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

Before
R.Q. WARD, J.R. MCFARLANE, K.M. MCDONALD
Appellate Military Judges

UNITED STATES OF AMERICA

v.

TAYLOR R. JANOWIAK
HOSPITALMAN (E-3), U.S. NAVY

NMCCA 201300246
Review pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862

Military Judge: Maj N.A. Martz, USMC.
Convening Authority: Commander, Marine Corps Installations East-Marine Corps Base, Camp Lejeune, NC.
For Appellant: LT Gabriel Bradley, JAGC, USN.
For Appellee: LT Ian MacLean, JAGC, USN.

29 August 2013

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.

WARD, Senior Judge:

This case is before us on a Government interlocutory appeal, pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862, and RULE FOR COURTS-MARTIAL 908, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). The appellee, Hospitalman Taylor R. Janowiak, U.S. Navy, is currently charged with *inter alia* abusive sexual contact against the alleged victim, SAF, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920.

Prior to trial, the defense moved to suppress statements made by the appellee on 13 March 2012, to Naval Criminal

Investigative Service (NCIS) agents at Camp Lejeune, North Carolina. The defense argued that tactics employed by the NCIS agents during the interview coerced the appellee into making false admissions. On 29 May 2013, the military judge heard the defense motion to suppress and, after a short recess, granted the motion. After announcing his ruling, the military judge indicated he would attach a written ruling to the record prior to authentication. However, after the Government requested essential findings of fact to pursue an appeal, on 6 June 2013 the military judge issued a written ruling from which the Government now appeals.[1]

In its interlocutory appeal, the Government argues that the military judge abused his discretion both in his factual findings and in concluding that the appellee's statements were involuntary.[2] After carefully considering the record of the motions hearing and the submissions of the parties, we find that the military judge failed to make crucial findings of fact, which failure prevents us from conducting a *de novo* review of the voluntariness of the appellee's confession. Accordingly, we grant the Government's appeal and remand the record for action consistent with our opinion below.

Background

The pending charges stem from an encounter between the appellee and the alleged victim, SAF, during the late evening of 3 December 2011 or early morning hours of 4 December 2011. SAF was the girlfriend of the appellee's best friend. The two were in the appellee's barracks room watching TV and drinking alcohol. The appellee's and SAF's recollection of what actually happened thereafter differs and is not relevant to this appeal. Upon learning later that day that SAF was accusing him of sexual assault, the appellee drove to West Virginia and checked into a

[1] As we cautioned in *United States v. Doucet*, "[w]e again stress the importance of entering essential findings on the record and urge trial judges to do so contemporaneously with the ruling. This practice not only minimizes the possibility of error . . . but enhances the discipline and integrity of the decision-making process. Essential findings prepared after a ruling 'may become nothing more than a post hac [sic] rationalization.'" 43 M.J. 656, 659 (N.M.Ct.Crim.App. 1995) (quoting *United States v. Flores-Galarza*, 40 M.J. 900, 906 n.9 (N.M.C.M.R. 1994)).

[2] The specific issue raised by the Government is as follows: "Did the Military Judge abuse his discretion in suppressing both appellee's typed and handwritten statements by an arbitrary decision made in reliance on facts unsupported by the record and an incomplete and therefore erroneous view of the law?" Appellant's Brief on Interlocutory Appeal of 7 Jul 2013 at 2.

hotel. There he drank a significant amount of alcohol and contemplated committing suicide.

The following morning, local police found the appellee in his hotel room and transported him to a local hospital. Representatives from the appellee's command later picked him up and brought him back to Camp Lejeune where he was treated at the Mental Health Clinic. NCIS initiated an investigation into the sexual assault allegation made by SAF against the appellee. As part of its investigation, NCIS interviewed the appellee on three different occasions: 5 January, 23 January, and finally on 13 March 2012.

