9 August 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

AIRMAN FIRST CLASS (E-3)
PABLO P. IRIZARRY,
UNITED STATES AIR FORCE,
Appellant.

Crim. App. No. ACM 37748

USCA Dkt. No. 12-0451/AF

Appellant’s Brief

Dwight H. Sullivan
CAAF Bar No. 26867
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240)612-4773
dwight.sullivan@pentagon.af.mil

Travis K. Ausland, Capt, USAF
CAAF Bar No. 34141
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240)612-4770
travis.ausland@pentagon.af.mil

Counsel for Appellant

INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Rule

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	APPELLANT'S BRIEF
v.	)	Crim. App. No. ACM 37748
	)	USCA Dkt. No. 12-0451/AF
Pablo P. Irizarry Airman First Class (E-3) United States Air Force, Appellant.	)	

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

Issue Presented

WHETHER THE MILITARY JUDGE ERRED BY DENYING A DEFENSE MOTION TO SUPPRESS AN ITEM SEIZED BY APPELLANT'S FIRST SERGEANT DURING A WARRANTLESS ENTRY INTO APPELLANT'S OFF-BASE HOME.

Statement of Statutory Jurisdiction

Appellant's approved court-martial sentence included a bad-conduct discharge, which brought his case within the Air Force Court of Criminal Appeals' Article 66 jurisdiction. *See* Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2006). On March 15, 2012, the Air Force Court of Criminal Appeals affirmed the findings and sentence. *United States v. Irizarry*, No. ACM 37748, 2012 WL 1059021 (A.F. Ct. Crim. App. Mar. 15, 2012) (per curiam) [J.A. 001-04]. This Court has jurisdiction to review the Air Force Court's opinion. Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

Statement of the Case

On August 19-20, 2010, Appellant was tried by a general court-martial composed of officer members at Dyess Air Force Base, Texas. Contrary to his pleas, he was found guilty of a single specification of larceny of military property of a value greater than $500 in violation of Article 121 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 921 (2006). On August 20, 2010, the members sentenced Appellant to a bad-conduct discharge, confinement for 45 days, and reduction to E-1. On October 1, 2010, the convening authority approved the sentence as adjudged and, with the exception of the bad-conduct discharge, ordered it executed.

In a decision issued on March 15, 2012, the Air Force Court of Criminal Appeals affirmed the findings and sentence. J.A. 001-04. Appellant filed a timely petition for grant of review on April 20, 2012. *United States v. Irizarry*, __ M.J. __, No. 12-0451/AF (C.A.A.F. Apr. 20, 2012). This Court granted Appellant's petition for review on July 10, 2012. *United States v. Irizarry*, __ M.J. __, NO. 12-0451/AF (C.A.A.F. July 10, 2012).

Statement of Facts

The defense moved to suppress the seizure of an Altitude Vertical Velocity Indicator (AVVI), which was the subject of Appellant's larceny conviction, from an off-base apartment in

Abilene, Texas rented to Appellant and his wife. J.A. 86, 23-39. The Government filed a written response. J.A. 44-49.

During an Article 39(a) session held to litigate the motion, the Government called Master Sergeant (MSgt) Matthew G. Saganski, Appellant's former first sergeant who seized the AVVI in Appellant's home. *See* J.A. 89-90, 94, 101-02, 160. MSgt Saganski testified that he went to the apartment on February 23, 2010 during duty hours in uniform, accompanied by Technical Sergeant (TSgt) Charles Zenor. J.A. 90, 96, 102. TSgt Zenor was Appellant's shop chief. J.A. 143.

MSgt Saganski testified that when he went into Appellant's home, he was representing the Air Force. J.A. 96, 102-03. He went there after being contacted by employees of the apartment's management company, who called him several times over the preceding week. J.A. 93-96. He dealt with both Lora Norwood, the apartment's community manager, and Charles Marquette, a maintenance technician. J.A. 94-95, 127-28, 137. Ms. Norwood and/or Mr. Marquette told MSgt Saganski that Appellant had not paid his rent and the apartment was in an unhygienic condition. J.A. 95. Before going to Appellant's home, MSgt Saganski discussed the situation with his commander, who instructed MSgt Saganski to report back to him. J.A. 96.

Neither MSgt Saganski nor TSgt Zenor went to Appellant's home to make repairs, to estimate the cost of repairs, or to

perform maintenance. J.A. 105, 156. Rather, MSgt Saganski went to gather information to report back to the commander to deal with the situation. J.A. 103.

Ms. Norwood testified that she did not deem the situation with Appellant's apartment to be an emergency. J.A. 131.

