United States Navy–Marine Corps Court of Criminal Appeals

Before
HOUTZ, MYERS, and KISOR
Appellate Military Judges

UNITED STATES
Appellant

v.

Ricardo A. RIVERA
Lieutenant Commander (O-4), U.S. Navy
Appellee

No. 202200195

Argued: 15 November 2022—Decided: 9 December 2022

Appeal by the United States Pursuant to Article 62, UCMJ

Military Judge:
Donald R. Ostrom

Arraignment on 11 April 2022 before a general court-martial convened at Naval Station Norfolk, Virginia, consisting of a military judge sitting alone.

For Appellant:
Colonel Joseph M. Jennings, USMC
Lieutenant Gregory A. Rustico, JAGC, USN

For Appellee:
Philip D. Cave, Esq.
Captain Arthur L. Gaston, III, JAGC, USN

Judge MYERS delivered the opinion of the Court, in which Senior Judge HOUTZ and Judge KISOR joined.

PUBLISHED OPINION OF THE COURT

MYERS, Judge:

This case is before us on an interlocutory appeal pursuant to Article 62(a)(1)(B), Uniform Code of Military Justice [UCMJ].[1] Appellee is charged with one specification of sexual assault, in violation of Article 120, UCMJ.[2] The sole specification forms the basis of this appeal.

After referral of charges but before trial was set to begin, trial defense counsel moved to suppress two inculpatory statements made by Appellee. The first statement was a text chain between Appellee and Lieutenant Commander [LCDR][O-4] November,[3] and the second was a pretext phone call between Appellee and LCDR November. Appellee argued that both statements were given involuntarily and in violation of his rights under Article 31(b), UCMJ. In his ruling, the military judge did not suppress the text messages between Appellee and LCDR November, but did suppress the pretext phone call on the grounds that there was a clear senior-subordinate relationship between the two, which necessitated Article 31(b), UCMJ, rights advisement.

On appeal, the Government asserts three assignments of error [AOEs]: (1) the military judge abused his discretion when he found the existence of a "clear senior-subordinate relationship" despite LCDR November and Appellee holding the same grade and no longer belonging to the same unit; (2) the military judge used the wrong legal test to determine whether Article 31(b) warnings were required; and (3) the military judge selected the "severe remedy" of exclusion even though LCDR November's pretext phone call was not made in an "official law enforcement or disciplinary capacity" and no reasonable person in Appellee's position would have believed otherwise. We disagree.

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[1] 10 U.S.C. § 862(a)(1)(B).

[2] 10 U.S.C. § 920.

[3] All names in this opinion, except those of the judges, appellate counsel, and Appellee, are pseudonyms. LCDR November is the alleged victim.

I. BACKGROUND

LCDR November was the Executive Officer [XO] of a SEAL Team, and had been selected for promotion to Commander [CDR][O-5] at the time of the alleged incident. Appellee, also a LCDR, had been assigned as the XO at one of the six Naval Reserve Units [NRUs] that fell under LCDR November's SEAL Team, but at the time of the alleged incident, was assigned to the Expeditionary Combat Readiness Center [ECRC].[4] When Appellee was attached to the NRU supporting the SEAL team, LCDR November did not provide input on Appellee's fitness report, but would have provided input on Appellee's end of tour award and was often the tie breaker vote during award deliberations briefs for subordinate NRU command XOs. LCDR November would also pass down tasks from his superiors to NRU XOs. More generally, within the Navy, XOs are the conduit by which Commanding Officers [COs] relay "orders relative to the duties of the command," and receive "communications of an official nature from subordinates."[5] As a matter of naval policy and tradition, the XO is the second in command behind the CO, and is critical in the operation of the command as he or she acts on behalf of, and at the direction of, the CO.[6]

The charge and its sole specification arose out of an incident that occurred in June 2021, when Appellee was mobilized for active duty for a deployment. Appellee's orders were to report to the SEAL Team for which LCDR November was XO no later than 28 May 2021, then report to the ECRC on or about 29 May 2021, and then report back to the SEAL Team on or about 21 June 2021. Appellee's deployment would then begin on or about 29 June 2021 for a "boots on the ground" time period of 339 days. After his deployment, Appellee would return to his position at one of the NRUs supporting this particular SEAL Team. This was an individual deployment vice a unit deployment. At the time of the alleged assault, Appellee was not attached to the SEAL Team, but he came from an NRU supporting this particular SEAL Team and intended to return after the deployment.

