

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

**Before
C.L. REISMEIER, J.K. CARBERRY, R.Q. WARD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JENNIFER A. ADAMS
AVIATION BOATSWAIN'S MATE (AIRCRAFT HANDLING) AIRMAN (E-3)
U.S. NAVY**

**NMCCA 201100324
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 2 March 2011.

Military Judge: CAPT Kevin R. O'Neil, JAGC, USN.

Convening Authority: Commander, Naval Medical Center, San Diego, CA.

Staff Judge Advocate's Recommendation: CDR M.E. Moss, JAGC, USN.

For Appellant: LCDR Michael Torrissi, JAGC, USN.

For Appellee: LT Benjamin J. Voce-Gardner, JAGC, USN.

15 March 2012

OPINION OF THE COURT

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

CARBERRY, Senior Judge:

A special court-martial composed of officer members convicted the appellant, contrary to her pleas, of one specification of conspiracy to commit larceny of Basic Allowance for Housing (BAH) by entering into a fraudulent marriage, one specification of making a false official statement, and two specifications of larceny of currency of more than \$500.00 in

violation of Articles 81, 107, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 907, and 921. The members sentenced the appellant to confinement for a period of 12 months, reduction to pay grade E-1, forfeiture of \$978.00 per month for 12 months, and a bad-conduct discharge from the United States Navy. The convening authority approved the sentence as adjudged, and, except for the punitive discharge, ordered the sentence executed.

The appellant raises two assignments of error: that the military judge erred in denying her motion to suppress all evidence obtained from a traffic stop as it was the fruit of an illegal seizure; and, that the military judge erred by not suppressing statements made by the appellant that were obtained in violation of her Article 31(b), UCMJ, rights.

After consideration of the pleadings of the parties, as well as 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 occurred. Arts. 59(a) and 66(c), UCMJ.

Background

On 16 January 2010, the appellant and Aviation Boatswain's Mate (Aircraft Handling) Third Class (ABH3) Jorge Castillo travelled from their duty station in San Diego, California to Houston, Texas. They made the trip in the appellant's Ford Mustang. In Houston they picked up two of ABH3 Castillo's friends, both of whom were going to return to San Diego with the appellant and ABH3 Castillo. The appellant planned to enter into a fraudulent marriage with one of ABH3 Castillo's friends solely for the purpose of obtaining BAH at the with dependant rate. Record at 322, 435, 440; Prosecution Exhibit 1 at 2, 5; PE 3; Appellate Exhibit III. Once in the Houston area on 17 January, ABH3 Castillo rented a Chevrolet Malibu for a one day, one-way rental from Houston to San Diego for their return trip.

The group departed the Houston area in the two vehicles, the appellant's Mustang and the rented Malibu. At approximately 0430 on 17 January 2010 both vehicles pulled off of Interstate 10 in a remote area between Houston and San Diego. The license plates were removed from the appellant's Mustang and it was lit on fire. The four then fled the scene in the rented Chevrolet Malibu and continued west on Interstate 10 towards San Diego.

A few hours later, at approximately 1007, while travelling through a relatively remote area of western Texas they were

pulled over by Texas state troopers. The officers stopped the vehicle for two traffic violations, one occupant was not wearing a seatbelt and the vehicle was travelling on the right hand shoulder of the road. An officer approached the vehicle and obtained ABH3 Castillo's driver's license and rental car agreement. The officer noted extreme nervousness on the part of the driver and two of the passengers while the remaining passenger was openly confrontational. The officer asked a few questions about their travel plans to which the driver demonstrated a lack of detailed knowledge. ABH3 Castillo responded that the back seat passengers were friends that wanted to get out of Houston and were going to stay with him in San Diego for an indeterminate period of time despite neither of them having potential jobs or a means of supporting themselves in California. ABH3 Castillo explained that he and the appellant travelled to Houston in a one-way rental vehicle they turned in on arrival in Houston and they were now travelling back to San Diego in a new one-way rental vehicle. The rental car agreement he produced was for a one day, one-way trip with the vehicle drop off point in San Diego. The officer performed a records check on the occupants of the vehicle and learned one of the passengers had a significant arrest record.

