UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	)	**Misc. Dkt. No. 2011-04**
Appellant	)	
	)	
v.	)	
	)	**ORDER**
Airman First Class (E-3)	)	
SCOTT M. DEASE, JR.,	)	
USAF,	)	
Appellee	)	**Special Panel**

The appellee consented to the search and seizure of his urine for testing on 15 June 2010. He provided a urine specimen pursuant to that consent on 16 June 2010, and the specimen was stored in the base hospital laboratory until it was shipped to the Air Force Drug Testing Laboratory (AFDTL) on 27 July 2010. On 21 June 2010, before AFDTL tested the specimen, the appellee revoked "any prior consent for search, samples or any other procedure." AFDTL reported that the specimen tested positive for cocaine on 25 August 2010.

The appellee moved to suppress the urinalysis testing results as a search in violation of the Fourth Amendment, U.S. CONST. amend. IV, arguing that his revocation of consent after he provided the urine specimen prohibited testing the specimen. Concluding the appellee maintained a reasonable expectation of privacy in the urine specimen, the military judge determined that analysis of the urine specimen after revocation of consent violated the Fourth Amendment and that the evidence obtained from testing would not have been inevitably discovered. Based on this conclusion he excluded the results of the testing as well as all derivative evidence to include the appellee's confession. The government appeals that ruling pursuant to Article 62, UCMJ, 10 U.S.C. § 862, which we find confers jurisdiction to hear this interlocutory matter.

Standard of Review

We review de novo matters of law in appeals under Article 62, UCMJ. On factual determinations, we are bound by those of the military judge unless they are unsupported by the record or are clearly erroneous. "On questions of fact, [we ask] whether the decision is *reasonable*; on questions of law we ask whether the decision is *correct*." *United States v. Terry*, 66 M.J. 514, 517 (A.F. Ct. Crim. App. 2008) (quoting *United States v. Baldwin*, 54 M.J. 551, 553 (A.F. Ct. Crim. App. 2000)).

Discussion

We agree with the military judge's conclusion that the analysis of the appellee's urine constituted a search subject to Fourth Amendment analysis, but we disagree with his conclusion that the search violated the Fourth Amendment. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV. But the Fourth Amendment prohibits only those searches which are unreasonable, and whether a search is reasonable "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 619 (1989) (citing *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)).

In *Skinner*, the Court acknowledged the long recognized expectation of privacy in the collection and testing of urine and found that such intrusions by the government are searches under the Fourth Amendment. *Skinner*, 489 U.S. at 617. But the Court found the searches at issue were not unreasonable and upheld federally mandated blood and urine testing of covered railroad employees who were involved in accidents and other safety violations based on the special governmental need to ensure the safety of the traveling public. *Id*. at 621. Relying on *Skinner*, the military judge correctly concluded the testing of the appellee's urine sample was a search subject to Fourth Amendment analysis. We find, however, he erred in concluding that testing the sample in this case was an *unreasonable* search in violation of the Fourth Amendment.

A threshold requirement for Fourth Amendment protection against unreasonable searches is a subjective expectation of privacy in the item or area to be searched that society recognizes as objectively reasonable. *California v. Greenwood*, 486 U.S. 35, 39-40 (1988); Mil. R. Evid. 311(a)(2) (A search is not unlawful absent a reasonable expectation of privacy in the person, place or property searched.). In *Greenwood*, the Court rejected a claim of a reasonable expectation of privacy in waste contained in opaque garbage bags delivered to the curb for collection but which was instead searched by the police: "It may well be that respondents did not expect that the contents of their garbage bags would become known to the police or other members of the public. An expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable." *Greenwood*, 486 U.S. at 39-40.

In rejecting the application of *Greenwood*, the military judge relied on *United States v. Pond*, 36 M.J. 1050 (recon) (A.F.C.M.R. 1993), to conclude that one who consents to the seizure of a urine specimen for testing "maintains a significant privacy interest in the urine sample." But his reliance on *Pond* is misplaced. In *Pond*, we recognized a reasonable expectation of privacy subject to Fourth Amendment protection in both the act of urination and the urine excreted under *normal* circumstances. *Id*. at

1054 (citing *Capua v. Plainfield*, 643 F. Supp. 1507, 1513 (D.N.J. 1986) ("Urine . . . is *normally* discharged and disposed of under circumstances that merit protection from arbitrary interference.") (emphasis added)). The act of urination is traditionally private, and facilities both at home and in the public accommodate this privacy tradition. *Capua*, 643 F. Supp. at 1514. Because of the normally private nature of this act, *Pond* recognized that "a person *engaging* in the act of urination has a reasonable expectation of privacy for that act and the urine excreted." *Pond*, 36 M.J. at 1054 (emphasis added); *see also Skinner*.

