



**Arbitration CAS 2009/A/1892 World Anti-Doping Agency (WADA) v. Comitato Olimpico Nazionale Italiano (CONI), Ronaldo Sylvester Slay & Guillermo Jose Diaz Gonzalez, award of 7 January 2010**

Panel: Mr Hans Nater (Switzerland), President; Mr Michele Bernasconi (Switzerland); Prof. Jacopo Tognon (Italy)

*Basketball*

*Doping (failure or refusal to submit to doping control*

*Insufficient evidence establishing a liability*

**“Refusal” or “failure” to submit to doping control or an “otherwise evading a doping control” has not been established according to the applicable comfortable satisfaction standard of proof when the evidence submitted is not sufficient to establish that the athletes were told in an unequivocal and understandable manner not to leave the doping control station so as to enable them to understand that they would be in breach of their duties if they did so.**

The World Anti-Doping Agency (WADA or the “Appellant”) is a Swiss private law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. WADA was created in 1999 to promote, coordinate and monitor the fight against doping in sport.

Comitato Olimpico Nazionale Italiano (CONI or the “First Respondent”) is the Italian national Olympic committee, which represents all national sports associations in Italy.

Mr. Ronaldo Sylvester Slay, the Second Respondent, is a professional basketball player.

Mr. Guillermo José Diaz Gonzales, the Third Respondent, is a professional basketball player.

On 15 November 2008, on the occasion of a Serie A Championship basketball game between the Eldo Juve Caserta and the Tercas Teramo teams at Teramo, Italy, the Second Respondent and the Third Respondent were selected to undertake a doping control. Both Athletes were playing for the Eldo Juve Caserta team, which is affiliated with the Italian Basketball Federation.

Mr. Gianluigi Consalvi (“Mr. Consalvi”), an official of the Italian Basketball Federation, went to the changing room of the Eldo Juve Caserta team to summon the Athletes to the doping control station. The Athletes went to the doping control station. They were accompanied by Dr. Mario Pasqualino Stranges (“Dr. Stranges”), the physician of their team. They arrived at the doping control station at 23:00. Two players of the Tercas Teramo team, who had also been selected for sample collection as well as their representative, were already present.

Dr. Siriano Cordoni (“Dr. Cordoni”), the Doping Control Officer (DCO), asked the Athletes who among them was ready for the sample collection. The Second Respondent provided his urine sample, but the quantity provided was insufficient for the purposes of doping control. Consequently, the partial sample provided was sealed.

Both Athletes then declared that they were not ready for the sample collection and expressed their intent to take a shower. There was a shower room adjacent to the doping control station. At 23:09 the Athletes left the doping control station.

Dr. Stranges stayed at the doping control station. He was notified by Dr. Cordoni that the behaviour of the Second and Third Respondent was incorrect and would be reported in the sample collection procedure minutes.

Neither Dr. Cordoni nor Mr. Gianluigi Consalvi followed the Athletes when they left the doping control station. Visual contact was lost between 23:09 and 23:32.

Dr. Stranges returned to the changing room of the Eldo Juve Caserta team. At 23:32, Dr. Stranges and the two Athletes returned to the doping control station. When they returned, they were no longer in their game outfits, but were dressed in their team tracksuits. Then, their samples were collected normally.

Individual collection reports were filled in for the Athletes. These reports mention the fact that the Athletes left the doping control station without authorisation between 23:09 and 23:32. Both reports were signed by Dr. Cordoni, Mr. Gianluigi Consalvi, Dr. Stranges and the Athlete concerned.

The CONI Anti-Doping Prosecutor (“the Prosecutor”) investigated the case and on 21 April 2009 referred the Second and the Third Respondent to the CONI National Anti-Doping Tribunal.

On 8 May 2009, the CONI National Anti-Doping Tribunal imposed a sanction of 1 month’s ineligibility on both the Second and the Third Respondent.

On 24 June 2009, the Appellant filed its statement of appeal.

