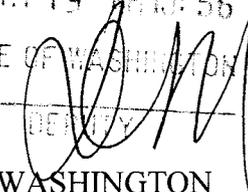


FILED
COURT OF APPEALS
DIVISION II

07 OCT 19 11:10:56

STATE OF WASHINGTON
BY 
DEPUTY

NO. 36269-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

vs.

DANIELLE WILSON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR MASON COUNTY
CAUSE NO. 07-1-00077-1

BRIEF OF PETITIONER

Bruce Finlay, WSBA #18799
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A. ASSIGNMENTS OF ERROR

The trial court erred when it denied Danielle Wilson's motion to vacate the court's requirement that she submit to weekly urinalysis testing for drugs as a 'standard' condition of pre-trial release, where the State made no showing that she would either fail to return to court or would be likely to commit a violent crime, and the trial court made no such findings.

B. STATEMENT OF THE CASE

Danielle Wilson was arrested on investigation of unlawful possession of a firearm, four counts. (Report of Proceedings, Identification Hearing, February 7, 2007, pg. 1). The deputy prosecutor told the court that the case history showed only a bail forfeiture on a charge of recreational fishing second degree, but that he understood from the investigating detective that Ms. Wilson had a prior kidnapping conviction, and that under the circumstances, he did not feel that he had a very good idea of Ms. Wilson's criminal history. (RP pg. 3-4).

The deputy prosecutor further told the court that Ms. Wilson had bailed out on \$10,000 bail and was now appearing on a promise to appear that she signed when she posted bail. (RP pg. 4).

The deputy prosecutor then asked the court to impose standard conditions of release, as follows:

I don't – subject to any discretion the Court would exercise, if the Court has more information than I do, I would presume that it would be sufficient that that bail remain as the bail requirement for Ms. Wilson to remain out; other standard court conditions.

I'm going to ask specifically, given the nature of this investigation – and for the record, as the Court, I believe, understands, all three of the cases on for identification right now are connected. There was a significant marijuana growing operation in the residence in question, and I will ask the Court to, on that basis, impose the drug and alcohol conditions and weekly UAs.

(RP pg. 4).

Attorney James Gazori stood in for Ms. Wilson for the hearing, and asked the trial court not to impose the urinalysis requirement because there had been nothing presented showing that Ms. Wilson was a drug user, and she had no prior convictions for controlled substances crimes.

(RP, pg. 5).

The deputy prosecutor responded that he did not know whether Ms. Wilson had any prior drug convictions, but this investigation concerned marijuana sale and growing and a search warrant had been executed at Ms. Wilson's residence, where a large marijuana grow was found. (RP pg. 6) (This information was incorrect – there was a search warrant executed at Ms. Wilson's residence, but no marijuana grow was found there; a marijuana grow was allegedly found at Ms. Wilson's father-in-law's house, John Wilson).

The trial court ordered certain conditions of release that included that she submit to a weekly urinalysis test, with the first test to be that same day, and that Ms. Wilson would pay for the weekly testing. (RP pg. 7).

Ms. Wilson filed a motion to terminate the urinalysis requirement. That motion was heard on April 9, 2007. There was no further evidence presented in regard to the need for the urinalysis as a condition of release. The court denied the motion, ruling as follows, in full:

Defense motion is denied. I think that both Scott – and I've gone over this before with respect to Scott. Scott is so far different than what we have and is occurring in this court. I don't know what happens in other courts in this state, but I know what is imposed and what is intended and what is done with the results of these tests in this court. And that is, we're trying to be sure that we have defendants that are here; we're trying to be sure that we have defendants that are responsive to their attorneys so that they are able to present their cases in an orderly fashion, and see that the cases move along.

If you come up with a dirty UA, we're going to talk about reviewing conditions of release because that isn't helping your case be better. And that's what it's all about. We're not going to talk about now you're going to be prosecuted for a new offense, there's something going to happen to you bad because you've had this dirty UA. We're going to talk about no, what do we need to do to make sure that you're still on course so far as being here and being available; not a new prosecution.

And in the Scott case – which I believe was a Nevada case, originating out of Nevada – it was a whole lot more intrusive than that, and I would agree. I don't think that Scott was a shocking revelation whatsoever, given the way they were imposing their condition down there and what they were doing with the information they were receiving.

Similarly, in Kato, I don't think that there's anything particularly revealing in the Kato decision. In that case, what was actually being done was there were affirmative requirements being put on. Drug/alcohol evaluation is not what we're doing here. We're not trying to find out if you're an addict or anything of that nature. What we're trying to do is make sure that you are not using while we're here, because we need you to be available to counsel.

