BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND **ST 04/11**

BETWEEN	**DRUG FREE SPORT NEW ZEALAND**
	Applicant
AND	**SYLVESTER SEAY**
	Respondent

DECISION OF SPORTS TRIBUNAL
28 July 2011

Hearing: 12 July 2011

Tribunal: Alan Galbraith QC (Deputy Chairperson)
Anna Richards
Chantal Brunner

Present: Sylvester Seay, athlete
Andrew McCormick, counsel for Sylvester Seay
Graeme Steel and Jayne Kernohan, Drug Free Sport New Zealand
Isaac Hikaka, counsel for Drug Free Sport New Zealand
Lawrence Floyd and Sandra Seay, witnesses for athlete
Dr Catrin Goebel, witness for Drug Free Sport New Zealand
Stephen Layburn and Tim Hamilton, Basketball New Zealand

Registrar: Brent Ellis

1. A provisional suspension order was made by this Tribunal on 8 June 2011 provisionally suspending Mr Seay from 31 May 2011 as a result of an adverse analytical finding for a metabolite of cannabis (THC) arising out of an in-competition drug test on 16 April 2011.

2. The hearing of the substantive Application for Anti-Doping Rule Violation Proceedings by Drug Free Sport New Zealand was heard on Tuesday 12 July. Sylvester Seay was represented by Andrew McCormick as counsel. Drug Free Sport was represented by Isaac Hikaka as counsel. Mr Seay and some other witnesses, who were either in USA or Australia, participated by teleconference.

Background

3. Sylvester Seay is a professional basketballer. He had a successful basketball career at both Arizona and Fresno State Universities, variously majoring in criminology, mass communication and journalism and receiving awards in 2009 as the most valuable player and in 2010 as the most defensive player.

4. Since leaving Fresno State he has played professionally in Israel, South Korea and in April 2011 came to New Zealand to play for the Waikato Pistons. His wife and young son accompanied him to New Zealand.

5. He was tested in competition on 16 April 2011 and the result of that test being positive was notified by letter on 12 May 2011. By that date Sylvester had returned with his wife and son to the United States. His last game in New Zealand was towards the end of April 2011.

6. Sylvester's evidence, supported by his wife, a friend Lawrence Floyd and an email from the head basketball coach at Fresno State University was that he was not a user of cannabis or any other drug. His coach said in his email "During my time at Fresno State we drug tested student athletes every month of the year. Sylvester was in the programme for three years and never had a positive in any drug test that was given at the University. I have known Ves for five years and I have never seen or heard of him using any type of drug."

7. Sylvester's own evidence was that he came from an under-privileged environment and through basketball obtained scholarships to attend a highly rated school in Boston, later to Arizona State University and then on to Fresno State in California. It is clear from reading his CV that he was a major contributor to the Fresno State team.

8. Sylvester met his wife, Sandra, while at Fresno State and they have a young son. A basketballer in Sylvester's position is dependent upon obtaining contracts from year to year for basketball leagues in countries outside the USA. Of course the hope always is of succeeding and landing a USA contract.

9. At the moment Sylvester is hoping to obtain a playing contract in Mexico for the league season starting in early August or, alternatively, obtaining a playing contract in Dubai for a season which starts a little later.

Position under the Rules

10. Mr Hikaka for Drug Free Sport filed a helpful submission which correctly identified the issues facing the Tribunal under the Sports Anti-Doping Rules 2011 (SADR) as:

    (a) Can Mr Seay establish on the balance of probabilities how the prohibited substance entered his system?

    (b) If so, can Mr Seay establish that he bears no fault or negligence?

    (c) If not, is there evidence (and corroborating evidence) that there was no intent to use the prohibited substance for performance enhancing purposes?

11. Mr Hikaka also identified the three possible outcomes:

    (a) If Mr Seay cannot establish how the prohibited substance entered his system then the mandatory period of suspension will be two years;

(b) If Mr Seay can establish how the prohibited substance entered his system and show that he bears no fault or negligence then no suspension will be imposed;

(c) If Mr Seay can establish how the prohibited substance entered his system, but cannot show "no fault or negligence" then Drug Free Sport would accept that the evidence shows no intent to enhance performance and therefore the period of suspension would be four months, plus or minus, depending upon whether there are any aggravating or mitigating factors.

