13 November 2014

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	USCA Dkt. No. 14-0166/AF
Airman First Class (E-3), BRITTANY N. OLSON, USAF, *Appellant.*	)	Crim. App. No. S32034

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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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 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, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's Statement of the Case is generally accepted.

STATEMENT OF FACTS

a. Appellant's supervisor alerts AFOSI to suspicions about Appellant's husband's involvement with drugs.

In approximately the beginning of August 2011, Appellant's supervisor, Staff Sergeant D, spoke with Special Agent (SA) Kent Carter of the Air Force Office of Special Investigations (AFOSI). (J.A. at 308.) SSgt D told SA Carter that he had

heard that Appellant's civilian husband had been involved with drugs and had possibly been arrested. (J.A. at 309.) SSgt D described Appellant as a bad troop and a "dirt bag" and was concerned that her husband was a bad influence on her, but did not say he believed that Appellant herself was involved in illegal drug use.[1] (J.A. at 208-09.) SSgt D also relayed to SA Carter his belief that Appellant's husband was distributing drugs on base to other airmen. (J.A. at 293.)

b. Appellant is called into AFOSI.

On 17 August 2011, at approximately 1050, SSgt D told Appellant that he had received an interesting call and that she needed to go talk to Agent Carter at the education building on Joint Base Andrews. (J.A. 217-18, 248.) SSgt D gave Appellant instructions to go to the third floor of the education building, to dial a phone number and she would be let it. (J.A. at 218.)

At the time of Appellant's meeting with AFOSI, she was 26 years old and had been in the Air Force for approximately four years. (J.A. at 223.) Although she had been reduced in rank, she had previously reached the rank of Senior Airman and had graduated high school and attended some college. (Id.)

Appellant drove her own van to the education building and was not accompanied or escorted by her First Sergeant or anyone

[1] Appellant's troubles at work are evident in her Enlisted Performance Reports and in the Letters of Reprimand she received. These documents do not allege drug use by Appellant. (J.A. at 47-68.)

else. (J.A. 155, 224, 247.) Appellant testified at trial, "when I first arrived at OSI, I didn't even know it was OSI." (J.A. at 243.)

Upon arrival at AFOSI at approximately 1100, Appellant was met at the door by SA Wayne Horton who brought her to the AFOSI conference room, rather than to an interrogation room. (J.A. at 218, 224.) According to Appellant's testimony at trial, prior to entering the conference room, SA Horton "asked" Appellant if they could have her cell phone because she could not take it into the conference room. (J.A. at 221.) SA Horton described at trial that "[w]hen we talk to people, when we bring people in, we take their cell phone, or we ask for their cell phones. And it's completely voluntary; they don't have to give us their cell phone if they don't want to; but she volunteered to give it to us." (J.A. at 108.) SA Horton and SA Carter both testified that Appellant could have had her phone if she had asked for it. (J.A. at 121, 174.)

In the windowed and lighted conference room, Appellant, SA Horton, and SA Carter sat at a long conference room table. (J.A. at 83, 225-26.) SA Horton and SA Carter sat across the table from Appellant, and Appellant was situated closest to the unlocked door. (J.A. at 82-83, 104, 156.) Appellant was not handcuffed or otherwise physically restrained. (J.A. at 81, 225.) She described SA Carter as being "in a good mood." (J.A.

at 248.) The agents offered Appellant snacks, but she declined. (J.A. at 157.)

At the request of the agents, Appellant completed an administrative information form. (J.A. 043.) The AFOSI agents then asked Appellant various questions about whether she was aware of any illegal activity taking place. (J.A at 219.) Then, AFOSI asked Appellant if she was aware of any illegal drug activity involving her husband. (J.A. at 219.)

During this part of the conversation, the AFOSI agents told Appellant that her husband had been arrested for drug possession the previous October or December. (J.A. at 245, 250.) Appellant started crying upon hearing this news. (J.A. at 159.) At trial, Appellant claimed that was the first time she had heard of her husband's arrest. (J.A. at 245.)