But we expressly noted that the Fourth Amendment preference for a warrant did not apply "in cases of *consent* or exigent circumstances." *Pond*, 36 M.J. at 1054 (emphasis added). Clearly showing our focus on the circumstances surrounding the taking of the sample as the critical point for Fourth Amendment analysis, *Pond* holds that to be admissible in a criminal prosecution a urine sample "has to be *obtained*" either by consent, by a warrant, or under exigent circumstances supported by probable cause. *Id*. at 1058 (citing *Schmerber v. California*, 384 U.S. 757 (1966); *Cupp v. Murphy*, 412 U.S. 291 (1973)). We did not state that the expectation of privacy in the normal act of urination survives after *voluntarily* providing a urine specimen to the government.

In the case sub judice, the appellee did not provide his urine sample under *normal* circumstances: he consensually provided the sample under direct observation of another person, in a public setting, with the understanding that the sample would later be tested for the presence of drugs and would then be destroyed at some point. In this situation, "the same privacy did not exist as would have existed in a lavatory in [the appellant's] own home." *Venner v. State*, 367 A.2d 949, 955 (Md. 1977), *cert. denied*, 431 U.S. 932 (1977). In *Venner*, the appellant argued an expectation of privacy in his excrement wherein police discovered balloons filled with heroin. In determining whether the accused had a "reasonable" expectation of privacy in his human waste, the court in *Venner* considered: (1) where he eliminated his waste—in a bedpan in the hospital; (2) that in the normal course of hospital procedure, someone would remove the bedpan with waste in it; and (3) the fact that the accused did not "protest to the removal of his excreta." *Id*. at 955-56. The court "deemed [the appellant] abandoned the balloons which his body passed [through excreta], so that their subsequent retrieval on behalf of the police was lawful despite defendant's Fourth Amendment objection." *Id*. at 949.

Of course, the legality of the initial seizure of the specimen impacts the legality of later analysis of the specimen since each involves an invasion of privacy interests. *Skinner*, 489 U.S. at 616 (warrantless seizure of blood and later chemical analysis constitute separate invasions of privacy interests). That is not to say, however, that each requires a separate justification. In *Dodd v. Jones*, 623 F.3d 563 (8th Cir. 2010), the appellant argued that the analysis of a blood specimen a month after it was lawfully seized required a warrant because the exigent circumstances under which it was obtained had expired. Rejecting the argument that the later testing required independent justification, the court held that "the testing of [the appellant's] blood required no

justification beyond that which was necessary to draw the blood on the night of the accident." *Id*. at 569. Clearly, such an independent justification would have been required if a reasonable expectation of privacy had survived the lawful seizure of the blood sample. Just as the lapse in exigent circumstances does not revive an expectation of privacy in a blood sample taken by the government, a revocation of consent to seize a urine specimen does not revive an expectation of privacy in a urine sample surrendered to the government.

In finding that a reasonable expectation of privacy in a urine sample continues after it has been provided to the government for testing, the military judge states that one who provides a urine specimen has "a reasonable expectation that the government will properly secure his sample and prevent unauthorized access, tampering, or testing of that sample." In support of this conclusion the military judge analogizes the privacy interest in a bottle of urine to that in a computer. But we find the analogy incorrect. Unlike a computer hard drive in which one might reasonably retain some possessory and privacy interest after voluntarily providing it to the government for analysis, urine is by definition a waste product which will ultimately be destroyed and in which no continuing reasonable expectation of privacy exists. *See Venner*, 367 A.2d at 956 (The accused could "not have had an 'expectation . . . that society [would be] prepared to recognize as 'reasonable' a property right in human excreta for the simple reason that human experience is to abandon it immediately.").

While society recognizes a reasonable expectation of privacy in the act of urination and the urine excreted under normal circumstances, we find that this reasonable expectation does not survive voluntary surrender of urine waste to government control for analysis. We agree with the military judge that at the time he provided the sample the appellee could reasonably expect his urine sample to be secured against unauthorized access. But this alone is insufficient to maintain a reasonable expectation of privacy subject to Fourth Amendment protection: the appellee should also have reasonably expected the sample to be tested at any time, to be incrementally destroyed during testing, and to be ultimately discarded.

Under the circumstances of this case, we find no continuing reasonable expectation of privacy in the sample and, therefore, no continuing Fourth Amendment protection which the appellee's revocation of consent could reclaim. As stated above, a threshold requirement for Fourth Amendment protection against unreasonable searches is a subjective expectation of privacy in the item or area to be searched that society recognizes as objectively reasonable. In the case of waste urine provided to the government for testing, we find that this threshold requirement is not met. Like delivering garbage to the curb, the appellee voluntarily abandoned any reasonable expectation of privacy in his waste urine when he delivered it to the government for analysis. *See Greenwood*, 486 U.S. at 39-40; *Venner*, 367 A.2d at 956.

Having determined that the analysis of the appellee's urine did not violate the Fourth Amendment, we need not address the remaining issues of inevitable discovery and derivative evidence.

On consideration of the interlocutory appeal by the United States under Article 62, UCMJ, it is by the Court on this 29th day of September, 2011,

ORDERED:

That the United States Appeal Under Article 62, UCMJ, is hereby **GRANTED**. The ruling of the military judge is vacated and the record is remanded for further proceedings.

Judges BRAND, GREGORY, and SARAGOSA concur.

FOR THE COURT

OFFICIAL

STEVEN LUCAS
Clerk of the Court