

Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2019/A/6376 Stirley Jones v. United States Anti-Doping Agency (USADA)

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Judge James M. Murphy (Ret.), Spokane, Washington, USA

in the arbitration between

Stirley Jones, San Clemente, California, USA

Represented by Mr. Howard L. Jacobs, Ms. Lindsay Brandon and Ms. Katy Freeman,
Attorneys-at-Law with the Law Offices of Howard Jacobs in Westlake Village, California,
USA,

as Appellant

and

United States Anti-Doping Agency (USADA), Colorado Springs, Colorado, USA

Represented by Mr. William Bock, III, Mr. Jeff Cook, and Ms. Nadia Soghomonian, USADA,
Colorado Springs, Colorado, USA

as Respondent

I. PARTIES

1. Mr. Stirley Jones (the “Appellant” or “Athlete”) is a 34-year old Paralympic track and field sprinter from San Clemente, California and a member of the United States Paralympics Track and Field National Team.
2. The United States Anti-Doping Agency (the “Respondent” or “USADA”) is the national anti-doping agency and the competent body for anti-doping issues in the United States.

II. FACTUAL BACKGROUND

3. On 1 October 2018, the Athlete was added to the USADA Registered Testing Pool (“RTP”).
4. On 2 October 2018, the Athlete was subjected to an out-of-competition doping control test. This was his first out-of-competition doping control test.
5. On 17 October 2018, the Respondent notified the Athlete that he had tested positive for the prohibited substance Stanozolol following his doping control.
6. On 7 November 2018, the UCLA Laboratory confirmed the finding of Stanozolol in the Athlete’s B Sample. He was then provisionally suspended from competition and charged with violating Articles 2.1 (presence) and 2.2 (use/attempted use) of the World Anti-Doping Code (“WADC”).
7. On 23 April 2019, a first-instance procedure was held before the American Arbitration Association (“AAA”) in accordance with the USADA protocol for the Olympic Movement Testing Program.
8. On 17 June 2019, the AAA Panel issued its corrected final award finding that the Athlete committed a violation under Article 2.1 of the WADC and sanctioning him with a 4-year period of ineligibility as from 17 October 2018 (the “AAA Decision”).

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

9. On 8 July 2019, the Athlete filed his statement of appeal at the CAS in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the “Code”). In his statement of appeal, the Appellant nominated Hon. Hugh Fraser as arbitrator.
10. On 13 July 2019, the Appellant (in support of an effort to reduce the costs of this procedure and as part of his application for legal aid) suggested that this procedure be referred to a Sole Arbitrator in lieu of a three-member Panel.
11. On 30 July 2019, the Respondent confirmed its agreement to refer this procedure to a Sole Arbitrator in accordance with Article R54 of the Code.
12. On 30 July 2019, the Parties jointly proposed Judge James Murphy (Ret.), Spokane, Washington, USA as Sole Arbitrator, subject to confirmation by the President of the Appeals Arbitration Division.

13. On 22 August 2019, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, confirmed the appointment of Judge Murphy as Sole Arbitrator in accordance with Article R54 of the Code.
14. On 18 July 2019, the Appellant filed his appeal brief in accordance with Article R51 of the Code.
15. On 20 August 2019, the Respondent filed its answer in accordance with Article R55 of the Code.
16. On September 30, 2019, a hearing was held in accordance with Article R57 of the Code. In addition to the Sole Arbitrator, the following individuals were present at the hearing:

For the Appellant:

Mr. Howard Jacobs, Counsel
Ms. Lindsey Brandon, Counsel
Mr. Paul Cook, Witness
Mr. Paul Scott, Witness
Ms. Carmen Perez Jones, Witness
Mr. Stirley Jones, Appellant

For the Respondent:

Mr. Jeff Cook
Ms. Nadia Soghomonian
Ms. Laura Chabrier, Witness
Ms. Kelly Albert-Coo, Witness
Dr. Matthew Fedoruk PhD, Witness
Dr. Daniel Eichner, Witness
Mr. Amy Eichner, Witness

17. On 27 September 2019, the Parties signed and returned the Order of Procedure in this proceeding.
18. At the outset of the hearing, the Parties confirmed that they had no objection to the Sole Arbitrator and upon conclusion of the hearing, confirmed that their right to be heard was respected.