The AFOSI agents asked if there had been any past occasions when Appellant's husband had been arrested on drug charges. Appellant told the agents that both she and her husband had been caught up on some drug charges previously in another state, but that she was not aware that he had been involved with drugs since moving to Maryland.[2] (J.A. at 159.)

[2] Based on Appellant's subsequent videotaped interview with AFOSI, it appears that Appellant was arrested for possession of marijuana with intent to distribute when she was 17 years old. Her husband's brother "manned up" and the charges against Appellant were dropped. (J.A. at 46, 01:01:47.) The record is unclear as to how much of this information was relayed to the agents during their initial conversation with Appellant. Given Appellant's later discussions with AFOSI about her husband's local drug supplier, PC, it appears that Appellant's statement that she was unaware that her husband had

c. AFOSI requests consent to search Appellant's residence.

The AFOSI agents next asked Appellant for consent to search her off-base residence using an AF IMT 1364 "Consent for Search and Seizure." (J.A. at 31, 230.) The agents asked for consent to search because they believed that Appellant's off-base residence might contain evidence that Appellant's husband was distributing drugs on Joint Base Andrews. (J.A. at 113.) They told Appellant they wanted to make sure her house was safe and to make sure there were no drugs there. (J.A. at 160.)

Appellant admitted during her testimony that she read the AF IMT 1364. (J.A. at 230.) The form read, "I, Brittany Olson, state that Kent Carter was identified to me as a Special Agent and 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. at 31). The form further stated:

> I know I have the legal right to either consent to a search or to refuse to give my consent. I understand that if I do consent to a search, anything found in the search can be used against me in a criminal trial or in any other disciplinary or administrative procedure. I also understand that if I do not consent, a search cannot be made without a warrant or other authorization recognized in law. (Id.)

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been involved with drugs since moving to Maryland was untrue. (Id. at 02:50:15.)

Appellant never indicated any lack of understanding of this part of the form to the AFOSI agents. (J.A. at 89.) Appellant was unsure as to whether to sign the form, and asked for a smoke break to think about it. (J.A. at 87, 230.) SA Bradley Burch accompanied Appellant outside the building on the smoke break. (J.A. at 133.)

During her testimony, Appellant claimed that the AFOSI agents "said I would have to either sign the form or they would – we would wait there until a magistrate signed off on it." (J.A. at 222.) SA Horton, SA Carter and SA Burch each denied telling Appellant that they would get a search warrant if she did not sign the form. (J.A. at 91, 135-36, 161.)

d. Appellant takes a smoke break.

Appellant testified that during the smoke break she was not allowed to go to her car to get her own cigarettes, and instead was provided cigarettes by SA Burch. (J.A. at 222.) During the 20-25 minute smoke break, Appellant relayed her concern that the AFOSI agents were going to try and get her in trouble. (J.A. at 134.) She also told SA Burch that she had family in law enforcement and that she was well aware of the types of things law enforcement say and how they word things to get people to do what they want. (J.A. at 134-35, 149.) SA Burch told Appellant that if she had done nothing wrong then she had nothing to worry about. (J.A. at 145.)

While smoking, Appellant debated whether she wanted to call her husband first or sign the consent form. SA Burch advised Appellant not to call her husband. (J.A. at 142.) According to Appellant's testimony at trial, Agent Burch told her that she could not call her husband to ask permission to search the house, "because if I asked him and he said no, since he is a civilian, he had the right to privacy and he can stop their search at any time." (J.A. at 221.) She also admitted that Agent Burch did not threaten her and did not tell her that she had to sign the consent form. (J.A. at 231-32.)

After returning from the smoke break, Appellant signed the AF IMT 1364 at 1300 granting AFOSI consent to search her off-base residence. (J.A. at 31, 234.) Her signature was witnessed by SA Burch and SA Horton. (J.A. at 31.)