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[4] ECRC is not a subordinate command to the SEAL Team; it is a separate command.

[5] U.S. Navy Regs., art. 0806 (Dec. 16, 2015) [Navy Regs]. This is shared for the purpose of explaining the role of an XO within the United States Navy. It is not intended to imply that all conversations between XOs and members of their command necessarily require Article 31(b), UCMJ, rights.

[6] Navy Regs, art. 1005.

On 13 June 2021 and while Appellee was assigned to the ECRC, LCDR November invited Appellee to his home for dinner and drinks in an effort to engage in team building with the XOs of the NRUs.[7] Appellee arrived at approximately 1430, whereupon the two began drinking tequila. They later consumed at least two bottles of wine with dinner, and watched movies until about 2300, when they retired for the night. Because Appellee had been drinking heavily, LCDR November offered Appellee his couch to sleep on, while LCDR November went to sleep upstairs in his own bedroom. At approximately 0535 the next morning, LCDR November stated that he awoke to Appellee performing fellatio on him. It took LCDR November a few seconds to process what was happening before he knocked Appellee's head away. Appellee stated that he should probably leave. LCDR November agreed, and Appellee left.

The next day, LCDR November texted Appellee the following:

> [I]'ve had some time to think today and I want to clear a few things up. What you did was the most f[***]ed up experience of my life, so here is how things will go from here.
>
> I am not your friend. Do not talk to me unless it is for official business. Do not stop by my office unless it is for something that cannot be accomplished via email or phone.
>
> Do not text or call me on my personal phone unless it cannot wait for business hours and involves your official duties.
>
> If I catch wind of anything like this happening again, I will make an unrestricted report of this incident.
>
> I do not want your apology nor do I care how you feel. Do not ask me any questions about this and do not bring it up to me. In fact, do not respond to this text with anything other than an indication that you understand what I have said.[8]

Appellee responded by texting LCDR November, "I understand. It won't ever happen again."[9] Appellee did not text LCDR November again. It is this text message exchange that was the subject of Appellee's motion to suppress at trial.

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[7] Another LCDR NRU XO was also invited but did not attend.

[8] Appellate Ex. V(a) at 5.

[9] R. at 50, 89, 176.

Approximately a week later and while Appellee was still assigned to the ECRC,[10] LCDR November made an unrestricted report about the incident and provided a statement to Naval Criminal Investigative Service [NCIS] investigators. Working with NCIS, LCDR November attempted to make a pretext phone call to get Appellee to provide an admission or incriminating statement. According to an affidavit submitted by Appellee, he received four or five phone calls from LCDR November in the span of a couple of minutes.[11] Because Appellee deleted LCDR November's phone number after receiving the text message above, and because no voice message was left, Appellee suspected that the calls were from LCDR November due to the area code, but was not certain. He then received a call from a known contact on his phone—the Deputy Operations Officer at the SEAL Team—who directed Appellee to call LCDR November. Appellee explained in his affidavit, "I absolutely thought I had to call [LCDR November] back regarding official business due to our official positions and the context of previous taskings I had received from him."[12] The pretext phone call lasted approximately 12 minutes during which LCDR November often mentioned his position as XO and the steps he had taken to assist Appellee while Appellee was assigned to the SEAL Team. Appellee initially replied to LCDR November's assertions with comments like, "I don't know why" and "I can't explain it," and "I am sorry,"[13] but about two thirds of the way into the call and after being reminded of LCDR November's position within the command, Appellee stated, "I'm sorry I violated you by sucking your d[***]. Okay?"[14] and "I am sorry, [LCDR November], that I woke—that I violated you by sucking your d[***] while you were sleeping."[15] Toward the end of the call, LCDR November again asserted the relationship between the two of them, seemingly referencing the text message sent by LCDR November to Appellee on 15 June 2021.

