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

Before
M.D. MODZELEWSKI, F.D. MITCHELL, J.A. FISCHER
Appellate Military Judges

UNITED STATES OF AMERICA

v.

MICHAEL B. GILBREATH
CORPORAL (E-4), U.S. MARINE CORPS

NMCCA 201200427
GENERAL COURT-MARTIAL

Sentence Adjudged: 14 June 2012.
Military Judge: LtCol Stephen F. Keane, USMC.
Convening Authority: Commanding General, 1st Marine Division (Rein), Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: Maj V.G. Laratta, USMC.
For Appellant: LT Jared A. Hernandez, JAGC, USN.
For Appellee: LT Ian D. MacLean, JAGC, USN.

12 November 2013

OPINION OF THE COURT

MODZELEWSKI, Chief Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his plea, of one specification of larceny in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. The convening authority (CA) approved the adjudged sentence of a reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge.

The appellant now raises the following errors on appeal: first, that the military judge erred in concluding that the

appellant, a member of the individual ready reserve (IRR), was not entitled to the protections of Article 31(b), UCMJ; and, second, that he erred in concluding that the appellant's statements were admissible under the analysis established by *United States v. Duga,* 10 M.J. 206 (C.M.A. 1981).

After careful consideration of the record, the briefs of the parties, and oral argument, we find that the military judge did not err in concluding that this appellant, as a member of the IRR, was not entitled to the protections of Article 31(b). The findings and the sentence are correct in law and fact and there are no errors materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Background

On 13 October 2006, the appellant enlisted in the Marine Corps through the Delayed Entry Program. He began his four-year active duty obligation on 3 January 2007, and was honorably discharged on 2 January 2011. Upon discharge, he transferred to the IRR; his commitment to the IRR was to run for the remaining four years of his enlistment contract, through 12 October 2014.

Prior to his discharge in January 2011, the appellant had been assigned to Force Reconnaissance Company, First Reconnaissance Battalion, where he served as the armory custodian from June 2009 through his departure on terminal leave in December 2010. In that position, the appellant worked with and for Sergeant NM (Sgt NM).

In May 2011, personnel at his prior unit conducted an inventory of the armory and discovered an apparent discrepancy: an M1911 pistol was unaccounted for. The executive officer (XO) directed Sgt NM to reconcile the discrepancy, but Sgt NM was unable to do so from the existing paperwork. The records were unclear or contradictory as to whether the weapon was transferred to another unit, shipped off for repair or destruction, or simply missing. Sgt NM was, however, able to pinpoint a timeframe in which the weapon apparently was removed or shipped from the armory; during that timeframe, the appellant was the armory custodian.

On 5 May 2011, Sgt NM directed subordinates to call the appellant at his home in Oklahoma. He told them "not to accuse him of anything, just to ask if he had any situation[al] awareness (SA) on where the 1911 might be." Appellate Exhibit VIII at 19. When the appellant failed to answer or respond to those initial calls, Sgt NM himself called, and the appellant

returned his call later that day. Sgt NM informed the appellant that he was calling about a weapon that was listed by serial number on the command's inventory but was missing from the armory. The appellant quickly identified the weapon by its specific transfer history; he told Sgt NM that it had been shipped for destruction and that the destruction had been properly documented. Sgt NM considered this response to be "a dead give away," that it was at best "kind of odd" that the appellant immediately knew which weapon was in issue. *Id.*; Record at 39. Sgt NM later testified that he then used what could have been classified as an "aggressive" tone with the appellant and told him that "people's heads are on the line" over the missing pistol. Record at 39, 46. After a pause, the appellant admitted that he had the missing M1911 pistol, and the two men developed a plan for the appellant to return the weapon to Sgt NM.

When Sgt NM advised the XO that the appellant had the pistol and that he would personally retrieve custody of the weapon, the XO did not concur in the plan and instead called the appellant. Upon questioning by the XO, the appellant again confirmed that he had the missing pistol in his possession. Shortly thereafter, the command notified Naval Criminal Investigative Service (NCIS), Sgt NM gave a sworn statement to agents, and the agents used him to conduct controlled calls and texts to the appellant. NCIS agents eventually retrieved the weapon from the appellant's civilian attorney. At no time was the appellant advised of his Article 31(b), UCMJ, rights by Sgt NM, the XO, or NCIS.

In September 2011, the Secretary of the Navy approved a request from First Marine Division to recall the appellant "pursuant to Articles 2 and 3 of the Uniform Code of Military Justice to exercise court-martial jurisdiction . . . ." Prosecution Exhibit 14 at 2. The appellant was involuntarily recalled to active duty in February 2012.

