NO. 46886-7-II

IN THE COURT OF APPEALS OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Petitioner,

vs.

BRITTANIE J. OLSEN,

Respondent.

BRIEF OF PETITIONER

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A. ASSIGNMENTS OF ERROR

The Superior Court erred when it vacated a portion of the District Court's sentence subjecting a probationer to random urinalyses (hereinafter "UAs") to ensure compliance with drug and alcohol abstinence conditions of probation.

ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Whether the District Court had the authority to order a probationer to submit to random UAs to ensure compliance with the court's order that the probationer not consume alcohol, marijuana or non-prescribed drugs?

B. STATEMENT OF THE CASE

I. **FACTS AND PROCEDURAL HISTORY**

Respondent, Brittanie J. Olsen, pled guilty to driving under the influence in Jefferson County District Court on June 11, 2014. CP 2, p. 5; CP 13. The Court, *inter alia*, ordered that she not consume alcohol, marijuana or non-prescribed drugs. *Id.* To ensure Ms. Olsen complied with this condition, the Court ordered Ms. Olsen to submit to "random urine analysis screens… to ensure compliance with conditions regarding the consumption of alcohol and controlled substances." *Id.*

Through counsel, Ms. Olsen objected to this condition and appealed the issue to Jefferson County Superior Court. CP 1 & 4. After hearing RALJ argument the Court ruled in Ms. Olsen's favor. CP 13. The State sought reconsideration which was denied. CP 20. The State then

filed the instant Motion for Discretionary Review which was granted by a Commissioner of this Court.

C. SUMMARY OF ARGUMENT

The Superior Court erred when it ruled the District Court lacked the authority to order a probationer to submit to random UAs to ensure compliance with the Court's order that the probationer not consume alcohol, marijuana or non-prescribed drugs.

RCW 3.66.067 and RCW 46.61.5055 (11) vest district courts with broad discretion to create terms of probation that fit the crime, suit the needs of the probationer and protect community safety. This includes random UAs. Further, neither the federal nor state constitutions prohibit misdemeanor courts from using this authority and discretion to impose random UAs in order to ensure compliance with drug or alcohol related prohibitions.

D. ARGUMENT

I. District courts have the authority and discretion to impose random urine analysis screens pursuant to misdemeanor drug or alcohol related driving convictions

RCW 3.66.067 provides in pertinent part that District Courts may place a defendant on probation and "prescribe the conditions thereof ...". Conditions may include those tending to prevent further criminal activity.

State v. Deskins, 180 Wn.2d 68 (2014). This grant of authority allows misdemeanor courts to "impose probationary conditions that bear a reasonable relation to... prevent[ing] the future commission of crimes," and even conditions that merely "tend to prevent future crime." In *State v. Deskins*, for example, the District Court acted within its authority and discretion in prohibiting the defendant from owning animals as a condition of probation after she was convicted of a cruelty to animals charge. *Id.* This was true despite a lack of specific power to impose such a condition under RCW 3.66.067 and .068.

Where RCW 3.66.067 provides courts with general authority to impose conditions tending to prevent future crimes, RCW 46.61.5055, the penalty schedule for alcohol and drug related convictions such as driving under the influence, specifically permits courts to impose appropriate probation conditions and monitoring measures that test for alcohol in the probationer's system. Under that statute, a district court has power to impose appropriate conditions of probation, including "installation of an ignition interlock device on the probationer's motor vehicle, alcohol or drug treatment, supervised probation, or other conditions that may be appropriate." RCW 46.61.5055(11). Furthermore, "[i]f the court orders that a person refrain from consuming any alcohol, the court may order the person to submit to alcohol monitoring through an alcohol detection breathalyzer device, transdermal sensor device, or other technology

designed to detect alcohol in a person's system." RCW 46.61.5055(5)(b). UAs are "other technology designed to detect alcohol in a person's system."

