

Notes from the Field

United States v. Salazar: Search, Seizure, Consent and Deceit

Introduction

In *United States v. Salazar*, the United States Court of Appeals for the Armed Forces (CAAF) considered an issue of military first impression regarding law enforcement deception in searches and seizures.¹ While the court could not resolve the issue, it signaled great dislike for the use of deception in obtaining consent to search.² The court ruled, however, that a commander's ordering a soldier into barracks cannot ordinarily terminate a soldier's expectation of privacy in his off-post quarters.

The Facts

In early July 1993, Private First Class (PFC) Salazar and his wife were living in Killeen, Texas, in the home of Mrs. Salazar's sister and brother-in-law, the Buinoses.³ PFC Salazar was a soldier assigned to nearby Fort Hood, and had only two to four weeks left in the Army before he would be administratively discharged.⁴ Most of the Buinos house was of common use for the entire family, but the Salazars had primary use of a bedroom and nursery and PFC Salazar was given the exclusive use of a hall closet to store his military gear.⁵ On July 9, PFC Salazar's company commander ordered him to move into the barracks, on-post because of a complaint that PFC Salazar had struck his eight month pregnant wife.⁶ The company commander intended to prevent PFC Salazar from seeing his wife without an escort.⁷ Contrary to the order of his commander and to the

wishes of the Buinoses, PFC Salazar on several occasions went to his in-laws' house and spent the night with his wife.⁸

After the order to move out of the house but before separation from the Army, PFC Salazar was apprehended for breaking into an automobile.⁹ As the investigation progressed, he became the suspect in the theft of some stereo equipment, and the Military Police Investigator (MPI) working the case, MPI Gambert, asked PFC Salazar for consent to a search of Salazar's barracks room and his in-laws' house in Killeen. PFC Salazar consented to the search of his barracks room but refused the search of the off-post quarters.¹⁰ MPI Gambert then proceeded to the Buinos house and asked Mr. Buinos for permission to search the house. Mr. Buinos refused.¹¹

Undeterred, MPI Gambert returned to the Military Police Station and attempted to reach Mrs. Salazar by telephone. During a subsequent conversation, MPI Gambert intentionally lied to Mrs. Salazar, claiming that her husband, whom MPI Gambert had in custody, had consented to a search of the Buinos house and wanted her to go through the house and bring to the Military Police Station any stereo equipment that was not theirs. At MPI Gambert's direction, Mrs. Salazar, aided by her sister-in-law, collected a variety of stereo equipment and took it to the Military Police Station. At the station, she discovered that her husband had neither consented to the search nor requested her to collect the stereo equipment and bring it to the Military Police Station.¹²

1. *United States v. Salazar*, 44 M.J. 464 (1996).

2. This case also was unique in that it was perhaps the first appeal in the United States in which two of the five judges participated remotely via video-conference. Judge Crawford was located in Fairfax, Virginia, and Senior Judge Everett was in Raleigh, North Carolina. The case was argued in William and Mary's "Courtroom 21."

3. *Salazar*, 44 M.J. at 465.

4. *Id.* at 466.

5. *Id.* at 465.

6. *Id.*

7. *Id.* at 466.

8. The Buinoses, notwithstanding their preferences, tolerated PFC Salazar's frequent visits. *Id.* n.2.

9. *Id.* at 467.

10. Based on information contained in the record of PFC Salazar's original general court-martial as presented in the Amicus Curiae brief, *United States v. Salazar*, 44 M.J. 464 (1996).

11. *Salazar*, 44 M.J. at 467.

12. *Id.*

PFC Salazar was convicted by a general court-martial on a conditional guilty plea of disobedience of a lawful order, damage to property, and two specifications of larceny.¹³ The military judge sentenced PFC Salazar to a bad-conduct discharge, fifteen months confinement, and reduction from E-3 to E-1.¹⁴ The Army Court of Criminal Appeals (ACCA) affirmed the findings and sentence without opinion.¹⁵ The CAAF granted review and considered two main issues: first, did PFC Salazar have standing to challenge the search and second, if he did have standing, was there valid consent to search?

Holding

The CAAF held that PFC Salazar had standing to contest the search of the bedroom and hall closet of the Buinos house. The military judge had determined that PFC Salazar had no reasonable expectation of privacy in the house and could not contest the search.

The military judge based this conclusion on several factors.¹⁶ First, the order from PFC Salazar's company commander to vacate the house and not return without an appropriate escort for the remainder of his time in service terminated PFC Salazar's lawful ability to be in the house. Further, Mr. and Mrs. Buinos testified that they did not want him in the house. PFC Salazar, the military judge noted, had no responsibility for the house, no control over the house, and had no possessory interest in the house. The military judge reasoned that all of these factors combined to eliminate any reasonable expectation of privacy PFC Salazar might have had in the Buinos house.