At trial, the appellant sought to suppress the statements he made to Sgt NM, contending that Sgt NM failed to properly warn him pursuant to Article 31(b). The military judge denied the appellant's motion to dismiss, concluding that the appellant, as a member of the IRR, was not subject to the UCMJ and therefore not entitled to the protections of Article 31(b). Additionally, the military judge concluded that, even if the appellant were entitled to the protections of Article 31(b), his statements to Sgt NM were nonetheless admissible under the analysis established in *Duga*. The appellant now challenges those conclusions.

Analysis

We review a military judge's denial of a motion to suppress a confession for an abuse of discretion. *United States v. Chatfield*, 67 M.J. 432, 437 (C.A.A.F. 2009). We will not disturb a military judge's findings of fact unless they are clearly erroneous or unsupported by the record. *Id.* (citing *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007)). We review *de novo* any conclusions of law supporting the suppression ruling. *Id.* Here, the military judge's findings of fact are well-within the range of the evidence permitted under the clearly-erroneous standard and we therefore adopt them for our analysis.

In reviewing *de novo* the military judge's conclusion that the appellant was not entitled to the protections of Article 31(b), we consider the history, purpose and application of both Articles 2 and 31(b). Article 2 specifically defines thirteen categories of persons subject to the UCMJ (e.g., members of a regular component, midshipmen and cadets, and members of a reserve component while on inactive duty training). Article 2 does not include the IRR as a category of person subject to the code. In May of 2011, if the appellant had spoken discourteously to his former XO, failed to obey an order to return to base, or thrown the pistol in the local swimming hole, he could not be charged with violations of Article 91, 92, or 108, UCMJ.

Nevertheless, as "a member of a reserve component not on active duty," the appellant was not completely free of the jurisdiction of the UCMJ in May 2011. Article 2 specifically authorizes an involuntary recall of reservists for trial by court-martial for an offense committed while on active duty. Article 2(d)(1)(B); Art 2(d)(2)(A). The question before us then is whether the appellant, who was not subject to the UCMJ, was nevertheless entitled to the protections of Article 31(b) when being questioned about an offense committed while on active duty. Article 31(b) provides in pertinent part:

> No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

Read literally, Article 31(b) has a broad sweep, and would apply to the situation at hand, as Sgt NM was clearly "a person subject to this chapter" and was requesting a statement from the appellant, whom he suspected of an offense.[1] The U.S. Court of Appeals for the Armed Forces (CAAF) has, however, consistently eschewed such a literal application of the statute, instead looking to the Article's purpose and legislative history. *See United States v. Norris*, 55 M.J. 209, 215 (C.A.A.F. 2001); *Duga*, 10 M.J. at 210; and *United States v. Gibso*n, 14 C.M.R. 164, 170 (C.M.A. 1954). In that line of cases, the CAAF concludes that the fundamental purpose of Article 31(b) is to avoid impairment of the constitutional guarantee against compulsory self-incrimination in the military environment, in which service members are subject to pressures of superior rank or position and may feel compelled to respond to questions.

> The purpose of Article 31(b) apparently is to provide servicepersons with a protection which, at the time of the Uniform Code's enactment, was almost unknown in American courts, but which was deemed necessary because of subtle pressures which existed in military society. . . . Conditioned to obey, a serviceperson asked for a statement about an offense may feel himself to be under a special obligation to make such a statement. Moreover, he may be especially amenable to saying what he thinks his military superior wants him to say – whether it is true or not. Thus, the serviceperson needs the reminder required under Article 31 to the effect that he need not be a witness against himself . . . . To paraphrase a remark by Mr. Justice Stewart in *Rhode Island, v. Innis*, 446 U.S. 291 . . . (1980), "(t)he concern of the (Congress) in (enacting Article 31(b) was that the 'interrogation environment' created by the interplay of interrogation and (military relationships) would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory incrimination" contained in Article 31(a) of the Uniform Code of Military Justice.

Duga, 10 M.J. at 209-10 (quoting from *United States v. Armstrong*, 9 M.J. 374, 378 (C.M.A. 1980) (internal citation omitted)).

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[1] Regardless of whether Sgt NM suspected the appellant at the beginning of their conversation, he clearly suspected the appellant by the time that he asked where the weapon was and noted that people at the command, including himself and the XO, would be held accountable.

The *Duga* court concluded that, in light of Article 31(b)'s purpose and legislative history, the Article should apply only to those situations "in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry." *Id.* at 210 (citation omitted).

The appellant contends that, as a member of the IRR, he should be afforded the protection of Article 31(b) when questioned about an offense for which he may later face trial by court-martial. That argument, however, is not supported by the legislative history of Article 31(b) or by case law. Instead, the circumstances here clearly demonstrate that the appellant was well outside the class of persons whom Congress sought to protect with the creation of Article 31(b).