Here, the District Court imposed random UA testing on Ms. Olsen as a method of ensuring compliance with the terms her probation related to her DUI conviction—specifically, the term of probation prohibiting her from consuming alcohol or controlled substances. Thus, the court acted pursuant to its lawful authority because the UA screens will tend to prevent crime and ensure community safety. The District Court did not abuse its discretion when it allowed suspicionless UA screens to ensure compliance with probation terms.

II. Neither the federal nor state constitutions prohibit courts from using their discretion to impose suspicionless urine testing in order to ensure compliance with drug and alcohol related probation terms

The federal constitution prohibits unreasonable searches and seizures. U.S. Const. Amend. IV. A person enjoys a much lower expectation of privacy on probation or parole, however. *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987). As such, it is reasonable under the federal constitution for an officer to search a probationer in the absence of probable cause or reasonable suspicion—even in the absence of any suspicion at all—for evidence of

criminal conduct unrelated to the crime of conviction. *United States v. Knights*, 534 U.S. 112, 114, 122 S. Ct. 587, 588, 151 L. Ed. 2d 497 (2001) (permitting probation officers to search probationers based on reasonable suspicion); *see also Samson v. California*, 547 U.S. 843, 846, 126 S. Ct. 2193, 2196, 165 L. Ed. 2d 250 (2006) (permitting parole officers to search parolees without any suspicion at all).

Article 1, section 7 of the Washington State constitution prohibits the state from interfering in an individual's home or private affairs "without authority of law." Wash. Const. art. I, § 7. With its emphasis "on protecting the individual's right to privacy [versus] the Fourth Amendment ['s emphasis] on curbing governmental actions," the state constitution provides broader protections than the federal government. *State v. Lucas*, 56 Wash. App. 236, 240, 783 P.2d 121, 124 (1989) (internal citations omitted). Even under the state constitution, however, once an individual becomes a probationer "'the State has a continuing interest in the defendant and its supervision of him *as a probationer*' such that the defendant can expect state officers and agents to scrutinize him closely." *Id.* (citing *State v. Lampman*, 45 Wash. App. 228, 233, Fn. 3, 724 P.2d 1092, 1095 (1986) (italics in the original). It is well established, therefore, that a probation officer may search a probationer without a warrant and without probable cause, provided that the officer has a "well-founded suspicion" that a probation violation has occurred. *Id.* at 243.

The "well-founded suspicion" rule has been applied consistently to traditional searches, such as those of the probationer's person, effects, and residence. *State v. Patterson*, 51 Wash. App. 202, 752 P.2d 945 (1988) (rule applied in the search of a vehicle); *Lampman*, at 228 (rule applied in the search of personal a purse); *State v. Simms*, 10 Wash. App. 75, 516 P.2d 1088 (1973) (rule applied in the search of a residence).

Despite this robust body of case-law applying to traditional physical probationary searches, whether District Courts may impose random UAs pursuant to drug or alcohol related convictions appears to be an issue of first impression because neither the Washington Supreme Court nor the Court of Appeals has yet ruled on the issue.[1] Nonetheless, UAs are permissible under the Sentencing Reform Act (SRA). RCW 9.94A *et seq*.

If random UAs are permissible in a felony sentence under the more restrictive SRA scheme; it follows that they are permissible in a misdemeanor sentence, where the courts retain their traditional discretion unchecked by the SRA. Even absent the SRA allowing suspicionless UAs, random UA tests are reasonable under article 1, section 7 because they are necessary to ensure compliance with drug and alcohol abstinence conditions; this special need outweighs the limited expectation of privacy

[1] Once again however, it is quite clear under the federal constitution suspicionless searches of parolees is reasonable. *Samson v. California*, 547 U.S. at 846.

that probationers retain after being convicted for drug or alcohol related driving offenses.

