UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class NAOMI LANE
United States Air Force

ACM S30930

13 July 2007

Sentence adjudged 15 April 2005 by SPCM convened at Randolph Air Force Base, Texas. Military Judge: Barbara G. Brand.

Approved sentence: Bad-conduct discharge, confinement for 3 months, forfeiture of $823.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major Christopher S. Morgan.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Jin-Hwa L. Frazier, and Captain Daniel J. Breen.

Before

JACOBSON, PETROW, and ZANOTTI
Appellate Military Judges

ZANOTTI, Judge:

A special court-martial consisting of officer and enlisted members convicted the appellant, contrary to her pleas, of one specification of wrongful use of cocaine. She was sentenced to a bad-conduct discharge, confinement for 3 months, forfeiture of $832.00 pay per month for 3 months, and reduction to the grade of E-1. The convening authority approved the findings and sentence as adjudged. The appellant now argues before this Court that the military judge erred in denying her motion to suppress the urinalysis test results supporting the specification of wrongful use of cocaine.[1] We disagree and affirm.

[1] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Background

On the morning of 15 November 2004, the appellant first called, and then went to the home of her Noncommissioned Officer in Charge ("NCOIC") to show him the bugs and worms that she believed were crawling on her skin, arms and legs and in her hair. The NCOIC, Master Sergeant (MSgt) R, did not see insects, but did see marks left by the appellant's vigorous scratching.

On 16 November, the appellant did not show up for work. The assumption within her duty section in the pharmacy, was that she was at an appointment with her psychiatrist, Dr. M. Dr. M was treating the appellant for depression.[2] Dr. M's opinion the day before was that prescription drug interaction problems were likely causing the appellant to see the bugs and worms. When the unit contacted Dr. M, it learned that Dr. M had cancelled the appointment, instead instructing the appellant to go to the emergency room. The unit also learned that the appellant did not follow Dr. M's advice to report to the emergency room. She was not answering her home telephone and her whereabouts were unknown.

During this time, the pharmacy unit was being led by its Chief, Lieutenant Colonel (Lt Col) L, who was also acting as the medical group commander. Lt Col L asked her first sergeant, MSgt F, and MSgt R to search for the appellant. They ultimately learned that the appellant was at home, sleeping. Lt Col L testified she wanted MSgt R and MSgt F to convince the appellant that it was in her best interest to report to the hospital. Lt Col L also testified that she knew toxicology screening would be done, and that this would include a urinalysis. The appellant's urine was collected and tested (Collection I). Lt Col L contacted hospital staff for the results, but her request was denied under the Health Insurance Portability and Accountability Act.[3] But as the Chief of Pharmacy, she had access to the computer system storing the results and looked up the results herself. She found that the test result for Collection I was presumptively positive for cocaine use.

At this point, Lt Col L relied on experience she gained from another urinalysis test conducted on a sample the appellant had provided in April 2004. In April, the appellant had threatened suicide. She had not reported to work, was engaging in angry outbursts, and making threats to others. She agreed to go to the hospital, but only after insisting that she just needed an hour of sleep. The unit allowed her to rest for an hour and then took her to the hospital. A toxicology screening was accomplished, and the result was presumptively positive for cocaine. No report was made to the unit following this test. The discovery occurred approximately a month later, when the appellant's records were

[2] Other medical providers in this case include the appellant's Life Skills provider, Captain C, and her primary care physicians, Major S and Captain S.

[3] The request was denied under the Health Insurance Portability and Accountability Act (HIPAA), Pub. L. 104-191, 110 Stat. 1936 (Aug. 21, 1996), 42 U.S.C. § 1320-d *et. seq*, (1996), which provides, among other things, protection for the use and disclosure of protected health information.

being reviewed in preparation for a medical evaluation board. By then it was too late to have a confirmation test performed.

Lt Col L sought to have the test result from Collection I confirmed. Medical staff also refused this request. Lt Col L considered having the appellant ordered to provide a urine sample, but ultimately a decision was made to present all known information to a military magistrate to obtain search authorization to conduct the test. The magistrate found probable cause and ordered a seizure of the appellant's body fluids. A urine sample was collected (Collection II), and the result was positive for cocaine. Additional facts are outlined in the analysis section, infra.

Analysis

The appellant argues that the positive urinalysis test result obtained from Collection II on 16 November 2004 was the product of an illegal search, and the military judge erred in failing to suppress the results of the test. The standard we use to review this ruling is abuse of discretion. *United States v. Ayala*, 43 M.J. 296, 298 (C.M.A. 1995). We review the military judge's findings of fact under a clearly erroneous standard, and her conclusions of law de novo. *Ayala*, 43 M.J. at 298.