At the first interview on 5 January, the appellee signed a written acknowledgment and waiver of his rights under Article 31(b), UCMJ. In a handwritten statement, he admitted to kissing and touching SAF's breast, but maintained that the contact was consensual. On 23 January, the appellee again signed a written Article 31(b) rights acknowledgment and waiver, and also signed a sworn typewritten statement. In this second statement, the appellee admitted to essentially the same conduct as before, but added that SAF was drunk when the incident occurred. At some point during either this first or second interview, the appellee agreed to submit to a polygraph examination.

On 13 March, the appellee was summoned by NCIS to the NCIS building at Camp Lejeune, North Carolina. He again waived his Article 31(b) rights and signed a written rights acknowledgement and waiver. He also signed a rights acknowledgement and waiver for a polygraph examination. The interview that day involved a mix of both interrogation and a polygraph examination. Two agents participated, one of whom was the polygraph examiner. During the interview, the appellee signed another sworn typewritten statement. Later during the interview, he handwrote several additional sentences at the bottom of his earlier sworn statement and signed his name again.

Twice during the interview process that day, the polygraph examiner looked through his notes only to inform the appellee that he had no questions to ask. The first time, the appellee spoke to the examiner for a few minutes before the examiner advised him that after looking through his file the examiner had no questions and the appellee was free to leave. The appellee left the room and proceeded into the hallway only to be stopped by an agent and asked to return. After the appellee returned to the interview room, the examiner reviewed his file further and again told the appellee that he was free to leave. The appellee

then left the room and exited the building. As he was walking in the parking lot, an agent called to him from the building and asked him to return. Once the appellee returned, the polygraph examination began. At first, the examiner was unable to conduct the examination because the appellee was agitated and upset. After advising the appellee to calm down, the examiner concluded the examination after asking the appellee five or six questions. The examiner then reviewed his responses and advised the appellee that all of his answers, save one, indicated deception. Shortly thereafter, the appellant agreed to provide additional details and handwrote these at the bottom of his earlier typed statement.

The typewritten statement indicates that the appellee touched SAF with his penis on her inner thigh in an effort to try to get her sexually aroused. The later handwritten statement indicates that SAF was asleep when he tried to initiate sexual intercourse, and she was also asleep when the appellee had attempted to place two of his fingers into her vagina.

The defense moved to suppress both the typewritten and handwritten statements made on 13 March 2012. At the motion hearing on 29 May 2012, the defense submitted documentary evidence and presented the testimony of the appellee. The Government likewise submitted documentary evidence, but opted not to call any witnesses to rebut the appellee's testimony. Under oath, the appellee testified that he understood and voluntarily waived his Article 31(b) rights that morning. However, he explained that once he was stopped by an agent in the parking lot and asked to return to the interview room, he became nervous and scared. He testified that at that point he felt coerced and provided his handwritten statements under duress at the specific direction of the examiner and other agent.

Standard of Review

a. Article 62(b), UCMJ, Interlocutory Appeal

When reviewing matters under Article 62(b), UCMJ, we act only with respect to matters of law. *United States v. Baker*, 70 M.J. 283, 287-88 (C.A.A.F. 2011) (citing *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004)). We may not find additional facts and cannot substitute our own interpretation of the facts. *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007). Thus, we are bound by the military judge's findings unless such

findings are clearly erroneous. Findings are "clearly erroneous" when they are not "fairly supported by the record." *Gore*, 60 M.J. at 185 (internal citations and quotation marks omitted). If findings are incomplete or ambiguous, the "'appropriate remedy . . . is a remand for clarification' or additional findings." *United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995) (quoting *United States v. Kosek*, 41 M.J. 60, 64 (C.M.A. 1994)).