The Facts

12. Sylvester's evidence was that he and his wife visited a friend, Lawrence Floyd, on the night before they left for New Zealand. Sylvester was suffering from a heavy cold and dosing himself with various cold remedies bought over the counter at the local chemist shop. Towards the end of the evening he took what he thought was a Jolly Rancher sweet from a small bowl sitting on the table. The sweet was clear, wrapped in cellophane, but had no advertising trade name. He took the sweet to help ease the effects of the cold on his throat.

13. In his written evidence and in cross examination he said that he did feel some dizziness subsequent to eating the sweet but, given the effects of the cold and the medicine that he was already taking, he did not associate this with the sweet at all. His wife, Sandra, in cross examination said that when they commenced the drive home Sylvester was the driver but after a short time he told his wife he was not feeling well, pulled the car over and she drove the remainder of the way.

14. Sylvester and his family left for New Zealand, he played four games for the Waikato Pistons, then he was tested on 16 April 2011. A few days later in a Facebook exchange with his friend Lawrence Floyd, he told Lawrence that he had been tested and then got the response that there could be a problem as Lawrence had subsequently discovered that the sweet which Sylvester had eaten at his house was laced with THC.

15. Evidence was provided to the Tribunal that marijuana may be dispensed in California to persons who hold a medical marijuana certificate/card. Apparently it is not particularly difficult to obtain such a certificate. Marijuana is apparently dispensed in a variety of forms and, from the material provided to the Tribunal, a popular form seems to be its incorporation into sweets similar to the innocuous Jolly Rancher range of sweets. Indeed, from the material provided to us it appears that the name Jolly Rancher is also used in online promotional and informational materials associated with the similarly appearing cannabis laced sweets.

16. Lawrence Floyd filed a written statement of evidence and was also cross examined. He confirmed that the sweets had been left at his place by a friend who had a medical marijuana certificate, but given their innocuous appearance he had not thought to connect them with marijuana enhanced Jolly Ranchers. Only when the friend contacted Mr Floyd, several days later, to retrieve the sweets, did Mr Floyd learn that they had been obtained from a medical marijuana store and were laced with cannabis.

17. Mr Floyd also said that he had known Sylvester for about seven years and his wife Sandra for about two years. They had been friends since attending the same high school in San Bernadino. He said that he had not known Sylvester to use drugs or to not pass a drug test in his many years of playing basketball. He also said that he knew of the importance of Sylvester not taking drugs given his professional career and would never have let Sylvester take the sweet had he had any thought that there might be some risk.

18. Accordingly the evidence on behalf of Sylvester was that he did not use cannabis, supported by the evidence of his wife, Mr Floyd and the Fresno State Head Coach, and had been tested regularly over a three year period and never failed a test. His evidence, again supported by Mr Floyd, was that the source of the cannabis resulting in the positive test had to be the sweet which he had eaten at Mr Floyd's house immediately before departure to New Zealand.

19. Drug Free Sport very fairly took the position that if the Tribunal was satisfied that this was the source of the cannabis detected in the positive test, that it would not contend that an athlete who consumed a sweet at a friend's place, not knowing or suspecting anything of any possible drug contamination, should be said to be at fault or negligent.

20. The Tribunal does accept that there was nothing that could fairly be said to put Sylvester on notice regarding possible contamination of the sweet. If an athlete goes to a friend's house, particularly a friend who knows of the importance of the athlete being drug free, and consumes some food or a sweet or sweets at that house it would go beyond reasonableness to then say that the athlete was at fault if some drug contamination unknown to the athlete or the friend was in fact present. Obviously the factual circumstances could be very different if the athlete was consuming food or drink provided by a stranger in a different setting.

21. Accordingly if we accept Sylvester and his witnesses' evidence the Tribunal's conclusion would have to be that the source of the positive test was the eating of the drug laced sweet and that was in circumstances where it would not be reasonable to impute any fault or negligence to Sylvester. On that basis there would be no penalty imposed albeit that there would have been a breach of the primary obligation to be drug free in competition.