At 1021 the officer issued a warning citation to ABH3 Castillo regarding the two traffic infractions and informed him there were no penalties or fines associated with the citation. AE XVII at 10:21:14; Record at 231. The officer then asked ABH3 Castillo for consent to search the vehicle. Petty Officer Castillo declined to give consent for a search of the vehicle. The officer then contacted a canine unit to come to the scene to conduct a sniff test of the exterior of the vehicle. AE XVII at 10:24:38; Record at 233. The canine unit arrived and conducted a sniff test of the exterior of the vehicle. The canine unit alerted to the right rear passenger door of the vehicle at 1111. AE XVII at 11:11:14; Record at 234. Pursuant to the canine alert, the passengers were removed from the vehicle and a search ensued. The officers noted several items during their search, including a set of California license plates, two screwdrivers, a receipt for the purchase of two screwdrivers in Katy, Texas time-stamped at about 0140 that morning, a car tarp, a box of latex gloves, and five cell phones. Record at 235, 471. Having not discovered any drugs or other contraband, the officers released the appellant and the other occupants of the vehicle. The appellant returned to the San Diego area and reported to the San Diego Police Department that her vehicle was stolen. Concurrently, Sergeant (Sgt) Jones, a criminal investigator in Guadalupe, Texas was investigating a vehicle arson. Through his

investigation, he learned that the appellant was stopped in Texas and given the time and location she was stopped, suspected that she may have been involved in the arson. Sgt Jones contacted Naval Criminal Investigative Service (NCIS) and asked that the appellant and ABH3 Castillo be interviewed.

On 2 April 2010, the appellant was interviewed at the NCIS field office, San Diego. The appellant arrived for her scheduled interview and was brought into an interview room where the entire encounter was video recorded. The appellant was provided Article 31(b) warnings at the outset of the interview through the use of a Military Suspect's Acknowledgement and Cleansing Waiver of Rights Form. PE 1. The appellant was advised in writing that she was suspected of the following offenses:

Texas Penal Code, Section 28.02 (Arson) and Section 35.02 (Insurance Fraud). I am also suspected of Article 80 (Attempt to Commit Fraud), Article 81 (Conspiracy to Commit Fraud), Article 107 (False Official Statement), Article 126 (Arson), and Article 134 of the UCMJ.

PE 1. The appellant signed and dated the form in addition to initialing every numbered paragraph therein. After consideration of the rights advisory form, the appellant agreed to speak with the NCIS special agent and ultimately made incriminating statements regarding the arson of her vehicle and a scheme to marry solely for the purpose of obtaining BAH at the with dependant rate.

On the day of her trial, her civilian defense counsel raised a motion to suppress all evidence obtained during the traffic stop as the fruit of an illegal seizure. The military judge received evidence and heard argument of the parties. After orally announcing a nonexclusive list of seven findings of fact, he denied the defense motion to suppress and later provided a complete written ruling containing more thorough factual findings and conclusions of law. AE XXXIII.

Discussion

The appellant alleges the military judge erred by denying the defense motion to suppress the evidence obtained from the search of the rental car arguing the search was conducted pursuant to an illegal seizure. The appellant does not challenge the legitimacy of the initial traffic stop of the

vehicle. The appellant's challenge begins at the point the officer asked for and was refused consent to search the vehicle at 10:21:54, the fourteenth minute of the stop. The appellant contends that the legitimate traffic stop was concluded at that point and the officer lacked reasonable suspicion to justify any further detention to conduct an investigatory stop. The appellant further contends the officer detained the vehicle because the driver refused consent to search, thereby turning the detention into an unlawful seizure. Accordingly, the appellant argues all evidence obtained by the troopers should have been suppressed as the fruits of an illegal seizure.

