

Consol. to 36269-4

NO. ~~37164-2-II~~

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

STATE OF WASHINGTON,

Respondent,

vs.

KEVIN MICHAEL WENTZ,

Petitioner.

FILED
COURT OF APPEALS
DIVISION TWO
DO JUN 21 PM 1:28
STATE OF WASHINGTON
BY DEPUTY

MOTION FOR DISCRETIONARY REVIEW

Bruce Finlay, WSBA #18799
Attorney for Petitioner
P.O. Box 3
Shelton, Washington 98584
(360) 432-1778

TABLE OF CONTENTS

A. IDENTITY OF MOVING PARTY.....	1
B. DECISION.....	1
C. ISSUES PRESENTED FOR REVIEW.....	1
D. STATEMENT OF THE CASE.....	2
E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.....	6
1. 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 based upon findings that the defendant will either fail to reappear at court as directed or will commit a violent crime.....	6
a. Urinalysis is a search in the constitutional sense.....	8
b. The court rule on release, CrR 3.2, requires a court to find individualized reasons that support a condition of release; the rule does not authorize ‘standard’ conditions of release.....	14
2. The revocation of pre-trial release requires a hearing that complies with due process of law.....	19
F. CONCLUSION.....	26

TABLE OF AUTHORITIES

Constitutions:

United States Constitution:

Fourth Amendment.....	10, 11, 12, 13, 14
Fourteenth Amendment.....	20

Washington State Constitution:

Article 1, section 7.....	11, 12, 13, 24
Article 1, section 22.....	20

United States Supreme Court Cases:

<u>Bearden v. Georgia</u> , 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).....	20, 25
<u>Beck v. Ohio</u> , 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964).....	8
<u>Davis v. Alaska</u> , 415 U.S. 308, 39 L.Ed.2d 347, 94 S.Ct. 1105 (1974).....	23
<u>Gagnon v. Scarpelli</u> , 411 U.S. 778, 36 L.Ed.2d 656, 93 S.Ct. 1756 (1973).....	21, 22
<u>Mapp v. Ohio</u> , 374 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).....	11
<u>Morrissey v. Brewer</u> , 408 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972).....	21, 22, 25

Federal Cases:

<u>United States v. Penn</u> , 721 F.2d 762 (11 th Cir. 1983).....	24
<u>United States v. Ramirez</u> , 347 F.3d 792 (9 th Cir. 2003).....	25
<u>United States v. Scott</u> , 450 F.3d 863 (9 th Cir. 2006).....	7, 9, 10, 17

Washington State Cases:

Butler v. Kato, 137 Wn. App.515, 154 P.3d 259 (2007).....7, 15, 16

City of Seattle v. Lea, 56 Wn. App. 859, 786 P.2d 798 (1990).....19

In Re Boone, 103 Wn.2d.224, 691 P.2d 964 (1984).....20, 22, 23

State v. Anderson, 88 Wn. App. 541, 945 P.2d 1147 (1997).....24

State v Dahl, 139 Wn.2d 678, 990 P.2d 396 (1999).....23, 24

State v Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999).....13

State v Lampman, 45 Wn. App. 228, 724 P.2d 1092 (1986).....14, 25

State v. Lawrence, 28 Wn. App. 435, 624 P.2d 210 (1981).....22

State v Morse, 156 Wn.2d 1, 123 P.3d 832 (2005).....12

State v. Nelson, 103 Wn.2d 760, 697 P.2d 579 (1985).....23

State v. Pollard, 66 Wn. App 779, 834 P.2d 51 (1992).....21

State v. Rankin, 151 Wn.2d 689, 92 P.3d 202 (2004).....11

State v. Surge, 122 Wn. App. 448, 94 P.3d 345 (2004).....9

Court Rules:

CrR 3.2.....7, 10, 14, 15, 18,19

Treatises:

W. LaFave, Search and Seuzure: A Treatise on the Fourth Amendment, Fourth Edition (2004).....8

A. IDENTITY OF MOVING PARTY

Petitioner Kevin Wentz seeks the relief designated in Part B of this motion.