b. Motion to Suppress

We review a military judge's ruling on a motion to suppress for abuse of discretion. *Baker*, 70 M.J. at 287. An abuse of discretion occurs "when: (1) the findings of fact upon which [the military judge] predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010) (citation omitted). But we review the military judge's conclusion of law *de novo*, including his conclusion as to the voluntariness of the statement. *United States v. Chatfield*, 67 M.J. 432, 437 (C.A.A.F. 2009) (citing *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991) and *United States v. Bubonics*, 45 M.J. 93, 94 (C.A.A.F. 1996)). An inquiry into voluntariness assesses "the totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamante*, 412 U.S. 218, 226 (1973); *see also United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008). These circumstances include the appellee's age, education and intelligence, the nature of any rights advice, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as deprivation of food or sleep. *Freeman*, 65, M.J. at 453. The Government bears the burden of demonstrating voluntariness by a preponderance of the evidence, and we review the military judge's ruling in a light most favorable to the prevailing party, here the appellee. *United States v. Cowgill*, 68 M.J. 388, 390 (C.A.A.F. 2010).

Discussion

Both in its brief and during argument on the motion, the defense alleged that NCIS agents coerced the appellee into making false admissions both in his typewritten and handwritten statements. Specifically, the defense argued that "by using the psychological effects of a polygraph in conjunction with the psychological records of the [appellee], [NCIS] coerced the

[appellee] and his will was overborne." *See* Government Interlocutory Appeal of 21 Jun 2013, Appendix D, Defense Motion to Suppress at 4, Appendix F, Authenticated verbatim record of motion session at 17-18. Focusing on the question of voluntariness, the military judge concluded that although the appellee "freely, knowingly and intelligently waived his rights," the circumstances surrounding the interrogation eventually "overbore the [appellee's] will" and invalidated his earlier waiver. *See* Appellant's Brief on Interlocutory Appeal of 7 Jul 2013, Appendix G (Court Ruling) at 5.

1. The military judge's findings of fact. Recited verbatim below are the military judge's findings pertaining to the issue of voluntariness.

. . . .

g. At some point during the investigation, but before 13 March 2012, the accused volunteered to undergo a polygraph examination to prove his innocence to investigators.

h. On 13 March 2012, the accused was summoned to the NCIS building at Camp Lejeune, North Carolina. He obtained a ride from someone in his command. Once at the NCIS building, he checked in at the lobby and was escorted to a polygraph room by a SA [Special Agent] Parker, NCIS.

i. This began a series of three interviews that day with NCIS SAs.

j. Once in the polygraph room, the accused engaged in small talk for approximately fifteen minutes with Special Agent Michael Wright, a polygraph expert at NCIS. During this time, SA Wright looked through the accused's file and administered a 31(b) rights advisement, as well as a polygraph examination waiver.

k. The accused understood his rights and freely, knowingly, and intelligently waived them.

l. After approximately fifteen minutes, SA Wright told the accused that upon reviewing his case file, he did not have any questions for the accused. SA Wright told the accused he was free to leave. The accused did as directed, and was escorted back to the NCIS lobby.

m. As the accused prepared to leave, SA Parker returned to the NCIS lobby and told the accused that SA Wright needed

to speak to him again. SA Parker then escorted the accused back to the polygraph room, where SA Wright told the accused that, contrary to what he had told the accused earlier, SA Wright was still reviewing the accused's case file and might have some questions for him at a later time. SA Wright again told the accused he was free to leave and SA Parker again escorted the accused to the NCIS lobby.

n. The accused left the lobby and was in the parking lot of the NCIS building attempting to contact someone at his command to get a ride from the NCIS building when SA Parker again approached him. SA Parker told him that SA Wright had some questions for him, and that the accused had to return to the NCIS building to undergo the polygraph examination.

o. The accused was extremely nervous at this point. He wanted to terminate the polygraph examination at this time, but did not because he felt he was now in the custody of SAs Parker and Wright. Furthermore, the accused believed that because he had waived his rights during the first interview that day, he could not escape that waiver, and that he was now obligated to participate in the interview and polygraph examination.

p. The accused was again escorted to the polygraph room, where SA Wright was waiting. SA Wright connected the accused to the polygraph machine, noting that the accused seemed extremely nervous, and that the accused's heart rate was so fast they could not get an accurate reading. SA Wright eventually began to conduct his interview with the accused. When he was finished questioning the accused, he appeared to review the results, then told the accused that the accused had lied in response to every question, with the exception of one, which had to do with the color of the walls in the polygraph room.