The AFOSI agents did not read Appellant her Article 31(b) rights before she signed the form. The agents explained at trial that they did not consider Appellant to be a suspect. (J.A. at 107-08, 142.)

e. AFOSI searches Appellant's residence.

After Appellant signed the AF IMT 1364, she and several AFOSI agents traveled to Appellant's off-base residence. (J.A. at 235.) Appellant drove her own van on the 30-40 minute drive to her house and no one else accompanied her in her vehicle. (J.A. at 92, 111, 137, 235.) Upon arrival at Appellant's house,

Appellant unlocked her door, and the AFOSI agents executed the search and seized several contraband items. (J.A. at 93, 138.) After AFOSI found drug paraphernalia in Appellant's master bedroom, they began to suspect her of involvement with drugs. (J.A. at 173.) The AFOSI agents and Appellant left her residence at approximately midnight and returned to the AFOSI building to interview Appellant about the items found in her home. (J.A. at 93-94.)

f. AFOSI re-interviews Appellant after the search.

At this point, SA Horton read Appellant her Article 31(b) rights. (J.A. at 98.) When asked if she understood her rights, Appellant replied, "I understand what you said, but I don't see how you're investigating me for whatever you say it was, but yeah, I understand my rights." (J.A. at 46, 00:49:19.) Appellant said she did not want to a lawyer "right now" and that she was willing to answer questions to the best of her ability. (Id. at 00:49:41.) Appellant then stated, ""[y]ou make it seem like I'm under arrest. I've just been trying to help you guys out for the last 13-14 hours." (Id. at 00:50:01.)

The majority of the several hours of questioning that followed focused on the activities of Appellant's husband. Initially, Appellant repeatedly denied any knowledge of the existence of the contraband and drug paraphernalia found in her house. (Id.) Ultimately, however, Appellant admitted that she

was aware that the contraband and the drug paraphernalia had been in her house. (Id. at 04:21:17.) She also admitted to taking a bottle of pills from her work at the medical group. (Id. at 04:43:56.)

g. Motion to suppress and ruling at trial.

Prior to trial, trial defense counsel filed a motion to suppress all evidence seized from Appellant's home and vehicle and any statements made by Appellant after the search of her home. (J.A. at 23-34.) The Government opposed this motion. (J.A. at 35-45.)

Applying the totality of the circumstances test from United States v. Wallace, 66 M.J. 5, 9 (C.A.A.F. 2008), the military judge denied Appellant's motion to suppress. The military judge's findings included that Appellant's "liberty was not restricted" beyond the "nominal restriction" of removal of her cell phone; that Appellant was not bullied or threated into providing consent; that one could infer Appellant "was aware of her right to refuse consent"; that Appellant was upset after learning of her husband's arrest, but still "had the ability to make a rational decision;" that Appellant "did not seek to consult with counsel because she had not been told she was suspected of anything;" and that there were no prior violations of the Appellant's rights. (J.A. at 295-96.)

With regard to the differing testimony as to whether AFOSI told Appellant that they would obtain a search warrant from a magistrate if she did not consent, the military judge found, "[w]hether or not this statement was made, the accused may have inferred or deduced that this statement was made or was the case based on the surrounding circumstances and her own knowledge of law enforcement." (J.A. at 292.)

The military judge also determined that AFOSI *should* have considered Appellant a suspect and advised her of her Article 31(b) rights prior to seeking her consent. In his ruling, the military judge stated, "it strains credulity that AFOSI would not have at least at the point of the smoke break considered the accused a suspect," however, he did "not find that AFOSI engaged in subterfuge." (J.A. at 299.)

Nonetheless, the military judge found that the lack of a rights advisement was "but one factor among many" and under a totality of the circumstances, Appellant voluntarily consented to the search. (J.A. at 299-300.)[3]

After the military judge's initial ruling, additional evidence was provided, including testimony from SA Carter that Appellant's supervisor had called her a "dirt bag" when originally relaying his suspicions to AFOSI. (J.A. 308-09.)

[3] The military judge also found that the doctrine of inevitable discovery did not apply in this case. (J.A. at 300.)