B. DECISION

Mr. Wentz requests that this Court grant his motion for discretionary review of the Mason County Superior Court's order on pre-trial release that he submit to weekly urinalysis for the detection of drugs. A copy of the trial court's order at issue is attached as Exhibit A. Mr. Wentz also seeks discretionary review of the Mason County Superior Court's refusal to grant him a due process hearing to contest the trial court's finding that he had violated his conditions of release by using marijuana.

C. ISSUES PRESENTED FOR REVIEW

1. Did the trial court err when it ordered Kevin Wentz to submit to weekly urinalysis testing for drugs as a standard condition of pre-trial release, where the State made no showing that Mr. Wentz would either fail to return to court or would be likely to commit a violent crime, and the trial court made no such findings?

2. Did the trial court err when it refused to give Kevin Wentz a release revocation hearing that complied with due process of law, when

the hearing given involved no witnesses, no cross-examination, and no offer and introduction of evidence?

D. STATEMENT OF THE CASE

Kevin M. Wentz was before the Mason County Superior Court for arraignment on November 9, 2007. The charges were unlawful possession of a controlled substance with intent to deliver (marijuana); unlawful possession of a controlled substance (marijuana over 40 grams); and unlawful possession of a firearm in the second degree. (Nov. 9, 2007 Transcript, pg. 1).

Conditions of release, including weekly urinalysis and bail had previously been set when Mr. Wentz was first before the court after his arrest, on October 26th, but had expired by the time of the arraignment on November 9th. (Nov. 9th Transcript, pg. 3). Therefore, the court heard argument on what conditions of release would be appropriate.

Mr. Wentz argued that there was nothing in Mr. Wentz's criminal record that would indicate that he was a danger to fail to appear or a danger to commit a violent offense. Therefore, a condition that Wentz submit to weekly urinalysis was not authorized by the court rule on release. (Nov. 9 Transcript, pg. 3-5).

The State argued that the court needed to be concerned with the defendant's risk of failure to appear in court, and risk of danger to

members of the community from the defendant, and asked that the court impose bail of \$30,000 and conditions that included weekly urinalysis. (Transcript pg. 7).

The judge stated that Mr. Wentz's record indicated a failure to appear on a 1995 gross misdemeanor charge, and that she did not see any prior felonies. (Nov. 9 Transcript, pg. 7).

The court ruled as follows:

Well, the Court will modify the conditions of release in just one small respect, and that is the bail schedule amounts that were indicated from the booking sheets would total \$27,500.00, and that's what the bail bond was posted for. And then the conditions of release that were set by the court commissioner were \$30,000.00, which would mean he'd need to be taken into custody right now because he's a little short on his bail bond.

So, the Court will modify the conditions to match the amount that was set under the bail schedule and which has been posted, which is \$27, 750.00. The Court sets bail in that amount based upon a prior failure to appear – it's an old one, but it is there on his record that at some time during the pendency of the domestic violence assault fourth he did not appear timely.

Secondly, the concern that the Court has for the safety of the community, probable cause having been found that he has a disabling conviction and then was in possession of multiple firearms. That is a concern for the community. And the Court believes that the other conditions that were set on October 29th, including to live at a fixed address, to not possess any dangerous weapons or firearms, to not possess or use alcohol or un-prescribed drugs, **and the weekly urinalysis so the Court can be advised whether Mr. Wentz is following the Court's conditions regarding un-prescribed medications or other drugs or alcohol**, are reasonable in light of the nature of the charges.

That he have absolute law-abiding behavior, maintain contact with his attorney on a weekly basis, be available to appear in court on three days' notice, except during the jury term where he

must be available on a daily basis. And the Court will set the omnibus to take place on December 17th at 9:00 a.m.; pretrial January 14th at 9:00 a.m.; readiness hearing January 29th, with a final start date of February 7th.

Order reestablishing the conditions of release has been signed and order amending them so that they match with the bail bond that's previously posted.

(Nov. 9 Transcript, pg. 8-10) (emphasis added).