A military judge's ruling denying a motion to suppress evidence is reviewed for abuse of discretion. *United States v. Michael*, 66 M.J. 78, 80 (C.A.A.F. 2008) (citations omitted). In conducting a review of a ruling on a motion to suppress, the evidence is considered "in the light most favorable to the prevailing party." *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996) (citations and internal quotation marks omitted). We accept the findings of fact made by the military judge unless they are clearly erroneous. *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007). The possibility that a factual finding could be wrong is insufficient to find it clearly erroneous. *Id.* (explaining where record contains some support for a factual finding it is not clearly erroneous); *United States v. Martin*, 56 M.J. 97, 106 (C.A.A.F. 2001) (explaining findings are clearly erroneous where there exists a "'definite and firm conviction that a mistake has been committed'") (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

Here the military judge orally summarized his factual findings and announced his ruling denying the defense motion to suppress. Record at 272-73. The military judge followed his oral ruling with more thorough written findings. AE XXXIII. After a thorough review of the record of the motion session and related appellate exhibits, we find the factual findings well-supported by the testimony and exhibits received.¹ Therefore, the military judge's factual findings as announced orally on the

¹ Unlike *United States v. Boyce*, 351 F.3d 1102, 1109 (11th Cir. 2003), heavily relied on by the appellant, where only two facts found by the trial court survived the clearly erroneous review such that they could be considered in determining whether the officers had reasonable suspicion to justify their investigatory stop.

record and as reduced to writing in Appellate Exhibit XXXIII are accepted for our *de novo* review of his conclusions of law.²

Legitimacy of the Investigatory Stop

An investigatory stop must be supported by reasonable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). Reasonable suspicion exists where there are specific and articulable facts supporting the conclusion that criminal activity may be afoot. *Id.* at 27. Facts that may seem innocuous individually can form the basis for a reasonable suspicion when they are considered in their totality. *United States v. Sokolow*, 490 U.S. 1, 9 (1989). Law enforcement personnel are permitted to use their training and experience to draw rational inferences from facts they observe in determining whether they have grounds to detain in order to conduct an investigatory stop. *United States v. Arvizu*, 534 U.S. 266, 273 (2002).

Here, the validity of the initial traffic stop is unchallenged. Once the officer provided a warning citation to ABH3 Castillo at 1021 the initial traffic stop was concluded. From that moment the initial traffic stop ripened into an investigatory stop to confirm or dispel a suspicion of possession of narcotics. In order to continue to detain the appellant and other occupants of the vehicle, the officers must have had a reasonable suspicion of criminality based on specific and articulable facts.

The military judge made several specific relevant factual findings regarding the officer's observations: (1) extreme nervousness on the part of three of the four occupants of the vehicle, while the fourth was confrontational; (2) utter lack of specificity as to the purpose of the travel plans and explanation of the passengers; (3) nature of the means of transportation used, specifically the use of two separate one-way rental vehicles; (4) lack of any visible items indicating planning or aforethought regarding a long drive, i.e, items associated with extended travel; and, (5) the officer's knowledge from training and experience that the I-10 corridor

² The appellant suggests the officer's testimony "should be viewed skeptically." Appellant's Brief of 15 Aug 2011 at 14. While the military judge did not issue specific factual findings regarding witness credibility, the factual findings as a whole closely track the officer's testimony. Therefore, the military judge, who had the opportunity to observe the witness and his demeanor on the witness stand, found him credible. Accordingly we decline the appellant's invitation to view the testimony "skeptically."

was frequently used to transport narcotics. Record at 272-73; AE XXXIII at 3, 4, and 6. Those specific factual findings paint a picture of several extremely nervous people, travelling a known drug corridor, in a one-way rental vehicle, without a plausible explanation of their trip or passengers, one of which had a significant criminal arrest record, lacking any signs of a planned trip. While each of those facts may be innocuous individually, when considered together, they establish a reasonable suspicion as to the presence of narcotics in the vehicle. Therefore, the officers were justified in detaining the appellant, the driver, and the two other passengers in the vehicle to confirm or dispel their suspicion.

