SUPREME COURT NO. 93315-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRITTANIE OLSEN,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS, DIVISION TWO

Court of Appeals No. 46886-7-II
Jefferson County No. 14-1-00120-2

PETITION FOR REVIEW

CATHERINE E. GLINSKI
Attorney for Petitioner

GLINSKI LAW FIRM PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Cases

Statutes

Constitutionl Provisions

Rules

A. IDENTITY OF PETITIONER

Petitioner, BRITTANIE OLSEN, by and through her attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Olsen seeks review of the May 24, 2016, published decision of Division Two of the Court of Appeals reversing the Superior Court's decision that the order for random UAs as a probation condition was unconstitutional.

C. ISSUE PRESENTED FOR REVIEW

Whether an order permitting random, suspicionless searches of a misdemeanor DUI probationer is constitutionally permissible.

D. STATEMENT OF THE CASE

On June 11, 2014, Petitioner Brittanie Olsen pled guilty in Jefferson County District Court to one count of driving under the influence in violation of RCW 46.61.502, a misdemeanor offense. CP 5. The court imposed a sentence of 364 days, with 334 days suspended. As a condition of her suspended sentence, the court ordered that she not consume alcohol, marijuana, or non-prescribed drugs. CP 5. Over defense objection, the sentencing court ordered Olsen to submit to "random urine analysis screens … to ensure compliance with conditions

regarding the consumption of alcohol and controlled substances." RP 8-10; CP 5.

Olsen appealed, arguing that the random UA provision subjected her to unconstitutional searches in violation of the Fourth Amendment and article I, section 7, of the Washington Constitution. CP 7. On October 14, 2014, the Jefferson County Superior Court entered a Memorandum Opinion and Order vacating the district court sentence and directing the district court to resentence Olsen without the requirement that she submit to random urine tests. CP 29-32. The court cited case law holding that a warrantless search of a probationer requires a well-founded suspicion that a probation violation has occurred, and the collection of biological samples is a search under the state and federal constitutions. CP 30. Because the sentencing provision for random urine testing would permit a warrantless search of Olsen without any well-founded suspicion of sentence violation, the provision was not constitutionally permitted. CP 30-31.

The superior court denied the State's motion for reconsideration, and the Court of Appeals granted the State's motion for discretionary review. In a published decision, the Court held that the district court had authority to impose random UAs as a condition of Olsen's misdemeanor

probation and that the random UA condition does not violate Olsen's constitutional rights.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THE ORDER FOR RANDOM, SUSPICIONLESS SEARCHES VIOLATES OLSEN'S CONSTITUTIONAL RIGHTS, AND THE SUPERIOR COURT PROPERLY VACATED IT.

Both article I, section 7 of the Washington constitution and the Fourth Amendment to the federal constitution protect individuals from warrantless searches. Our state constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I, § 7. "It is by now axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment." State v. Parker, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). While article I, section 7 encompasses those legitimate expectations of privacy protected by the Fourth Amendment, its scope is not limited to subjective expectations of privacy. Its broader protection encompasses "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984); Parker, 139 Wn. App. at 493-94. The emphasis of article 1, section 7 is on protecting the individual's right to privacy, while the emphasis of the Fourth Amendment is on curbing governmental actions.

State v. Rose, 146 Wn. App. 439, 455, 191 P.3d 83 (2008); State v. Lucas, 56 Wn. App. 236, 240, 783 P.2d 121 (1989).

With a few narrowly drawn exceptions, a warrantless search is unreasonable per se. Rose, 146 Wn. App. at 455 (citing State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999)). One such exception is recognized for probationers. Because they have a diminished expectation of privacy, a warrant based on probable cause is not required for search of their persons, homes, or effects. Instead, probationers are subject to search based on a well-founded suspicion that a probation violation has occurred. State v. Massey, 81 Wn. App. 198, 200, 913 P.2d 424 (1996); Lucas, 56 Wn. App. at 243; State v. Patterson, 51 Wn. App. 202, 204-05, 752 P.2d 945 (1988).

In Massey, the sentencing order required Massey to submit to testing and other searches by a community corrections officer to monitor compliance with his conditions of community placement. The order did not explicitly state that the searches must be based on reasonable suspicion, and Massey appealed. Massey, 81 Wn. App. at 199-200. The Court of Appeals held that the challenge was not ripe for review, because Massey had not been charged with violating the order. The court also reiterated the recognized exception to the warrant requirement for probationers, noting that the search of a probationer is reasonable if an

officer has a well-founded suspicion that a probation violation has occurred. While the trial court was not required to include reference to that standard in its sentencing order, the reasonable suspicion standard would apply to any searches conducted pursuant to the order: "We note that, regardless of whether the sentencing court includes such language in its order, the standard for adjudicating a challenge to any subsequent search remains the same: Searches must be based on reasonable suspicion." Massey, 81 Wn. App. at 425-26.

Whereas the order in Massey could be applied without violating constitutional rights by requiring reasonable suspicion of a probation violation to conduct a search, the challenged order in this case specifically eliminates the reasonable suspicion requirement by authorizing random UAs. CP 5. The Court of Appeals deviated from the recognized standard for searches of probationers by upholding this condition.