The omnibus hearing took place on December 17, 2007. The defendant had filed a motion seeking to terminate the requirement that he submit to weekly urinalysis as a condition of pre-trial release, and argument was heard by Judge Sawyer on that motion. Judge Sawyer denied the motion, ruling as follows:

I will deny the request, and the reason is – and the reason that the case law that's cited to me, I don't believe, is controlling in this case is that the case that was – that is seminal, I believe, and pivotal for the defense comes out of the Federal District – Federal courts and I believe out of the state of Nevada as I recall.

In that particular case the condition is entirely different than the condition that's being required here, in that we're asking you to appear and submit to UAs on a scheduled basis. The reason that we're doing that is because what we're dealing with here is a controlled substance case that includes indications that you very well may have been using. That insofar as that affects your ability to be readily available to your attorney and receptive to dealing with your case, that's another concern that the Court has, and your availability to the Court.

If you're actively using, you're less responsive to the requirements of attendance, and that's what we're trying to do. We're not trying to catch you up and charge you with another crime; we're simply trying to make sure that you're staying clean and sober while this is going on so that you can be bright-eyed and receptive and responsive in the court proceeding.

Insofar as changing it from weekly, I have no problem with changing to every other week, especially given the nature of the substance that we're dealing with. So, we'll get you an order with respect to that, changing conditions of release to every other week.

(December 17 Transcript, pg. 13-14).

On December 24th, Mr. Wentz came before the court on allegations that he had submitted a UA that was positive for THC, which is associated with marijuana use. No hearing was held; no evidence was introduced; no witnesses testified; yet, the court held that Mr. Wentz had violated the conditions of his release and ordered that bail be increased immediately. Mr. Wentz was taken to jail on that order. (December 24th Transcript, pg. 21-26).

Mr. Wentz argued that there was no showing that he was likely to fail to appear for court or to commit a violent offense; therefore, there was no reason to put Mr. Wentz in jail. (December 24th Transcript, pg. 22).

Mr. Wentz also argued that he had not admitted that he had used marijuana; that the State had produced no evidence to prove that he did; and that the UA report itself was insufficient proof without at minimum a cover letter from the lab explaining its terms. Mr. Wentz also argued that he has the right to live testimony with the ability to cross examine witnesses against him, unless the State could show good cause why not,

and no such showing was made or attempted by the State. (December 24 Transcript, pg. 24-25).

The Court rejected all of Mr. Wentz's challenges and found that he violated the conditions of release by using marijuana, as follows:

"Whether you look at the figures for the adjusted or non-adjusted quantitative amounts of THC detected by the lab, we go up from 482 to 997, or 370 to 627. There's no issue that the analysis at this point is confusing." (December 24 Transcript, pg. 25). It is unknown to the Petitioner where the judges got their understandings of what the numbers on the UA reports mean; no evidence or testimony was presented in this case to establish that, and the Petitioner submits that it is not self-explanatory.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The trial court's decision was such a departure from the current law of this State and federal authorities that review by the Court of appeals is called for.

1. 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 based upon findings that the defendant will either fail to reappear at court as directed or will commit a violent crime. 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 presumption of innocence and the presumption of release on personal recognizance without conditions. Mr. Wentz is required to report to the Mason County Probation office in Shelton, every Wednesday (now every other Wednesday) during a two hour window between 10:00 a.m. and noon, to then and there submit a sample of his urine with a probation officer observing. Mr. Wentz is required to pay for the urinalysis. (Appendix B).

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).

There is no law that would prevent the prosecutor from instituting a new criminal investigation and prosecution based upon evidence obtained from these weekly urinalyses. Thus, the urinalysis requirement has serious and significant consequences to the defendant. Here, the defendant was put in jail on increased bail without being allowed to

contest the evidence against him by confrontation or other means. He was not given a 'hearing' in the due process sense of the term.

a. Urinalysis is a search in the constitutional sense.