Existing case law provides some guidance but inconclusively. In *State v. Massey*, the Court of Appeals considered a sentence term that a defendant must submit to any and all probationary searches, "but which did not state that searches must be based on reasonable suspicion." *State v. Massey*, 81 Wash. App. 198, 199, 913 P.2d 424, 424-25 (1996). Mr. Massey had been convicted of delivering cocaine and argued to the Court of Appeals that the lower court had abused its discretion in imposing the sentence condition. *Id.* at 200. The *Massey* court never reached the issue of whether or not the lower court had abused its discretion because the defendant had not yet been searched. Nevertheless the *Massey* court discussed, in dicta, the legality of the language of the sentence. *Massey*, 81 Wash. App., at 200. The District Court in *Massey* had "not violate[d] Washington law...," because "no Washington case... has required language referring to the reasonableness of a search in the order itself." *Massey*, 81 Wash. App., at 200-01. However, the court noted:

> [T]he standard for adjudicating a challenge to any subsequent search remains the same: Searches must be based on reasonable suspicion. While the failure to include the language does not affect the order's constitutionality, we urge sentencing courts to state explicitly in the order that searches of parolees and probationers must be based on reasonable suspicion.

Massey, 81 Wash. App., at 201.

The *Massey* decision is inconclusive on the issue of whether a misdemeanor court may impose suspicionless UAs on drug and alcohol related driving offenders. First, the issue in this case was not addressed in *Massey* at all. The *Massey* court commented on the legality of a random probationary search of anything, which would presumably include searches of the probationer's vehicle, personal effects, residence, etc. The issue in the case at bar is whether or not random UAs are permissible as necessary measures to ensure compliance with otherwise valid probation conditions, not whether or not random searches are permissible *in toto*. Second, the salient issue in the case—the legality of random searches—was not ripe for the *Massey* court. Therefore, even though the court's assertion that searches "must be based on reasonable suspicion" may be correct as a general proposition, the court did not have an opportunity to apply this to any specific fact pattern. It did not, therefore, develop whether an exception to the general rule—such as the special needs exception—might exist in a particular circumstance.

The second case that touches on the legality of suspicionless UAs, albeit in the context of pre-trial release conditions, is *State v. Rose*, 146 Wn. App. 439, 191 P.3d 83 (2008). The defendants in *Rose* were each charged with controlled substance and firearm violations. *Id.* 442-45. As part of a pre-trial conditions package, the trial court imposed a "UA condition require[ing] the accused to provide weekly samples...." *Id.* at

445. The defendants argued that the District Court had abused its authority in imposing random UAs because the conditions were not sufficiently related to the purpose of pre-trial release, and that the UAs violated the federal and state constitutions. *Id.* The Court of Appeals ultimately agreed with the defendants on the first ground, concluding that "because a UA is a warrantless search and there is not any evidence that a weekly UA would increase the likelihood of appearance, the imposition of a UA as a standard condition of pretrial release is inappropriate." *Id.* at 442. The court expressly rejected the State's special needs argument—not because of the degree of intrusiveness of UAs in general, but because the State had failed to adequately connect the UAs with the danger of failure to reappear or danger to the community in the pre-trial release context:

> Although the trial court made a finding that [the defendant in question] presented a danger to the community, it did not tie that danger to a likelihood of failing to appear.... [W]ithout a showing that drug use leads to a higher likelihood of absconding or an individual determination by the trial court that [the defendant's] drug use would increase the likelihood of him failing to appear, the special needs warrant exception does not apply here.

Id. at 457-58.

Like *Massey*, the *Rose* decision, is inconclusive on the issue of whether a misdemeanor court may impose suspicionless UAs pursuant to driving under the influence of drug or alcohol related convictions. *Rose* is inconclusive because its ruling relates to pre-trial conditions of release and its holding rests on the fact that the State failed to establish the

relationship between the UAs and the concern that the defendants would fail to reappear. Interestingly, however, the implication of *Rose's* dicta—and the issue undeveloped in *Massey*—is that had the State shown that drug use was related to the its special need of ensuring the defendant's reappearance, the condition of UAs would have been permissible.

a. If random UA tests are permissible in a felony sentence under the more restrictive SRA scheme; it follows that they are permissible in misdemeanor sentences, where the courts retain their traditional discretion

Despite the fact that there are no decisions directly on point, relevant authority in the felony context suggests that suspicionless UA testing is permissible under article 1, section 7 of the state constitution.