22. However, the Tribunal has to measure this evidence against the evidence of Dr Catrin Goebel, called for Drug Free Sport, who is the director of the Australian Sports Drug Testing Laboratory.

23. Dr Goebel's evidence was that Sylvester's explanation was not consistent with the results of the test. Her evidence was that THC and its metabolites would not be detectable in urine analysis seven days after ingestion unless the person was a frequent cannabis user. Dr Goebel asserted that because, on Sylvester's evidence, the sweet had been eaten some 12 days before the test, in order to produce the positive test of 35 ng/mL, it would have had to have contained many grams of THC which would have caused severe impairment, hallucinations and the virtual

necessity of medical treatment. Therefore, Dr Goebel's evidence was that it was simply not realistic to contemplate Sylvester's symptoms of dizziness being consistent with having ingested one sweet containing a quantity of THC with sufficient potency to produce the test results obtained.

24. Mr McCormick in questioning Dr Goebel, and later in submissions, pointed to an extract from a text, Drugs of Abuse (2nd edition) by Dr Simon Wills which referred to the lengthy periods of time that cannabis could take to be eliminated from the body of habitual users but also to a statement that "it may still take a few weeks but clearance from urine in as little as 1-3 days has been observed" in those who use cannabis infrequently. The text also noted that the terminal half life is variable depending upon circumstances, but is very long and reflects a process of slow clearance as the drug is gradually released from body fat and metabolised. The Tribunal asked for and was supplied with the footnote references to that statement quoted above and two referenced articles. Those references confirm that studies have shown a significant variability within the parameters referred to in the text.

25. We note that these studies focused on excretion patterns in heavy, moderate and light users of smoked cannabis and there was little to guide the Tribunal with respect to expected excretion patterns of so called naïve users, described as someone who has used cannabis only once and is not using on a regular basis over a period of time. Nor was there guidance as to the expected excretion patterns with respect to edible cannabis, which, based on evidence produced to the Tribunal is made from the resinous head of the marijuana plant and is therefore more potent than the smoked variety.

26. Counsel for the parties were given the opportunity to make further submissions in relation to these articles or issues raised in them. Mr Hikaka made statements to the broad effect that the articles were consistent with Dr Goebel's evidence. Mr McCormick effectively submitted that the articles supported Mr Seay's explanation of the circumstances and noted that "Dr. Goebel did not dismiss the possibility that such a

range could accommodate a 'naïve' user such as she described Mr Seay to be, depending on the various factors that serve to determine how the drug is metabolised in a user's system".

27. However, what these studies do show is that for each category of user there can be extreme variability in the time for excretion. In any event, the Tribunal was not provided with any more recent studies that suggested any lesser parameters of variability than in these articles. Dr Goebel agreed that variability could occur depending upon a variety of circumstances including the different physiology or sensitivity to drugs of different people, whether the food had or had not been consumed, the potency or type of particular drug etc. Dr Goebel also confirmed that drugs are in that respect similar to alcohol – different people have different tolerances and different reactions.

Discussion

28. While Mr Hikaka made the quite proper submission that it was open to the Tribunal to accept Dr Goebel's evidence without determining that Sylvester's evidence was untruthful, because there may have been some subsequent cause unknown to Sylvester from which the positive test resulted, the Tribunal is satisfied that the latter is too improbable a hypothesis. Accordingly a decision one way or the other is a decision as to the truthfulness of Sylvester and the witnesses of fact.

29. It is obviously difficult to assess credibility without seeing witnesses. However, the Tribunal was impressed with the manner in which Sylvester, Lawrence Floyd and Sandra Seay gave their evidence. It was given matter of factually, it was not exaggerated, and it had the ring of truth. It is extremely difficult to reject evidence in those circumstances.

