

FILED
COURT OF APPEALS
DIVISION II
08 MAR -3 PM 1:16
STATE OF WASHINGTON
BY
DEPUTY

Consol. to #36269-4

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO
NO. 37164-2-H**

STATE OF WASHINGTON,
Respondent,
Vs.
KEVIN MICHAEL WENTZ,
Petitioner.

RESPONSE TO MOTION FOR DISCRETIONARY REVIEW

From the Mason County Superior Court
Case No. 07-1-00505-6
The Honorable TONI A. SHELDON, Presiding

MICHAEL K. DORCY, WSBA NO. 31968
Mason County Prosecutor's Office
Deputy Prosecuting Attorney
521 N. Fourth Street
P.O. Box 639
Shelton, WA 98584
Ph: 360.427.9670 ext. 401

TABLE OF CONTENTS

I. IDENTITY OF PARTIES 1

II. DECISION TO BE REVIEWED 1

III. ISSUES PRESENTED FOR REVIEW 1

IV. STATEMENT OF THE CASE..... 1

V. ARGUMENT 2

VI. CONCLUSION..... 8

TABLE OF AUTHORITIES

CASES

CrR 3.2..... 2, 7, 8

Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)..... 6

State v. Goodwin, 4 Wash. App. 949, 951 (Div. 3, 1971)..... 3

State v. Perez, 16 Wash. App. 154, 157 (Div. 3, 1976)..... 3

State v. Reese 15 Wash. App. 619, 620 (Div. 3, 1976) 3

State v. Surge, 122 Wash. App. 448 (Div. 1, 2004)..... 4

Surge 4, 5

United States v. Scott, 450 F.3d 863 (9th Cir. 2006)..... 4, 5, 6, 7

RULES

CrR 3.2..... 4, 8, 9

I. IDENTITY OF PARTIES

Comes now Respondent State of Washington, by and through Mason County Deputy Prosecuting Attorney Michael K. Dorcy, and responds to the Defendant/Petitioner's Motion for Discretionary Review filed herein pursuant to RAP 6.2 and RAP 17.4.

II. DECISION TO BE REVIEWED

Petitioner has requested that this Court review the imposition of a certain condition of pretrial release imposed by the Mason County Superior Court requiring him to submit to weekly urinalysis as a measure to ensure his compliance with the condition that he not use alcohol or unprescribed drugs while on release pending trial.

III. ISSUES PRESENTED FOR REVIEW

Did the court below commit error when it imposed conditions of pretrial release including, among others, a prohibition against using unprescribed drugs and alcohol and a requirement for weekly urinalysis to ensure compliance therewith, when those conditions were imposed as a package of conditions designed to ensure responsiveness to the court's jurisdiction and the safety of the community at large?

IV. STATEMENT OF THE CASE

The State accepts Petitioner's recitation of the procedural and substantive facts for the purpose of this response.

V. ARGUMENT

- A. This Court should grant review if it find that the Superior Court manifestly abused its discretion to establish pretrial conditions of release, thus committing probable error substantially limiting the freedom of a party to act.**

Petitioner argues that this Court should grant review because 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." (Petitioner's Motion for Discretionary Review, page 6). On the contrary, the trial court may in its discretion impose conditions of release designed to ensure the safety of the community and is specifically authorized to that end to prohibit the possession and/or consumption of intoxicating liquors or drugs not prescribed to the accused. CrR 3.2(2)(3). Once, under the circumstances of the case, the court has so determined that possession and/or use of alcohol or unprescribed drugs by the accused poses a danger to the community, Respondent State of Washington submits that pretrial drug testing is the least restrictive means to ensure compliance with that condition before such a danger can be realized.

Respondent, therefore, does not view the issue before this Court as involving a significant departure from state or federal law, but rather whether the trial court has abused its discretion in imposing the conditions at issue here under the facts of this particular case such that the freedom of

Petitioner to act has been substantially limited. RAP 2.3(b)(2). There is no abuse of discretion in this case.

Once a trial court determines that bail and/or other conditions of release are necessary, the amount of the bail and the nature of the other conditions are within the discretion of the trial court and are only disturbed on appeal for manifest abuse of that discretion. State v. Reese 15 Wash. App. 619, 620 (Div. 3, 1976); State v. Goodwin, 4 Wash. App. 949, 951 (Div. 3, 1971). One charged with a crime is entitled by court rule to a presumption of release on personal recognizance, but is not entitled to such release. CrR 3.2; Goodwin, 4 Wash. App. at 950-51; State v. Perez, 16 Wash. App. 154, 157 (Div. 3, 1976). Certainly a prohibition against possessing and/or using unprescribed drugs and a requirement to submit to urinalysis on a weekly basis limits in some respect one's freedom to act, in that he or she will have to report to a certain place at a certain time every week. Therefore, this Court should base its decision to grant review upon a determination that the Mason County Superior Court manifestly abused its discretion in establishing pretrial conditions of release such that it committed probable error. RAP 2.3(b)(2).