IV. SUBMISSIONS OF THE PARTIES

A. The Athlete's Submission

19. In his appeal brief, the Appellant requested that the CAS uphold his appeal and that the Appealed Decision be dismissed. Alternatively, should a violation be confirmed, that the appropriate sanction should not exceed 6-8 months, commencing 17 October 2018.
20. The Appellant specifically seeks the following relief:

9.1 Mr. Jones respectfully requests that, for all the foregoing reasons:

9.1.1 That the appeal of Stirley Jones is admissible;

9.1.2 *That the Corrected Final Award of the USADA / AAA ARBITRATION PANEL be set aside;*

9.1.3 *That Appellant Stirley Jones' sanction be reduced and/or eliminated; and,*

9.1.4 *That Respondent shall bear all costs of the proceedings including a contribution toward Appellant's legal costs.*

21. The Appellant's submission can be summarized as follows:

- The Appellant did not intentionally violate the anti-doping rules, therefore the default sanction is 2 years not 4 years.
- On a balance of probabilities, the Appellant established that he ingested a supplement that was contaminated with Stanozolol which was the source of his positive test result. For this reason, his sanction should be substantially reduced, with credit given for his period of provisional suspension, and any period of ineligibility commencing 17 October 2018.

B. The Respondent's Submission

22. In its answer, the Respondent requests that the CAS determine that the Appellant ingested the prohibited substance Stanozolol and in doing so, failed to meet his required burden of proof to establish that his violation was not intentional.

23. The Respondent seeks the following relief:

“[The] Appellant's appeal should be dismissed and USADA should be granted its costs and all other appropriate and necessary relief.

USADA requests that Appellant bear the costs associated with the appeal he initiated and reimburse USADA its attorneys' fees.”

24. The Respondent's submission can be summarized as follows:

- Appellant claims that a supplement which he did not declare on his doping control form was contaminated with Stanozolol and caused his positive test. USADA tested seven sealed containers of the same supplement - six from the exact same lot as Appellant's open container - and none contained Stanozolol.
- Since the first-instance hearing, the Appellant has changed his version of how and when he obtained the product he claims was contaminated and each time his evidence has been discredited. The only difference is that he has presented a receipt, torn, washed out and not readable in an attempt to prove the source and date of purchase of the product that was sent to the lab for verification of containing Stanozolol.

- The lack of such evidence played no part in the AAA hearing decision. The default period of ineligibility is 4 years as he has not established that the source of his positive test came from a contaminated product.
- It is plausible that he intentionally spiked his supplement which under cuts his contamination theory.

V. JURISDICTION

25. Article R47 of the Code provides as follows:

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 the said body so provide or as the parties have concluded a specific arbitration agreement 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 the said sports-related body.

An appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules applicable to the procedure of first instance.

26. The Appellant relies on Article 17(b) of the USADA Protocol as the basis for CAS jurisdiction. Article 17(b) provides, in operative part, that “*the final award by the AAA arbitrator(s) may be appealed to the CAS within twenty-one (21) days of issuance of the final reasoned award.*”
27. The Respondent did not object to CAS jurisdiction and the Parties’ expressly agreed thereto when signing the order of procedure.
28. In light of the provision outlined above, the Sole Arbitrator is satisfied that the CAS has jurisdiction to hear this matter.

VI. ADMISSIBILITY

29. Article R49 of the CAS Code reads as follows:

In the absence of a time limit set in the statutes or regulation of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against.