As a member of the IRR, the appellant was far removed in time and place from the coercive military environment contemplated by Congress, in which he might respond to a question in the same way he was trained to respond to a command. The appellant left his unit in December 2010 on terminal leave and was discharged on 2 January 2011. When he received the phone call in May 2011, the appellant was, by all appearances, a civilian: home in Oklahoma, working on the family farm, honorable discharge in hand. As a member of the IRR, he was subject to active duty recall if the President authorized a recall of the reserves. 10 U.S.C. § 12304. Other than that, the appellant's ties to military authority were attenuated: his discharge certificate required him only to keep the military "informed of any change of address, marital status, number of dependents, civilian employment, or physical standards." AE IX at 23.

If Congress created Article 31(b) as "a precautionary measure," meant to counteract the implicit coercion of the military command structure, that precaution is unnecessary in these circumstances, in which the appellant was far removed from any military environment that "might operate to deprive (him) of his free election to speak or to remain silent." *Gibson*, 14 C.M.R. at 172. In determining whether the protections of Article 31(b) extend to members of the IRR, who are themselves not subject to the UCMJ, "(j)udicial discretion indicates a necessity for denying its application to a situation not considered by its framers, and wholly unrelated to the reasons for its creation." *Id.* at 170. We eschew a literal application of Article 31(b) and conclude that the military judge did not err in determining that the appellant was not entitled to the protections of Article 31(b).

In light of our decision on the first assignment of error, we decline the appellant's request in his second assignment of error to consider whether the military judge properly applied the two-prong test articulated in *Duga*.

Conclusion

The findings and the sentence as approved by the CA are affirmed.

Senior Judge MITCHELL concurs.

FISCHER, Judge (concurring in the result):

I concur in the result reached by my colleagues, but do so by finding the military judge did not err in concluding the appellant's statements to Sgt NM were admissible under the analysis established by *United States v. Duga,* 10 M.J. 206 (C.M.A. 1981). I cannot join the majority, because I do not find the appellant's status as a member of the Individual Ready Reserve (IRR), in and of itself, dispositive on the issue of the applicability of Article 31. I think the case law requires we apply the *Duga* test. Additionally, to the extent resolving the raised issue solely on the first assignment of error may suggest a *per se* rule that Article 31 does not apply to members of the IRR, I do not find sufficient support in the text of Article 31, or in the litany of case law interpreting its applicability, to establish such a rule.

I agree with the majority that, given a literal reading, Article 31(b) would apply to the conversations between Sgt NM and the appellant regarding the missing weapon. I further agree that an extensive line of case law shuns a literal reading of Article 31(b) and looks rather to the purpose and intent of the statute in determining its applicability. *See United States v. Cohen,* 63 M.J. 45, 49 (C.A.A.F. 2006); *United States v. Norris,* 55 M.J. 209, 215 (C.A.A.F. 2001); *United States v. Duga,* 10 M.J. 206, 208-09 (C.M.A. 1981); *United States v. Gibson,* 14 C.M.R. 164 (C.M.A. 1954). As stated in *Duga,* "[i]t may be reasonably inferred [then] that Congress did not consider a warning to be a *sine qua non*, but rather a precautionary measure introduced for the purpose of counteracting the presence of confinement, or other circumstances [of 'presumptive coercion,' implicit in military discipline and superiority], which might operate to deprive an accused of his free election to speak or remain silent." *Duga,* 10 M.J. at 209 (quoting *Gibson*, 14 C.M.R. at 172.).

The *Duga* court established a two-prong test to ultimately determine if "because of military rank, duty or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry." *Id.* at 210 (citation omitted). Under the *Duga* test, "Article 31(b) warnings are required only if: (1) a questioner subject to the Code was acting in an official capacity in his inquiry. . . ; and (2) . . . the person questioned perceived that the inquiry involved more than a casual conversation." *United States v. White,* 48 M.J. 251, 257 (C.A.A.F. 1998) (quoting *Duga,* 10 M.J. at 210) (internal quotation marks omitted)).

The first prong of the *Duga* test has been further refined by case law to distinguish between official questioning for law enforcement or disciplinary purposes and official questioning for other purposes. *See Cohen*, 63 M.J. at 49 (citing *United States v. Swift,* 53 M.J. 439, 446-47 (C.A.A.F. 2000)); *United States v. Bradley*, 51 M.J. 437, 441 (C.A.A.F. 1999); *United States v. Good*, 32 M.J. 105, 109 (C.M.A. 1991); *United States v. Loukas*, 29 M.J. 385, 388 (C.M.A. 1990). The Court of Appeals for the Armed Forces "has also interpreted Article 31(b) in a manner that recognizes the difference between questioning focused solely on the accomplishment of an operational mission and questioning to elicit information for use in disciplinary proceedings. Where there is a mixed purpose behind the questioning, the matter must be resolved on a case-by-case basis, looking at the totality of the circumstances . . . ." *Cohen*, 63 M.J. at 50 (citation omitted). This case presents mixed purpose questioning so the totality of the circumstances test is applicable.

