IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES	)	APPELLANT'S REPLY TO
Appellee	)	APPELLEE'S ANSWER
	)	
	)	
v.	)	
	)	USCA Dkt. No. 19-0109/AR
Specialist (E-4)	)	
JOSHUA D. LEWIS	)	Crim. App. Dkt. No. 20180260
United States Army	)	
Appellant	)	

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE SUPPRESSED SPC LEWIS'S THIRD STATEMENT AS INVOLUNTARY UNDER MILITARY RULE OF EVIDENCE 304.

Statement of the Case

On December 17, 2018, appellant filed a petition for review with this Court, along with a motion to file the supplement separately. On December 19, 2018, this Court granted appellant's motion, and appellant filed a supplement to the petition for grant of review on January 8, 2019. On January 28, 2019, the government filed its answer. Pursuant to Rules 19(a)(5)(A) and 21(c)(1) of this Court's Rules of Practice and Procedure, this is appellant's reply.

Argument

1. Under the totality of the circumstances, SPC Lewis's statement to SA MB was involuntary.

In its brief, the government ignores the lasting impact of Investigator (INV) LD's purposeful violation of Specialist (SPC) Lewis's Article 31(b), Uniform Code of Military Justice (UCMJ), rights, disregards the importance of a cleansing statement in cases of intentional police misconduct, and wrongfully asserts that Special Agent (SA) MB did not "bootstrap" SPC Lewis's previous statements into the third interrogation. (Gov't. Br. at 37-45).

In *United States v. Phillips*, the appellant was subjected to unwarned questioning by members of the chain of command, followed by questioning by law enforcement, without a cleansing statement, that expressly referenced the appellant's previous unwarned statements. 32 M.J. 76, 81 (C.M.A. 1991). There, this Court's predecessor determined that the subsequent warned statement was involuntary, in large part because (1) bad faith on the part of law enforcement, (2) the lack of a cleansing warning, and (3) the express reference to a previous unwarned statement. *Id*. at 81-82. These precise facts are present in this case.

First, INV LD intentionally violated SPC Lewis's Article 31(b), UCMJ, rights in order to get him to incriminate himself, then purposely mischaracterized SPC Lewis's statements as "spontaneous" in her notes. (App. Ex. XIII, p. 3; App. Ex. VI, p. 11). Second, SPC Lewis was subsequently interrogated by both SA AS

and SA MB, yet neither of them provided a cleansing statement. (App. Ex. XIII, p. 9). Third, SA MB "confronted [SPC Lewis] about lying in his previous statements," specifically asked him if he said, "Let's do it. It will be our secret," and was the first person in the interrogation to bring up the topic of vaginal penetration. (R. at 61-62, 67-68; App. Ex. XIII, p. 5). By confronting SPC Lewis in this manner, SA MB made specific reference to SPC Lewis's previous statements to members of the Criminal Investigation Command (CID) office. Accordingly, the facts of this case are precisely what this Court's predecessor prohibited in *Phillips*, and similar to what the Supreme Court later prohibited in *Missouri v. Seiberts*, 542 U.S. 600 (2004). As such, the military judge did not abuse his discretion in finding SPC Lewis's statements to SA MB were involuntarily given.

2. The military judge correctly determined that SPC Lewis was in custody during SA MB's interrogation, but even if SPC Lewis was not in custody during the third interrogation, the military judge's analysis of the totality of the circumstances was correct.

The government asserts that the military judge abused his discretion in finding that SPC Lewis was in custody during his interrogation with SA MB. (Gov't. Br. at 21-30). He did not. In his ruling on SPC Lewis's motion to suppress, the military judge cited the proper "objective test" and "reasonable person" standard applicable when determining if an accused is in custody. (App. Ex. XIII, p. 6-7). However, he appeared to consider SPC Lewis's personal

characteristics, such as "age, experience, education, diagnoses, and military service" in finding that SPC Lewis was in custody during the three interrogations. (App. Ex. XIII, p. 7). Despite these considerations, the military judge correctly determined that SPC Lewis was indeed in custody given the facts of this case. *See United States v. Mitchell*, 76 M.J. 413, 418 (C.A.A.F. 2017).

Specialist Lewis was ordered to CID by his command team, escorted by a non-commissioned officer, searched and stripped of his personal belongings upon arrival at CID, and escorted to the interrogation room by law enforcement agents. (App. Ex. VI, encls. 2, 4; App. Ex. XIII, p. 7). While SA MB's interrogation of SPC Lewis was not "of long duration" and SPC Lewis was not in shackles during the questioning, he was nonetheless sufficiently restrained by the environment created by his command and the law enforcement surroundings. (App. Ex. XIII, p. 7; App. Ex. XVII, p. 1). Accordingly, the military judge's findings of fact in this case demonstrate that he correctly found that SPC Lewis was in custody, even if his analysis was overbroad. *See Mitchell*, 76 M.J. at 418.