The appellant places significant weight on speculation that the officer detained the appellant because the driver refused to consent to a search of the vehicle as opposed to his stated reason of the totality of the observations he made during the traffic stop. Record at 230, 232. The appellant asks us to find the seizure unlawful based on speculation as to the subjective motivations of the officer conducting the stop. We refuse to do so as subjective motivations play no role in a Fourth Amendment analysis. *Kentucky v. King*, 131 S. Ct. 1849, 1859 (2011) (explaining consideration of subjective motivations or bad faith is "fundamentally inconsistent with our Fourth Amendment jurisprudence."). The analysis is limited to whether an officer's behavior is supported by objective facts. *Whren v. United States*, 517 U.S. 806, 812 (1996) (explaining an officer's subjective justification does not invalidate objectively justifiable behavior under the Fourth Amendment). Here, the military judge found several specific and articulable facts, each well-supported by the record. Based upon those facts, the officers had reasonable suspicion as to the presence of narcotics, thereby justifying detention to confirm or dispel the suspicion.

Scope of the Investigatory Stop

An investigatory stop must remain limited in scope to confirming or dispelling the reasonable suspicion of criminality on which it is predicated. *Terry*, 392 U.S. at 20. The limitation on the scope of the stop refers both to its intrusiveness and its duration. *United States v. Place*, 462 U.S. 696, 709 (1983). A stop can be no more intrusive than reasonably necessary to confirm or dispel the suspicion it is predicated upon and it cannot be longer in duration than reasonably necessary to accomplish that task. *Florida v. Royer*, 460 U.S. 491, 500 (1983). There is no specific period of time

that renders the duration of a stop unreasonable. *Place*, 462 U.S. at 709. Investigatory stops are reasonable in duration where law enforcement "diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *United States v. Sharpe*, 470 U.S. 675, 686 (1985) (citation omitted).

This investigatory stop to confirm or dispel the suspicion of the presence of narcotics was reasonable both in its level of intrusiveness and its duration. The officers utilized a canine sniff test, the least intrusive means possible, to confirm the presence of the odor of narcotics. A canine sniff test is a narrow investigative tool, binary in nature, as the only information it reveals is the presence or absence of the odor of narcotics. See *Place*, 462 U.S. at 707 (explaining canine sniff test significantly less intrusive than other investigative techniques). The sniff test is narrowly tailored to its purpose; it addresses the officer's suspicion without revealing other extraneous information or requiring any rummaging through the subject's property.

This investigatory stop, lasting approximately 50 minutes, was reasonable in duration, lasting no longer than necessary to achieve its purpose. The investigatory stop began the moment the traffic stop concluded at 1021 and concluded when the canine alerted at 1111. Here, the troopers contacted a canine unit nearly immediately after ABH3 Castillo refused consent. The canine unit arrived, conducted its free air search of the exterior of the vehicle, and alerted at 1111. At the moment the canine alerted, the officers had probable cause to justify a search of the vehicle. Therefore, the investigatory stop was concluded and the encounter moved into its next phase, the search supported by probable cause.

The officers diligently pursued their investigation by contacting the canine unit mere moments after the conclusion of the traffic infraction stop and the investigatory stop commenced. Law enforcement cannot realistically be expected to have a canine unit on hand for every traffic stop conducted; some delay is inevitable as canine units travel to the scene. See *United States v. Bloomfield*, 40 F.3d 910, 917 (8th Cir. 1994) (holding one hour detention awaiting canine reasonable explaining police forces cannot be expected to have drug dogs immediately available to all officers in the field at all times). We find nothing to suggest the officers were anything less than diligent in pursuing their investigation. Based in

