

14 October 2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

BRITTANY N. OLSON,
Airman First Class (E-3), USAF
Appellant.

Crim. App. No. S32034
USCA Dkt. No. 14-0166/AF

BRIEF ON BEHALF OF APPELLANT

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USAF,)	
<i>Appellant.</i>)	

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

Issue Granted

**WHETHER THE MILITARY JUDGE ERRED BY DENYING THE
DEFENSE'S MOTION TO SUPPRESS THE EVIDENCE SEIZED FROM
APPELLANT'S HOUSE BECAUSE THE TOTALITY OF THE
CIRCUMSTANCES INDICATED THAT APPELLANT'S CONSENT TO
SEARCH WAS INVOLUNTARY.**

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c). This Honorable Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On 15-18, 21-23, and 28 November 2011, A1C Brittany N. Olson (Appellant) was tried by Special Court-Martial, officer members, at Joint Base Andrews, Maryland. The charges and specifications she was arraigned on, her pleas, and the findings of the court-martial were as follows:

Chg	Art	Spc	Summary of Offense	P	F
I	92			NG	G
		1	Did, a/n JB Andrews, MD, btw o/a 1 Aug 11 and o/a 7 Sep 11, violate a lawful general regulation, to wit: paragraph 3.2.3, AFI 44-121, by wrongfully using oxycodone, valium, and cyclobenzaprine, commonly referred to as Flexeril.	NG	NG
		2	Did, know of her duties at or near JB Andrews, MD, o/a 17 Aug 11, was derelict in the performance of those duties in that she willfully failed to refrain from possessing drug paraphernalia, as it was her duty to do.	NG	G
II	109			NG	G
			Did, a/n North Beach, MD, btw o/a 1 Aug 09 and o/a 17 Aug 11, recklessly spoil by failing to remove animal excrement and an insect infestation from the house, a house located at 1053 Walnut Ave., North Beach, Maryland, the amount of said damage being in the sum of about \$6,000.00, the property of Jack Bannister.	NG	G
III	112a			NG	G
		1	Did, a/n JB Andrews, MD, o/a 17 Aug 11, wrongfully possess some amount of Ketamine, a Schedule III controlled substance.	NG	G
		2	Did, a/n JB Andrews, MD, btw o/a 1 Aug 11 and o/a 18 Aug 11, wrongfully use Oxymorphone, a Schedule II controlled substance.	NG	NG
IV	121			NG	G
			Did, a/n JB Andrews, MD, btw o/a 1 Aug 11 and o/a 18 Aug 11, steal 1000 pills of cyclobenzaprine, military property, of a value of about \$1,000.00, the property of the United States.	NG	G
V	134			NG	NG
			At or near JB Andrews, MD, btw o/a 1 Apr 11 and o/a 17 Aug 11 was responsible for the care of CSO, a child under the age of 16 years and did endanger the safety	NG	NG

			of said CSO, by failing to provide adequate supervision and exposing him to hazardous conditions, and that such conduct constituted culpable negligence, being prejudicial to good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces.		
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Appellant was sentenced to four months of confinement, forfeiture of \$978.00 pay per month for four months, reduction to the grade of E-1, and a bad-conduct discharge. J.A. 354-55. On 27 March 2012, the convening authority reduced the forfeitures by one month but otherwise approved the sentence as adjudged. J.A. 350-53.

On 11 September 2013, the Air Force Court of Criminal Appeals (Air Force Court) affirmed the approved findings and sentence. J.A. 1-4. On 3 December 2013, this Court remanded the case to the Air Force Court, and on 18 March 2014, the Air Force Court again affirmed the approved findings and sentence. J.A. 5-9. On 11 September 2014, this Court granted Appellant's petition to review whether Appellant's consent to the search was involuntary under the totality of the circumstances.

Statement of Facts

A. Appellant is ordered to talk to AFOSI

On 17 August 2014, Appellant was ordered to talk to the Air Force Office of Special Investigations (AFOSI) by her supervisor, Staff Sergeant (SSgt) D. J.A. 217-18. SSgt D did

not tell Appellant she was going to AFOSI to be interviewed about allegations her husband was involved with drugs. Rather, SSgt D simply told her to go to the education building and use the phone to call Agent Carter. *Id.* SSgt D. had previously contacted AFOSI about Appellant because he suspected her civilian husband of distributing drugs, he thought Appellant was a "dirt bag," and he thought she was being influenced by her drug dealing husband. J.A. 153-54, 309.