The urinalysis condition is a 'search' for purposes of constitutional analysis. 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 urinalysis 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. This testing could reveal evidence that could be used against the defendant. There is no probable cause to support these searches; none was alleged by either the prosecutor or the judge. 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. There was no showing that Mr. Wentz would either fail to appear or would commit a violent crime if he did not give weekly urine samples. There was simply no showing or finding as to why the urinalysis condition was needed, particularly when the prosecutor allowed the original conditions of release to expire by not filing an information within the required 72 hour period.

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. 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.

If pre-trial urinalysis is a search under federal law, it certainly is a search under our State’s Constitution. 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; indeed, neither the prosecutor nor the court felt that probable cause was necessary.

b. The court rule on release, CrR 3.2, requires a court to find individualized reasons that support a condition of release; the rule does not authorize 'standard' conditions of release.

The court rule pertaining to pre-trial release is CrR 3.2. It reads in relevant part as follows:

RULE 3.2 RELEASE OF ACCUSED

(a) Presumption of Release in Noncapital Cases. Any person . . . *shall* at the preliminary appearance or reappearance pursuant to rule 3.2.1 or CrRLJ 3.2.1 *be ordered released on the accused's personal recognizance pending trial unless:*

- (1) the court determines that such recognizance will not reasonably assure the accused's appearance, when required, or
- (2) there is *shown a likely danger* that the accused:
 - (a) *will* commit a violent crime; or

(b) will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice.

CrR 3.2(a) (emphasis added).

Thus, conditions of pre-trial release cannot be imposed unless the State has shown and the court has found that 1) the accused is not likely to return to court or 2) there is a *likely danger* that the accused *will* commit a violent crime. The rule further directs how these decisions are to be made: “In making the determination herein, the court *shall*, on the *available information*, consider the relevant facts including, but not limited to, those in subsections (c) and (e) of this rule.” CrR 3.2(a) (emphasis added). Subsection (c) lists those factors relevant to the accused’s future appearance. Subsection (e) lists those factors relevant to a showing of substantial danger.

The court rule 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.” 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.

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 defendant represented a substantial danger that he would either not appear or would seek to intimidate witnesses or would be likely to commit a violent crime. Moreover, it is clear from the record of the hearing that the Court did not make any such findings. The fact that a person is charged with a crime such as a drug crime does not constitute a substantial danger to fail to appear or to intimidate witnesses or to the administration of justice. 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 in a drug case, and for no

other reason. There were no individualized allegations or evidence that showed that Mr. Wentz would not appear for court. Mr. Wentz does not have a violent criminal history, a history of non-appearance, or a demonstrated disregard for court orders. CrR 3.2(c).¹ There were no allegations that showed that he would be likely to commit a violent crime if the urinalysis requirement was not imposed. The one failure to appear in 1995 on a gross misdemeanor case does not prove a likelihood that Mr. Wentz would fail to appear now.

There was no showing whatsoever that Mr. Wentz would be likely to disappear, commit a violent crime, intimidate witnesses or otherwise interfere with the administration of justice. Because of the lack of evidence, the trial court did not have grounds to impose the condition of

¹ The factors used to assess accused's likelihood to return to court are: (1) The accused's history of response to legal process, particularly court orders to personally appear; (2) The accused's employment status and history, enrollment in an educational institution or training program, participation in a counseling or treatment program, performance of volunteer work in the community, participation in school or cultural activities or receipt of financial assistance from the government; (3) the accused's family ties and relationships; (4) The accused's reputation, character and mental condition; (5) The length of the accused's residence in the community; (6) The accused's criminal record; (7) The willingness of responsible members of the community to vouch for the accused's reliability and assist the accused in complying with the conditions of release; (8) The nature of the charge, *if relevant to the risk of nonappearance*; (9) Any other factors indicating the accused's ties to the community. CrR 3.2(c) (emphasis added).

release that he submit to weekly urinalysis, nor did the court state any such grounds. Kevin Wentz was entitled by the rule to release on his personal recognizance without the condition to submit to weekly urinalysis.

2. The revocation of pre-trial release requires a hearing that complies with due process of law.

If a person who has been ***convicted*** has the right to a due process hearing prior to incarceration for violations, then it cannot be denied that a person such as Kevin Wentz who ***has not been convicted***, and enjoys a presumption of innocence, has an equal or greater right to a due process hearing.