The trial counsel offered the positive test result from Collection II under a theory of probable cause. Mil. R. Evid. 315(a) and (f)(1). The appellant argues that the military magistrate had insufficient evidence upon which to base a probable cause determination and the test result was therefore inadmissible under Mil. R. Evid. 311(a). The cornerstone in this argument is that the military magistrate improperly considered the presumptively positive test result from Collection I. Appellant argues the consideration of this evidence is fatal to the probable cause determination because the presumptive positive test result from Collection I was, itself, the subject of an illegal seizure.

The appellant offers two reasons why the presumptive positive test result from Collection I was the product of an illegal seizure.[4] First, the appellant argues that this test result was the product of a commander directed urinalysis, and not a sample obtained for valid medical purposes under Mil. R. Evid. 312(f). Second, the appellant argues that the presumptive positive test result from Collection I was illegally seized because Lt Col L obtained that result in violation of the federal Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. § 201 et seq. (42 U.S.C. § 1320d-2) (1996).[5]

[4] An additional basis — the inherent unreliability of an unconfirmed presumptive positive test result and thus the impropriety of considering it as a basis for probable cause — was argued before the military judge but is not continued before us.

[5] This basis was not argued before the military judge.

De Facto Command Directed Analysis

The theory behind the appellant's argument on this basis is that Lt Col L was motivated to compensate for the lapse in judgment exhibited in April 2004, when the medical staff learned of the appellant's presumptive positive test result for cocaine, but failed to notify the appellant's commander. The appellant also argues Lt Col L exploited the factual developments occurring on 15-16 November 2004 in order to collect and test the appellant's urine under the subterfuge of a medical concern. As discussed above, the appellant developed a factual record that Lt Col L knew the medical community would collect and test the appellant's urine as a matter of standard operating procedure; that a presumptive positive test result needed to be confirmed and that Lt Col L in fact attempted to have the test confirmed; and that Lt Col L discussed, and at some point at least considered, having the appellant ordered to provide a sample under command direction.

Additional facts in the record, as found by the military judge, support the conclusion that the collection of the appellant's urine was for valid medical purposes. On 15 November 2004, the appellant approached her NCOIC and claimed to see otherwise invisible bugs and worms crawling over her body. Based on the appellant's claims, a call was placed to her psychiatrist, Dr. M. No further action was taken that day because Dr. M had reported that the appellant's sensation of bugs and worms was likely due to adverse prescription drug reactions, and the appellant could be counted on to report to the emergency room if she felt it necessary. In any event, an appointment with the appellant was previously scheduled for the morning of 16 November 2004.

A renewed sense of urgency ensued on 16 November 2004 when the appellant's psychiatrist reported to Lt Col L that she had directed the appellant to go to the emergency room instead of the previously scheduled appointment, but the appellant had not followed her advice — she was not at the emergency room, she was not at work, and she was not answering her home telephone. Lt Col L knew of the appellant's medical history, which included threats of suicide, therapy with a psychiatrist for depression, and treatment with a variety of prescription medications. Lt Col L contacted Major S and Captain S. They agreed with Dr. M that the appellant needed to go to the emergency room.

Several hours later, in the early afternoon, the appellant spoke with her NCOIC and requested assistance getting to the emergency room. The appellant confirmed that her doctor told her she should go to the emergency room. The military judge found that she went to the emergency room voluntarily. After initial medical screening, which included providing the Collection I urine sample, but before Lt Col L knew the results, the appellant simply left the emergency room without telling anyone, making it necessary for her unit to contact security forces to find her. All of this was against the backdrop of

the experience in April 2004, which, as found by the military judge, included the appellant's call to a suicide hotline with reports of feeling poorly, her strange behavior, and her failure to report to work.

Reviewing these facts, the military judge found that the Collection I sample had been collected for valid medical purposes. We agree. All medical personnel with information about the appellant had also concluded that the scenario had risen to the level of medical emergency. There is nothing in the record to refute that medical personnel collect urine (or blood) as a matter of course when being called upon to treat emergency medical conditions.