In reversing the military judge and the ACCA, the CAAF found that PFC Salazar did have a reasonable expectation of privacy in the Buinos home, and therefore, had standing to contest the search and subsequent seizure.¹⁷

Analysis

PFC Salazar's Standing to Contest the Search and Seizure

13. PFC Salazar plead guilty, reserving the right to contest the validity of the search on appeal under Rule for Courts-Martial 910 (a)(2). MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 910(a)(2) (1995).

14. *Salazar*, 44 M.J. at 465.

15. *Id.*

16. *Id.* at 466 n.2.

17. *Id.* at 465.

18. *Id.* at 467.

19. The CAAF did not squarely address the Military Judge's finding that the Buinoses did not want him in the house; however, the CAAF highlighted other factors (i.e. no effort to exclude PFC Salazar nor his belongings) that tended to undercut the Buinoses words.

20. *Id.*

21. *Id.* The majority admits that PFC Salazar had no privacy interest in the stolen property.

Two factors served as the basis for the CAAF's reversal. The first was the temporary nature of PFC Salazar's departure from the home. The order given to PFC Salazar to move into the barracks specifically stated that it was only effective for his remaining weeks in the service. After that, he would not be subject to military control and could do as he pleased. Second, and of equal importance, upon being ordered out of the house, he left the bulk of his personal property at the Buinos home. There was no evidence that he did not intend to return. On the contrary, at his trial, the Buinoses testified that PFC Salazar's wife remained in the home and was welcome to continue staying with them. The evidence further showed that on several occasions he returned to the house, with full knowledge of the Buinoses. During these visits, no effort was made to remove his personal belongings, and their continued storage was without objection.¹⁸ No effort was made by anyone to prevent his re-entry into the house. His vacating the house was therefore temporary.¹⁹

The majority was clearly hesitant to allow a commander's order to vitiate a soldier's off-post expectation of privacy and standing to contest a search. While admitting that there could be instances where an order could terminate an expectation of privacy, the CAAF refused to open that door based on the facts of the case by stating, "it would be illogical if the existence of a service member's expectation of privacy in his or her private residence depended solely on military orders. The issuance of orders would then be the predicate event to every search."²⁰

Additionally, the CAAF majority did not think it dispositive that PFC Salazar had no possessory interest in the stolen goods nor control over the house.²¹ Based upon these two main factors--the temporary nature of his removal which in no way interrupted his exclusive use of the area in question, and the danger of allowing an order alone to determine privacy interests--the majority concluded that PFC Salazar did have a reasonable expectation of privacy in the home and, therefore, had standing to contest the search.

In her dissent, Judge Crawford concentrated on the order requiring PFC Salazar to vacate the Buinos home. She conceded that PFC Salazar did not lose his standing to contest a search by being physically absent from the house. However, she argued that his commander's order terminated any legitimate interest he had in the home, and he could not therefore, contest the subsequent search and seizure.²²

In reaching her conclusion, Judge Crawford overlooked the factors used by the majority to find standing by stating, "our standard of review is to 'give due deference' to the judge's findings of fact and accept them 'unless . . . unsupported by the evidence of record or . . . clearly erroneous'."²³ The dissent, therefore, did not give any weight to the temporary nature of PFC Salazar's absence, the presence of his property and family at the Buinos home, the Buinoses' tolerance of his continued presence, and other facts relied upon by the majority. The dissent reasoned that the commander's order was, therefore, enough to terminate PFC Salazar's privacy expectation.

The Validity of Police Deception to Obtain a Consent to Search

The CAAF further specified the review of whether there was valid consent to the search.²⁴ This question was not litigated in PFC Salazar's trial. The CAAF therefore remanded the issue for further proceedings.²⁵ It did, however, write extensively on the issue of consent based upon the facts at hand.

The CAAF defined this question of military first impression as follows: "Under what facts and circumstances can a military dependent wife turn over contraband to a military policeman, thus vitiating the servicemember's own expectation of privacy in the place where the goods are stored?"²⁶

In its discussion of this issue, the majority analogized *Salazar* to *Bumper v. North Carolina*.²⁷ In *Bumper*, dealing with the issue of deceit regarding the existence of a search warrant, the Supreme Court specified that consent to a search must be "more than the acquiescence to a claim of lawful authority" and not the product of coercion.²⁸

In *Salazar*, MPI Gambert told Mrs. Salazar that her husband, then in custody, consented to the search and wanted her to bring any and all stereo equipment to the Military Police Station. Mrs. Salazar was not in a position to refuse. She was led to believe that her husband's "consent" gave MPI Gambert a legal means to compel the search. Her husband, in custody, could not refute what MPI Gambert told her. Her consent should be viewed as nothing more than acquiescence to legal authority.