A court may not revoke probation without affording the defendant a hearing that complies with due process of law. City of Seattle v. Lea, 56 Wn. App. 859, 786 P.2d 798 (1990). In Lea, the defendant attempted to argue that the mere fact of arrest was insufficient to revoke probation, but the trial court ignored his argument and revoked anyway. The Court of Appeals reversed, emphasizing that the trial court can only revoke probation on verifiable facts that prove the defendant's misconduct. The fact of an arrest does not prove the allegations that underlie the arrest, and thus violates the defendant's rights to due process of law.

CrR 3.2 (k)(2) states as follows:

Upon a showing that the accused has wilfully violated a condition of release, the court may revoke release and may order forfeiture of any bond. Before entering an order revoking release or forfeiting bail, the court shall hold a hearing in accordance with section (j). Release may be revoked only if the violation is proved by clear and convincing evidence.

Section (j) provides for a recorded hearing, with an opportunity for both parties to present evidence. There does not appear to be any case law in Washington on the specific due process considerations for these hearings. The defendant suggests to this Court that an apt analogy may be made to the due process protections that must be afforded defendants in a probation revocation hearing. Regardless, here, *no* hearing was held and no evidence was presented.

The Due Process Clause of the Fourteenth Amendment imposes procedural and substantive limits on the revocation of the conditional liberty created by probation. Bearden v. Georgia, 461 U.S. 660, 666, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983). Even so, probation revocation hearings are not criminal proceedings within the meaning of the Bill of Rights and the Fourteenth Amendment, or within the meaning of Article I, § 22 of the Washington State Constitution. Accordingly, a probationer's due process rights are not the same as for those accused of a crime. In re Personal Restraint of Boone, 103 Wn.2d 224, 230, 691 P.2d 964 (1984).

The obvious implication here is that a person accused of a crime has *greater* rights than does a person who has been convicted of a crime.

In State v. Pollard, 66 Wn. App. 779, 784-85, 834 P.2d 51 (1992), the court held that although the Rules of Evidence do not strictly apply to non-trial fact-finding hearings, nonetheless, the evidence presented must meet due process requirements, such as providing the defendant an opportunity to refute the evidence presented, and requiring that the evidence be reliable. There was no showing here that the urinalysis report was reliable, and no witness testified to what the report's terms meant.

The Courts have set out minimal procedural safeguards which must exist at probation revocation hearings to satisfy due process. The United States Supreme Court listed these requirements in Morrissey v. Brewer, 408 U.S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972) and Gagnon v. Scarpelli, 411 U.S. 778, 36 L. Ed. 2d 656, 93 S. Ct. 1756 (1973). In Morrissey, the Court set out the procedural safeguards for parole revocation hearings; the safeguards were extended to probation revocation hearings in Gagnon. The minimum safeguards set out in those cases are:

- (a) written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probationer or] parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the

right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation or] parole.

Gagnon at 786 (quoting Morrissey at 489).

A failure to allow the defendant to call witnesses to testify in his behalf may constitute a deprivation of due process. State v. Lawrence, 28 Wn. App. 435, 624 P.2d 201 (1981).

In Personal Restraint of Boone, the Court held the defendant's right to due process was violated when, on the day of the revocation hearing, the probation officer submitted a "special report" to the Court - but no one else - outlining a telephone call the probation officer had received from Boone's girlfriend in which she stated she feared for her safety if Boone was released. Attached to the report was a written statement from the girlfriend in which she alleged Boone had been violent towards her. The report was never mentioned on the record during the revocation hearing and Boone only learned of its existence after his probation was revoked.

The Boone Court held the probationer's due process rights were violated because (1) petitioner was not given notice of all of the claimed violations of his probation; (2) petitioner was not told of the evidence against him; (3) petitioner was denied the right to confront and cross-examine witnesses against him; and (4) petitioner was denied the

opportunity to present evidence that might rebut the charge. Boone, 103 Wn.2d. at 232.