When Appellant arrived at the education building, she had to use an exterior phone to contact Agent Carter so he could come to the front of the building and escort her inside because it was a secure building. J.A. 218. Upon entering the AFOSI office, the agents asked her to give them her cell phone prior to the interview. She complied, and they placed her cell phone in another conference room. J.A. 108, 174-75, 183-84. Although AFOSI agents testified they would have allowed her to refuse to hand over her cell phone and it was voluntary on her part, they also testified that they never told her she could refuse to hand over her cell phone and it was simply a voluntary request. J.A. 108, 174-75.

Two OSI agents questioned Appellant for approximately two hours. J.A. 110, 156-58. Shortly after the interview started, the AFOSI agents "brought up her husband because [they] knew that he had been arrested on drug charges" the previous year.

J.A. 159. Appellant told the agents she was unaware of that arrest. *Id.* She then started to cry. *Id.* Shortly thereafter, the AFOSI agents asked her for consent to search her house to make sure it was safe and there were no drugs. J.A. 159-60.

B. Appellant is escorted by AFOSI for a smoke break

According to AFOSI agents, when presented with the consent to search form, Appellant was hesitant to give consent and wanted to take a smoke break to think about it. J.A. 87, 106-07. Although Agent Carter "allowed" Appellant to take a smoke break, he first found another AFOSI agent, Agent Burch, to escort Appellant during the smoke break. J.A. 160. Agent Burch testified that he was asked to escort Appellant on a smoke break because they were trying to get her to consent to a search of her home, they were having trouble getting her to consent, and they wanted him to help her make a decision. J.A. 133, 140.

At the smoke break, Appellant told SA Burch that "she was worried that [the two AFOSI agents] were going to try and get her in trouble." J.A. 134. Agent Burch reassured her by stating, "[I]t's just a consent to search her house; we weren't looking at her we were looking at her husband, and she didn't have to sign it." J.A. 135. Appellant then told SA Burch she wanted to talk to her husband about the consent to search, and he advised her not to call her husband. J.A. 142.

C. AFOSI told Appellant she had nothing to worry about

SA Burch testified that after the smoke break, they returned to the AFOSI office where SA Horton and he filled out the consent form with Appellant. J.A. 136. Although Appellant had questions about the form (J.A. 141), the AFOSI agents again told Appellant she did not have anything to worry about. J.A. 141. In fact, SA Burch testified he "told her absolutely under no circumstances did she have anything to worry about with this search." J.A. 144. After being prompted by trial counsel, SA Burch later explained that he also said "if she hadn't done anything wrong that she had nothing to worry about." J.A. 145, 147. Although SA Carter suspected Appellant's husband of drug use and thought there was "a good possibility" that drugs were located in Appellant's house, he told Appellant "numerous times she wasn't suspected of anything." J.A. 168, 173.

D. AFOSI threatens Appellant with a warrant

Appellant testified that SA Horton told her that if she did not consent to the search, AFOSI would obtain a search warrant. J.A. 222. She testified that when she was asked for consent to search, she said she wanted to speak to her husband about it. *Id.* The OSI agents responded "that I would have to either sign the form or they would - we would wait there until a magistrate signed off on it." *Id.* She testified that she did not know what a magistrate was at the time, so she asked and was told

"that it was a judge that would sign off on the search warrant."

Id.

In contrast, the three AFOSI agents testified that they did not indicate to Appellant that if she did not consent, they would obtain a search warrant. J.A. 90-91, 103, 113-14, 149-50, 160, 175, 187.

E. Appellant was kept behind closed doors

Appellant explained that she did not feel like she was free to get up and leave the interview because:

In reference to when I wanted to smoke, I had asked them if I could smoke and they told me to wait in the conference room until they could get an agent that did smoke to escort me downstairs to smoke with me. I did not have my cigarettes on me at the time. I told them I needed to go to my car to get my cigarettes. I was not allowed to go to my car to get my cigarettes. I had to get my cigarettes from - from Bill [sic].

Why I did not leave at any other time, every time Agent Horton and Agent Carter walked in and out of the conference room, when they left, they had shut the door behind them and asked me to stay there.

J.A. 222.