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[10] The only evidence that indicated Appellee was still at the ECRC at the time of the pretext phone call was the military judge's comments to trial counsel during the Article 39(a), in which he states, ". . .[H]e was not at—underneath [the] SEAL Team. . ." Trial counsel responded with "Correct." Military judge concluded, "[b]ut he came from there…and he was going back there." Trial counsel agreed.

[11] Appellate Ex. VII(c).

[12] Appellate Ex. VII(c) at 2.

[13] Appellate Ex. VIII at 1.

[14] Appellate Ex. VIII at 6.

[15] Appellate Ex. VIII at 6.

II. DISCUSSION

Article 31(b), UCMJ, states that no person subject to the code may "interrogate . . . a person suspected of an offense without first informing him of the nature of the accusation."[16] When that provision is violated, Article 31(d), UCMJ, provides: "No statement obtained from any person in violation of this article . . . may be received in evidence against him in a trial by court-martial."[17]

The military judge ruled that an inculpatory text message sent by Appellee to LCDR November was admissible despite the absence of Article 31(b) warnings because it was not the product of a question or other solicitation from LCDR November. However, the inculpatory statements made by Appellee to LCDR November during a pretext phone call were inadmissible because they had not been preceded by Article 31(b) warnings given LCDR November repeatedly trying to get Appellant to confess, and given a "clear senior-subordinate relationship."[18] The military judge explained, "[w]ere this a civilian case where the nuances of military influence and life were not a factor, then this court would have no issue with the phone call and no rights advisement."[19]

"We review a military judge's ruling on a motion to suppress—like other decisions to admit or exclude evidence—for an abuse of discretion. In reviewing a military judge's ruling on a motion to suppress, we review factfinding under the clearly-erroneous standard and conclusions of law under the *de novo* standard. Thus, on a mixed question of law and fact as in this case, a military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect."[20] To be "clearly erroneous" a finding of fact "must

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[16] Art. 31(b), UCMJ.

[17] Art. 31(d), UCMJ.

[18] Appellate Ex. X at 9.

[19] Appellate Ex. X at 12.

[20] *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). "On matters of fact with respect to appeals under Article 62, UCMJ, this Court is 'bound by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous.'" *United States v. Becker*, 81 M.J. 483, 489 (C.A.A.F. 2021) (quoting *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017)).

be more than just maybe or probably wrong; it must strike us with the force of a five-week-old unrefrigerated dead fish."[21]

"The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous."[22] "In an Article 62, UCMJ, appeal, [the] Court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the party which prevailed at trial,"[23] which, in this case, is Appellee. "It is an abuse of discretion if the military judge: (1) predicates his ruling on findings of fact that are not supported by the evidence; (2) uses incorrect legal principles; (3) applies correct legal principles to the facts in a way that is clearly unreasonable; or (4) fails to consider important facts."[24] We conclude the military judge's findings of fact were not clearly erroneous.

A. The Military Judge Did Not Abuse His Discretion When He Found the Existence of a "Clear Senior-Subordinate Relationship"

The military judge found the existence of a "clear senior-subordinate relationship" despite LCDR November and Appellee holding the same grade and no longer belonging to the same unit. The Government argues that the military judge's findings were an abuse of discretion.

During the motions hearing to adjudicate this issue, the Government conceded to the military judge that there was a senior-subordinate relationship: "It is a professional relationship, and there is, in some cases, superior/subordinate-type relationships; however, he was not acting in his official capacity at this point in time, which is where it matters."[25] The Government continued to argue that the relationship changed from personal to professional and back again. Assuming arguendo that the relationship vacillated between personal and professional, the evidence shows that LCDR November alone determined

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[21] *United States v. Cooper*, 80 M.J. 664, 672 n.41 (N-M. Ct. Crim. App. 2020) (further citations omitted).