q. Not understanding this result, and upset, the accused began to cry. He agreed to write an additional statement, in which he typed and handwrote further admissions, including that he had touched the alleged victim with his penis, that he had touched her vagina, and that he had done these things while she was sleeping. The accused states that SA Wright told him what to write in this additional statement, and that the accused did as directed.

r. The court specifically notes that it observed the

> accused's demeanor and manner in which he testified closely during this proceeding, and found the accused's testimony credible.
>
> s. The government produced no evidence at this hearing to contradict the accused's version of events on 13 March 2012.

Id. at 1-4.

2. The military judge's conclusions of law

In a section marked "Conclusions of Law", the military judge properly states the legal standards and tests applicable to involuntary statements, and the respective burdens of production and persuasion. *Id*. at 4-5. In a final paragraph marked "Conclusions", the military judge concludes that the appellee's statements were involuntary and provides the following analysis:

> . . . .
>
> d. Though the accused had at some point prior to 13 March 2012 agreed to participate in a polygraph examination, and on 13 March the accused freely, knowingly, and intelligently waive his rights, the court finds that . . . the circumstances in which the polygraph examination eventually occurred overbore the accused's will and invalidated the accused's earlier rights waiver. The court specifically notes that once the burden shifted to the government, the only evidence produced by the government was the various rights waivers and the various statements provided by the accused. The trial counsel also engaged in limited cross-examination with the accused in which the accused confirmed that his initial rights waiver was knowing, free, and intelligent. Conspicuously absent was any evidence whatsoever contradicting the accused's version of events that occurred that day.
>
> e. The court had the distinct opportunity to observe the accused's demeanor during his testimony, and finds the accused credible. Consequently, the uncontradicted version of events relayed to the court by the accused paint a picture of an environment in which the accused's will was overborne by the NCIS tactics that day. The accused voluntarily appeared for the polygraph examination that

> day. The accused was dropped off at the NCIS by members of his command. NCIS SAs were aware of the mental health issues of the accused, as the accused had admitted extreme depression and a suicidal ideation in previous statements to investigators. He subsequently freely, knowingly, and intelligently waived his rights, but was then summarily dismissed by the polygraph examiner, who told the accused that he had no questions for him. The accused departed, but was called back within a few minutes only to have the polygraph examiner tell the accused that the polygraph examiner was reviewing his case file some more and might have some questions for him at some later point in time. The accused was then dismissed, only to be summoned back into the polygraph examiner's room and told that the polygraph examiner did have some questions for him. At this point, the accused's interrogation became custodial in nature. The accused would have terminated his interview at that point but was scared and believed he had waived his right to do so during the first meeting with SA Wright. The polygraph had a significant number of questions for the accused. The accused was hooked up to a polygraph machine and interviewed; he was subsequently told he lied in response to every question but one. The accused, crying and wanting to end the process, his will overborne, admitted each and every question the polygraph examiner asked him, and wrote a statement after being directed by the polygraph examiner what to write. This sequence of events testified to by the accused is uncontroverted by any government evidence. In viewing the totality of the circumstances in this case as a holistic assessment of human interaction, not as a "cold and sterile list of isolated facts," it is clear to this court that the government failed to prove, by a preponderance of the evidence, that the accused's statement . . . was voluntary.

Id. at 5-6.

3. Analysis of the military judge's findings and conclusions

At the onset of his analysis, the military judge, cites *Schneckloth v. Bustamonte*[3] and *United States v. Bubonics*[4] for the legal proposition that numerous factors must be considered in assessing whether the totality of the circumstances indicates a

[3] 412 U.S. 218 (1973).