Both superior and district courts have traditionally had broad discretion in crafting sentences to ensure rehabilitation and community safety. The Sentencing Reform Act (SRA) created a dichotomy between the two however, by placing "substantial constraints" on the historically broad discretion in felony sentencing." *State v. Anderson,* 151 Wn. App. 396, 402, 212 P.3d 591 (2009). Despite the SRA's constraints, under *State v. Riles*, Superior Courts may impose measures on felony probation intended to "monitor compliance with other community placement conditions." 86 Wn. App. 10, 15, 936 P.2d 11, 13 (1997) *aff'd*, 135 Wn. 2d 326, 957 P.2d 655 (1998). These measures include random UAs.

In *State v. Vant*, 145 Wn. App. 592, 186 P.3d 1149 (2008), the defendant was convicted of a protection order violation and a sex offender registration violation. As a condition of probation, he was prohibited from possessing or consuming controlled substances. *Id.* at 603. In order to ensure compliance, "[t]he trial court further ordered [the defendant] to submit to random urinalysis/portable breath test/blood alcohol content (urinalysis/PBT/BAC) tests and random polygraph tests at his CCO's discretion. *Id.* at 597. The defendant argued that this was unlawful, but the Court of Appeals disagreed:

> [T]hrough *Riles*, [it follows] that the trial court has the ability to enforce these conditions [of not possessing/consuming any controlled substances]. As such, the trial court's imposition of random urinalysis/PBT/BAC tests to ensure compliance with its conditions does not constitute an abuse of discretion, and the condition should remain.

Id., at 603-04. Random UA tests were also permitted in *State v. Acevedo*, 159 Wn. App. 221, 231, 248 P.3d 526 (2010). In *Acevedo*, the defendant, who was convicted of possession of a stolen vehicle, objected to community custody conditions including that he abstain from drug use and "submit to polygraph and/or urinalysis tests upon request..." *Id.* at 231. The court found the sentencing court had acted within its authority, and upheld the conditions. It is important to note that in both *Vant* and *Acevedo*, the court imposed alcohol/drug prohibitions and random UA

monitoring conditions despite the fact that neither alcohol nor drugs were alleged to be connected to the crime of conviction.

As noted above, the SRA does not apply to District Courts. District courts have "great discretion" when imposing sentences within the statutory limits for misdemeanors and gross misdemeanors. When imposing such conditions, the misdemeanor court remains "[un]nrestricted by the Sentencing Reform Act, which applies only to felonies;[2]" they have "a great deal of discretion when setting probation conditions for misdemeanors." *State v. Deskins*, 180 Wn. 2d 68, 77, 322 P.3d 780, 784 (2014), *as amended* (June 5, 2014) (citing *State v. Williams,* 97 Wn. App. 257, 263, 983 P.2d 687 (1999)). *State v. Anderson*, 151 Wn. App. 396, 402, 212 P.3d 591, 593-94 (2009). "This broad discretion is consistent with the tradition in American criminal jurisprudence affording wide latitude to sentencing judges on grounds that "'the punishment should fit the offender and not merely the crime.'" *Id.* (internal citations omitted).