Law enforcement officials may use deception to gain permission to enter a home or other area protected by a person's reasonable expectation of privacy.²⁹ Misplaced confidences as to a policeman's identity or motive do not invalidate consent to a search because the person consenting to the policeman's entry is not precluded by the deception from saying "no" and closing the front door.

On the other hand, deceit, based on a false assertion of a legal right to which there is no alternative but compliance, has never been upheld by the courts. A policeman may not lie about possessing a warrant,³⁰ about an exigent circumstance,³¹ and by the same logic, should not be permitted to lie about a person's consent to compel a search. All three tactics invalidate any voluntary, meaningful "consent" to a search; any evidence derived from such a search must be suppressed.³²

22. *Id.* at 472 (Crawford, J., dissenting).

23. *Id.* at 471.

24. Judge Everett observed that some may argue that there was never a Fourth Amendment "search" in the case. *Id.* at 469. Citing the rationale of a similar Pennsylvania case, the majority held that there was a search and that a service member's spouse should be able to depend upon the authorities to tell the truth. A strong argument can be made that the actions of Mrs. Salazar, *acting as an agent* for MPI Gambert at his behest, constituted a search. It is clear from the facts of the case that, had it not been for MPI Gambert's deception, she would have not searched through the house, found the stereo equipment, and then proceed to deliver it to the Military Police Station. Senior Judge Everett, concurring in part and dissenting in part, on the contrary felt that since MPI Gambert personally did not seize the evidence at issue in Salazar's home, that it was not protected by the Fourth Amendment. His view was that as long as the police received the evidence in question outside the home, their conduct in facilitating delivery was immaterial. From a policy point of view, this approach seems contrary to the spirit of the Amendment's protection, and would encourage the use of "police agents" to accomplish what they the police cannot.

25. *Id.* at 467.

26. *Id.*

27. 391 U.S. 543 (1968).

28. *Id.* at 549.

29. *See, e.g.*, *Lewis v. United States*, 385 U.S. 206 (1966); *Hoffa v. United States*, 385 U.S. 293 (1966).

30. *Salazar*, 44 M.J. at 469.

31. *United States v. Giraldo*, 743 F. Supp. 152 (E.D.N.Y. 1990).

Although the case was remanded for litigation of the consent issue, the majority suggests that deception by the military police as to their legal right to compel a search, unlike a ruse to gain entry, cannot result in valid “consent” to a search. Judge Crawford in her dissent is correct in stating that there is “nothing illegal about outfoxing the criminal and obtaining reliable evidence.”³³ This sentiment, however, seems to ignore the more important maxim that the police should not circumvent the protections of the Constitution in order to enforce the laws created by it.

Conclusion

Salazar is a case of military first impression and teaches two important lessons of great practical value to the practitioner in the field.

First, the CAAF limits the effects of a commander’s order; an order alone to vacate off-post quarters does not strip a soldier of constitutionally protected expectations of privacy. Investigators cannot rely on an “order to vacate” as license to search and seize in the knowledge that the soldier will not have

standing to contest police action. Commanders’ orders do not extinguish expectations of privacy, allowing investigators to avoid warrant requirements. Counsel must consider whether probable cause exists to search and whether there are any circumstances which dispose of the need for consent or a warrant. Trial counsel should carefully evaluate the nature of the possessory interests involved and coordinate with company commanders and investigators to analyze whether there are facts indicating a permanent transfer and attenuated, as opposed to exclusive, control over property left behind.

Second, *Salazar* sets clear limits on the police’s ability to use deception. Lying under color of legal authority to obtain a vicarious consent to search when no probable cause exists exceeds the bounds of constitutional due process. Defense counsel now have added grounds to challenge government overreaching and prosecutors now have added reasons to control police methods. Captain Drew Swank, Funded Legal Education Program Officer, College of William and Mary.

32. Judge Crawford attempted to justify MPI Gambert's tactics by distinguishing his deception, which prompted Mrs. Salazar to search for and seize specific items, from a deception by a police officer to gain consent for a “general exploratory search.” *Salazar*, 44 M.J. at 473. Under this approach, would a deception about the existence of a warrant be allowed so long as only one, specific piece of evidence was desired? It seems the issue in this case is not the specific result which MPI Gambert’s deception sought (enumerated items versus general search), but that Mrs. Salazar had little choice but to submit based on the circumstances.

33. *Id.* at 474