MSgt Saganski believed that under Appellant's lease, the landlord was allowed to grant him access, but he did not have any discussions about the lease's terms or the management company's authority to enter. J.A. 113-15. MSgt Saganski knew the management company had previously entered Appellant's apartment, apparently for the purpose of inspecting it. J.A. 115-16. When Mr. Marquette entered the apartment, he had a key. J.A. 114-15. MSgt Saganski also believed that Appellant "was still residing there." J.A. 099.

MSgt Saganski explained:

> I went there because [the apartment's management company] had called me numerous times. I went there to find out more of the facts about what was going on so that I could come back and discuss with Airman Irizarry and the commander, the situation and hopefully put a better light on the Air Force that yes, somebody from the Air Force does care, and that we came to see what they had to show. . . . My intent was to find out how bad things really were, how much money did he really owe, so that when I sat down with Airman Irizarry later and/or his supervision, I could say what they were saying were the facts about how much he owed so that he could be counseled and he could be talked to, and see if we can get the situation remedied.

J.A. 114.

While MSgt Saganski was in Appellant's home, he seized the Altitude Vertical Velocity Indicator (AVVI) that was the subject of Appellant's larceny conviction. J.A. 101, 160. He testified that the AVVI was not visible when he entered the apartment. J.A. 101. Rather, it was in an interior room. *Id*.

The military judge denied the defense's motion to suppress after making extensive findings of fact. J.A. 208-15, 218. He ruled that the apartment management company had authority to consent to MSgt Saganski and TSgt Zenor entering Appellant's apartment because "[t]heir purpose was to effectuate repairs upon the property, a purpose specifically listed in the lease at Paragraph 28." J.A. 217. The military judge also ruled that even if the apartment management company did not have actual authority to allow MSgt Saganski and TSgt Zenor to enter the apartment, they believed that it did. *Id*. He also concluded that their belief was reasonable. J.A. 218. On those bases, the military judge denied the motion to suppress. *Id*.

Summary of Argument

Government officials' warrantless entry into a citizen's home is presumptively impermissible. While some narrow exceptions to that rule have been recognized, none applies in this case. Two Air Force noncommissioned officers (NCOs), acting in the official performance of their duty, entered an off-base home rented by Appellant and his wife at the invitation

of employees of Appellant's landlord. No emergency existed. The NCOs were not there to make repairs or to perform maintenance. Rather, they entered Appellant's home in their official governmental capacity.

While the lease allowed the landlord's employees to enter Appellant's apartment for designated purposes, Supreme Court precedent has rejected the notion that a landlord can lawfully permit government officials to enter a leased property merely because the lease allows the landlord to enter in certain circumstances. Supreme Court precedent has also rejected the notion that a government official could believe in good faith that a landlord is authorized to permit a warrantless entry into a leased residence.

Both the military judge and the Air Force Court of Criminal Appeals erred by holding that the NCOs could constitutionally seize property within Appellant's home because they were there at the invitation of the landlord's employees. In reaching that holding, both the trial judge and the Air Force Court relied on this Court's opinion in *United States v. Jacobs*, 31 M.J. 138 (C.M.A. 1990). This case does not fall within the exceptions to the prohibition against warrantless entries recognized by *Jacobs*. Nevertheless, this Court may wish to reconsider *Jacobs*' viability in light of the Supreme Court's subsequent decision in

Georgia v. Randolph, 547 U.S. 103 (2006), which is consistent with Chief Judge Everett's *Jacobs* dissent.

Argument

THE MILITARY JUDGE ERRED BY DENYING A DEFENSE MOTION TO SUPPRESS AN ITEM SEIZED BY APPELLANT'S FIRST SERGEANT DURING A WARRANTLESS ENTRY INTO APPELLANT'S OFF-BASE HOME.

A. Standard of Review

A military appellate court reviews a military judge's ruling on a motion to suppress evidence for abuse of discretion. *United States v. Monroe,* 52 M.J. 326, 330 (C.A.A.F. 2000). It reviews findings of fact under the clearly erroneous standard and conclusions of law de novo. *United States v. Rodriguez,* 60 M.J. 239, 246 (C.A.A.F. 2004).

B. Law and Analysis

This case involves a governmental intrusion into an off-base apartment leased to Appellant and his wife. Protection against unreasonable governmental intrusion into the home is "'the very core' of the Fourth Amendment." *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . . ." *United States v. United States Dist. Court*, 407 U.S. 297, 313 (1972). Such a physical

intrusion by two NCOs acting in their official governmental capacity occurred in this case.

The Supreme Court has emphasized that "[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo*, 533 U.S. at 31. The entry into and seizure of an item from Appellant's home does not fall into any exception to that principle.

As a general rule, a landlord has no authority to consent to government agents' entry into a tenant's apartment. *Chapman v. United States*, 365 U.S. 610, 617 (1961). As this Court has stated, "Ordinarily, warrantless entry into a person's house is unreasonable per se." *United States v. Weston*, 67 M.J. 390, 392 (C.A.A.F. 2009) (citing *Randolph*, 547 U.S. at 109). That general rule indicates that MSgt Saganski had no lawful right to be in Appellant's off-base home when he seized the AVVI. He did not have Appellant's consent; he did not have a search warrant; he did not have valid third-party consent to enter. The evidence that MSgt Saganski found in Appellant's home was therefore inadmissible under both the Fourth Amendment exclusionary rule and Military Rule of Evidence 311. *See* Mil. R. Evid. 311.

1. MSgt Saganski's presence in Appellant's off-base home was not authorized by valid third-party consent

In *Chapman*, the Supreme Court held that a landlord cannot lawfully consent to a search of a tenant's residence even if the terms of the lease and local property law will allow the landlord to enter the apartment to abate a nuisance. *Chapman,* 365 U.S. at 617. Additionally, even if a landlord is authorized to permit employees to enter rented premises for such purposes as cleaning, this right does not include authorizing law-enforcement officials to search the tenant's room in the landlord's company. *See Stoner v. California,* 376 U.S. 483, 489-90 (1964). The Supreme Court reiterated this law in 2006:

> A person on the scene who identifies himself, say, as a landlord or a hotel manager calls up no customary understanding of authority to admit guests without the consent of the current occupant. See *Chapman v. United States*, *supra* (landlord); *Stoner v. California*, 376 U.S. 483 (1964) (hotel manager). A tenant in the ordinary course does not take rented premises subject to any formal or informal agreement that the landlord may let visitors into the dwelling, *Chapman*, *supra*, at 617, and a hotel guest customarily has no reason to expect the manager to allow anyone but his own employees into his room, see *Stoner*, *supra*, at 489, see also *United States v. Jeffers*, 342 U.S. 48, 51 (1951) (hotel staff had access to room for purposes of cleaning and maintenance, but no authority to admit police). In these circumstances, neither state-law property rights, nor common contractual arrangements, nor any other source points to a common understanding of authority to admit third parties generally without the consent of a person occupying the premises.

Georgia v. Randolph, 547 U.S. 103, 112 (2006).

That language is dispositive; Appellant's landlord's employees could not lawfully authorize government officials to enter Appellant's residence. Yet both the trial judge and the Air Force Court ruled otherwise. Neither cited *Georgia v. Randolph*, much less explained why it did not compel the opposite outcome.

Instead of following *Georgia v. Randolph*, both the trial judge and the Air Force Court relied on this Court's decision in *United States v. Jacobs*, 31 M.J. 138 (C.M.A. 1990), to hold that the evidence discovered as a result of MSgt Saganski's warrantless entry into Appellant's off-base home was admissible. Facts in this case, however, distinguish it from *Jacobs*' rationale. As detailed below, even if *Jacobs* were to be applied, this case should be resolved in Appellant's favor. Additionally, subsequent case law has confirmed that Chief Judge Everett's dissenting opinion in *Jacobs* provided a better interpretation of the Fourth Amendment than did the majority's opinion. This Court should adopt Chief Judge Everett's *Jacobs* dissent in light of *Georgia v. Randolph*.

In *Jacobs*, this Court upheld the seizure of evidence discovered by a non-commissioned officer who was in an airman's off-base residence at the request of the airman's landlord. This Court upheld the seizure under two rationales. First, this Court "agree[d] with the implied finding of the court below that

an emergency situation existed." *Jacobs*, 31 M.J. at 144. Second, this Court found no Fourth Amendment violation where government officials "enter the apartment 'in the shoes' of the landlord to assist him in making emergency repairs." *Id*. Neither of those exceptions to the general prohibition against warrantless entries applies in this case.

First, no emergency situation existed. Ms. Norwood expressly testified that she did not believe that the state of Appellant's apartment constituted an emergency. J.A. 131. Nor had any tenants complained about the condition of Appellant's apartment. *Id*. Additionally, it is apparent that MSgt Saganski did not believe that an emergency existed. He did not visit Appellant's apartment until a week after he was first contacted by the apartment management company, belying any notion that he was responding to an emergency. J.A. 94.

As to *Jacobs*' second rationale, both MSgt Saganski and TSgt Zenor specifically disavowed any intention to assist in making repairs to or performing maintenance on Appellant's property. *See* J.A. 97, 156. Nor were they standing in the landlord's shoes; they were representing the United States Air Force, not Cedar Creek Apartments, when they entered Appellant's home. J.A. 96-97, 102-03, 155-56. Additionally, Mr. Marquette testified that he invited MSgt Saganski to visit the apartment to *see* the damage, not to effectuate repairs. J.A. 171.

Accordingly, the military judge clearly erred when he concluded that Mr. Marquette, MSgt Saganski, and TSgt Zenor entered the apartment for the purpose of "effectuat[ing] repairs upon the property." J.A. 217. Finally, *Jacobs* referred to "making emergency repairs." 31 M.J. at 144. As discussed above, there was no "emergency" in this case, thus no "emergency repairs" were at issue.

Thus, neither of *Jacobs*' rationales applies to this case. Nor should the *Jacobs* exceptions to the prohibition against warrantless entries be extended. As this Court has observed, "the rule against warrantless entry is vigilantly guarded." *Weston*, 67 M.J. at 392.

Rather than expanding *Jacobs*' exceptions to that general prohibition, it may be appropriate for this Court to repudiate them. Chief Judge Everett's view in his *Jacobs* dissent is more consistent with *Georgia v. Randolph*'s subsequent approach:

> [A] landlord's consent to a search cannot bind the tenant, even if the terms of the lease and local property law will allow the landlord to enter for emergency purposes. *See Chapman v. United States*, 365 U.S. 610, 612 (1961). Moreover, even though a landlord may be entitled to authorize his employees to enter rented premises for such purposes as cleaning, this right does not include authorizing law-enforcement officials to search the tenant's room in the landlord's company. *See Stoner v. California*, 376 U.S. 483, 489-90 (1964).

Jacobs, 31 M.J. at 146-47 (Everett, C.J., dissenting) (footnote omitted).

2. MSgt Saganski's seizure of the AVVI cannot be upheld under the exclusionary rule's good faith exception

The military judge ruled that even if no one with actual authority consented to MSgt Saganski and TSgt Zenor entering Appellant's apartment, they "certainly believed they had that authority" and "reasonably believed [the apartment's management company] had the authority to allow them in." J.A. 217-18. This ruling, however, conflicts with Supreme Court case law.

In *Randolph*, the Court observed that "[a] person on the scene who identifies himself, say, as a landlord or a hotel manager calls up no customary understanding of authority to admit guests without the consent of the current occupant." *Randolph*, 547 U.S. at 112. When he visited the apartment, MSgt Saganski believed that Appellant "was still residing there," J.A. 99, and was thus the current occupant. As a matter of Supreme Court case law, therefore, MSgt Saganski could not reasonably believe that the landlord had the authority to invite him into Appellant's home.

The relevant question is whether consent was given "by a person who reasonably appears to have common authority." *Randolph*, 547 U.S. at 110 (citing *Illinois v. Rodriguez*, 497 U.S. 177, 181-82 (1990)); *see also id*. at 112 ("It is also easy to imagine different facts on which, if known, no common authority could sensibly be suspected."). The Supreme Court has

defined “common authority” as “mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right.” *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974). The landlord’s employees obviously did not meet that definition.

It is not sufficient that a government agent incorrectly believed that someone without apparent “common authority” could validly allow them to enter the premises; if that were the law, the exception would swallow *Chapman*’s edict that a landlord cannot lawfully consent to search a tenant’s apartment. *See Chapman,* 365 U.S. at 617. It would also offend *Randolph*’s assessment of the scope of a landlord’s apparent authority. 547 U.S. at 112. Yet the military judge upheld the evidence’s admissibility on that alternate basis.

It is a widely shared social expectation that a landlord cannot willy-nilly enter an apartment rented to a tenant, much less invite guests along to do so. Tenants would be shocked to wake up from their beds or get out of their showers to find their landlord in their kitchen or sitting on their couch. Nothing suggests that MSgt Saganski believed that Mr. Marquette had common authority over Appellant’s apartment and such a belief would have been unreasonable even if he had entertained it. Accordingly, the military judge erred not only by holding

that Mr. Marquette could lawfully consent to MSgt Saganski entering Appellant's apartment, but also by concluding that MSgt Saganski had a reasonable belief that justified his otherwise unconstitutional warrantless entry into Appellant's off-base home.

3. Appellant was prejudiced by the military judge's erroneous ruling.

Appellant was charged with and convicted of only one offense: theft of the AVVI. Had the military judge granted the motion to suppress, the Government would have had no case. The entire prosecution consisted of evidence obtained during MSgt Sagonski's and TSgt Zenor's warrantless entry into Appellant's off-base home or as a result of that warrantless entry. The ruling on the motion to suppress was outcome determinative. The military judge's erroneous denial of that motion therefore prejudiced Appellant.

Conclusion

For the foregoing reasons, this Honorable Court should set aside the findings of guilty and the sentence.

Respectfully submitted,

Dwight H. Sullivan
CAAF Bar No. 26867
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240)612-4773
dwight.sullivan@pentagon.af.mil

Travis K. Ausland, Capt, USAF
CAAF Bar No. 34141
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240)612-4770
travis.ausland@pentagon.af.mil

Counsel for Appellant