If Superior Courts may impose random UAs—even for convictions bearing no immediate relation to alcohol or drugs—it follows that misdemeanor sentencing courts, which operate under their traditionally broad powers, may also impose random UAs as a part of probation—

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[2] Maintaining "the distinct treatment of misdemeanants and felons for purposes of sentencing credit rationally relates to maintaining the traditional discretion that courts have when sentencing a misdemeanor offender." *Harris v. Charles*, 171 Wn. 2d 455, 465, 256 P.3d 328, 335 (2011).

especially if the crime of conviction is directly related to the probation condition. The fact that the SRA allows random UAs implies that District Courts should be able to impose random UAs as well.

b. Random UA tests are a special need under article 1, section 7 because they are necessary to ensure compliance with drug and alcohol probation conditions; this special need outweighs the limited expectation of privacy that probationers retain after being convicted for drug or alcohol related offenses

Even in the absence of the positive comparison to the SRA cases, the clear implication of the law is that neither the federal nor the state constitutions prohibit suspicionless UAs because the State has a compelling and special need to ensure compliance with probation conditions for drug and alcohol driving related probationers.

Suspicionless searches are permissible where the government has a compelling and special need to search "'beyond the normal need for law enforcement.'" *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) (internal citations omitted). *United States v. Martinez-Fuerte*, 428 U.S. 543, 545, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976) (special need to prevent illegal aliens from entering borders permits border patrol checkpoints).

In *Nat'l Treasury Employees Union v. Von Raab*, the United States Customs Services announced a program whereby the department would conduct suspicionless "drug tests of employees who applied for, or occupied, certain positions" within that department. 489 U.S. 656, 660,

109 S. Ct. 1384, 1388, 103 L. Ed. 2d 685 (1989). A union of federal employees commenced suit, arguing that the program would violate the Fourth Amendment because the searches were overly intrusive and made without probable cause or reasonable suspicion. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 663, 109 S. Ct. 1384, 1389, 103 L. Ed. 2d 685 (1989). In fact, the government had a great interest in preventing drug users from occupying posts where they might "endanger the integrity of our Nation's borders or the life of the citizenry." *Id.* at 679. This interest "outweigh[ed] the privacy interests of those who seek promotion to these positions, who enjoy a diminished expectation of privacy by virtue of the special need...." *Id.* Thus, the suspicionless UA tests were reasonable because of the government's special interest in maintaining the safety and integrity of the nations' borders and citizenry. *See also, Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 620 109 S.Ct. 1402, 1415, 103 L.Ed.2d 639 (1989) (the government's interest in regulating railroad employees' conduct, "like its supervision of probationers or regulated industries," presents "'special needs' beyond normal law enforcement" that justifies suspicionless collection of blood, breath and urine for drug and alcohol testing).

Like the federal constitution, article 1, section 7 of the state constitution also countenances the special needs exception. In *State v. Olivas*, the Washington Supreme Court considered whether court ordered

DNA blood draws pursuant to sex crimes and violent crimes were illegal searches under the federal and state constitutions. 122 Wn. 2d 73, 90, 856 P.2d 1076 (1993). The purpose of the blood draws was "to create a DNA databank, and the purpose of the databank [was] to assist in the investigation and prosecution of criminal offenses." *Id.* at 101. The Court ultimately decided however, that the State had a special need beyond normal law enforcement in collecting the DNA, and allowed the blood draws. *Id.* at 93, 97-98. It is important to note that the Washington Supreme Court in fact interpreted the special needs exception as allowing searches when the State proved a compelling need alone, even in the absence of a diminished expectation of privacy;[3] of course, in the case at bar, the government has not only a compelling need but the probationer also has a limited expectation of privacy.

Suspicionless UA screens of DUI probationers falls squarely within the special needs exception to the Fourth Amendment and 1, section 7 of the state constitution.

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[3] "The drawing of blood without a search warrant, probable cause or individualized suspicion has been allowed by federal and state cases. However, there are two distinct logical routes used by those courts to arrive at that conclusion. One route is to balance the limited privacy rights of convicted persons against a compelling governmental interest. The other route is to balance the general privacy right of persons to be free from unjustified governmental intrusion against the "special needs beyond normal law enforcement" of the government. We conclude that the latter is the better reasoned approach." *State v. Olivas*, 122 Wn. 2d 73, 97-98, 856 P.2d 1076, 1088 (1993)

> [Probation restrictions]... are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large.... Supervision, then, is a 'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large.