[22] *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010).

[23] *Becker*, 81 M.J. at 488 (quoting *Pugh*, 77 M.J. at 3).

[24] *Id*. at 489 (quoting *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017)) (additional citation omitted).

[25] R. at 171. At oral argument, Government counsel disputed that trial counsel conceded this issue but acknowledged that on appeal the Government was bound by the position the Government had taken at the trial level.

the nature of their relationship. Regardless, the Government argued that because LCDR November started the phone conversation on a personal note (despite Appellee being directed to call LCDR November by the Deputy Operations Officer of the unit), the conversation was purely personal. The Government concluded by stating, ". . . so while there is a mixing of rules, and Government is not contending that there was no superior/subordinate relationship in this instance of the [pretext phone call] and of the text message. It is clearly a personal and not professional capacity."[26] It is with this backdrop that the military judge then adjudicated the admission of both the text message and the pretext phone call, finding only the text message admissible.

The military judge predicated his ruling on findings of fact that were supported by the evidence. The military judge explained the relationship between Appellee and LCDR November as follows: "…[Appellee] was on active duty on orders that placed him, at the time of the alleged incident, under [the] ECRC. However, when looking at the totality of circumstances here this factor does not obviate [LCDR November] from his military supervisory role. The deployment was not a permanent change of duty. Both before and after the deployment, [Appellee] was the XO of an NRU under [the SEAL team]."[27] The military judge recognized that Appellee was going back to the SEAL Team after his deployment, and referenced the text sent by LCDR November to Appellee in which Appellee is reminded that theirs is a professional, working relationship. [28] "The tenor and tone of that text are readily apparent to anyone reading it. This was an official relationship between the two of them, and while that was already the case to an outside observer, LCDR [November] made it clear in the text message . . . every bit of LCDR [November's] actions before and after this incident in question evince a command relationship vice a personal relationship, as stated by the alleged victim."[29] At the time Appellee received a phone call from the SEAL Team Deputy Operations Officer directing him to call LCDR November, he did so because he believed it was his duty to do so in light of the direction he received from LCDR November in the text message, and because past phone calls with LCDR November concerned important command-related issues.[30] Regardless of what the relationship between Appellee

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[26] R. at 172.

[27] Appellate Ex. X at 8.

[28] Misidentified by the military judge as an email in Appellate Ex. X at 8.

[29] Appellate Ex. 10 at 8.g

[30] The military judge also determined that the text message, in which LCDR November directed Appellee not to contact him unless it was for a work-related purpose, was an order.

and LCDR November may have been prior to the text message, a reasonable person would interpret the text message from LCDR November as clearly re-establishing their relationship as a professional one only, at the time of the phone call from LCDR November to Appellee. There is no evidence suggesting that there was further communication between Appellee and LCDR November between the text message and the pretext phone call so as to change the nature of their relationship prior to the phone call. It makes little difference that Appellee was not actually assigned to the SEAL Team at the time of the phone call in light of LCDR November's statements indicating he only wanted to maintain a professional relationship with Appellee.

During the pretext phone call, LCDR November regularly asserted his position within the command by stating, "I am the XO of a SEAL team. I am responsible for everyone at that command. What really scares me is that you are going to do it to someone junior who doesn't know how to take care of themselves."[31] After comments like this, Appellee incriminated himself, LCDR November concluded with, "I am sorry that I busted my a[***] to keep you at the command, because I think if I hadn't done that, if I hadn't waived you into that billet that is actually supposed to be for [a] SEAL, because I thought you were an honorable man, I'm sorry for that."[32] The conversation is laced with LCDR November's reminders about his position within the command, respective to Appellee's position within the command. The incriminating statements were made after LCDR November directed Appellee not to speak with him unless the matter was work-related in the text message, and after LCDR November reminded Appellee of LCDR November's standing within the command. For these reasons, the military judge did not abuse his discretion when he found the existence of a clear senior-subordinate relationship, and that finding of fact is not clearly erroneous.