On reconsideration of his ruling, the military judge reiterated, "[t]he court does not conclude that AFOSI necessarily believed the accused was a suspect and used subterfuge. . ." (J.A. at 348.) Despite his continued belief that AFOSI should have advised Appellant of her Article 31(b) rights, the military judge again concluded that Appellant had voluntarily consented to the search under the totality of the circumstances. (J.A. at 349.)

SUMMARY OF THE ARGUMENT

The military judge did not abuse his discretion in finding that Appellant voluntarily consented to the search of her residence and thereby denying Appellant's motion to suppress the evidence seized during that search. The military judge appropriately applied the Wallace factors to the facts of the case. At the time Appellant gave consent (1) her liberty was not restricted; (2) she was not subject to coercion or intimidation; (3) she was aware of her right to refuse consent; (4) her mental state did not impair her ability to make a rational decision; (5) she did not consult counsel because she was not advised she was a suspect; (6) and there was no violation of Appellant's rights that had a coercive effect on her decision to give consent. The totality of the circumstances indicated that Appellant's decision to consent to the search of her residence was voluntary.

ARGUMENT

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN FINDING APPELLANT VOLUNTARILY CONSENTED TO THE SEARCH OF HER RESIDENCE AND IN DENYING APPELLANT'S MOTION TO SUPPRESS.

Standard of Review

A military judge's "denial of a motion to suppress is reviewed for an abuse of discretion." United States v. Rader, 65 M.J. 30,32 (C.A.A.F. 2007) (citing United States v. Khamsouk, 57 M.J. 282, 286 (C.A.A.F. 2002)). "Findings of fact are affirmed unless they are clearly erroneous; conclusions of law are reviewed de novo." Id. "In reviewing a ruling on a motion to suppress, [this Court] considers the evidence 'in the light most favorable to the prevailing party.'" United States v. Reister, 44 M.J. 409, 413 (C.A.A.F. 1996) (quoting United States v. Sullivan, 42 M.J. 360, 363 (C.A.A.F. 1995)). A military judge's ruling that consent was voluntary should not be disturbed unless it is unsupported by the evidence on the record or is clearly erroneous. United States v. Middleton, 10 M.J. 123, 133 (C.M.A. 1981.)

Law and Analysis

Voluntariness of consent is a question to be determined from all the circumstances. Mil. R. Evid. 314(e)(4); *see also* Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (applying a totality of the circumstances review.) The government must

prove voluntary consent by clear and convincing evidence. Mil. R. Evid. 314(e)(5). To determine whether consent is free and voluntary, the following non-exhaustive factors are to be considered:

(a) The degree to which the suspect's liberty was restricted;

(b) The presence of coercion or intimidation;

(c) The suspect's awareness of her right to refuse based on inferences of the suspect's age, intelligence, and other factors.

(d) The suspect's mental state at the time;

(e) The suspect's consultation, or lack thereof, with counsel; and

(f) The coercive effect of any prior violations of the suspect's rights.

United States v. Wallace, 66 M.J. 5, 9 (C.A.A.F. 2008) (citing United States v. Murphy, 36 M.J. 732, 734 (A.F.C.M.R. 1992)).

In this case, an analysis of the Wallace factors reveals that under a totality of the circumstances, Appellant voluntarily consented to the search of her residence.

a. Appellant's liberty was not restricted.

In his analysis of the first Wallace factor, the military judge correctly determined that Appellant's liberty was not restricted when she gave AFOSI permission to search her residence. Nothing in the record indicates SSgt D gave Appellant a formal "order" to go to AFOSI. Indeed, Appellant testified she did not even realize she was going to AFOSI until after she arrived. Appellant was not formally escorted to AFOSI by her First Sergeant, but rather arrived on her own volition.