Griffin v. Wisconsin, 483 U.S. 868, 874-75, 107 S. Ct. 3164, 3168-69, 97 L. Ed. 2d 709 (1987) (internal citations omitted). The State's need to supervise and ensure compliance with probation terms is particularly cogent in the context of alcohol and drug related driving offenses, where any lapse in appropriate supervision can have devastating effects on entire communities. Suspicionless UA tests are not only effective to realize this interest, but alternatives to random UAs—i.e., scheduled UAs or UAs based only on suspicion—seriously frustrate the purposes of the condition not to drink alcohol or ingest drugs. This is because while a probation officer may be able to randomly visit or interview with a probationer, and this interview may sometimes provide the officer with suspicion of alcohol or drug ingestion, signs of impairment may become completely absent given the passage of only a short amount of time. It is easy to imagine a situation where a probationer ingests alcohol in the evening and receives a surprise visit from the probation officer the following afternoon. By this time, any evidence of the alcohol will probably have dissipated, and no amount of interaction or supervision with the probationer at this time will provide the officer with suspicion of the prior evening's revelry. A UA

however, would expose the probationer in their violation,[4] and would allow the State to take the steps essential to ensuring no future dangerous behavior.

Not only does the government have a special need to supervise probationers convicted of a drug or alcohol related driving offenses, but probationers have a limited expectation of privacy due to their status as a probationer. This is reasonable. Once an individual unreasonably endangers the lives and property of others by ingesting drugs or alcohol then operating a vehicle, it is reasonable that the State would insert itself to make sure the behavior isn't repeated.

The State's interest in supervising probationers to ensure compliance with drug and alcohol abstinence conditions of probation, imposed pursuant to drug and alcohol related driving convictions, is a special need that far outweighs a probationer's limited expectation of privacy.[5]

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[4] Traces of alcohol may be revealed up to five to seven days after usage depending on the type of testing done, the amount consumed and the person's metabolism. Marijuana usage may be revealed up to 30 days following ingestion (possibly longer with a hair follicle test). Once again, dosage, metabolism and body mass play a significant role in test results.

[5] It should be noted that sister states have also upheld probationary provisions allowing for suspicionless probationary searches. *See, e.g.*, State *v. Purdum,* 147 Idaho 206, 207, 207 P.3d 182, 183 (2008) (a term of probation requiring the defendant to "submit to a random blood, breath and/or urine analysis *upon the request* of the Court, his probation officer or any law enforcement official" constituted a waiver of constitutional rights); *State v. Rickard,* 1994-NMCA-083, 118 N.M. 312, 317, 881 P.2d 57, 62 *aff'd in part, rev'd in part on different grounds,* 1994-NMSC-111, 118 N.M. 586, 884 P.2d 477 ("[R]andom drug tests do not constitute unreasonable searches... [because] testing is reasonably related to deterring future criminality" (citing *State v. McCoy,* 1993-NMCA-

E. CONCLUSION

The Superior Court erred when it ruled that the District Court could not impose suspicionless UAs pursuant to probation terms of an alcohol related driving conviction. The State respectfully requests that the Court of Appeals overrule the Superior Court's ruling and reinstate the District Court's sentencing, including the random UAs.

Respectfully submitted this 6th day of July, 2015.

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064, 116 N.M. 491, 500, 864 P.2d 307, 316 *rev'd on other grounds by State v. Hodge*, 1994-NMSC-087, 118 N.M. 410, 882 P.2d 1).

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I, Janice N. Chadbourne, certify that on this date:

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I delivered an electronic version of the brief, using the Court's filing portal, to:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Port Townsend, Washington on July 16, 2015.

Janice N. Chadbourne
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