Here, the trial court judges have apparently had some training or education as to what the UA lab reports mean; but that education was not presented in court in this case and Mr. Wentz was not privy to it. He was given no opportunity or means to challenge it.

The Washington Courts have consistently held that a defendant's right to confrontation applies in probation violation hearings. State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999); In re Boone, 103 Wn.2d 224, 232, 691 P.2d 964 (1984). The United States Supreme Court has repeatedly stated that denial of the right to confront and cross-examine witnesses is "constitutional error of the first magnitude" and that "no amount of showing of want of prejudice [will] cure it." Davis v. Alaska, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974).

The Courts have held the right to confrontation is not absolute and that hearsay evidence may be admissible in a probation revocation hearing where good cause exists for allowing the evidence. State v. Nelson, 103 Wn.2d 760, 765, 697 P.2d 579 (1985). Hearsay evidence should be considered "only if there is good cause to forgo live testimony." Dahl at 686. Under the good cause standard, the reliability of the hearsay must be considered in light of the difficulty in procuring live witnesses. Dahl at 687. Here, no testimony was offered and no cause was shown for not producing live testimony. Both the court and the prosecutor appeared to believe that it was not necessary.

In State v. Dahl, 139 Wn.2d 678, 990 P.2d 396 (1999), the Supreme Court held the trial Court erred by admitting and relying on unreliable hearsay evidence at a hearing to revoke a suspended sentence. Dahl at 687.

Under the good cause standard set forth in Nelson, drug test results and an explanatory letter from the testing lab were held to be admissible in United States v. Penn, 721 F.2d 762 (11th Cir. 1983). Similarly, in State v. Anderson, 88 Wn. App. 541, 945 P.2d 1147 (1997), Division II upheld a revocation where the Court relied on hearsay consisting of drug test results and a letter from the laboratory supervisor which was introduced through Anderson's CCO, who had obtained the urine sample from the probationer and sent it to the laboratory for testing, over the defendant's objection. The Court found the judge's observation that "expense factors . . . weigh against requiring the State to have the individual here," and its reasoning that the lab plays an independent and neutral role, i.e., it simply tests a sample and reports whether it contains any illicit drug, to not be clearly erroneous.

Here, no witness introduced the lab report; there was no testimony from the person who took the urine sample, and there was no explanatory cover letter from a lab supervisor or anyone else. The lab report was not formally offered or introduced into evidence. There was no showing whatsoever that the lab report was reliable.

Article I, §7 of the Washington Constitution requires application of the exclusionary rule, without exception, to probation revocation hearings.

State v. Lampman, 45 Wn. App. 228, 232, 724 P.2d 1092 (1986).

Therefore, if the urine sample was obtained without authority of law, it cannot be used to revoke Mr. Wentz's release.

Before a revocation of probation can occur, the Constitution requires there be (1) a formal finding that a probationer has committed a violation and (2) a determination that the violation was serious enough to warrant reimposing the probationer's or parolee's original sentence. See Gagnon, 411 U.S. at 784; United States v. Ramirez, 347 F.3d 792, 799 (9th Cir. 2003). A violation does not automatically trigger a revocation; probation authorities generally have two options: modify or extend the conditions of supervision, or revoke. Ramirez at 800.

Where other steps are available which will protect society and improve chances of rehabilitation, revocation is generally inappropriate. Ramirez, supra; see also Morrissey, 408 U.S. at 484 (“[s]ociety thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions”).

In Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983), the Supreme Court held the trial Court erred by automatically revoking an indigent defendant's probation for failure to pay without determining adequate alternatives of punishment did not exist. The Bearden Court held that, if the probationer willfully refused to pay or

failed to make bona fide efforts to acquire the resources to pay, the Court may revoke probation. However, if the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the Fourteenth Amendment requires that the Court consider alternatives to punishment other than imprisonment and may only imprison the probationer if alternative measures are not adequate to meet the State's interests in punishment and deterrence. Bearden, 461 U.S. at 668-69.