B. The trial court is authorized to impose conditions of pretrial release deemed in its discretion to be appropriate to protect the community and to assure the presence of the accused at future court proceedings.

Petitioner argues that the weekly submission to urinalysis constitutes a search lacking probable cause and is, therefore, unconstitutional as a condition of pretrial release. For this premise, Petitioner principally relies upon general legal definitions of the term "search" and upon State v. Surge, 122 Wash. App. 448 (Div. 1, 2004). The Respondent does not disagree with the general proposition that a urinalysis is a search.

The court in Surge was faced with consideration of the constitutionality of state law requiring submission of a DNA sample upon conviction of a felony offense. Surge, 122 Wash. App. at 451. Relying in part on a "special needs" analysis, that court ultimately concluded that the post-conviction collection of DNA by means of a blood draw or a cheek swab, although a search, was not precluded by the Fourth Amendment to the US Constitution nor by Article I, Section 7 of the Washington Constitution. Surge, 122 Wash. App. at 459-60.

Petitioner also relies upon the Ninth Circuit case of United States v. Scott, 450 F.3d 863 (9th Cir. 2006), for the proposition that pretrial urinalysis is a search that must be supported by probable cause (and presumably a warrant) and that, therefore, the conditions at issue here are unconstitutional. The Scott case specifically rejected a "special needs" analysis as to pretrial drug testing as a condition of release, but did so on

facts completely distinguishable from the condition complained of in this case.¹

In Scott, the defendant was released upon conditions, including “random” drug testing “anytime of the day or night by any peace officer without a warrant” and that his home may be searched for drugs “by any peace officer anytime[,] day or night[,] without a warrant.” Scott, 450 F.3d at 865. Such a search and seizure in fact took place, without a warrant or probable cause, and a separate criminal prosecution was instituted based upon evidence seized during the search of his home. Scott, 450 F.3d at 865.

The court in Scott recognized the “special needs” principal, the same used to uphold the post-conviction collection of DNA in Surge, discussed above. *Id.* at 868-70. Under a “special needs” analysis, the normal proof thresholds prior to a search and seizure are relaxed “when special needs, beyond the normal need for law enforcement, make an insistence on the otherwise applicable level of suspicion impracticable.” Scott, 450 F.3d at 868 (internal quotations omitted; citing in part, Griffin

¹ Another focus of the court in Scott was the “unconstitutional conditions doctrine”, a doctrine that prohibits a trial court from requiring the defendant to surrender a constitutional right in order to receive a benefit (release from custody pending trial). As summarized by that court, “The right to keep someone in jail does not in any way imply the right to release that person subject to unconstitutional conditions.... Once a state decides to release a criminal defendant pending trial, the state may impose only such conditions as are constitutional....” Scott, 450 F.3d at 867. However, if the condition for pretrial drug testing as imposed here is constitutional, then this analysis would not apply.

v. Wisconsin, 483 U.S. 868, 873 (1987)). However, that court went on to hold that the condition at issue in that case did not satisfy the special needs analysis because it was related to the normal need for law enforcement and had a tenuous and speculative connection to appearance at court proceedings. Scott, 450 F.3d at 870.

The Scott court specifically reasoned that the condition of release at issue there was designed to prevent arrestees from committing crime, and that "crime prevention is a quintessential general law enforcement purpose and therefore is the exact opposite of a special need." Scott, 450 F.3d at 870. The condition at issue in Scott was sufficiently broad that the defendant whose release was subject to that condition subjected his home and person to random searches by any peace officer without limitation as to time of day and/or location. That condition could, and in fact did, yield evidence of a criminal law violation used to support a separate investigation and prosecution.

In contrast, the condition at issue before this Court directly relates to the specifically authorized interest charged to the trial court of protecting the community from a risk posed by one under its jurisdictional authority. The court made a finding that "there exists a substantial danger that the defendant will commit a serious crime, or that defendant's physical condition will jeopardize the defendant's personal safety or that of others, or that defendant will seek to intimidate the witnesses or

otherwise unlawfully interfere with the administration of justice...". (See Appendix A to Petitioner's Motion for Discretionary Review, Item Nos. 8.e, f, g, h.) The trial court prohibited use of alcohol and unprescribed drugs as part of a package of conditions of release, all designed to take into consideration the court's two primary concerns: safety of the community and future appearance of the defendant at required proceedings. CrR 3.2(a). This is far more specific than general crime prevention, it implicates a compelling interest of the government, and it is narrowly drawn to meet that end.