30. The CAS Code, therefore, allows that the time-limit of 21 days for the filing of the appeal may be derogated by the statutes or regulation of the association concerned. In this regard, the Sole Arbitrator notes that the athlete received notification of the corrected final award 17 June 2019.
31. The statement of appeal was duly filed on 8 July 2019 and is, therefore, timely.

VII. APPLICABLE LAW

32. Article R58 of the Code provides as follows:

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.

33. In their submissions, the Parties rely exclusively on the provisions of the WADC and USADA Protocol, as well as a long-line of CAS jurisprudence. No other law was cited by the Parties or and no argument by either Party required the Sole Arbitrator to deviate from directives of the WADA, USADA Protocol and CAS jurisprudence.
34. In this respect, the Sole Arbitrator will rely on the express provisions of the WADA and USADA Protocol and consider as guidance, where necessary, CAS jurisprudence.

VIII. MERITS

A. New Evidence

35. As an initial matter, the Sole Arbitrator notes that the Parties rely on most of the facts and evidence adduced at the first-instance hearing, with the exception of a new receipt submitted by the Appellant, which allegedly proves when and where the Appellant purchased the product which he claims unknowingly contained Stanozolol.
36. The Respondent asserts that the receipt, which is tattered and in parts unreadable, must be proved to be genuine for the Sole Arbitrator to consider it as valuable evidence. However, to the contrary, the Respondent has presented evidence that the transaction never took place and thus the receipt should not be considered.
37. After evaluating the evidence and the circumstances around the alleged purchase, the Sole Arbitrator determines that the receipt represents an uncorroborated and inauthentic purchase. As a result, it shall not be considered as conclusive proof of purchase.

B. Violation

38. The Parties agree that Appellant's A and B sample contains 3'-hydroxystanozolol, a metabolite of Stanozolol, which is prohibited at all time in the class of Anabolic Agents on the WADA Prohibited List. In this sense, the Parties agree that an anti-doping rule violation has been committed. Therefore, the principal issue centers on the appropriate sanction for such a violation, taking into account all the specificities of this particular case.
39. As a starting point, the default period of ineligibility for non-specified substances including Stanozolol is four years. The Appellant posits that a reduction is appropriate because he consumed a contaminated supplement and his use was not intentional.
40. The Appellant's case is built on three pillars, or pieces of evidence, which when examined together, allegedly establish the source of the prohibited substance.

41. First, the Appellant points to MuscleTech Nitro Tech 100% Whey Gold protein manufactured by Iovate Nutrition. He testified that he only received and used a single bottle of this product and said it was sent to him as part of an athlete sponsorship program in October 2017. An open container of this product was sent by the Appellant to KorvaLabs to be analyzed. The lab detected Stanozolol in the product. The remaining product was forwarded to the WADA accredited laboratory in Salt Lake City, Utah, which also confirmed the finding of the presence of Stanozolol in the bottle.
42. Next, the Appellant relies on the exhibits filed in support of his appeal (which were the same exhibits put forward before the AAA Panel). In particular, he provides bank and credit card statements from Target, Walmart and in order to show opportunities to purchase the product in July, September and October of 2018.
43. Third, the Appellant relies on a newly submitted piece of evidence, namely a partial, barely legible receipt allegedly from a GNC nutritional store in Chula Vista, California in September 2018.
44. As it concerns his receipt, the Sole Arbitrator notes that the Appellant previously testified that he began using the product in August 2018. Iovate confirmed that it received only one shipment of the product and the Appellant has testified that he received the product in October 2017 but it had not been manufactured until 2018. The Respondent requested a bottle of the product from Iovate in the same lot number as the Appellant's opened bottle and received an unopened case of 6 sealed containers. SMRTL then conducted an analysis on all of the bottles and Stanozolol did not appear in any tested bottle. An additional sealed container from a different lot number was also shipped by Iovate and tested by SMRTL. Similarly, this outside container did not contain Stanozolol.
45. Interesting, the Sole Arbitrator notes that Iovate's cooperation was blind, i.e. it was not informed which substance SMRTL would be screening for. But this said, the Appellant proffered arguments including that Iovate may have prescreened the sealed containers to assure that it did not contain Stanozolol to protect its corporate integrity (Iovate's litigation history shows many accounts of contamination in supplements even though there is incomplete information about the nature of such claims, the ultimate outcomes, and factual or legal findings in ending these suits).
46. The Appellant further claims that he lacked the sophistication to spike his open container. However, the process of self-contamination is seemingly quite simple. SMRTL conducted experiments and provided evidence that it is not only plausible but quite easy for the Appellant to spike his own sample without any scientific knowledge, materials or equipment.
47. The Appellant further proposes the application of the "binary choice", as offered in CAS 2017/A/5301 *Sara Errani v. International Tennis Federation*, namely that the panel must choose between the Athlete's version of event, i.e. that an unintentional ADRV was caused by ingestion of a contaminated supplement, or that the ADRV was simply intentional. USADA, however, proposes a third version, simply that the Athlete has not proved that his ADRV was unintentional. In this respect, the AAA panel ruled that USADA neither has the burden to hypothesize nor prove any alternative source other than the one suggested by the athlete.