You're not guilty. You're not guilty and you've pled not guilty, and that's where we're at. But, we're asking you to be sure that you're not using during the pendency because you're not as available to the Court, and that's what we're trying to accomplish with this condition. I think that it's consistently applied here with that in mind, and is not an affirmative requirement.

I think truly when you take a look at NA/AA requirements, although it might be tempting to say gee, you might get acquainted with this type of thing, we don't know whether the person even is appropriate for that until we get into a position that there might be some kind of sentencing and that may or may not occur, plain and simply.

I think the requirement is an appropriate imposition of conditions of release. It is not a search as it is applied in this particular case, and will continue in effect. And if the courts – if the Court of Appeals tells me I'm wrong, then I'm wrong, unless of course the Supreme Court tells the Court of Appeals they're wrong. And we'll move along. The defense motion is denied.

(Report of Proceedings, Motion to Terminate Urinalysis Requirement,

April 9, 2007, pg. 4-6).

C. ARGUMENT

The law allows a court to impose conditions of pre-trial release only upon a showing of a specific need for the condition in an individual case; the court cannot impose such a condition as a 'standard' condition of release with no such showing and no such individualized finding. CrR 3.2; Butler v. Kato; 137 Wn.App. 515, 154 P.3d 259 (2007); United States v. Scott, 450 F.3d 863 (9th Cir. 2006).

Weekly urinalysis is a significant impact on the right to a presumption of innocence and to a presumption of release on personal recognizance without conditions. Ms. Wilson is required to report from her home in Hoodspport, Washington, to the Mason County Probation office in Shelton, every Wednesday during a two hour window between 10:00 a.m. and noon, to then and there submit a sample of her urine with a probation officer observing. Ms. Wilson is required to pay for the urinalysis.

If the urinalysis reveals the use of unprescribed drugs, the trial court may hold a hearing to determine what action to take, which could include anything from no action to issuing an immediate order imposing a large amount of bail. The court could also act sua sponte, or on the ex-parte application of the prosecutor, and issue an immediate warrant for the defendant's arrest without notice to the defendant. CrR 3.2(j), (k), and (l).

Thus, the urinalysis requirement has serious and significant consequences to the defendant.

The trial court's statement that the urinalysis condition is not a 'search' is clearly erroneous. The term 'search' is defined widely as follows, according to Professor LaFave:

[s]ome exploratory investigation, or an invasion and quest, a looking for or seeking out. The quest may be secret, intrusive, or accomplished by force, and it has been held that a search implies some sort of force, either actual or constructive, much or little. A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. While it has been said that ordinarily searching is a function of sight, it is generally held that the mere looking at that which is open to view is not a "search".

W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, s.2.1(a) Fourth Edition (2004), quoting C.J.S. Searches and Seizures, s.1 (1952). Areas entitled to protection from unlawful search include 'persons', which includes the bodies and clothing of individuals. LaFave, s. 2.1(a), citing Beck v. Ohio, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964).

Courts of various jurisdictions are in agreement that the collection and analysis of biological samples from individuals, including urine sample analysis, is a search. State v. Surge, 122 Wn.App. 448, 452, 94 P.3d 345 (2004).

The 9th Circuit Court of Appeals has recently held that a requirement for pretrial urinalysis is a search, and therefore, must be supported by probable cause. United States v. Scott, 450 F.3d 863 (9th Cir. 2006).

In Scott, the defendant was arrested and charged with drug charges in a Nevada state court. He was released on his personal recognizance, subject to certain conditions which included random drug testing. The conditions were not the result of any sort of findings established after a hearing; rather, they were standard conditions of release in that type of case. Scott, at 865.

Based on an informant's tip, state officers went to Scott's house and administered a urine test, which tested positive for methamphetamine. The informant's tip did not establish probable cause for the drug test. Based on the urine test, officers arrested Scott and searched his house, finding evidence of crime. Scott was charged in federal court, and moved to suppress the evidence on the grounds that the drug test was a warrantless search that was not supported by probable cause. Scott, at 865.

The Ninth Circuit held that the pre-trial condition for random drug testing was a warrantless search that required probable cause. Because no

probable cause supported the drug test, all evidence that proceeded from that search must be suppressed. Scott, at 875.

In the present case, the defendant was ordered to submit to weekly urinalysis testing through the probation department. There is no probable cause to support these searches; the condition for weekly urine testing was imposed as a standard condition of release in drug cases. There was no showing that the condition was necessary to serve any purpose of the rule on pre-trial release, CrR 3.2.

The federal courts' pronouncements on the protections of the Fourth Amendment are binding on state courts. The states' constitutions may give their citizens more protections than the Fourth Amendment; however, they may not give them less protection. Mapp v. Ohio, 374 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

As stated by the Supreme Court in Mapp:

There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine '(t)he criminal is to go free because the constable has blundered.' People v. Defore, 242 N.Y. at page 21, 150 N.E. at page 587. In some cases this will undoubtedly be the result.^{FN9} But, as was said in Elkins, 'there is another consideration-the imperative of judicial integrity.' 364 U.S. at page 222, 80 S.Ct. at page 1447. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in Olmstead v. United States, 1928, 277 U.S. 438, 485, 48 S.Ct. 564, 575, 72 L.Ed. 944: 'Our government is the potent, the omnipresent

teacher. For good or for ill, it teaches the whole people by its example. * * * If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.' Nor can it lightly be assumed that, as a practical matter, adoption of the exclusionary rule fetters law enforcement. Only last year this Court expressly considered that contention and found that 'pragmatic evidence of a sort' to the contrary was not wanting. Elkins v. United States, supra, 364 U.S. at page 218, 80 S.Ct. at page 1444.

Mapp v. Ohio, 374 U.S. at 659.

It is well settled that Article I, section 7 of the Washington Constitution provides greater protection for individual privacy than does the Fourth Amendment. State v. Rankin, 151 Wn.2d 689, 694-95, 92 P.3d 202 (2004) (mere request for identification from automobile passenger is a seizure unless there is reasonable suspicion based on specific, articulable facts).

Under article I, section 7 of the Washington Constitution, warrantless searches are per se unreasonable. Article I, section 7 provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Under this provision, the warrant requirement is especially important as it is the warrant which provides the requisite "authority of law." Exceptions to the warrant requirement are to be jealously and carefully drawn. The burden of proof is on the State to show that a warrantless search or seizure falls within one of the exceptions

to the warrant requirement. State v. Morse, 156 Wn.2d 1, 7, 123 P.3d 832 (2005).

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. It does not prohibit reasonable warrantless searches and seizures. Thus, the analysis under the Fourth Amendment focuses on whether the government has acted reasonably. In contrast, the word 'reasonable' does not appear in Article I, section 7 of the Washington Constitution. Thus, there is no 'good faith' exception to the warrant requirement in Washington. Morse, at 9.

Article I, section 7's language is explicitly broader than that of the Fourth Amendment as it clearly recognizes an individual's right to privacy with no express limitations and places greater emphasis on privacy. While the Fourth Amendment operates on a downward ratcheting mechanism of diminishing expectations of privacy, Article I, section 7 holds the line by pegging the constitutional standard to 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. Ladson, 138 Wn.2d 343, 348-49, 979 P.2d 833 (1999).

When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. Under the Fourth Amendment, courts have asked

whether suppression would serve to deter future police misconduct. However, under Article I, section 7, suppression is constitutionally required. In other words, the exclusionary rule applies in every case where there was an unlawful search or seizure. This constitutionally mandated exclusionary rule saves Article I, section 7 from becoming a meaningless promise. Exclusion provides a remedy for the citizen in question and saves the integrity of the judiciary by not tainting our proceedings by illegally obtained evidence. Ladson, at 359-60) (while pretextual traffic stops may be acceptable under the Fourth Amendment, they are not acceptable under Article I, section 7).

Another significant difference between Fourth Amendment analysis and Article I, section 7 analysis is that under the State Constitution, unlawfully obtained evidence cannot be used for any purpose. State v. Lampman, 45 Wn.App. 228, 724 P.2d 1092 (1986). Thus, a defendant's pretrial urinalysis result, obtained unlawfully, cannot be used to revoke his or her release.

Here, the pre-trial requirement for weekly urine testing is a search. This weekly search is not supported by probable cause, there is no warrant authorizing these searches, and there is no applicable exception to the warrant requirement. The order to submit to weekly urine testing should be terminated.

Moreover, there is no showing in the record that supports the trial court's order.

The court rule that authorizes pre-trial release contains a strong presumption for release on personal recognizance with no conditions. This presumption of release may be overcome, but there must be an individualized showing that conditions are necessary. Butler v. Kato, 137 Wn.App. 515, 154 P.3d 259, (2007); CrR 3.2.

As stated in Butler,

Criminal Rule (CrR) 3.2 and CrRLJ 3.2 govern conditions of pretrial release. Under these rules, release from pretrial detention on personal recognizance is presumed. "Any person, other than a person charged with a capital offense, shall at the preliminary appearance or reappearance pursuant to rule 3.2.1 be ordered released on the accused's personal recognizance pending trial."^{FN4} The presumption of release may be overcome if the court determines that such recognizance will not reasonably assure the accused's appearance when required, or when there is shown a likely danger that the accused will commit a violent crime.^{FN5}

Butler v. Kato, 137 Wn.App. at 521.

The trial court in the Butler case had imposed certain conditions that included that the accused attend at least 3 AA or NA meetings per week and that the accused within 30 days be evaluated by a state-approved alcohol agency and enroll in any recommended treatment. The Court of Appeals ruled that those conditions were beyond the conditions allowed by the rule. There was no showing by the State that the defendant in that

DUI case would either fail to appear or would seek to commit a violent crime. The trial court appeared to have imposed the conditions based on the nature of the charge of DUI and the police reports. The Court of Appeals held that it could not do so based solely on the nature of the charge; DUI is not a charge that shows a propensity to fail to appear or to commit a violent crime. The rules require that the court release the accused on personal recognizance, unless there is a strong showing that the accused will either not appear or will seek to commit a violent crime. Upon such a showing, the court is required to impose the least restrictive conditions possible. Butler, 137 Wn.App. at 522-23.

Here, there was no showing that the accused represented a substantial danger that she would either not appear or would seek to intimidate witnesses or interfere with the administration of justice. The fact that a person is charged with a drug crime or with a crime such as unlawful possession of firearms does not constitute a substantial danger to fail to appear or to intimidate witnesses or to the administration of justice. Does a person charged with a drug crime constitute a danger to use drugs? Perhaps yes, perhaps no, but the use of drugs simply does not equate to witness intimidation or interference with the administration of justice, and the Scott court stated that such a position would directly contradict the

presumption of innocence that an accused, but as yet unconvicted, person enjoys. As stated by the court:

Moreover, the assumption that Scott was more likely to commit crimes than other members of the public, without an individualized determination to that effect, is contradicted by the presumption of innocence: That an individual is charged with a crime cannot, as a constitutional matter, give rise to any inference that he is more likely than any other citizen to commit a crime if he is released from custody. Defendant is, after all, constitutionally presumed to be innocent pending trial, and innocence can only raise an inference of innocence, not of guilt.

Scott, 450 F.3d 863, at 874. Note 15 at the same page states as follows:

Prior convictions and other reliably determined facts relating to dangerousness may be relevant to such a determination, but the mere fact that the defendant is charged with a crime cannot be used as a basis for a determination of dangerousness.

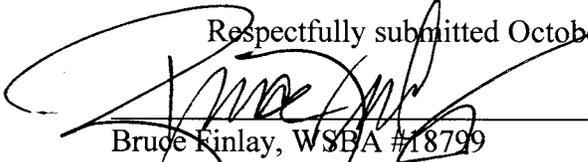
In the present case, the court ordered the condition of pre-trial urine testing as a standard condition of release for drug crimes. There were no individualized allegations or evidence that showed that the defendant was somehow a danger to anyone, other than the fact that he was now charged with drug offenses.

The defendant requests that the pretrial UA requirement be terminated.

D. CONCLUSION

The trial court erred when it imposed weekly urinalysis testing as a standard condition of pretrial release. In order to overcome the presumption for pretrial release without conditions, the trial court must make an individual determination based upon the available evidence that the defendant is either likely to fail to appear as ordered or to commit a violent crime. There was no such showing and no such finding here; there is no authority to impose 'standard' conditions of release; the trial court's denial of Ms. Wilson's motion to vacate the pretrial urinalysis condition of release must be reversed.

Respectfully submitted October 17, 2007.



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Attorney for Defendant
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APPENDIX 'A'

SUPERIOR COURT OF WASHINGTON
COUNTY OF MASON

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.)
 Danielle K. Wilson,)
)
 Defendant.)

NO. 07-1-77-1
ORDER FOR PRETRIAL RELEASE /
ORDER ESTABLISHING CONDITIONS
OF RELEASE

IT IS ORDERED that the above-named defendant be released from custody pending trial on the following conditions:

- 1. On personal recognizance. Bail shall be exonerated.
- 2. Upon execution of a surety bond or posting of cash for \$10,000⁰⁰ Already Posted.
- 3. Upon execution of an unsecured appearance bond for \$_____.
- 4. Defendant shall be in the custody of: _____.
- 5. Defendant is not to leave Western Washington without prior written approval of the Court.
- 6. During the period of release, defendant shall reside at: 51 N. NAUCY AVE HOODSPORT. Such address shall not be changed without prior written permission of the Court.
- 7. Other: _____.
- 8. The Court, having determined that there exists a substantial danger that defendant will commit a serious crime, or that defendant's physical condition will jeopardize defendant's personal safety or that of others,

TAS

or that defendant will seek to intimidate the witnesses or otherwise unlawfully interfere with the administration of justice, imposes the following additional conditions of release:

- (a) Defendant shall not approach, or communicate in any manner with, or go to the property, school, or place of business of:
1. John Wilson
 2. _____
 3. Other witnesses named in Police Reports
- (b) Defendant shall not go to _____.
- (c) Defendant shall have no contact with children under the age of eighteen (18).
- (d) Defendant shall not go to or loiter in places where children congregate, such as schools, parks and shopping malls.
- (e) Defendant shall not possess any dangerous weapons or firearms.
- (f) Defendant shall not drink or possess intoxicating liquors and shall not go to any establishment wherein alcoholic beverages are the chief item of sale.
- (g) Defendant shall not use or possess any drugs except those prescribed to defendant by a physician.
- (h) Defendant shall submit to weekly urinalysis/breath testing for drug/alcohol screening under the direction of Mason County Probation Services at his/her own expense and shall provide the results each week to the Court and to the Mason County Prosecuting Attorney's Office. **The first urinalysis appointment is the first Wednesday following release between 10:00 a.m. until noon.** (2/7/07)
- (i) Defendant shall report regularly to, and remain under the supervision of:

NAME	TITLE	TELEPHONE
------	-------	-----------

9. Other Conditions:

- (a) Commit no crimes.
- (b) Defendant shall maintain contact with his/her attorney on a weekly basis.
- (c) Defendant shall be available to appear in court on three (3) days notice, except during the jury term when defendant shall be available daily.

TAS

#17.00
7th & Hilder St.
Gleason, WA

[] (d) _____

[X] 10. Defendant shall appear as directed by the Court:

NEXT APPEARANCE: Feb. 14, 2007, at 1:00 ~~a.m.~~ p.m.

[X] 11. Defendant is remanded to the Sheriff for:

[] Administrative booking and release; or
[X] Custody pursuant to the above conditions. *Bond Already Posted*

[X] 12. Unless an Information or Petition for Show Cause is filed, this order shall expire seventy-two (72) hours after defendant's detention in jail or release on conditions, whichever occurs first. Computation of the 72 hours shall not include any part of Saturday, Sunday, or holidays.

Dated: 02/07/07 Tonia Sheldon
JUDGE / COURT COMMISSIONER

DEFENDANT'S ACKNOWLEDGEMENT

1. I have read the above conditions of release and any other conditions of release that may be attached;
2. I agree to follow the conditions of release and understand that any violation may lead to the forfeiture of any bail or bond posted and to the issuance of a warrant for my immediate arrest, and that I may be charged with a separate crime;
3. I understand that a law enforcement officer having probable cause to believe that I am about to leave this state, or that I have violated a condition of my release, may arrest me and bring me immediately before the Court;
4. I understand that failure to appear when required by this Court is a crime; and
5. I have received a copy of this Order and will keep it with me.

Dated: 02/07/07 [Signature]
DEFENDANT'S SIGNATURE

[Signature] Standby
Defendant's Attorney

51W. Nancy Ave.
Street Telephone

Hoodsport Wa. 98548
City State Zip

- cc: Original - Court File
 Yellow - Defendant
 Pink - Defense Attorney
 Goldenrod - Prosecuting Attorney

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DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION TWO

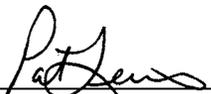
STATE OF WASHINGTON,)	
Plaintiff,)	No.36269-4-II
)	
vs.)	DECLARATION OF SERVICE
)	
DANIELLE WILSON,)	
Defendant.)	
_____)	

I, Pat Lewis, on October 18, 2007, at 1:30 p.m., served by hand the following document:

Brief of Petitioner to the Court of Appeals, Division II
to the office of the Prosecuting Attorney for Mason County.

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

DATED: October 18, 2007, at Shelton, Washington.



Pat Lewis, Legal Assistant for
Bruce Finlay

DECLARATION OF SERVICE

Bruce Finlay
Attorney at Law
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