Evidence collected for valid medical purposes does not implicate Fourth Amendment concerns, and evidence gained from procedures utilized for valid medical purposes is specifically excluded from the Mil. R. Evid. 311 definition of unlawfully seized evidence. Mil. R. Evid. 312(f); *United States v. Fitten*, 42 M.J. 179, 182 (C.A.A.F. 1995). It is the medical purpose that drives the consideration whether such results are outside the scope of Mil. R. Evid. 311, even if there is a contemporaneous suspicion of illegal activity. *United States v. Maxwell*, 38 M.J. 148, 149 (C.M.A. 1993). In *Maxwell*, a blood alcohol test was one of many diagnostic tests performed on the appellant's blood following a car crash because "the protocol suggests blood-alcohol tests be performed in trauma cases and . . . the results of the blood-alcohol tests are used in diagnosis" even when the physician suspects that alcohol may have been involved.[6] *Maxwell*, 38 M.J. at 149. The Court found that use of the results was proper even though the doctor testified that he had not used the results in the treatment. *Id.*

In *United States v. Nand*, 17 M.J. 936 (A.F.C.M.R. 1984), this Court held that a second urine sample collected and screened for drug use was properly treated as having been provided for medical purposes, even though the appellant was ordered to provide it. *Nand*, 17 M.J. at 937. In *Nand*, the appellant submitted water instead of a urine sample, the collection of which was part of a routine occupational physical examination. The medical technician told the appellant he would need to submit another, but the appellant left instead. The technician's supervisor called the appellant's commander and advised that a sample was still necessary because the appellant had submitted water. The next day, the commander ordered the appellant to submit another sample. Because the technician was suspicious, he collected the sample under drug testing protocols for legal proceedings. He used part of the sample to complete the physical, and sent the remainder off for drug testing. *Id.* at 936-37. This Court held that the results were admissible as a collection under Mil. R. Evid. 312(f), and "the fact that a portion of the urine sample was used for another purpose is irrelevant since the sample was validly taken." *Id*. at 937 (quoting *United States v. Foley*, 12 M.J. 826 (N.M.C.M.R. 1981)).

[6] The doctor in *Maxwell* had reported his observation that alcohol had been a factor in 40% of the emergency room patients presented due to car accidents. *Maxwell*, 38 M.J. at 149.

The military judge concluded that, under the totality of the circumstances, there was a reasonable belief that evidence of cocaine use would be found. We agree. The probable cause determination was based on the presumptively positive urinalysis test result from Collection I and the appellant's bizarre behaviors over the course of two days. Additionally, the military judge found that the magistrate was advised of the presumptive positive test result for cocaine in April 2004, and the strikingly similar circumstances giving rise to the need to collect urine for medical testing then.

In light of the authority discussed herein, we see no basis to set aside the military judge's finding that the Collection I urine sample was collected for valid medical purposes. We hold that the military judge was not clearly erroneous in her findings of fact and did not abuse her discretion in denying the appellant's motion to suppress the urinalysis test results.

HIPAA

There has been no reported case before our superior court or sister service courts of appeals in which the provisions of HIPAA were raised in the context of an exclusionary rule. We hold that HIPAA is inapplicable in the case before us for reasons set forth below.

Violations of HIPAA result in civil and criminal sanctions by the Secretary of Health and Human Services against a health care provider. There is no private cause of action granted. 42 U.S.C. §§ 1320d-5, 1320d-6; *Acara v. Banks*, 470 F.3d. 569, 571 (5th Cir. 2006) (HIPAA does not contain any express language conferring privacy rights upon a specific class of individuals); *Doe v. Bd. of Trs. of the Univ. of Ill.*, 429 F. Supp. 2d 930, 944 (N.D. Ill 2006*); Agee v. United States*, 72 Fed. Cl. 284, 289 (2006); *Logan v. VA*, 357 F. Supp. 2d 149, 155 (D.C. 2004). *See also United States v. Zamora,* 408 F. Supp.2d 295, 298 (S.D. TX 2006) (HIPAA not intended to be a means for evading prosecution in criminal proceedings). HIPAA allows for exceptions for law enforcement purposes, authorizing disclosure as required by law, provided the disclosure is in compliance with, and is limited to, the relevant requirements of a *process authorized under law*. *See* 45 C.F.R. 164.512(f)(ii)(C) (emphasis added). Lt Col L's disclosure was made as an affiant before a military magistrate charged with a duty to determine whether probable cause existed on facts presented to him.

The appellant also argues before this Court that the military judge abused her discretion in applying the good faith exception to the exclusionary rule. Mil. R. Evid. 311(b)(3), *United States v. Leon*, 468 U.S. 897 (1984), *United States v. Carter*, 54 M.J.

414, 419 (C.A.A.F. 2001). The appellant's argument regarding the absence of good faith is also based on HIPAA.[7] We have considered the issue and find it to be without merit.

Conclusion

The findings and sentence are correct in law and fact. Article 66(c), UCMJ, 10 U.S.C § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and the sentence are

AFFIRMED.

OFFICIAL

MARTHA E. COBLE-BEACH, TSgt, USAF
Court Administrator

[7] Specifically, the appellant argues that Lt Col L's reckless disregard for the appellant's privacy rights under HIPAA in accessing the test results, and then reckless omission in failing to advise the magistrate of the hospital staff member's refusal to release the results, precludes a finding of good faith.