On 10 July 2009, the Appellant filed its appeal brief, requesting the CAS to rule that:

- “1. *The Appeal of WADA is admissible.*
2. *The decision of the TNA in the matter of Mr Ronald Sylvester Slay and Mr Guillermo Jose Diaz Gonzalez is set aside.*
3. *Mr Ronald Sylvester Slay is sanctioned with a period of ineligibility of two years starting on the date on which the CAS enters into force. Any period of ineligibility (whether imposed or voluntarily accepted by Mr Ronald Sylvester Slay) before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*
4. *Mr Guillermo Jose Diaz Gonzalez is sanctioned with a period of ineligibility of two years starting on the date on which the CAS enters into force. Any period of ineligibility (whether imposed or voluntarily*

*accepted by Mr Guillermo Jose Diaz Gonzalez) before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*

5. *WADA is granted an Award for costs”.*

On 14 August 2009, the Second Respondent and the Third Respondent filed their answer.

CONI has not filed any answer.

On 22 October 2009, a hearing was held at the Court of Arbitration for Sport in Lausanne, Switzerland.

The Second and the Third Respondent submitted that they did not commit any fault because they cannot be said to have refused or failed without compelling justification to submit to sample collection or to have otherwise evaded sample collection. They refer to CAS/2008/A/1551 and to CAS/2008/A/1557, 2<sup>nd</sup> award.

Both Athletes further submitted that “*otherwise evading sample collection*” according to Article 2.3 of the CONI Anti-Doping Rules required an intentional doing, which was not the case as with regard to their behaviour and their intentions.

According to the Respondents, they were not sufficiently informed about the procedural rules of sample taking.

Moreover, the Athletes submitted that it was not compelling that Article 2.11 of the CONI Anti-Doping Rules apply in addition to Article 2.3 of these rules.

Before the Panel a dispute of fact arose as to what happened at the doping control station after the basketball game of 15 November 2008 between the Eldo Juve Caserta team and the Tercas Teramo team.

The Appellant asserted that the Athletes left the doping control station to take a shower, although Dr. Cordoni and Mr. Consalvi had previously urged them in an understandable manner not to leave the doping control station. The Appellant stressed that the Athletes had no difficulty in understanding Dr. Cordoni when he asked them in Italian whether they wanted him to pour the sample in the official container to be sealed and sent to the laboratory. The Appellant also submitted that Dr. Cordoni had told the Athletes that a shower room was adjacent to the doping control station and had offered the Athletes to take a shower there.

The Second and Third Respondent maintained that they did not understand any Italian and that neither Dr. Cordoni nor Mr. Consalvi spoke English. Further, both Athletes described the doping control station as a small and cold room, with a shower with only cold water. At the hearing, the Second Respondent stated that it was too cold in the doping control station to take a shower. He further said that he had asked whether he may take a shower in the changing room, but that he did not receive an answer. Instead, the officials exchanged a few words among themselves. The Second Respondent submitted that no one had told him that he was not allowed to leave the doping control

station. The Third Respondent essentially stated the same as the Second Respondent. Both Athletes reiterated that they had believed they were allowed to leave the doping control station and then come back.

In his testimony, Dr. Stranges confirmed the Athletes' description of the doping control station. He testified that one of the Teramo players had told him that the water in the shower adjacent to the doping control station was cold. He said that there was water on the floor and that he had the impression that it was dangerous to take a shower there. Mr. Pierfrancesco Betti, the sporting director of the Juve Caserta team, testified that, when the game was over, he waited outside the doping control station. He stated that the door of the doping control station was open and that the doping control station was a small and cold place. In contrast, Dr. Cordoni and Mr. Consalvi testified that the room was warm and spacious enough and that there was hot water in the shower.

Dr. Cordoni testified that the Athletes left the doping control station despite his and Mr. Consalvi's warning. According to Mr. Consalvi's testimony to the Panel, when the Athletes had manifested their intention to leave the doping control station for taking a shower, Dr. Cordoni invited Dr. Stranges to tell the Athletes that they could take a shower in the doping control station and that someone should get their clothes. Mr. Consalvi further stated that the Athletes then decided to go to the changing room and that he and Mr. Cordoni immediately warned Dr. Stranges that this was forbidden. Mr. Consalvi's and Dr. Cordoni's statements partially corresponded to what Dr. Stranges had told the Prosecutor. Before the Prosecutor, Dr. Stranges stated that, when the Athletes were asked whether they could leave, Dr. Cordoni "*ha semplicemente risposto no*". Dr. Stranges, however, when examined as a witness before the Panel, testified that it was a misunderstanding, as one of the officials must have told them that they could go and take a shower. Dr. Stranges testified that he got the impression that the Athletes had been permitted to leave the doping control station. He told the Panel that only after the Athletes had left the room did the officials indicate to him that the Athletes were not allowed to take a shower in the changing room. He testified that he then went to call them back.