Sgt NM was initially tasked with resolving several discrepancies revealed through an armory inventory. According to Sgt NM, such discrepancies were relatively common and were typically traced to data entry errors or other system tracking errors. However, in this instance, Sgt NM was unable to resolve a discrepancy involving a missing M1911 pistol and that led him to contact the appellant who was the armory custodian and was responsible for the weapon at the time it went missing. Given his tasking, Sgt NM's primary motivation throughout was to locate and retrieve the missing weapon. He did not view himself as conducting a law enforcement or disciplinary inquiry. Record at 40. However, Sgt NM's intent in conducting the inquiry is not dispositive. The military judge should have looked to the time Sgt NM conducted his inquiry and evaluated the likelihood that the inquiry would lead to disciplinary action. Under *Cohen* the military judge should have considered the totality of the circumstances in making this evaluation.

Whenever military property is unaccounted for, it raises the possibility that those responsible for the property could be subject to disciplinary action. The greater the importance of accounting for the property given its nature and/or value, the greater the likelihood of disciplinary implications for any discrepancies. Also, the probability the property was stolen vice merely lost would in most instances lead to a greater chance of disciplinary action. Sgt NM emphasized the importance of accounting for the missing weapon when he told the appellant, "there's a lot of people's heads on the line right now and somebody is going to get in a lot of trouble if this thing doesn't get fixed." *Id.* at 47. Sgt NM further explained that by "trouble" he meant his commanding officer and/or his XO were at risk of being relieved over the missing weapon. *Id.* Given these circumstances, it was evident when Sgt NM first talked to the appellant about the missing weapon any evidence uncovered that the weapon had been stolen would very likely lead to disciplinary action. When the appellant was able to immediately identify the weapon in question during the course of their conversation, Sgt NM clearly suspected the appellant had taken it. *Id.* at 39. Thus, given the totality of the circumstances, Sgt NM was acting in an official capacity and performing a disciplinary or law enforcement function under the first prong of the *Duga* test. Consequently, I believe the military judge erred when he determined that Sgt NM was not acting in a "law enforcement or disciplinary function" when questioning the appellant regarding the missing weapon.

However, I believe the military judge ultimately did not err in admitting the appellant's statements to Sgt NM and base my conclusion on the second prong of *Duga*. In sum, the appellant did not perceive Sgt NM's inquiry as involving more than a casual conversation. While not specifically referencing the second prong of *Duga* in his analysis, the military judge did find, "[t]he evidence demonstrated that the [appellant] perceived the conversation to be informal and that [Sgt NM] would attempt to resolve the issue on behalf of the [appellant] without command involvement." *Id.* at 97; AE XI at 2.

Relevant to this conclusion, the military judge found the following facts: (1) Sgt NM and the appellant and their respective wives had shared a house off base for approximately six months while Sgt NM and the appellant worked together; (2) when Sgt NM and the appellant spoke over the telephone about the missing weapon, they were informal and referred to each other by first names; (3) Sgt NM did not intend to get the appellant in "trouble" as a result of the appellant's admissions and instead attempted to facilitate a return of the pistol without involving

legal action; and (4) the appellant sought assurances during this informal conversation and subsequent informal phone and text conversations that Sgt NM would not alert higher echelons of the command or law enforcement about the issue. Record at 94-95; AE XI at 2.

Moreover, the appellant's discharge from active duty four months prior to his discussions with Sgt NM and the appellant's status as a member of the IRR not subject to routine military orders both weigh heavily against the appellant in considering the second prong of *Duga*. As Sgt NM characterized his telephonic conversation with the appellant, "I was still acting as a Marine, not a senior Marine to a junior Marine. It is me . . . it's my job. I need to get this [weapon] back, but it was a Marine trying to do his job to a civilian at that point. I had no control over him. . . . I had no authority over him from the day he left the Marine Corps . . . ." Record at 45. The conversation between the appellant and Sgt NM while perhaps not casual in subject, was certainly casual in the sense that, due to Sgt NM and the appellant's personal relationship and the appellant's status as being released from active duty and a member of the IRR, the conversation was devoid of any "evidence of coercion based on 'military rank, duty, or other similar relationship.'" *White*, 48 M.J. at 258 (citing *Duga*, 10 M.J. at 210). Thus, the second prong of *Duga* was not satisfied, thereby rendering Article 31(b) inapplicable. For this reason, I join the majority in concluding that the military judge did not abuse his discretion in admitting the appellant's statements and in affirming the findings and sentence.

For the Court

R.H. TROIDL
Clerk of Court