48. Separately, the Sole Arbitrator considers that Appellant advanced inaccurate and misleading procedural arguments by withholding information despite USADA providing all evidence in support of its case with its pre-hearing brief. Whether an intentional act of gamesmanship or not, such actions cannot be tolerated in this procedure.
49. In close, the Appellant contends that he did not intentionally violate the WADC and the rules as they concern anti-doping, and the default sanction is 2 years, not 4 years. On a balance of probabilities, he merely ingested a supplement that was contaminated with Stanozolol, and because the source of his positive test was a contaminated supplement, his sanction should be significantly reduced. With this, he should be given credit for his provisional suspension which started on 17 October 2018.
50. USADA contends that the default period of ineligibility for non-specified substances such as stanozolol is four years. The Athlete has not established the source of his positive test was from a contaminated product and the plausibility of him intentionally spiking his supplement further undercuts his contamination theory. The sanction, therefore, should be four years, with a start date of his provisional suspension of 17 October 2018.
51. In consideration of the foregoing, the Sole Arbitrator considers that the Appellant has not established the source of his positive test was from a contaminated product nor has he shown that he bears “No Significant Fault or Negligence. Consequently, his appeal is dismissed.

IX. COSTS

52. Article R64.4 of the CAS Code provides:

At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and the costs of witnesses, experts and interpreters. The final account of the arbitration costs may either be included in the award or communicated separately to the parties.

53. Article R64.5 of the CAS Code provides:

In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the outcome of the proceedings, as well as the conduct and the financial resources of the parties.

54. In light of the outcome of this appeal and the conduct of the Parties in these expedited proceedings, the Sole Arbitrator determines that the costs of arbitration, to be calculated by the CAS Court Office and communicated separately to the Parties, shall be borne by

the Appellant. The Sole Arbitrator further determines that considering the Appellant's medical issues which preclude him from employment (other than his role as a coach which provides minimum resources for living) and noting his lack of resources to contribute to these costs, the Sole Arbitrator determines that each Party shall bear their own legal and other costs.

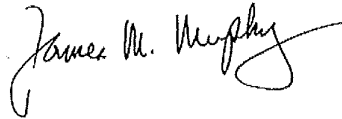
ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr. Stirley Jones against the United States Anti-Doping Association on 8 July 2019 with respect of the decision dated 17 June 2019 by the AAA Arbitration Panel is dismissed.
2. The costs of the arbitration, to be determined and served to the parties by the CAS Court Office, shall be borne by the Mr. Stirley Jones.
3. Each party shall bear its own costs and other expenses incurred in connection with this arbitration.
4. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Dated 12 December 2019

THE COURT OF ARBITRATION FOR SPORT



Judge James M. Murphy
Sole Arbitrator