IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. SCOVEL **J.F. FELTHAM** **J.D. HARTY**

UNITED STATES

v.

Steven H. ROBINSON
Lieutenant Junior Grade (O-2), U. S. Navy

NMCCA 200201841 Decided 7 February 2006

Sentence adjudged 10 January 2002. Military Judge: A.W. Keller. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Recruit Depot/Eastern Recruiting Region, Parris Island, SC.

Maj J. ED CHRISTIANSEN, USMC, Appellate Defense Counsel
LT KYLE KNEESE, JAGC, USNR, Appellate Defense Counsel
Maj RAYMOND BEAL, USMC, Appellate Government Counsel
LT DEBORAH MAYER, JAGC, USNR, Appellate Government Counsel

SCOVEL, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of willful dereliction of duty, wrongful use of meperidine hydrochloride (Demerol), larceny of Demerol, and conduct unbecoming an officer and gentleman, in violation of Articles 92, 112a, 121, and 133, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 912a, 921, and 933. The military judge sentenced the appellant to confinement for six months, forfeiture of all pay and allowances, and a dismissal. The convening authority approved the sentence as adjudged.

Before entering pleas, the appellant moved to suppress his statement to a criminal investigator. After the military judge denied the motion, the appellant entered conditional pleas of guilty, thereby preserving for appellate review the adverse determination of his motion to suppress. RULE FOR COURTS-MARTIAL 910(a)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). On

appeal, the appellant asserts that the military judge erred in failing to suppress this statement.

We have considered the record of trial, the assignment of error, and the Government's answer. We conclude that the findings of guilty 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.

Facts

In February 2001, the appellant was a 31-year-old college graduate and registered nurse. He was assigned to the Beaufort Naval Hospital, South Carolina, as a Nurse Corps officer. On the evening of 9 February 2001, he was found unconscious in a head of the hospital's special care unit. The presence of blood and needles, and the discovery in the narcotics locker that packages of Demerol had apparently been tampered with, led hospital personnel to suspect drug use by the appellant. A fitness-for-duty examination was conducted, and blood and urine samples were taken at approximately 0400 on 10 February. (Subsequent laboratory analysis of these samples revealed the presence of chemicals consistent with the use of Demerol, a schedule II controlled substance.) After the bodily fluid samples were taken, Special Agent Richardson of the Naval Criminal Investigative Service (NCIS) advised the appellant of his rights under Article 31(b), UCMJ, using a standard NCIS rights-advisement form, and asked him to sign it. The appellant testified that he repeatedly refused to sign the form and told Special Agent Richardson that he would not talk to him. He did not request to consult with counsel. Special Agent Richardson terminated the interview, and the appellant returned to his command's control. He later returned to his home and was not subject to any form of restraint.

On 12 February 2001, Special Agent Richardson met the appellant at the hospital and transported him to the NCIS office at Marine Corps Recruit Depot, Parris Island. Before questioning the appellant, Special Agent Richardson again advised him of his rights under Article 31(b), UCMJ, using the standard NCIS rights-advisement form. The appellant read the form and placed his initials beside the line describing each right. Special Agent Richardson testified that the appellant was cooperative and did not raise the issue of counsel, military or civilian, or say he wanted to speak to a lawyer. He did not recall the appellant saying that he was "confused" about his rights. The appellant waived his rights and signed a sworn statement in which he admitted stealing Demerol from the special care unit, using it while on duty, and replacing it with a saline solution.

At trial, the appellant moved to suppress his statement. He testified about his interview with Special Agent Richardson on 12 February, and responded to cross-examination as follows:

Q. My question though is this: You just now said in between reading those rights and waiving them, you thought about whether you needed a lawyer. Right?
A. That's when I talked with Mr. Richardson about – I told him I didn't know what I should do. I didn't know if I should get a lawyer; and I asked him the different scenarios about what if I did want to get a lawyer, like, give me the situation of what would happen and he explained it to me.

Q. Well, let me ask you this: Did you ever tell, at any time, Special Agent Richardson, that you wanted a lawyer?
A. I didn't say those words but I know that I said I think I should probably get a lawyer.

Q. You said those words?
A. I think that I should probably get a lawyer.

Q. So when you were testifying with [civilian counsel] a moment ago, you said your answers were I don't know if I should get a lawyer. But now on cross-examination, it's I think I need to get a lawyer; is that your testimony under oath?
A. Yes, sir.

Q. So now you're testifying that you told Special Agent Richardson that in fact you did want a lawyer, that you think you should get one?
A. During our conversation I said I'm confused. I don't know what I should – I don't know if I should get a lawyer. I think maybe I should get one. I don't know I'm just confused and that I said that.

Q. Okay. After that – was that before you signed the document waiving your right to have a lawyer?
A. Yes, sir.

Record at 66.

The military judge entered findings of fact, part of which bear on the appellant's contention that between 10 February 2001 and the re-initiation of interrogation, the appellant did not waive his right to counsel or withdraw his assertion of a right to counsel. The military judge found that: (1) on 10 February 2001, Special Agent Richardson advised the appellant of his Article 31(b), UCMJ, rights, after which the appellant declined to answer questions and the interview was terminated; (2) at no time during the attempted interrogation on 10 February 2001 did the appellant request counsel; and, (3) on 12 February 2001, Special Agent Richardson advised the appellant of his rights under Article 31(b), UCMJ, after which the appellant waived his rights and signed a sworn statement. *Id*. at 93-99; Appellate Exhibit XXIV.

Suppression of the Appellant's Statement

In reviewing a military judge's denial of a suppression motion, appellate courts apply an abuse of discretion standard. *United States v. Simpson*, 54 M.J. 281, 283 (C.A.A.F. 2000) (citing *United States v. Young*, 49 M.J. 265, 266-67 (C.A.A.F. 1998)). This is the standard of review for all evidentiary rulings. A suppression motion is a mixed question of fact and law. The military judge's "findings of fact will not be overturned unless they are clearly erroneous or unsupported by the record," while we review conclusions of law *de novo*. *United States v. Owens*, 51 M.J. 204, 209 (C.A.A.F. 1999)(quoting *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)). This standard for our review of the military judge's findings of fact is a strict one, requiring more than a mere difference of opinion. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). A military judge's admission of evidence will be reversed only when his actions are "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)(quoting *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)). Additionally, we must consider the evidence "in the light most favorable" to the "prevailing party." *Reister*, 44 M.J. at 413.

When an accused in custody requests counsel, interrogation must stop "until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *see also* MILITARY RULE OF EVIDENCE 305(f)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). If an accused in continuous custody requests counsel, Government officials may not reinitiate custodial interrogation without counsel being present, regardless of whether the accused has actually consulted with counsel. *See Minnick v. Mississippi*, 498 U.S. 146, 153 (1990). In such situations, a subsequent waiver of the right to counsel obtained during the custodial interrogation is invalid. *See* MIL. R. EVID. 305(g)(2)(b).

If, however, the Government can demonstrate by a preponderance of the evidence that the accused was not in continuous custody during the period between the request for counsel and the subsequent waiver, then a subsequent waiver of the right to counsel may be deemed valid. MIL. R. EVID. 305(g)(2)(B)(ii); *see also Young*, 49 M.J. at 268; *United States v. Vaughters*, 44 M.J. 377 (C.A.A.F. 1996); *United States v. Schake*, 30 M.J. 314 (C.M.A. 1990). This break in custody cannot be contrived or pretextual, *see Dunkins v. Thigpen*, 854 F.2d 394, 397 n.6 (11th Cir. 1988), and the accused must have a "reasonable" or "real" opportunity to seek counsel during the break. *See United States v. Brabant*, 29 M.J. 259, 263 (C.M.A. 1989)("reasonable opportunity"); *Schake*, 30 M.J. at 319 ("real opportunity"). We will examine the "totality of the circumstances" to determine if a break in custody "dissolves" an

appellant's *Edwards* claim. *See United States v. Bautista*, 145 F.3d 1140, 1150 (10th Cir. 1998); *United States v. Faisca*, 43 M.J. 876, 878 (Army Ct.Crim.App. 1996), *aff'd* 46 M.J. 276 (C.A.A.F. 1997).

Although a request for counsel clearly communicated by a suspect requires the termination of interrogation, an ambiguous comment or request does not. A request for counsel must be articulated "sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 459 (1994). If the mention of an attorney "fails to meet the requisite level of clarity," questioning may continue. *Id*. "If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." *Id*. at 461-62. The Supreme Court noted, however, "it will often be good police practice for the interviewing officers to clarify whether or not [a suspect] actually wants an attorney." *Id*. at 461.

In this case, we find the military judge's findings of fact to be supported by the record and not clearly erroneous. We note initially that the military judge analyzed the case as if the appellant had requested counsel during the attempted interrogation on 10 February 2001, when in fact he found—correctly, in our determination—that the appellant had exercised his right to remain silent but had not requested counsel. We conclude that the appellant's *Edwards* claim is misplaced and that this basis for his assertion of error is without merit.

Assuming *arguendo* that the appellant had requested counsel on 10 February, we nonetheless find that the military judge did not err in concluding that, under the totality of the circumstances, the break in custody dissolved the appellant's *Edwards* claim. Among the facts supporting this conclusion are: (1) Special Agent Richardson terminated his attempt to interview the appellant on 10 February after the latter told him that he had nothing to say; (2) during the next two days, the appellant was not under any form of restraint and was free to leave his command and to go home, and did so; and, (3) the appellant had access to telephones and the opportunity to consult with counsel, family, friends, and other advisors about his best course of action. No evidence was presented indicating that counsel could not be contacted during the period between 10 February and 12 February.

We conclude that the preponderance of the evidence demonstrates that the appellant was not in continuous custody between 10 February and 12 February. This break in custody was not contrived or pretextual, and the appellant had both a reasonable and real opportunity to seek counsel, had he wished to do so. Although the two-day break in custody was relatively brief, under the totality of the circumstances it was more than sufficient to dissolve the appellant's *Edwards* claim. *See Young*,

49 M.J. at 268 (two-day break); *Vaughters*, 44 M.J. at 378-79 (19-day break); *Schake*, 30 M.J. at 319 (six-day break).

We turn next to the interrogation on 12 February 2001. The focus is again the question of whether the appellant requested counsel. We conclude that the military judge did not err in determining that the appellant's waiver of his right to counsel was knowing and voluntary. The record clearly supports the military judge's conclusion that before questioning the appellant, Special Agent Richardson properly advised him of his rights to remain silent and to counsel. The record contains conflicting evidence, however, on what happened next. The appellant testified that he was "confused" about his rights and told Special Agent Richardson that he "should probably get a lawyer." Special Agent Richardson testified that the appellant did not raise the issue of counsel. The military judge's findings of fact did not state his resolution of this factual inconsistency. We will therefore address this issue using our Article 66(c), UCMJ, fact-finding power.

We find that the appellant did not request counsel before providing his statement on 12 February 2001. In cross-examination, Special Agent Richardson was clear that the appellant did not say, "I don't know if I should talk to you without a lawyer," and stated that he did not recall the appellant telling him that he was "confused" after receiving his rights advisement. Record at 49. He further testified that if the appellant had told him that he was not sure he should talk to him without a lawyer, he would have tried to convince him to talk to him; but had the appellant indicated he wanted a lawyer, he would have terminated the interview. *Id.* at 50. The appellant testified that he told Special Agent Richardson, "I think that I should probably get a lawyer." *Id*. at 66. We attach greater credence to the testimony of Special Agent Richardson. His action in terminating the attempted interview on 10 February 2001 when the appellant stated that he declined to answer questions demonstrates his willingness to terminate an interview when a suspect invokes his Article 31, UCMJ, rights. Similarly, the appellant's unequivocal assertion of his right to remain silent at the 10 February interview demonstrates that he understood his rights and knew how to terminate an interview, when he wished.

Assuming *arguendo* that the appellant had told Special Agent Richardson that he "should probably get a lawyer," we do not consider that statement to be sufficiently clear that a reasonable investigator in the circumstances would understand it to be a request for an attorney. *See Davis*, 512 U.S. at 459. The appellant testified on direct examination that the circumstances included this exchange with Special Agent Richardson:

> Any way he told me, you know, will you – asking again, will you sign this so we can talk. I was like no, I don't know. And I told him and when he did he read

> over those questions again and I told him I don't know. I'm confused. I don't know if I should talk to a lawyer[.] I really don't know what I should do. I asked him different scenarios. I said just say for instance, if I do want to talk to a lawyer what will happen? And he said that well, they have legal service here on Parris Island and they would get somebody to come over. Well, I was like, you know, I really don't know what I should do.

Record at 58. This discussion indicates significant indecision on the appellant's part. We find that under the circumstances, the appellant did not unambiguously or unequivocally request counsel.

Finally, the appellant asserts that Special Agent Richardson pressured him into waiving his rights by telling him that he had talked to his Commanding Officer, who said that the command "would do everything that they could" to send him to treatment if he cooperated. *Id*. at 59. Special Agent Richardson testified that he was sure he did not tell that to the appellant. *Id*. at 51. The military judge found that no threats or promises had been made to the appellant. We conclude that this finding is not clearly erroneous and is supported by the record.

We conclude that the military judge correctly applied the law in denying the motion to suppress the appellant's statement. Accordingly, we find that the military judge did not abuse his discretion in admitting the statement into evidence.

Conclusion

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

Judge FELTHAM and Judge HARTY concur.

For the Court

R.H. TROIDL
Clerk of Court