The AFOSI agents interviewed Appellant in an unlocked, windowed conference room, rather than in the interrogation room normally used for suspects. (J.A. at 225.) Appellant was not physically restrained by handcuffs, or in any other manner, and the AFOSI agents never told her that she could not leave.[4] (J.A. at 186.) Although the agents asked Appellant for her cell phone, she could have had it back if she had asked. This was only a nominal restriction, as the military judge himself rightly concluded. (J.A. at 296.)

Moreover, the agents' questioning focused on Appellant's husband's actions, rather than her own. SA Burch specifically told Appellant that they were not looking at her as a suspect, they were looking at her husband, and that if she had not done

[4] The Supreme Court has rejected the notion that a suspect must be affirmatively told he is free to go before a consent to search is deemed voluntary. Ohio v. Robinette, 519 U.S. 33, 39-40 (1996).

anything wrong, she had nothing to worry about. (J.A. at 145.) After signing the consent form, Appellant drove alone in her car to her residence, with the AFOSI agents following in separate cars.

During her testimony, Appellant stopped short of saying that she did not feel free to leave. She merely stated that she did not leave because "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." (J.A. at 222.)

Even if Appellant claimed at trial that she did not feel free to leave during the initial interview, this Honorable Court applies an objective, rather than subjective, test to determine whether a suspect is in police custody. United States v. Catrett, 55 M.J. 400, 409 (C.A.A.F. 2001); United States v. Miller, 46 M.J. 80 (C.A.A.F. 1997).

> In determining whether a suspect is in custody, the relevant inquiry is how a reasonable man in the suspect's position would have understood his situation. The test is not merely whether [the suspect] felt he was free to leave; rather, [the court] must determine whether he reasonably believed that his freedom of action [was] curtailed to a degree associated with formal arrest." United States v. Schake, 30 M.J. 314 (C.M.A. 1990) (quoting United States v. Carter, 884 F.2d 368, 370 (8th Cir. 1989) (internal citations omitted.)

Given all the circumstances described above, a reasonable person in Appellant's position would not have believed that her liberty was restricted to a degree associated with formal arrest. The military judge correctly found that Appellant was "free to leave at any time between 1100 and 1300 hours on 17 August." (J.A. at 296.)

Furthermore, other evidence suggests that Appellant did not perceive herself to be "under arrest" during the initial interview. After returning to the AFOSI building hours after the search occurred, AFOSI again interviewed Appellant. When SA Horton read Appellant her Article 31(b) rights that night, only then did Appellant say, "[y]ou make it seem like I'm under arrest. I've just been trying to help you guys out for the last 13-14 hours." (J.A. at 46, 00:50:01)

Ultimately, based on the above circumstances, the military judge's finding that Appellant's liberty was not restricted was not clearly erroneous.

b. There was no evidence of coercion or intimidation.

There is no evidence of coercion or intimidation to weigh in Appellant's favor under the second Wallace factor. As the military judge found, nothing in the record suggests that Appellant was physically threatened or bullied by AFOSI into signing the AF IMT 1364. Appellant herself described SA Carter as being in a good mood when she arrived, and there is no

evidence in the record of yelling, raised voices or any other type of intimidating behavior on the part of AFOSI. Appellant was also offered snacks by the agents, and the interview lasted at most two hours, including a 20-25 minute smoke break.

Appellant cites Wallace for the proposition that in this case the presence of the AFOSI agents or "authority figures" created a coercive and intimidating atmosphere. (App. Br. At 13.) However, the facts of this case are clearly distinguishable from Wallace. In Wallace, the appellant's First Sergeant, a person "responsible for unit discipline," was present during the search of his residence and also had escorted Appellant from the AFOSI building to his home. Wallace, 66 M.J. at 9. In contrast, here, no member of Appellant's command was present, and Appellant was not escorted by anyone either to the AFOSI office or to her residence.

Furthermore, in the subsequent videotaped interview conducted later that night after the search, Appellant consistently referred to the AFOSI agents by their first names, and even continued to refer to at least one agent by his first name during her testimony at trial. (J.A. at 46, 221-22.) This use of first names reflects a casual atmosphere, rather than an authoritative, coercive or intimidating one.