B. The Military Judge Did Not Apply the Wrong Legal Test to Determine Whether Article 31(b), UCMJ Warnings Were Required

The military judge applied the correct legal test. "Article 31(b) warnings are required when (1) a person subject to the UCMJ, (2) interrogates or requests any statement, (3) from an accused or person suspected of an offense, and (4) the statements regard the offense of which the person questioned is accused or suspected."[33] He also found:

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[31] Appellate Ex. VIII at 3-4.

[32] Appellate Ex. VIII at 7.

[33] *United States v. Jones*, 73 M.J. 357, 361 (C.A.A.F. 2014).

> A military questioner must give a military suspect an Article 31 warning when the questioner is "acting or could reasonably be considered to be acting in an official law-enforcement or disciplinary capacity." *United States v. Good*, 32 M.J. 105, 108 (C.M.A. 1991) "However, any questioning of a suspect by a military superior in his immediate chain of command will normally be presumed to be for disciplinary purposes." *Id*. at 108. However, that does not mean that all military relationships require warnings. The practice of having informants conduct oral wire intercepts – having law enforcement record the phone call of an accused and a third party without the accused's knowledge and with the consent of the third party—has a long history in law enforcement and the military. This investigative tactic has been upheld against other attacks under different legal theories. *See United States v. Parrillo*, 34 M.J. 112 (C.A.A.F. 1992) upholding the use of oral wire intercepts as not being in violation of M.R.E. 317's prohibition on interception of oral wire communications.
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> Article 31(b), UCMJ, should not be interpreted to reach literal but absurd results, such as imposing a rights warning requirement in an operational context where it could impede success of the military mission; rather, the purposes behind the article are used to inform its contextual application. However, congress intended Article 31(b), UCMJ, to address the subtle and not so subtle pressures that apply to military life and might cause members of the armed forces to feel compelled to self-incriminate. *Gilbreath*, 74 M.J. 11 (C.A.A.F. 2014).[34]

Our superior court established a two-part test for determining whether Article 31(b) warnings are required: 1. whether the person questioning was acting in an official capacity or was questioning based on a personal motivation; and 2. whether "a reasonable [person] in the suspect's position" would perceive that the inquiry involved more than casual conversation.[35] Whether LCDR November was acting in an official capacity "is determined by 'assessing all the facts and circumstances at the time of the interview to determine whether the military questioner was acting or could reasonably be considered to be acting in an

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[34] Appellate Ex. X at 7.

[35] *Jones*, 73 M.J. at 362 (quoting *United States v. Good,* 32 M.J. 105, 108 n.2 (C.M.A. 1991)).

official law-enforcement or disciplinary capacity.'"[36] Whether LCDR November was acting in an official capacity, and whether a reasonable person would perceive that LCDR November's inquiry was more than casual conversation, are questions of law, which we review de novo.[37] Because LCDR November was acting with the assistance of NCIS, was participating in a law enforcement investigation, and was using his positional authority during the pretext phone call, we find that he was acting in an official law enforcement or disciplinary capacity.[38]

Next, we assess whether a reasonable person in Appellee's position would perceive that the inquiry involved more than casual conversation. Because of the text message which outlined the professional nature of Appellee's relationship with LCDR November, and because of the nature of the phone call itself (both in the way it was conducted and in the way Appellee was directed to call LCDR November), we find that a reasonable person in Appellee's position would perceive that the inquiry involved more than casual conversation.

The Government argues that the military judge misstated the law when he wrote, "A senior cannot turn on and off again the military power dynamic," and "[T]he government cannot subvert the requirements of Article 31(b) because the senior military member claims to step out of the senior role."[39] The Government argues that since the military judge did not provide authority for this proposition, which ignores the "decades of precedent in which Article 31(b) warnings were held unnecessary despite the existence of a typical superior-subordinate relationship,"[40] the military judge applied the wrong legal test and misstated the law. We disagree.

The military judge's analysis regarding the second prong, whether a reasonable man in the suspect's position would perceive that the inquiry involved more than casual conversation, was not an abuse of discretion. He highlighted the fact that it was the Deputy Operations Officer who directed Appellee to

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[36] *United States v. Cohen*, 63 M.J. 45, 49 (C.A.A.F. 2006) (quoting *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F 2000)).

[37] *Swift*, 53 M.J. at 448.

[38] *See Jones*, 73 M.J. at 362. Should LCDR November's status as assisting law enforcement be considered a finding of fact and not a conclusion of law, the military judge's finding was not clearly erroneous as it does not strike us with the "force of a five-week-old unrefrigerated dead fish." *Cooper*, 80 M.J. at 672 n.41.

[39] Appellate Ex. X at 9, 12.

[40] Appellant's Br. at 29.

"call [t]he unit XO,"[41] which the military judge found to be an order. Appellee thus called the unit XO, LCDR November, which a reasonable person would do pursuant to such an order. The military judge also highlighted LCDR November's text message to Appellee in which LCDR November told Appellee not to contact him but for professional purposes only. "The tenor and tone of that text are readily apparent to anyone reading it. This was an official relationship between the two of them, and while that was already the case to an outside observer, [LCDR November] made it clear in the text message. [LCDR November] again stated the official business-only relationship when he referred back to it at the end of the pretext phone call."[42] As the military judge stated, "[i]n no world would a subordinate feel they had any real choice in this scenario."[43] The nature of the phone conversation also strongly indicates a professional relationship. While the military judge's discussion regarding the second prong of the *Jones* test may not be well defined, the correct analysis is there and he did not abuse his discretion.

The military judge did not abuse his discretion when he found that LCDR November was acting in an official capacity, and he did not abuse his discretion when he found that there was a senior-subordinate relationship that necessitated Article 31(b) rights advisement. Viewed in the light most favorable to Appellee, the content, tone, and tenor of the pretext phone call supports that a reasonable person in Appellee's position would perceive LCDR November's inquiry during the pretext phone call to be more than casual conversation.[44] The military judge weighed all of the facts and evidence, he applied the correct legal test, and he appropriately determined that LCDR November was required to provide Article 31(b) warnings. Therefore, we find that the military judge did not abuse his discretion.

C. The Military Judge's Remedy of Exclusion was Appropriate Under the Circumstances

The Government argues that the military judge selected the "severe remedy" of exclusion because LCDR November's pretext phone call was not made in an "official law enforcement or disciplinary capacity" and no reasonable person in Appellee's position would have believed otherwise. For the reasons held

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[41] Appellate Ex. X at 12.

[42] Appellate Ex. X at 8.

[43] Appellate Ex. X at 12.

[44] *See Jones,* 73 M.J. at 362.

above, we disagree. We hold that the military judge did not abuse his discretion in ruling that LCDR November's pretext phone call was made in an official law enforcement or disciplinary capacity, that a reasonable person in Appellant's position would perceive the pretext call to be more than casual conversation, and therefore, that Appellee's statements during the pretext phone call were involuntary. Accordingly, suppression of the statement is the appropriate remedy, in accordance with Article 31(d), UCMJ, and Mil. R. Evid. 305(c)(1).[45]

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the military judge did not abuse his discretion.

The military judge's ruling is **AFFIRMED**. The case is returned to the Judge Advocate General for remand to the military judge for further proceedings consistent with this opinion.

FOR THE COURT:

MARK K. JAMISON
Clerk of Court

[45] Military Rules of Evidence 305(c)(1) states, "[a] statement made in violation of the accused's rights under Article 31 is involuntary and therefore inadmissible against the accused."