* at 53.

In his findings of fact and conclusions of law, the military judge concluded that SA JH and the appellant did discuss the possibility that civilian courts would handle the case and could impose a five-year sentence resulting in separation from the appellant's family, but only after the appellant had confessed and requested such information. Ruling on Defense Motion to Suppress Statements of the Accused at 3-4.[2] The military judge also found that SA JH challenged the appellant to tell the truth saying that the commanding officer would view the appellant favorably if he cooperated. *Id*. However, he did not discern any unlawful inducement. *Id*. at 5. The judge also found that the appellant was alert and sober throughout the relatively short interrogation and that he was never threatened during it. *Id*. at 4. Also, the appellant understood his rights, specifically his right to remain silent, which he had invoked during an earlier, unrelated interrogation. *Id*. at 3, 5. The trial judge found that the appellant's confession was voluntary. *Id*. at 5. He therefore denied the defense's suppression motion.

Admission of Appellant's Confession

In his first assignment of error, the appellant argues that the military judge erred by admitting his confession into evidence despite his pretrial motion to suppress it on the

[2] The trial judge's findings were not initially attached to the record as an appellate exhibit but were rather attached pursuant to a granted consent motion to attach.

grounds that it was made involuntarily. A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). Findings of fact are affirmed unless they are clearly erroneous while conclusions of law are reviewed *de novo*. *United States v. Cohen*, 63 M.J. 45, 49 (C.A.A.F. 2006).

The voluntariness of a confession is a question of law reviewed *de novo*. *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008). We assess the totality of the circumstances surrounding the making of the statement when determining voluntariness. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). An accused's pretrial statement is involuntary if it was obtained through the use of "coercion, unlawful influence, or unlawful inducement." MILITARY RULE OF EVIDENCE 304(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). The essence of the inquiry is "whether the confession is the product of an essentially free and unconstrained choice by its maker". *United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F. 1996). Factors to be considered in determining whether a confession is voluntary include the following: "the condition of the accused, his health, age, education, and intelligence; the character of the detention, including the conditions of the questioning and rights warning; and the manner of the interrogation, including the length of the interrogation and the use of force, threats, promises, or deceptions." *United States v. Ellis*, 57 M.J. 375, 379 (C.A.A.F. 2002). Once voluntariness is raised, the Government must prove that the statement was voluntary by a preponderance of the evidence. MIL. R. EVID. 304(e).

The testimony provided at the motions hearing from SA JH and MA1 EA was inconsistent on some minor points. However, we find that those discrepancies were adequately accounted for in the military judge's findings of fact relative to the defense motion to suppress. We therefore adopt them as our own.

We find that the military judge did not abuse his discretion when he admitted the appellant's confession to NCIS into evidence. After reviewing the totality of the circumstances surrounding the confession, we find no facts that would render the appellant's confession involuntary. *Schneckloth*, 412 U.S. at 226. While it is true that SA JH may have presented implicating evidence, urged the appellant to tell the truth, and discussed potential punishments, he did not deploy any illegal methods to obtain the confession. *Id*. As the trial judge noted, the appellant, who was never handcuffed, underwent a relatively short interrogation, conducted during

working hours, after he was properly advised of his rights which the record demonstrates he fully understood. The record supports the conclusion that the appellant made an "essentially free and unconstrained choice" to confess. *Bubonics*, 45 M.J. at 95. We are confident that the prosecution met its burden of proof under MIL. R. EVID. 305(e) to show that the appellant's confession was voluntarily made. Therefore, the appellant's confession was properly admitted into evidence.

Factual Sufficiency

The appellant next alleges the evidence was factually insufficient to support a finding of wrongful use of N-benzylpiperazine. The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *see also* Art. 66(c), UCMJ.

After carefully reviewing the record of trial and all attendant matters entered into evidence, and recognizing that we

did not see or hear the witnesses, this court is convinced of the appellant’s guilt beyond any reasonable doubt.

Conclusion

The findings and sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court