The military judge also correctly noted that "no promises of leniency were made to [Appellant]." (J.A. at 296.) Although

AFOSI told Appellant that they were only looking at her husband as a suspect, Appellant herself recognized that there were potential consequences for her. In her statements to AFOSI made after the search, Appellant said, "I haven't seen nothing in writing that I'm not going to get [in trouble] for what my husband does," [sic] and "I don't feel if I tell you what I know about my husband that I would be protected." (J.A. at 46, 02:29:05, 02:30:54.) These statements also reinforce the fact that no promises were made to Appellant.

In his findings of fact, the military judge determined that Appellant may have believed AFOSI would have sought a warrant if she did not consent to the search of her residence. (J.A. at 292.) Indeed, Appellant could have come to that belief since the AF IMT 1364 itself mentions a warrant, stating, "I understand if I do not consent, a search cannot be made without a warrant or other authorization recognized by law." (J.A. at 31.) However, all three agents testified that they did not inform Appellant they would obtain a warrant if she refused to consent.

Even if AFOSI had told Appellant they would seek a warrant if she did not consent, both military and federal courts have repeatedly held that such a statement does not automatically render consent involuntary. *See* United States v. Wright, 52 M.J. 136 (C.A.A.F. 1999); United States v. Miller, 589 F.2d 1117

(1st Cir. 1978), *cert. denied,* 440 U.S. 958 (1979); United States v. Miley, 513 F.2d. 1191 (2d Cir. 1975), *cert. denied,* 423 U.S. 842 (1975); United States v. Duran, 957 F.2d. 499 (7th Cir. 1992).

The rest of the evidence in this case demonstrates Appellant consented to the search because she thought it was in her best interest to cooperate and she believed she could simply deny any knowledge of the drugs and paraphernalia found in her house. In her interview with AFOSI after the search and discovery of the contraband, Appellant told AFOSI after being read her rights that she did not understand why they were investigating *her.* (J.A. at 46, 00:49:19.) She also repeatedly asserted during this interview that she was trying to help the AFOSI agents. (Id.) She initially denied any knowledge of the drug paraphernalia found in her home, saying:

> I've been being 100% honest with you today. . . I have been. If I wasn't, why would I tell you to go into my house and search my house? I'd be a blooming freaking idiot. . . as many bags as you guys brought out of my house, I'd be stupid. . . I'm sitting here trying to help *you* guys. (Id. at 02:14:27)

Tellingly, in the subsequent videotaped interview, Appellant freely asserts her will at various points. After about two hours, Appellant asked to speak to SA Horton alone. (Id. at 02:27:34). When another agent entered the room to continue the interview, Appellant asserted, "I might know

something about [the Ketamine]. . . but I'd rather talk to Wayne. . . about it." (Id. at 03:55:55). Toward the end of the interview, Appellant affirmatively stated, "[m]an, I'm done. It's four something in the morning," and said she would be willing to come back in several hours to keep talking to AFOSI. (Id. at 04:40:17.) A few minutes later, she again asked to speak to one agent alone. (Id. at 04:42:25.) These actions of Appellant are not consistent with someone who a few hours earlier was so cowed by the AFOSI agents that her will was overborne. *See* United States v. Goudy, 32 M.J. 88, 91 (C.M.A. 1991) (appellant's articulated and assertive testimony at trial were not reflective of a submissive person and made it less likely that appellant "would have merely rolled over in the face of an implied order, as opposed to deciding for himself that his best chance lay in voluntarily consenting.")

The evidence on the record reveals that Appellant consented to the search of her own free will and not because of coercion or intimidation on the part of AFOSI. Therefore, the military judge properly weighed the second Wallace factor in favor of the Government.

c. Appellant was aware of her right to refuse consent.

In evaluating the third Wallace factor, the military judge appropriately determined that "[t]here's no reasonable inference that the accused was unaware of her right to refuse consent."