Here, the trial court put Mr. Wentz in jail on December 24th, the day before a major holiday. There is no indication that the court considered less restrictive alternatives to incarceration. The UA lab report was not offered into evidence by any witness; there was no showing that the UA report was scientifically valid or reliable, or that it was obtained and labeled in a reliable manner such that it would not be mistaken for someone else's urine sample. No witnesses were called to support the UA report, and no cause was shown why it would be too difficult or expensive to produce witnesses. Mr. Wentz was denied due process of law.

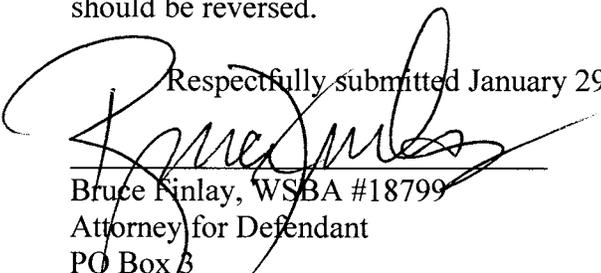
F. CONCLUSION

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 pretrial urinalysis condition of release must be reversed.

Mr. Wentz was denied due process of law when he was denied a hearing to contest the revocation of his release that would include the right to confront witnesses, and a showing of validity and reliability of the UA report. The trial court's order incarcerating Mr. Wentz on increased bail should be reversed.

Respectfully submitted January 29, 2008.



Bruce Finlay, WSBA #18799
Attorney for Defendant
PO Box 3
Shelton, WA 98584
360-432-1778

APPENDIX 'A'

SUPERIOR COURT OF WASHINGTON
COUNTY OF MASON

STATE OF WASHINGTON,)
Plaintiff,)
vs.)
Kevin Wentz)
Defendant.)

NO. 07 1-00505-6

ORDER FOR PRETRIAL RELEASE / ORDER
ESTABLISHING CONDITIONS OF RELEASE

IT IS ORDERED that the above-named defendant be released from custody pending trial, sentencing or other hearing on the following conditions:

- 1. On personal recognizance. Bail shall be exonerated.
- 2. Upon execution of a surety bond or posting of cash for \$ 30,000.00.
- 3. Defendant is not to leave Western Washington without prior written approval of the Court.
- 4. During the period of release, defendant shall reside at:
De Rosemary St. Shelton WA
Such address shall not be changed without prior written permission of the Court.
- 5. Other: _____
- 6. 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, or that the 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:

 - (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 possess or pass any negotiable instrument not lawfully in his/her possession.
 - (g) Defendant shall not operate a motor vehicle unless properly licensed and insured.

- (h) Defendant shall not drink or possess intoxicating liquors and shall not go to any establishment wherein alcoholic beverages are the chief item of sale.
- (i) Defendant shall not use or possess any drugs except those prescribed to defendant by a physician.
- (j) Defendant shall submit to weekly urinalysis/breath testing [] including ETG, for drug/alcohol screening under the direction of Mason County Probation Services, 7th & Alder Streets, Shelton, 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 the hours of 10:00 a.m. and 12:00 noon. The cost is \$_____. Please bring exact change.**
- [] (k) Defendant shall report regularly to, and remain under the supervision of:

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

7. 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 on a daily basis.
- (d) Other: _____

8. Defendant shall appear as directed by the Court:

NEXT APPEARANCE: Nov. 7, 20 07, at 9 a.m./p.m.

9. Defendant is remanded to the Sheriff for:

[] Administrative booking and release; or Custody pursuant to the above conditions.

10. 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: 10/29/2007

JUDGE / COURT COMMISSIONER

DEFENDANT'S ACKNOWLEDGEMENT

- I have read the above conditions of release and any other conditions of release that may be attached;
- 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;
- 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;
- I understand that failure to appear when required by this Court is a crime; and
- I have received a copy of this order and will keep it with me.

Dated: 10/29/2007

DEFENDANT'S SIGNATURE

Debera Garcia
DEPUTY PROSECUTING ATTORNEY 27730

Street Address

Telephone

A. Imbriano
ATTORNEY FOR DEFENDANT 35003

City

State

Zip