part on the relatively remote nature of the area where the appellant was stopped, a highway in west Texas, the approximately 50 minutes the appellant was detained while the canine unit arrived and conducted the sniff test did not extend the duration of the stop beyond its authorized scope. See *United States v. Donnelly*, 475 F.3d 946, 953-54 (8th Cir. 2007) (59 minute detention of vehicle for canine-sniff test reasonable because nothing suggested officer "exercised suboptimal diligence"); *United States v. Davis*, 430 F.3d 345, 355 (6th Cir. 2005) (explaining 30-45 minute detention awaiting arrival of canine unit did not turn investigative stop into unlawful seizure); *United States v. Maltias*, 403 F.3d 550 (8th Cir. 2005) (finding wait of approximately 2 hours and 30 minutes for canine to arrive in remote location reasonable); *United States v. Burton*, 288 F.3d 91, 102 (3d Cir. 2002) (finding approximately 45 minute detention of vehicle for canine sniff test reasonable because officers proceeded diligently); *United States v. White*, 42 F.3d 457, 460 (8th Cir. 1994) (holding 80 minute detention awaiting arrival of drug dog reasonable where delay due to remote location); *United States v. Hardy*, 855 F.2d 753, 761 (11th Cir. 1988) (holding approximately 50 minute detention awaiting arrival of nearest canine unit valid investigative stop).

The military judge did not abuse his discretion in denying the defense motion to suppress evidence obtained during the detention of the appellant.

Notice Provided by the Rights Advisory

The appellant alleges that the rights advisory provided prior to her interview was insufficient to place her on notice that she was suspected of committing BAH fraud. Despite the appellant raising this basis for challenge for the first time on appeal, we will consider whether the rights advisory provided adequate notice of the general nature of the charges *de novo*. *United States v. Simpson*, 54 M.J. 281, 283-84 (C.A.A.F. 2000).

A rights advisory warning need not list with legal precision all possible charges that could derive from the conduct being investigated. *United States v. Pipkin*, 58 M.J. 358, 360 (C.A.A.F. 2003). The purpose of the rights advisory warning is to "orient [the suspect] to the transaction or incident in which he is allegedly involved." *Simpson*, 54 M.J. at 284 (quoting *United States v. Davis*, 24 C.M.R. 6, 8 (C.M.A. 1957)). To achieve that purpose, the warnings need only be sufficiently precise to inform the accused "of the general

nature of the allegation, to include the area of suspicion that focuses [him] toward the circumstances surrounding the event." *Id.* There are several factors to consider in weighing whether a specific advisory adequately placed an appellant on notice of the general nature of the charges: (1) was the conduct part of a continuous sequence of events; (2) was the conduct within the frame of reference supplied by the warnings; and, (3) did the interrogator have previous knowledge of the unwarned offenses. *Id.* at 284.

Here, the appellant was advised in writing that she was suspected of several offenses. The initial sentence of the advisory expressly stated the appellant was suspected of violations of two Texas statutes, covering arson and insurance fraud. That warning, provided a frame of reference for the appellant, orienting her to what was being investigated, what she did over the course of her trip to Texas as well as her conduct upon returning to California and reporting her vehicle as stolen. See *id.* (explaining "manifest knowledge of [the suspect]" considered when measuring whether warnings adequately oriented suspect) (quoting *Davis*, 24 C.M.R. at 8). The second sentence of the warning expressly advised the appellant she was suspected of various offenses under the Uniform Code of Military Justice, including but not limited to attempt to commit fraud and conspiracy to commit fraud. The appellant was on notice that she was suspected of committing acts of fraud and that she was aware of the relevant time frame being investigated. While the appellant was not warned with legal precision that the fraud in question was BAH fraud, she was sufficiently warned that the general nature of the allegation was fraud. We find the language on the rights advisory form adequately informed the appellant of the general nature of the charges against her such that she was oriented to what was being investigated. Therefore, there was no error in receiving the written statement of the appellant into evidence at trial.

Conclusion

Accordingly, the findings and the sentence, as approved by the convening authority, are affirmed.

Chief Judge REISMEIER and Judge WARD concur.

For the Court

R.H. TROIDL
Clerk of Court