F. Appellant acquiesced to the search

After approximately a two hour interview involving three AFOSI agents (J.A. 110), Appellant signed the "CONSENT FOR SEARCH AND SEIZURE" form. J.A. 31, 136-37. That form indicated SA Carter "advised me that the nature of the offense(s) of which I am suspected (matters concerning which I may have knowledge) is/are as follows: Art. 112a Wrongful use, possession, or

distribution of Controlled Substances." J.A. 31. The form also indicated, "I know that I have the legal right to either consent to a search, or to refuse to give my consent." *Id.*

Immediately after Appellant signed the form, AFOSI agents followed Appellant to her house and searched her house, where they found and seized contraband. J.A. 93, 114, 139, 163. Appellant drove herself to her house in her own car, with three AFOSI agents following her in two separate vehicles. J.A. 91-92.

G. AFOSI violated Appellant's Article 31(b) rights

The military judge found that AFOSI should have advised Appellant of her Article 31(b) rights and their failure to do so was a violation of her rights:

Objectively this court finds that AFOSI should have suspected the accused and informed her as such prior to seeking her consent. Under the unique facts of this case and taking into account the demeanor of the witnesses, it strains credulity that AFOSI would not have at least at the point of the smoke break considered the accused a suspect.

J.A. 299-300.

H. Motion to suppress and military judge's ruling

At trial, Appellant moved to suppress the evidence against her because the consent she gave to AFOSI agents to search her house was invalid and all of the remaining evidence was fruit of the poisonous tree. J.A. 23-37, 75-76. The Government opposed the motion. J.A. 38-43. The

military judge denied the motion to suppress. J.A. 300-01. The military judge's initial ruling can be found at J.A. 289-301; the military judge reconsidered his initial decision but affirmed his earlier ruling. J.A. 347-49.¹

The military judge applied the six-factor test from *United States v. Wallace*, 66 M.J. 5 (C.A.A.F. 2008), to determine the voluntariness of Appellant's consent to search her house:

In the instant case, the accused's liberty was not restricted. She was not placed in a locked room, handcuffed or physically restrained and prevented from leaving. She was not escorted to AFOSI and she was free to leave at any time between 1100 and 1300 hours on 17 August. Evidence that there was nominal restriction included the removal of her cell phone from her person, but she was entitled to retrieve the cell phone. AFOSI did not threaten the accused or bully her into providing consent. No promises of leniency were made to the accused. She was placed in her own automobile and permitted to drive to her house unaccompanied by AFOSI.

Inferentially, the accused was aware of her right to refuse consent. Her conversation with Special Agent Burch indicated some knowledge of law enforcement tactics. There's no reasonable inference that the accused was unaware of her right to refuse consent. As to the accused's mental state, it is clear that she was upset on learning from AFOSI that her husband had been arrested but that in spite of this she had the ability to make a rational decision. There were no prior violations of the accused's rights and this was the first meeting between AFOSI and the accused. The accused did not seek to consult with counsel because she had not been told that she was suspected of anything, indeed no rights advisement were [sic] given to her.

J.A. 295-96.

¹ Although the military judge stated he was reserving Appellate Exhibit IV for his written ruling, it would appear he forgot to do so. Although Appellate Exhibit IV is a written ruling, it has nothing to do with this issue.

Summary of the Argument

The military judge abused his discretion by denying the defense's motion to suppress the evidence seized from Appellant's house because the *Wallace* factors weighed in Appellant's favor, showing her consent to search her residence was not voluntary under the totality of the circumstances.

Argument

THE MILITARY JUDGE ERRED BY DENYING THE DEFENSE'S MOTION TO SUPPRESS THE EVIDENCE SEIZED FROM APPELLANT'S HOUSE BECAUSE THE TOTALITY OF THE CIRCUMSTANCES INDICATED THAT APPELLANT'S CONSENT TO SEARCH WAS INVOLUNTARY.

Standard of Review

A military judge's decision to admit evidence over defense objection on consent grounds is reviewed for an abuse of discretion. *United States v. Wallace*, 66 M.J. 5, 7 (C.A.A.F. 2008) (internal citations omitted). Findings of fact and conclusions of law are reviewed under the clearly erroneous and *de novo* standards, respectively. *Id.* At trial, the burden was on the government to prove by clear and convincing evidence that Appellant's consent was voluntary. Mil. R. Evid. 314(e)(5).