The defendant in this case was arrested with a substantial amount of marijuana, a Schedule I controlled substance, along with a large sum of United States currency and multiple firearms with a prior disabling conviction. The trial court, in its discretion, determined that there was a risk of danger to the community with a personal recognizance release, and fashioned a package of pretrial release conditions in an effort to minimize the risk to the community and ensure the defendant's future appearance in the least restrictive way possible. The condition of pretrial urinalysis at issue in this case is the least restrictive means by which to ensure that the defendant is complying with the court's package of conditions, including the drug prohibition, and therefore not a danger to the community.

For the reasons stated above, the facts here are distinguishable from those in the Scott case, and serve a compelling governmental interest

beyond that of the normal need for law enforcement and criminal investigation. The trial court is charged with evaluating whether an accused poses a risk to the safety of the community and to the efficient administration of justice and, if so, with protecting that safety. CrR 3.2(a), (d). The trial court may impose any one or more of a nonexclusive list of conditions designed to protect the community and the administration of justice if, in its discretion, they are the least restrictive means of so doing. CrR 3.2(d). That nonexclusive list of conditions designed to protect the safety of the public and the administration of justice includes prohibiting the consumption of intoxicating liquor and/or drugs not prescribed to the accused. CrR 3.2(d)(3). Once, in its discretion, the trial court has prohibited the consumption of unprescribed drugs, a weekly scheduled urinalysis is the least restrictive means by which to monitor compliance with that compelling governmental interest. The condition of pretrial release involved here is narrowly tailored to meet that end, and should be upheld.

VI. CONCLUSION

Based upon the foregoing, the condition of pretrial release imposed in this case does not amount to a departure from state or federal law, and therefore this Court should decline to accept review. If this Court does accept review, then it should uphold the trial court's denial of Petitioner

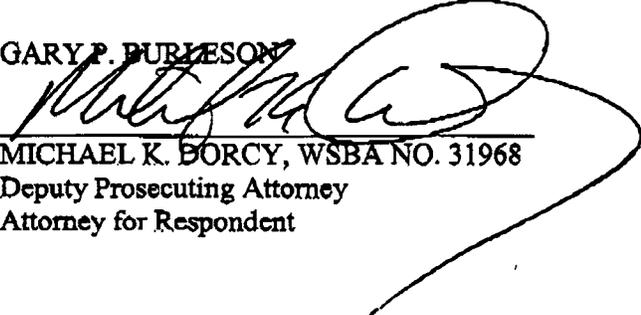
Danielle Wilson's motion to vacate the condition of pretrial urinalysis testing based upon the arguments in Part V.

DATED this 3rd day of March, 2008 at Shelton,

Washington.

RESPECTFULLY SUBMITTED

GARY P. BURLESON



MICHAEL K. BORCY, WSBA NO. 31968
Deputy Prosecuting Attorney
Attorney for Respondent

**OFFICE OF THE
MASON COUNTY PROSECUTING ATTORNEY**

**GARY P. BURLESON
PROSECUTING ATTORNEY**

521 N. FOURTH STREET
P.O. Box 639
SHELTON, WASHINGTON 98584
PHONE: (360) 427-9670 ext. 417
FAX: (360) 427-7754

FACSIMILE COVER SHEET

**To: STATE OF WASHINGTON COURT OF APPEALS (Div. II)
Attn: Syl Field, Sr. Case Manager**

**From: MICHAEL K. DORCY
Deputy Prosecuting Attorney
Mason County Prosecutor's Office**

**RE: Case No. 37164-2-II
State of Washington vs. Kevin Wentz**

Date: March 3, 2008

Fax Number: (253) 593-2806

Number of pages sent including the cover sheet: 13

Following this transmittal is the below-listed document(s):

- **Response to Motion for Discretionary Review (For Filing)**

THANK YOU!

This facsimile transmission (and/or the documents accompanying it) may contain confidential information belonging to the sender, which is protected by the attorney-client privilege. The information is intended only for the use of the individual or entity named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distributions, or the taking of any action in reliance on the contents of this information is strictly prohibited. IF YOU RECEIVED THIS TRANSMISSION IN ERROR, PLEASE IMMEDIATELY NOTIFY THE SENDER BY TELEPHONE TO ARRANGE FOR RETURN OF THE DOCUMENTS.

If you do not receive all copies or if they are inadequate, please call Tracie at (360) 427-9670 ext. #417.

RECEIVED
MAR -3 2008
CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON