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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

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUE ON REVIEW

Does an order for compulsory random urinalysis of a probationer convicted of misdemeanor DUI constitute a disturbance of the probationer's private affairs?

B. 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. The Jefferson County Superior Court vacated the district court sentence and directed the district court to resentence Olsen without the requirement that she submit

to random urine tests. CP 29-32. The superior court denied the State's motion for reconsideration.

Division Two of 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 under RCW 3.66.067 and RCW 46.61.5055. Washington v. Olsen, 194 Wn. App. 264, 269, 374 P.3d 1209 (2016). The Court further held that Olsen, as a misdemeanor probationer convicted of DUI, has no privacy interest in preventing the use of her urine to monitor compliance with probation conditions prohibiting the consumption of alcohol, marijuana, and non-prescribed drugs. Id. at 274. This Court granted Olsen's petition for review. 186 Wn.2d 1017, 383 P.3d 1020 (2016).

C. SUPPLEMENTAL ARGUMENT

THE COURT OF APPEALS' CONCLUSION THAT THE ORDER FOR RANDOM URINALYSES DID NOT CONSTITUTE A DISTURBANCE OF OLSEN'S PRIVATE AFFAIRS CONFLICTS WITH PRIOR CASE LAW AND MUST BE REVERSED.

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.

Courts undertake a two-part inquiry in determining whether government action violates article I, section 7. First the court asks whether the action constitutes a disturbance of private affairs. If the answer to the first question is yes, the court determines whether authority of law justifies the intrusion. York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 306, 178 P.3d 995 (2008).

The government action at issue here is an order for random urinalysis to monitor compliance with a probation condition prohibiting Olsen’s consumption of alcohol and controlled substances. Courts have recognized that interference in bodily functions constitutes a search, and the state constitution offers heightened protection for bodily functions.

York, 163 Wn.2d at 307 (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)); Robinson, 102 Wn. App. at 819 (“[i]t is difficult to imagine an affair more private than the passing of urine.” ... There is “no doubt that the privacy interest in the body and bodily functions is one Washington citizens have held, and should be entitled to hold, safe from governmental trespass.”).

The Court of Appeals held, however, that because Olsen was on probation from a DUI conviction, she did not have a privacy interest in the collection and use of her urine. Olsen, 194 Wn. App. at 272. The Court of Appeals relied on the lead opinion in State v. Surge, 160 Wn.2d 65, 156 P.3d 208 (2007). That case upheld the DNA sampling of convicted felons under RCW 43.43.754. In the lead opinion, signed by three justices, the Court upheld the sampling on the ground that the purpose of the statute was to collect identifying information, and convicted felons have no privacy interest in their identity. Surge, 160 Wn.2d at 74. Justice Chambers concurred in that decision but expressed concern that extension

of the RCW 43.43.754 DNA testing requirement to misdemeanants may violate article I, section 7. Surge, 160 Wn.2d at 82 (Chambers, J., concurring).

While a majority of the court concurred in the result, four justices disagreed with the lead opinion's conclusion that DNA sampling is not a disturbance of private affairs. Justice Owens concurred in the result but not with the article I, section 7 analysis:

Two inquiries are implicit in an article I, section 7 claim: (1) whether the contested state action "disturbed" a person's "private affairs" and, if so, (2) whether the action was undertaken with "authority of law" (that is, pursuant to a validly issued warrant, an exception to the warrant requirement, or a constitutional statute). The majority actually folds the second inquiry into the first and determines that the compulsory collection of a biological sample was not state action that "disturbed" the petitioners' "private affairs." That conclusion is not only intuitively implausible, it is contrary to prior case law, as Justices Fairhurst and Sanders explain. Id. The blood draw and DNA analysis assuredly constitute an intrusion into the petitioners' "private affairs." The majority should have recognized as much and should have directed its article I, section 7 analysis to the second inquiry, the validity of that intrusion.

Surge, 160 Wn.2d. at 87-88, (Owens, J, concurring). Justice Bridge joined Justice Owens' opinion.

Justice Sanders also disagreed with the conclusion that collection of biological samples from convicted felons for DNA testing does not disturb a private affair protected by article I, section 7. Justice Sanders noted that the privacy interest asserted was not in the felons' identities, as

stated by the majority, but in their bodies. Like Justices Owens and Bridge, Justice Sanders recognized that the collection of biological samples constitutes an intrusion into one's private affairs. Surge, 160 Wn.2d at 89-90 (Sanders, J., dissenting). Justice Fairhurst filed an opinion concurring in the dissent, noting that “[r]ather than identity, this case involves the nonconsensual taking of Surge's blood to test his deoxyribonucleic acid (DNA), which unquestionably intrudes on his privacy interest in autonomous decision making under article I, section 7.” Surge, 160 Wn.2d at 91 (Fairhurst, J., concurring in dissent).

In this case the Court of Appeals concluded that because Olsen's conviction involves the abuse of alcohol, she does not have a privacy interest in preventing the collection and use of her urine to enforce a prohibition on the consumption of alcohol, marijuana, and non-prescribed drugs. Olsen, 194 Wn. App. at 273-74. The court's article I, section 7 analysis folds the “authority of law” inquiry into the “private affair” inquiry, focusing on the justification for the search to support the conclusion that no private affair was disturbed. As Justice Owens recognized in Surge, the conclusion that the compulsory collection of a biological sample does not disturb private affairs “is not only intuitively implausible, it is contrary to prior case law[.]” Surge, 160 Wn.2d. at 87-88, (Owens, J, concurring). The Court of Appeals' holding that Olsen did

not have a privacy interest which could be disturbed by the order for random urinalyses must be reversed.

D. CONCLUSION

For the reasons discussed above and in the Petition for Review, this Court should reverse the Court of Appeals' decision.

DATED this 21st day of December, 2016.

Respectfully submitted,

GLINSKI LAW FIRM PLLC

A handwritten signature in cursive script, appearing to read "Catherine E. Glinski".

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Attorney for Petitioner

Certification of Service by Mail

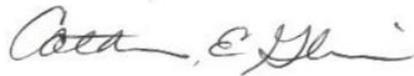
Today I caused to be mailed a copy of the Supplemental Brief of
Petitioner in *State v. Brittanie Olsen*, Cause No. 93315-4, as follows:

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Pursuant to agreement of the parties, I e-mailed copies as follows:

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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
December 21, 2016