Law and Analysis

This Court in *Wallace* adopted six non-exhaustive factors to assess the voluntariness of a consent to search:

(1) the degree to which the suspect's liberty was restricted; (2) the presence of coercion or

intimidation; (3) the suspect's awareness of his right to refuse based on inferences of the suspect's age, intelligence, and other factors; (4) the suspect's mental state at the time; (5) the suspect's consultation, or lack thereof, with counsel; and (6) the coercive effects of any prior violations of the suspect's rights.

Wallace, 66 M.J. at 9 (citing *United States v. Murphy*, 36 M.J. 732, 734 (A.F.C.M.R. 1992)). In evaluating these factors, the Court considers the totality of the circumstances. *Wallace*, 66 M.J. at 9 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)). In *Wallace*, this Court concluded that because four of the six factors favored the defense, the accused's "ultimate consent to the seizure of the computer was not a valid consent, but rather mere acquiescence to the color of authority." *Id.* at 9-10.

Here, the military judge abused his discretion in denying Appellant's motion to suppress because just as in *Wallace* at least four, if not all six, of the factors weigh in favor of Appellant.

A. Appellant's liberty was restricted

The military judge erroneously concluded that Appellant's liberty was not restricted. J.A. 296. First, the military judge ignored the fact that Appellant's supervisor ordered her to speak with AFOSI. J.A. 217-18. Such an order itself restricted her liberty, to the extent that if she refused to

present herself at AFOSI and agree to an interview, at least in her mind, she would have been violating a lawful order.

AFOSI further limited her freedom by asking for and receiving her cell phone, and securing it in another conference room. J.A. 174, 183-84. Although AFOSI agents testified that Appellant could have refused to hand over her cell phone, they conceded that they never explained to Appellant she could lawfully refuse to hand over the cell phone, or that she could request for it to be returned whenever she wanted. *Id.*

Moreover, when Appellant asked AFOSI to call her husband to talk to him about the consent to search, they told her "that I would have to either sign the form or they would - we would wait there until a magistrate signed off on it." J.A. 222. Thus, Appellant did not believe she was free to leave; she was either going to sign the form or she would be held until a magistrate signed off on the order. *See Bumper v. North Carolina*, 391 U.S. 543, 548-550 (1968)(finding that consent to search was not voluntarily given when the consent was given after the police lied and said they had a search warrant).

Appellant also testified that every time an AFOSI agent left the room, she was told to remain and they closed the door. J.A. 222. AFOSI further controlled Appellant's freedom of movement by not allowing her to take a smoke break without an agent escorting her. J.A. 160. In fact, AFOSI would not even

allow Appellant to go back to her car and get her own cigarettes, requiring her instead to borrow a cigarette from the agent escorting her. J.A. 222.

Under these circumstances, the first *Wallace* factor indicates a lack of voluntariness.

B. AFOSI's show of authority created a coercive and intimidating environment

This Court noted in *Wallace* that "the presence of several authority figures . . . created a coercive and intimidating atmosphere that stifled Appellant's inclination to refuse consent." *Wallace*, 66 M.J. at 9. In this case, Appellant was ordered to go to AFOSI by her supervisor. When she arrived, she had her cell phone taken, she was placed behind closed doors with two AFOSI agents, and every time they left the room they shut the door behind them and told her to stay. The AFOSI agents also would not allow her to take a smoke break by herself, and instead, sought out assistance from a third AFOSI agent to escort Appellant during her smoke break and also help Appellate make a decision on the consent to search.

Most significantly, Appellant testified that the agents told her that if she did not consent, they would detain her until they obtained a search warrant from a magistrate. J.A. 222. While the OSI agents denied doing so, the military judge noted the discrepancy and found that Appellant could have

honestly perceived the events to which she testified. See, e.g., J.A. 294, 348-49.

While a statement that a search warrant would be obtained may not be sufficient standing alone to invalidate consent, see *United States v. Wright*, 52 M.J. 136 (C.A.A.F. 1999), such a statement is probative of a coercive and intimidating environment for purposes of the second *Wallace* factor. Moreover, by dissuading Appellant when she expressed a desire to consult with her husband, AFOSI further isolated Appellant, which also tends to show the government created a coercive and intimidating situation for her. J.A. 142.