30. One matter which was discussed with counsel for Drug Free Sport was the recent CAS decision *IWCBF v UKAD & Gibbs* (CAS 2010/A/2230). That decision correctly confirmed that the onus is on an athlete to establish the source of a positive test and that reasoning backwards from a lack of

intent to enhance performance is inappropriate. However, the decision does not, and could not, conclude that in assessing the truthfulness of evidence as to source that a tribunal would not be entitled to weigh in the balance the fact that the most beneficial way out for an athlete, where the substance is not performance enhancing but the source is uncertain, would be to admit untruthfully to a source. The discussion in *Gibbs* on the possibility is irrelevant because that discussion concerns a performance enhancing substance and, in any event, is not directed to the factors that might properly be considered in a particular case in assessing truthfulness.

31. The circumstances here are such that if the Tribunal accepted Dr Goebel's evidence as absolute then although Sylvester has established, with corroborative evidence, how THC did get into his system 12 days before the test he would still have failed to establish how THC got into his system 1-7 days before the test and therefore he would be ruled ineligible for two years. And this with a substance that Drug Free Sport accepts would not have been intended to be performance enhancing. Obviously Sylvester would be much better off if he admitted (untruthfully) that he had smoked cannabis in that 1-7 day window which Dr Goebel asserts.

32. That Sylvester has not made such a self serving admission is, in the Tribunal's view, a factor, although far from conclusive in itself, in assessing the truthfulness of Sylvester's and, for that matter, his witnesses' evidence. As we have said, the Tribunal has no reason to doubt the truthfulness of that evidence as to the events at Lawrence Floyd's house. If that positive evidence is truthful, which the Tribunal accepts that it is, then what distinction should the Tribunal draw with the evidence that Sylvester has been previously drug tested multiple times, never returned a positive and does not do drugs. Is it appropriate to reject the logical connection between the accepted truthful evidence that THC did enter Sylvester's system through eating the THC laced sweet, the corroborative evidence that Sylvester does not do drugs including marijuana, and the positive test because of Dr Goebel's assertion that THC would not have been detectable in Sylvester's urine beyond 7 days?

33. The alternative findings open to the Tribunal are that Dr Goebel's opinion is correct as an absolute and Sylvester and his wife are untruthful in denying that Sylvester ingested cannabis after he got to New Zealand with his wife and son and that he never does drugs, including cannabis, or that Dr Goebel's 7 day period is subject to variability, as the Simon's text reference would suggest. The Simon's text, common experience and Dr Goebel's evidence in cross examination confirms that variability can lead to results outside the norm.

34. On the one hand we are given evidence by Dr Goebel stating that for THC to be detectable in urine analysis eight or more days after ingestion, the person would need to be a frequent user or at least, in her view, not a one-time user. On the other hand we have Mr Seay presenting studies showing that excretion patterns are highly variable and clearance from urine can be from one day to a few weeks for an "infrequent" user. On the scientific material and evidence presented to us in relation to variable excretion times of users, the lack of any specific scientific material presented to us regarding naive users, and the lack of any evidence showing the THC potency in the particular sweet consumed, we are unable to confidently draw an absolute conclusion of how long the substance would have stayed in Mr Seay's system.

35. On this first question of satisfaction as to the source of the positive test the Tribunal has to be satisfied by the athlete on a balance of probability. The Tribunal accepts the positive evidence that a cannabis enhanced sweet was consumed some 12 days before testing. Given the potential to extremes of variability recognised in the studies provided to the Tribunal, and the evidence that edible forms of cannabis are more potent, and metabolised differently, than the smoked varieties - in the Tribunal's view this establishes a source of the substance from which the positive test was obtained that cannot be ruled out.

36. The Tribunal is therefore satisfied on the balance of probability that the cannabis, resulting in the positive test, entered Mr Seay's system though his consumption of the sweet.

37. Given that conclusion and the acknowledgement by Drug Free Sport that consuming a sweet at a friend's house will not constitute fault or negligence unless there is some objective basis for concern, a position which the Tribunal agrees with, the result here must be that although a breach of Rule 3.1 of the SADR has occurred the defence under Rule 14.5.1 of the SADR, that the athlete has no fault or negligence, has succeeded and therefore no penalty is imposed. Obviously, also, the provisional suspension order lapses.

Dated: 28 July 2011

Alan Galbraith QC
Deputy Chairperson

Anna Richards

Chantal Brunner