(J.A. at 296.) First, Appellant's age and intelligence weigh in favor of finding valid consent. At the time of giving consent, Appellant was 26 years old, had graduated from high school, had completed some college, and had been in the Air Force for four years. She exhibited knowledge of law enforcement tactics based on her statements to SA Burch, and she had the prior experience of being arrested when she was 17 on suspicion of drug possession with intent to distribute.

Significantly, the face of the AF IMT 1364, which Appellant acknowledged she read before signing, stated, "I know that I have the legal right to either consent to a search, or to refuse to give my consent." (J.A. at 31, 173-74.) Based on the reading of the form alone, Appellant would have known she could refuse consent.

Appellant's knowledge of her right to refuse consent is further evidenced by her subsequent actions after initially being asked to sign the form. She herself testified that she was not sure what to do and she "wanted time to think about it." (J.A. at 230.) She apparently weighed the consequences of consenting while smoking with SA Burch because she voiced her concerns about getting in trouble. Finally, her statement to SA Horton after the search asking rhetorically why she would have allowed the search if she had known about all the drug paraphernalia in her home also reveals her knowledge of her

ability to refuse consent. *See* United States v. Vassar, 52 M.J. 9, 12 (C.A.A.F. 1999)(appellant's comment that he would have refused a urinalysis if he had known it would be positive, demonstrated he was aware of his right to withhold consent.)

These circumstances dispel any doubt that Appellant knew that she had a choice of whether or not to consent to the search. Thus, the military judge's conclusion to that effect was not clear error.

d. Appellant's mental state did not impair her ability to give consent.

In his consideration of the fourth Wallace factor, the military judge determined that although Appellant was upset during her initial interview with AFOSI, she was still able to make a rational decision. In United States v. Duran, 957 F.2d. at 503, the 7th Circuit Court of Appeals considered similar facts, where the appellant broke into tears several times during her interrogation before ultimately providing police with consent to search. The Court asserted that "absent a showing that [the appellant's] emotional distress was so profound as to impair her capacity for self-determination or understanding of what the police were seeking, it is not enough to tip the balance towards finding that her consent was involuntary." Id.

Likewise, in this case, there is no evidence to suggest that Appellant was so distressed that she could not make a

rational decision or understand what AFOSI was asking her. On the contrary, her statements to SA Burch about her concern that AFOSI was trying to get her in trouble and her familiarity with law enforcement tactics demonstrated that she was able to evaluate her options and the consequences of her actions, even after her tearful episode. Further, appellant was apparently of sufficient mental state that she was able to drive by herself 30-40 minutes to her residence shortly after providing consent. The military judge's finding that Appellant was able to make rational decisions at the time she gave consent to search is amply supported by the record, and was not clearly erroneous.

e. The fact that Appellant did not consult with an attorney did not render her consent involuntary.

In analyzing the fifth Wallace factor, the military judge noted that, "[t]he 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 given to her." (J.A. at 296.) This conclusion is also supported by the record. SA Carter testified that between 1100 and 1300 on 17 August, Appellant never asked to speak with an attorney. Further, he asserted that the AFOSI agents did not do anything to restrict Appellant's ability to speak with an attorney and if she had asked to speak with an attorney she would have been allowed to do so. (J.A. at 188.)

In United States v. Roa, 24 M.J. 297, 300, (C.M.A. 1987) this Court refused to recognize a requirement that counsel be present when a suspect is asked to consent to a search. This Court reasoned that such a requirement was not "necessary to assure effective legal representation or to promote the truth-finding process." Id. Instead this Court commented that, "[i]f the investigators had *refused* appellant the opportunity to contact his counsel or neglected to advise him that he could refuse to consent to search, that would weigh heavily against a determination that the consent is voluntary." Id. (emphasis added.) Thus, the fact that Appellant did not consult counsel in this case is not dispositive of the voluntariness of her consent.

Importantly, in this case, Appellant was never *denied* the ability to speak to an attorney. She could have spoken to an attorney if she had wanted to. Ultimately, the lack of attorney involvement does not weigh in favor of finding Appellant's consent involuntary.

f. There were no prior violations of Appellant's rights that had a coercive effect on Appellant's decision to grant consent.