The three authority figures who dealt with Appellant at the AFOSI office, in combination with her being ordered to be there by her supervisor, created a coercive and intimidating atmosphere, impairing Appellant's ability to refuse consent.

C. Appellant's awareness of her rights was overcome by AFOSI

The third *Wallace* factor is the suspect's awareness of her right to refuse based on inferences of the suspect's age, intelligence, and other factors. Although the form Appellant signed and the testimony of the AFOSI agents suggests Appellant was aware of her right to refuse consent, the record also reflects that she reasonably believed this was a Hobson's choice based on AFOSI's statement that it would obtain a warrant from a magistrate absent her consent. J.A. 222. Under these

circumstances, it is not reasonable to conclude that she believed refusal was an option. To whatever extent Appellant was aware she had the right to refuse consent, her awareness was overcome by the actions of AFOSI.

D. Appellant was emotionally distraught during the interview

The fourth *Wallace* factor - which considers the individual's mental state at the time - also suggests a lack of voluntariness. The record reflects that agents were aware Appellant was in an emotionally distraught state, and that she was reduced to tears during the interview. J.A. 159.

E. Appellant did not consult counsel

The fifth *Wallace* factor favors Appellant, as she never consulted counsel throughout [her] questioning and the subsequent search. *Wallace*, 66 M.J. at 10. Moreover, in *Wallace*, the accused was read his Article 31(b) rights, and although he requested counsel, he subsequently waived his right and answered questions and gave consent to search. Here, Appellant was not even given the opportunity to consult with counsel because, as the military judge found, AFOSI violated her Article 31(b) rights by failing to advise her of her rights.

F. AFOSI violated Appellant's Article 31(b) rights

The sixth *Wallace* factor also suggests a lack of voluntariness. The military judge correctly found that the AFOSI agents did suspect or should have suspected Appellant

committed UCMJ offenses at some point before she granted consent to search. J.A. 299-300. In fact, the evidence suggests that they knew or should have known at the outset of questioning that she was suspected of a UCMJ offense, since they believed that her husband was a drug dealer, believed there was a good possibility that drugs were in her home, and had been told by her supervisor that she was a "dirt bag" and that her problems as an Airman might be caused by her drug dealing husband.² J.A. 308.

Additionally, a forensic laboratory examination request signed by SA Jill Gava, the chief of the "Crim" section, indicated that SA Carter had received information that Appellant had previously smoked marijuana prior to questioning Appellant. J.A. 44-45, 168-171. SA Carter characterized that sentence as "a typo," (J.A. 171), and testified he had no such information (J.A. 181).

The military judge suggested that the line might have been included as a result of careless computer cutting and pasting. J.A. 180. But Technical Sergeant Myisha Richardson, a defense paralegal, testified that when the defense interviewed SA Gava,

² If the special agents are to be believed that they did not suspect Appellant of any wrongdoing, then it is hard to understand how their investigation of Appellant's husband would not be a violation of the Posse Comitatus Act, 18 U.S.C. § 1385. Appellant's husband was a civilian with no connection to the military, they lived off-base, and there was no allegation he was using or selling drugs on-base. See *United States v. Chon*, 210 F.3d 990 (9th Cir. 2000) and *United States v. Dreyer*, 2014 U.S. App Lexis 17714.

she said that SA Carter had Appellant sent to AFOSI because "[t]hey had questions about Airman Olson's husband **and Airman Olson's marijuana use.**" J.A. 205 (emphasis added), 210-11.

The OSI agents' testimony that they did not suspect her of a UCMJ violation diminishes their credibility. AFOSI's violation of Article 31(b) likely affected Appellant's ultimate agreement to sign the consent form. See *Schneckloth*, 412 U.S. at 226 (noting that failure to advise the accused of his or her Miranda rights is a factor to be considered in the totality of the circumstances). Accordingly, the sixth *Wallace* factor favors the defense as well.

Conclusion

In *Wallace*, four of the six factors favored the defense; here, at least four, if not all six, of the factors favor Appellant. Under these circumstances the prosecution did not demonstrate by clear and convincing evidence that Appellant's consent was voluntary. Accordingly, just as in *Wallace*, the totality of the circumstances indicates that Appellant's consent was not voluntary. As Appellant's consent to search was a mere acquiescence to authority, this Court should reverse the Air Force Court.

Respectfully Submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 14 October 2014.



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