The government argues that the "military judge erred as a matter of law in his voluntariness analysis by considering his finding that Appellant was in custody." (Gov't. Br. at 27). Additionally, the government asserts, "'custody' and 'custodial interrogation' are irrelevant to the determination of whether there has been a violation of Article 31(b), UCMJ, or whether a statement is voluntary."

(Gov't. Br. at 30). These arguments ignore the military judge's obligation to consider all of the details and circumstances surrounding the interrogation.

In considering the voluntariness of a statement, courts assess "both the characteristics of the accused and the *details of the interrogation*." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (emphasis added). Here, the military judge made detailed findings of fact related to the conditions and circumstances surrounding SA MB's interrogation of SPC Lewis. Specifically, the military judge found that SPC Lewis was ordered and escorted to CID, searched and stripped of personal belongings prior to questioning, and escorted to a closed room by CID agents, all of which are supported by the record and appropriate considerations in his voluntariness analysis. (App. Ex. VI, encls. 2, 4; App. Ex. XIII, p. 7). Regardless of the legal conclusion related to custody, the underlying facts considered by the military judge as part of his voluntariness analysis are unchanged and remain compelling. Accordingly, even if the military judge erred in considering the custodial nature of SPC Lewis's interrogation, his overall voluntariness analysis remains correct.

3. The military judge did not make clearly erroneous findings of fact.

In issuing his rulings on SPC Lewis's motion to suppress and the government's motion to reconsider his ruling, the military judge made extensive findings of fact. (App. Ex. XIII; App. Ex. XVII). The government now challenges

only three of the military judge's factual findings. (Gov't Br. at 30-36). For the reasons set forth below, the government's challenges lack merit.

A. The military judge's finding that SPC Lewis was suffering from adjustment disorder at the time of the SA MB's interrogation is not clearly erroneous.

Contrary to the government's assertion, the military judge's finding that SPC Lewis suffered from "a psychological disorder that affected his mood and ability to deal with additional stressors" is not clearly erroneous. (App. Ex. XVII, p. 7). The military judge found that SPC Lewis was diagnosed with "Adjustment Disorder with Mixed Anxiety and Depressed Mood" in November 2017. (App. Ex. XIII, p. 6). In his analysis, the military judge stated, "it is a reasonable presumption that [SPC Lewis] suffered from adjustment disorder with mixed anxiety and depressed mood at the time of the [INV LD] interview." (App. Ex. XIII, p. 11-12). Importantly, SPC Lewis specifically discussed some of his psychological issues with SA AS during the *second* interrogation in June 2017. (App. Ex. VI, encl. 4).

The government's position appears to be that you cannot suffer from a psychological condition prior to the date you are affirmatively diagnosed with the condition. That position is unsound, devoid of support in the record, and requires a suspension of common sense. The military judge knew SPC Lewis was finally diagnosed with the disorder in November 2017 (App. Ex. XIII, p. 6), as well as the symptoms and impacts that informed such a diagnosis. (R. at 131-36). Most

importantly, he knew SPC Lewis discussed the symptoms underlying the ultimate diagnosis with SA AS during his interrogation in June 2017, which occurred prior to SA MB's interrogation of SPC Lewis. (App. Ex. VI, encl. 4). The military judge even expressly noted the government, as the burden holder, never provided any evidence whatsoever to indicate SPC Lewis was not suffering the psychological disorder during the interrogations. (App. Ex. XIII, p. 12, n. 8). Taking all of these facts into account, the military judge's finding that SPC Lewis was suffering from "a psychological disorder that affected his mood and ability to deal with additional stressors" is not clearly erroneous. (App. Ex. XVII, p. 7).

The government asserts that even if the military judge's finding was not clearly erroneous, he should not have considered it as part of his analysis. (Gov't Br. at 32-33). This again ignores the plain language of Supreme Court precedent. *See Bustamonte*, 412 U.S. at 226 (In considering the voluntariness of a statement, courts assess "the characteristics of the accused."). Specialist Lewis agrees with the government that "[m]ental illness does not make a statement involuntary per se." (Gov't. Br. at 33) (citing *United States v. Mott*, 72 M.J. 319, 330-31 (C.A.A.F. 2013)). However, contrary to the government's assertion, it was an appropriate and critical consideration for the military judge in conducting his totality of the circumstances analysis. *See Bustamonte*, 412 U.S. at 226.

B. The military judge's finding that SA MB reviewed SPC Lewis's "spontaneous statement" is irrelevant to the totality of the circumstances analysis.

In his "Analysis" section, the military judge noted that SA MB "prepared for his interview of [SPC Lewis] by reviewing a summary of the statements, which included a misleading reference to a 'spontaneous' statement.'" (App. Ex. XIII, p. 12). Specialist Lewis agrees with the government that SA MB, according to the evidence in the record of trial, never saw the false reference to a "spontaneous statement" while he was preparing the polygraph. (Gov't. Br. at 34). However, the only salient legal fact is whether SPC Lewis's previous statements, or portions thereof, were referenced or mentioned to SPC Lewis as part of the subsequent interrogation. *See Phillips*, 32 M.J. at 81 (prohibiting "bootstrapping" of previous unwarned statements in a second interview); *see also United States v. Benner*, 57 M.J. 210, 213-14 (C.A.A.F. 2002). Whether SA MB subjectively characterized SPC Lewis's previous statements as spontaneous, voluntary, or coerced is wholly irrelevant.

The entire point of a voluntariness analysis in this context is to determine if subsequent warned statements were given voluntarily by an accused, free of any taint from a prior unwarned statement. *United States v. Gardinier*, 65 M.J. 60, 64 (C.A.A.F. 2007). To that end, it makes sense, and the case law confirms, that it weighs against the government if law enforcement continually remind an accused

that he previously gave an incriminating statement, thereby insinuating that further resistance to interrogation is an exercise in obstructionary futility. *See Phillips*, 32 M.J. at 81. Additionally, it follows that what a law enforcement agent reviewed outside the presence of an accused is of little relevance to the voluntariness inquiry. If that content is never disclosed to the accused, either expressly or through the questions asked during a subsequent interrogation, then the law enforcement agent's personal knowledge does not factor into the voluntariness analysis. Accordingly, even if the military judge erred in finding SA MB reviewed the misleading reference to a spontaneous statement, it has no bearing on the overall voluntariness analysis.

C. The military judge correctly found that SA MB reviewed SPC Lewis's prior statements "to form the basis of his denials for the polygraph."

In his ruling, the military judge made a finding of fact that SA MB was provided, through SA MC's two-paragraph summary, information from SPC Lewis's previous statements to INV LD and SA AS, "to form the basis for his denials for the polygraph." (App. Ex. XIII, p. 5). The government incorrectly asserts this finding is clearly erroneous. (Gov't. Br. at 35-36).

During SA MB's testimony, the trial counsel asked, "what did you review--or did you review anything to prepare for this examine [sic] or this interview?" (R. at 61). Special Agent MB responded, "Yeah. I get a--we have to submit a request . . . It's like a one[-]page or two[-]page document, usually about a summary of

what--in this case it would have been a summary about what [the complaining witness] had said and then a summary about what [SPC Lewis] had said up to this point." (R. at 61-62). Accordingly, SA MB specifically testified that he reviewed a summary of SPC Lewis's previous statements to prepare for the polygraph examination. (R. at 61-62). As such, the military judge's finding of fact was not clearly erroneous.

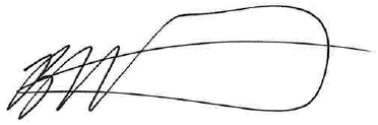
In its brief, the government argues that the military judge erred in relying on this finding because what SA MB subjectively knew or reviewed going into the interrogation is irrelevant. (Gov't. Br. at 36). As discussed in the preceding section, SPC Lewis agrees that what SA MB subjectively knew or reviewed is irrelevant, *provided that the reviewed information is not referenced or bootstrapped in the actual interrogation*. *See Phillips*, 32 M.J. at 81. Here, however, SA MB explicitly referenced SPC Lewis's previous involuntary confessions. (R. at 61-62, 67-68; App. Ex. XIII, p. 5). Specifically, during cross-examination, SA MB was asked, "And you also, during your interrogation, confronted [SPC Lewis] about lying in his previous statement?" (R. at 67). Special Agent MB responded, "Correct." (R. at 68).

Special Agent MB testified that he reviewed a summary of SPC Lewis's statements in preparing for a polygraph examination. (R. at 61-62). He also testified that he confronted SPC Lewis with those previous statements. (R. at 67-

68). Accordingly, the military judge's finding of fact is not clearly erroneous, and therefore his voluntariness analysis based on the finding of fact is correct.

Conclusion

WHEREFORE, Specialist Lewis respectfully requests this Honorable Court grant his petition for review.



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CERTIFICATE OF COMPLIANCE WITH RULE 21(b)

1. This supplement to the petition for grant of review complies with the type-volume limitation of Rule 21(b) because it contains 2,959 words.

2. This supplement to the petition for grant of review complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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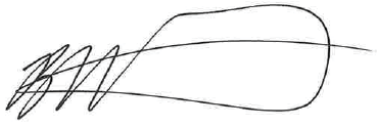
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Lewis*, Crim. App. Dkt. No. 20180260, USCA Dkt. No. 19-0109/AR was delivered to the Court and the Government Appellate Division on 4 February 2019.



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