[4] 45 M.J. 93 (C.A.A.F. 1995).

voluntary statement. He also properly identifies the factors to be considered. However, he offers scant findings addressing those circumstances that support his ultimate conclusion. For example, no findings address the appellee's age, education or intelligence, or length of service. Similarly, despite a passing reference in his conclusion, the military judge makes no findings addressing the appellee's mental health history or how it played any role in the interrogation.[5]

Additionally, there are no findings addressing the overall length of the interrogation, the length of each attempted interview in the polygraph room, the time lapse between the appellee's departure and return, or the length of the actual polygraph examination. Timing is crucial to the military judge's conclusion. He indicates that when the appellee returned from the parking lot, the appellee "became nervous and scared" and the interrogation became custodial in nature. But evidence considered by the military judge revealed that the appellee signed his typewritten statement well before he returned to the polygraph room from the parking lot.[6]

Equally as important to our analysis is the nature of the interrogation and how NCIS "tactics" as cited by the military judge resulted in a coerced confession. Few findings detail any actual tactics employed or, more importantly, how they induced the appellee's confession.[7] The military judge cites only the two instances where the examiner told the appellee he had no

[5] Evidence considered by the military judge included mental health treatment records following the appellee's hospitalization for suicidal ideations. But without supporting findings of fact and conclusions of law, we cannot determine to what extent the military judge based his ruling on psychological coercion by NCIS.

[6] The military judge found that after the polygraph examination, the appellee "agreed to write an additional statement in which he *typed* and handwrote further admissions." Court Ruling of 6 Jun 2013 at 3 (emphasis added). The record establishes that the appellee signed an Article 31(b) rights advisement and waiver at 0942, a polygraph rights advisement and waiver at 0949 and a typewritten statement at 1111. The time listed next to the appellee's handwritten potion and signature is 1324. Appendix E, Appellant's Brief and Interlocutory Appeal of 7 Jul 2013. The appellee testified that he completed the typewritten statement prior to his return to the polygraph room from the parking lot. *Id*. at Appendix F at 7, 12.

[7] The military judge does not explain how NCIS agents' actions were improper or "deliberately coercive", a key component to a 5th Amendment Due Process violation. *See Kosek*, 41 M.J. at 64 (citing *Oregon v. Elstad*, 470 U.S. 298, 314 (1985) ("[f]indings of fact and a conclusion of law regarding the issue whether there was actual coercion are critical predicates" to resolving the issue of voluntariness of a statement).

questions only to shortly thereafter ask the appellee to return for questioning. Furthermore, the military judge deems the interrogation custodial once the appellee returned to the interview room from the parking lot. However, he offers no explanation of any factors giving rise to this conclusion.[8] Last, although the military judge concluded that the appellee's rights waiver was made knowingly, intelligently and voluntarily, he provides no findings regarding the appellee's understanding of his rights, to include the advice that he could terminate the interview (and polygraph examination) at any time.

Conclusion

The military judge made incomplete findings on the circumstances surrounding the appellee and his interrogation. The lack of necessary findings on these circumstances constrains our ability to adequately review *de novo* his conclusions as to the voluntariness of the appellee's statements to NCIS.

Accordingly, the appeal of the United States is hereby granted. The military judge's ruling is vacated and the record of trial is returned to the Judge Advocate General for remand to the convening authority and delivery to the military judge for reconsideration in light of this opinion.[9] The military judge may, *sua sponte* or upon request of either party, permit additional evidence and argument on the question of the voluntariness of the appellee's statements to NCIS on 13 March 2012, or any other legal issues, and shall make essential findings of fact and conclusions of law thereon. The trial may then proceed or the United States may again pursue appeal under Article 62, UCMJ, if appropriate. *Kosek*, 41 M.J. at 65.

Judge MCFARLANE and Judge MCDONALD concur.

For the Court

R.H. TROIDL
Clerk of Court

[8] Although whether a suspect is in custody calls for a legal conclusion, the supporting inquiry is "'largely a question of fact'" based on examining the totality of the circumstances. *See Lincoln*, 42 M.J. at 320 (quoting *United States v. Schake*, 30 M.J. 314, 318 (C.M.A. 1990)).

[9] We make no ruling on the admissibility of the appellee's statements of 13 March 2012.