

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

**Before
D.E. O'TOOLE, F.D. MITCHELL, J.F. FELTHAM
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**CLINTON C. MALONE
AIRMAN (E-3), U.S. NAVY**

**NMCCA 200602512
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 12 January 2006.
Military Judge: CAPT David White, JAGC, USN.
Convening Authority: Commander, Task Force 67, Naval Air
Station, Sigonella, Sicily, Italy.
Staff Judge Advocate's Recommendation: LCDR Jason S.
Grover, JAGC, USN.
For Appellant: Mr. Philip D. Cave, Civilian Appellate
Counsel; Maj R. Belliss, USMC.
For Appellee: Maj James Weirick, USMC.

22 July 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FELTHAM, Senior Judge:

A military judge sitting as a special court-martial convicted the appellant, contrary to his pleas, of attempting to damage the engine of a helicopter and of recklessly endangering aircrew and ground crew associated with that aircraft, by placing a rock in the engine air particle separator (EAPS), in violation of Articles 80 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 890 and 934. The appellant was sentenced to confinement for 9 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

On appeal, the appellant asserts that the military judge erred when he ruled that the appellant's inculpatory pretrial statement to the Naval Criminal Investigative Service (NCIS) was involuntary. The appellant also raises five additional assignments of error pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).¹ After carefully considering the record of trial, the appellant's brief and assignments of error, and the Government's answer, we find 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.

Voluntariness

At trial, the appellant made a timely pretrial motion to suppress, *inter alia*, his 8 August 2005 confession to NCIS investigators.² The military judge took evidence and entered extensive findings of fact and conclusions of law on the record. Record at 440-43. The appellant does not challenge any of the military judge's findings of fact. Having carefully considered the record, we find that the findings of fact are well-supported by the record. We adopt them as our own.

We consider the voluntariness of a confession *de novo*. *United States v. Cuento*, 60 M.J. 106, 108 (C.A.A.F. 2004) (internal citation omitted). A statement is involuntary if it is obtained "in violation of the self-incrimination privilege or due process clause ... or through the use of coercion, unlawful influence, or unlawful inducement." MILITARY RULE OF EVIDENCE 304(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). We consider the "totality of all the surrounding circumstances" to include "the characteristics of the accused and the details of the interrogation" to determine whether a 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).

After hearing testimony from the appellant and both NCIS investigators involved with taking the 8 August 2005 statement, the military judge found that the appellant was properly warned, understood, and waived his rights before any questioning on 8 August 2005. The appellant was given reasonable water and

¹ I - The military judge erred by not ordering the appellant's release from pretrial confinement; II - legal and factual sufficiency; III - unreasonable multiplication of charges; IV - the convening authority abused his discretion by failing to order an inquiry into potential misconduct of a prosecution witness; and V - sentence severity.

² The suppression motion also addressed various 3 August 2005 statements by the appellant to NCIS. The military judge held that the statements, while not coerced, were technically involuntary due to the lack of proper Article 31 warnings. The statements were excluded by the military judge both for the lack of appropriate warnings and due to the prosecution's failure to provide appropriate notice to the defense. Record at 437.

bathroom breaks, was allowed a smoke break, and was provided dinner during the all-day interrogation. The interrogation was conducted during normal weekday working hours (1000-1645), and there is no indication the appellant was tired or sleep deprived.

Of particular importance, we note that the appellant made a "spirited attempt" to convince NCIS that he was not involved in the incident and that he freely participated in conversation with the agents. Nothing coercive, overbearing or unlawful occurred prior to the appellant changing his story at the end of the interrogation. While the appellant had been clinically diagnosed with depression, the military judge found that the appellant had been successfully medicated for this condition for a full eight weeks prior to the interrogation. The appellant was a 29-year-old high school graduate with prior employment experience in the aviation field. Additionally, the appellant had challenged authority within his command on prior occasions. Considering the totality of the circumstances, we find that the appellant's 8 August 2005 statement to NCIS was made voluntarily and that his will was in no way overborne.

Conclusion

The appellant's remaining assignments of error are without merit. The findings and approved sentence are affirmed.

Chief Judge O'TOOLE and Senior Judge MITCHELL concur.

For the Court

R.H. TROIDL
Clerk of Court