Although the military judge found that AFOSI should have read Appellant her Article 31(b) rights, the United States does not concede that this was a correct finding. Many factors indicated that Appellant was not considered a suspect, nor

should she have been. The military judge himself noted that AFOSI waited two weeks to interview Appellant after talking to SSgt D; Appellant was not escorted to the AFOSI building; she was brought to a conference room instead of an interrogation room; she did not make any incriminating statements; and drove her own vehicle to her house. (J.A. at 297.)[5]

Nonetheless, the question of whether Appellant *should* have been read her Article 31(b) rights is ultimately a non-issue because, as the military judge noted, Appellant did not make any incriminating statements during her initial interview with AFOSI.[6] The sixth Wallace factor does not merely contemplate whether a suspect's rights have been violated, but rather addresses the *coercive effects* of any such violation. If Appellant did not make incriminating statements, there was nothing to exert a "coercive effect" on her decision to consent.

"There is no general requirement that a suspect be informed of his or her Article 31 rights before being asked to consent to search." United States v. Murphy, 36 M.J. at 735. (citing United States v. Frazier, 34 M.J. 135 (C.M.A. 1992). Unwarned statements made during the events leading up to a consent to

[5] AFOSI's continued focus on Appellant's husband's conduct in the second interview, even after Appellant was read her Article 31(b) rights, reinforces that he, not Appellant, was their initial suspect.

[6] The fact that Appellant was previously arrested on drug charges should not be considered an incriminating statement. This incident happened approximately nine years earlier and before Appellant was the member of the Air Force. The evidence on the record indicates that Appellant denied any actual wrongdoing in this incident and that the charges against her were dropped. (J.A. at 01:01:47.)

search "must be weighed for their likely impact on that decision." Id.

In her brief, Appellant contends, "AFOSI's violation of Article 31(b) likely affected [her] ultimate agreement to sign the form." (App. Br. at 17.) However, Appellant cites no evidence from the record in support of that claim. Following AFCMR's logic in Murphy (which this Court relied upon in Wallace), this bare assertion of a rights violation is not enough to show that Appellant's consent to search was involuntary. In reality, nothing in the record indicates Appellant's decision to consent to the search was impacted by the responses she gave to AFOSI during her initial interview. AFOSI did not exploit any incriminating statements to coerce Appellant to consent. This is not a situation where Appellant had already admitted to illegal conduct and "the cat was sufficiently let out of the bag to exert a coercive impact" on Appellant's decision to consent to the search. (*See* Oregon v. Elstad, 470 U.S. 298 (1985)).

Furthermore, the lack of a rights warning did not mislead Appellant into believing the search could not have consequences for her. The face of the AF IMT 1364 contained the statement, "I understand that if I do consent to a search, anything found in the search can be used against me in a criminal trial or in any other disciplinary or administrative proceeding." Based on

this clear language, even if Appellant had not been warned through Article 31 rights that she was a suspect at that point, she was certainly on notice that the fruits of the search could be used to prosecute her. *See* United States v. Watson, 423 U.S. 411, 425 (1976)(finding the fact defendant had been cautioned that the results of the search of his car could be used against him weighed in favor of voluntariness.)

Simply put, even if AFOSI should have read Appellant her Article 31(b) rights, any failure to do so had no coercive effect on her decision to consent to the search of her home. The military judge considered the lack of Article 31(b) warning and correctly concluded that it did not render the consent invalid under a totality of the circumstances.

Considering the above evidence in the light most favorable to the Government, the military judge's ruling that Appellant's consent was voluntary under a totality of the circumstances using a six-part Wallace analysis is amply supported by the record and should not be disturbed. Accordingly, AFCCA correctly concluded the military judge did not abuse his discretion.

CONCLUSION

WHEREFORE the Government respectfully requests that this Honorable Court affirm the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 13 November 2014.

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