Specifically, the Court of Appeals held that "offenders on probation for DUI convictions do not have a privacy interest in preventing random collection and testing of their urine when used to insure compliance with a probation condition prohibiting the consumption of alcohol, marijuana, and/or non-prescribed drugs." Slip Op. at 7. This holding conflicts with previous decisions holding that interference in bodily functions constitutes a search, and the state constitution offers

heightened protection for bodily functions. York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 307, 178 P.3d 995 (2008) (citing Robinson v. City of Seattle, 102 Wn. App. 795, 813 n. 50, 10 P.3d 452 (2000) (citing Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 617, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989)); In re Juveniles A, B, C, D, E, 121 Wn.2d 80, 90, 847 P.2d 455 (1993); State v. Olivas, 122 Wn.2d 73, 83, 856 P.2d 1076 (1993); State v. Meacham, 93 Wn.2d 735, 738, 612 P.2d 795 (1980); State v. Curran, 116 Wn.2d 174, 184, 804 P.2d 558 (1991)).

In York, this Court considered whether random and suspicionless drug testing of student athletes violates article I, section 7 of the Washington State Constitution. York, 163 Wn.2d at 299. The Court noted that students have a lower expectation of privacy because of the nature of the school environment. Courts have nonetheless required reasonable and individualized suspicion to protect students from arbitrary searches while giving officials sufficient leeway to conduct their duties. York, 163 Wn.2d at 308. Even though students have a lower expectation of privacy, they maintain a genuine and fundamental privacy interest in controlling their bodily functions, and a UA is a significant intrusion on a student's fundamental right of privacy. Id.

The Court noted that when suspicionless searches have been allowed in Washington, it was either based entirely on federal law or in

the context of criminal investigations or dealing with prisoners. See e.g., Juveniles, 121 Wn.2d at 90 (Court upheld mandatory HIV tests of convicted sexual offenders); Olivas, 122 Wn.2d at 83 (applying 4th Amendment analysis, court upheld blood tests of convicted felons without individualized suspicion); State v. Surge, 160 Wn.2d 65, 156 P.3d 208 (2007) (collection of DNA sample from convicted felons was not intrusion into private affairs). The York court distinguished these cases from the testing of student athletes, noting that a felon has already been convicted beyond a reasonable doubt of a serious crime. York, 163 Wn.2d at 315.

While suspicionless searches of felons have been upheld, there is no justification for extending this exception to misdemeanor probationers. Exceptions to the warrant requirement of article I, section 7 must be narrowly applied. York, 163 Wn.2d at 323 (Madsen, J., concurring). Felons are subject to a different sentencing scheme; they have been convicted of serious crimes and therefore pose a greater threat to the community. These considerations may justify a special needs exception for felons as distinguished from misdemeanants. See e.g. Surge, 160 Wn.2d at 82 (Chambers, J., concurring) (concern that extension of RCW 43.43.754 DNA testing requirement to misdemeanants may violate article I, section 7).

The Court of Appeals justified its holding based on Olsen's probationary status and the nature of a DUI. Certainly, as the Court noted, random, suspicionless UAs are effective in ensuring compliance with probation conditions prohibiting the use of alcohol, marijuana, and non-prescribed drugs. But the effectiveness of such searches does not render them necessary or constitutionally permissible. "Drug and alcohol use often involves observable manifestations that would supply the particularized suspicion necessary to support a search." York, 163 Wn.2d at 325 (Madsen, J., concurring). The already-relaxed standard of suspicion for probationers is sufficient to meet the State's need while protecting the misdemeanor probationer's right to privacy.

The Court of Appeals's holding that misdemeanor DUI probationers have no privacy interest in the collection and testing of their urine conflicts with prior cases recognizing such a privacy interest and requiring a well founded suspicion for such searches. The holding further presents a significant question of constitutional law and an issue of substantial public importance. This Court should grant review. RAP 13.4(b).

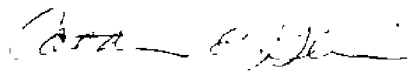
F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse the Court of Appeals decision.

DATED this 23rd day of June, 2016.

Respectfully submitted,

GLINSKI LAW FIRM PLLC



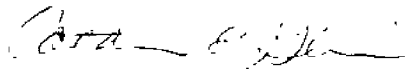
CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Petitioner

Certification of Service by Mail

Today I caused to be mailed a copy of the Petition for Review in *State v. Brittanie Olsen*, Court of Appeals Cause No. 46886-7-II, as follows:

Brittanie Olsen
PO Box 735
Port Hadlock, WA 98339

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Manchester, WA
June 23, 2016

GLINSKI LAW FIRM PLLC

June 23, 2016 - 12:58 PM

Transmittal Letter

Document Uploaded: 4-468867-Petition for Review.pdf

Case Name:

Court of Appeals Case Number: 46886-7

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

■ Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Catherine E Glinski - Email: glinskilaw@wavecable.com

A copy of this document has been emailed to the following addresses:

prosecutors@co.jefferson.wa.us