It remained unclear at what point in time Dr. Cordoni and Mr. Consalvi asked Dr. Stranges to prevent the Athletes from leaving the doping control station. When examined by the Prosecutor, Mr. Consalvi stated that he told Dr. Stranges that the Athletes were not allowed to leave the room at a point in time when the Athletes had already left. Mr. Consalvi was unclear in this regard in his testimony to the Panel. There he stated that he confirmed to Dr. Stranges that the Athletes were not allowed to leave the doping control station before they had left.

Dr. Cordoni testified that he did not speak English. Dr. Cordoni further testified to have told Dr. Stranges to act as a translator on behalf of the Athletes. Dr. Stranges, however, in his testimony to the Panel, testified that he did not speak nor understand English and that Dr. Cordoni did not ask the Athletes whether they needed an interpreter. Dr. Cordoni further stated that Mr. Consalvi tried to make clear to the Athletes that they were not allowed to leave the doping control station. According to Dr. Cordoni, Mr. Consalvi addressed the Athletes in English. In his testimony to the Panel, Mr. Consalvi stated that he speaks little English. He further stated that he and Dr. Cordoni addressed the Athletes in English. However, as already stated above, Dr. Cordoni said that he does not speak English.

The Athletes' admission that they were taking a shower in the changing room after having left the doping control station was supported by Dr. Stranges' testimony, according to which, at some point in time, he went to the changing room and instructed the Athletes to return to the doping control station as soon as they had finished to take the shower. He then stayed with the Athletes until they had finished. Dr. Stranges further stated that the door of the changing room was open all the time. Mr. Consalvi testified that he did not follow the Athletes when they left the room because he had to supervise another athlete who was submitting to sample collection.

Both Athletes testified that they were not familiar with the anti-doping rules and, in particular, not with the procedural rules. Dr. Cordoni and Mr. Consalvi disagreed and testified that it was generally recognised that the players must remain under the visual control of the officials during the doping control. In contrast, Mr. Fabrizio Frates, the coach of the Juve Caserta team testified that the Athletes were informed on the forbidden substances but not on the procedure of sample collection. He testified that he assumed that the Athletes were aware of the gravity of the sanction of any anti-doping offences. In her oral testimony to the Panel, Ms. Anne Marie Litt, secretary to the *Associazione Italiana Giocatori di Basket* (the "GIBA"), confirmed the testimonies of the Athletes and Mr. Frates. She stated that she had been working with the GIBA for 25 years and with the Union of Basketball Players (UBA) for ten years. She testified that the national federation had never circulated any information about the procedural rules concerning sample collection among the basketball players in Italy. Dr. Stranges testified that he could not remember that Dr. Cordoni had informed him or the Athletes on the procedure. But he clearly stated that Dr. Cordoni did not explain their rights and obligations to the Athletes on the relevant evening. Mr. Betti, in his testimony to the Panel, confirmed that the basketball players were not familiar with the procedural rules regarding sample collection.

## LAW

### Jurisdiction of the CAS

1. According to Article R47 of the Code, an appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of this body so provide and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of this sports-related body.
2. Under Article R47 of the Code, the CAS has jurisdiction in the present case if the rules governing CONI and the Italian Basketball Federation so provide and if WADA has exhausted the legal remedies available to it.
3. The Panel is of the view that the conditions of Article R47 of the Code are met.
4. Pursuant to Article 13.2.3 of the WADC, which is incorporated into the CONI Anti-Doping Rules by reference in Article 1.4 of its Appendix G, WADA has the right to appeal to CAS

against the final decision taken at the national level. According to Article 3.22 of Appendix H to the CONI Anti-Doping Rules all the decisions adopted by the *Tribunale Nazionale Antidoping* can be appealed by the interested parties.

5. Based on these grounds, the Panel considers that CAS has jurisdiction. This is also confirmed by the fact that the Appellant and the Second and the Third Respondent have signed the Order of Procedure on 1 October 2009 and recognised CAS jurisdiction.

### Applicable Law

6. Article R58 of the Code provides that the Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.
7. In the case at hand, both parties have invoked the CONI Anti-Doping Rules. Consequently, such regulations shall apply. Additionally, these rules are applicable for the following reasons: On 15 November 2008, both Athletes were licensed players of the basketball team Eldo Juve Caserta, which is affiliated to the Italian Basketball Federation. The regulations of this federation are applicable.
8. Article 37.2 of the Judiciary Regulations of the Italian Basketball Federation refers to the Anti-Doping Regulations of the CONI. Accordingly, the CONI Anti-Doping Rules are applicable.
9. The CONI Anti-Doping Rules in force on 15 November 2008 were the CONI Anti-Doping Rules 2008. Those rules basically incorporate the WADC mandatory provisions and the WADA International Standards.
10. The WADC 2009 has been applicable since 1 January 2009. However, the already pending case at hand is governed by the substantive anti-doping rules in force at the time the anti-doping rule violation occurred, unless the principle of *lex mitior* requires the application of the WADC 2009.
11. The relevant anti-doping rule is Article 2.3 of the CONI Anti-Doping Rules, which reads as follows:

*"Refusing or failing without compelling justification, to submit to Sample collection after notification as authorized in applicable anti-doping rules or otherwise evading Sample collection".*

## Merits

12. Given the parties' submissions and prayers for relief, the main issue raised is whether the conditions to find a violation of Article 2.3 of the CONI Anti-Doping Rules are met. On the basis of the evidence presented to the Panel, the Panel finds what follows.
13. WADA has not succeeded in establishing to the comfortable satisfaction of the Panel when and in what form the Athletes were made aware that they were told let alone directed not to leave the anti-doping station in a manner which enabled them to understand that they would be in breach of their duties if they did so. Although both Mr. Consalvi and Dr. Cordoni testified that they urged the Athletes not to leave the doping control station, they did not clearly state that they spoke directly to the Athletes in a manner which enabled the Athletes to understand. Mr. Consalvi testified that, after the Athletes had shown their intention to leave the doping control station, Dr. Cordoni had invited Dr. Stranges to tell them that they could take a shower in the doping control station and that someone should bring their clothes. Mr. Consalvi further testified that the Athletes then decided to go to the changing room and that he and Mr. Cordoni immediately warned Dr. Stranges that this was forbidden. Dr. Cordoni testified that Mr. Consalvi had tried to make clear to the Athletes that they were not allowed to leave the doping control station. According to Dr. Cordoni, Mr. Consalvi addressed the Athletes in English. However, in his testimony to the Panel, Mr. Consalvi testified that he speaks only little English. Further, it has to be noted that whereas Mr. Consalvi testified that he and Dr. Cordoni addressed the Athletes in English, Dr. Cordoni testified that he does not speak English. The Panel takes the view that the evidence submitted is not sufficient to establish that the Athletes were told in an unequivocal and understandable manner not to leave the doping control station to take a shower in their changing room.
14. For the above factual reasons, in the particular circumstances of this case, no liability under Article 2.3. of the CONI Anti-Doping Rules has been established.
15. Even if it had been established that the Athletes left the doping control station despite an unequivocal refusal of permission to do so, the Panels' findings would not be different. It is undisputed that Dr. Stranges went after the Athletes and instructed them to return to the doping station. It is further undisputed that the Athletes followed this instruction at 23:32 and submitted themselves to sample collection. The samples of both Athletes were tested, and the test results were negative. Neither party contended that the Athletes were doing something other than taking a shower in an open, accessible and monitorable changing room during their absence from the doping control station. It is further undisputed that the Second Respondent started to submit himself to sample collection before he left the doping control station to take a shower, although the quantity of urine provided was insufficient. For these factual reasons, the Panel is not satisfied that even if it were established that the Athletes left the doping control station despite an unequivocal instruction not to do so, the behaviour of the Athletes would constitute a *"refusal"* or a *"failure"* or an *"otherwise evading"* under Article 2.3 of the CONI Anti-Doping Rules.

16. Based on this conclusion, the Panel needs not discuss the question of whether or not Article 2.11 of the CONI Anti-Doping Rules applies in addition to Article 2.3 of these rules.
17. On all these grounds, the Panel concludes that the Appellant's prayers for relief are to be rejected and the Appeal is to be dismissed and the appealed decision confirmed.
18. Against the above background, all other prayers or requests are dismissed.

**The Court of Arbitration for Sport rules:**

1. The appeal filed by the World Anti-Doping Agency on 24 June 2009 is dismissed.
2. The decision issued by the CONI National Anti-Doping Tribunal on 8 May 2009 is upheld.
3. (...).
4. All further or other prayers for relief are dismissed.