

No. 91642-0

SUPREME COURT OF THE STATE OF WASHINGTON

CORTNEY L. BLOMSTROM, BROOKE M. BUTTON, and
CHRISTOPHER V. COOPER
Appellants,

v.

HONORABLE GREGORY TRIPP, et al.,
Respondent.

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

ANSWER OF RESPONDENTS TO BRIEFS OF AMICI CURIAE

LAWRENCE H. HASKELL
Prosecuting Attorney

Samuel J. Comi
Deputy Prosecuting Attorneys

Brian C. O'Brien
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

I. ISSUES PRESENTED 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 1

 A. PRE-TRIAL TESTING IS CONSTITUTIONALLY
 VALID 2

 1. Law Enforcement Purposes 3

 2. Impracticality of Obtaining Individualized Suspicion 4

 3. Reduced Expectation of Privacy 5

 B. THE TRIAL COURT COMPLIED WITH CrRLJ 3.2 6

 C. THE PETITIONER’S ABILITY TO PAY IS NOT AT
 ISSUE 8

IV. CONCLUSION 9

TABLE OF AUTHORITIES

WASHINGTON CASES

City of Seattle v. Evans, 184 Wn.2d 856, 366 P.3d 906 (2015)..... 6

In re Juveniles A, B, C, D, E, 121 Wn.2d 80, 847 P.2d 455 (1993) 3

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)..... 8

State v. Duncan, 185 Wn.2d 430, 374 P.3d 83 (2016) 6

State v. Hardtke, 183 Wn.2d 475, 352 P.3d 771 (2015)..... 8

York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297,
178 P.3d 995 (2008)..... 2, 4

FEDERAL CASES

Leocal v. Ashcroft, 543 U.S. 1, 125 S.Ct. 377,
160 L.Ed.2d 271 (2004) 6

STATUTES

RCW 9.94A.030..... 7

RCW 10.21.030 8

RULES

CrRLJ 3.2..... 4, 6, 7, 8

I. ISSUES PRESENTED

1. Whether pre-trial EtG and THC testing on DUI cases is constitutionally valid?
2. Whether the trial court complied with the strictures of CrRLJ 3.2?
3. Whether this court should address hypothetical issues related to accused's ability to pay for conditions of release?

II. STATEMENT OF THE CASE

The State incorporates by reference its statement of the case from its response brief.

III. ARGUMENT

The State maintains the arguments presented in its response brief filed, and presents the following analysis of arguments and issues raised by Amici. Initially, the brief presented by the Attorney General for the State of Washington substantially expands on the argument that the Petitioners lack standing to challenge the constitutionality of requiring the installation of an ignition interlock device. It delves into a variety of related subjects, highlighting exactly why this Court should not address an issue that is not properly justiciable at this time. The briefs of the remaining three amici, WAPA, ACLU, and WFCJ, each make arguments relevant to the substantive issues here. While the State maintains that the Petitioners were not entitled to a writ of review for procedural reasons, the pertinent nuanced

arguments raised by the Amici are discussed below. Finally, the ACLU and WFCJ each raise additional, new arguments that this Court should decline to consider, as those arguments have not been briefed or raised by the parties.

A. PRE-TRIAL TESTING IS CONSTITUTIONALLY VALID

Both the ACLU and WFCJ briefs reiterate the argument of the Petitioners that any warrantless search must fall into one of the well-established exceptions to the warrant requirement. The flaw with this argument is that warrants and the well-established exceptions can only apply in investigatory situations, where law enforcement has some evidence that a crime has been committed. This is not such a case.

Instead, this Court has sustained a variety of searches that are necessary because of some compelling governmental interest unrelated to law enforcement. *See* Br. of Resp't at 24. The real question presented here is what standard will this Court apply to such governmental actions? In the plural concurrences in *York*, a majority of this Court agreed that such a "special needs" exception to the warrant requirement exists under Art. 1 § 7, but could not agree whether to adopt the Federal special needs exception or apply some form of stricter scrutiny. *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 178 P.3d 995 (2008). However, regardless what standard is ultimately adopted by this Court, pre-trial EtG and THC testing satisfies

a compelling governmental interest that outweighs the minor intrusion into the Petitioners' privacy.

1. Law Enforcement Purposes

The ACLU and WFCJ both reiterate the argument that if a special needs exception were applied, the State's purpose is strictly within the ordinary needs of law enforcement. However, the ACLU very aptly quotes the factors discussed in *In re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 847 P.2d 455 (1993). Br. of Amicus Curiae ACLU of Wash. at 6-7.

As in *Juveniles*, the statute here is not part of the criminal code, but rather, is a procedural rule. *Juveniles*, 121 Wn.2d at 92. The rule is not intended to punish the defendant, but instead, serves to enable the court to protect the community from the potential random victimization caused by drunk driving. Again, unlike a typical law enforcement search, EtG and THC tests are not intended to gain evidence for criminal prosecution. *Id.* If an individual tests positive, that would not give rise to new criminal charges.¹ These facts reveal a purpose separate and distinct from general law enforcement. Rather, the tests at issue monitor compliance with the

¹ As highlighted in the State's response brief, this is one of the fundamental differences between the situation here and the situations in both *Rose* and *Scott*. See Br. of Resp't at 11-12.

trial court's orders and *only* determine whether an individual has recently consumed alcohol or marijuana in violation of such a court order.

2. Impracticality of Obtaining Individualized Suspicion

The ACLU and WFCJ both further challenge whether it is impracticable to formulate an individualized suspicion of alcohol/marijuana prior to EtG or THC testing. These Amici assert that because persons under the influence outwardly exhibit manifest signs of intoxication, an individualized suspicion will exist to support obtaining a search warrant. *See Br. of Amicus Curiae ACLU of Wash.* at 8; *Br. of Amicus Curiae WFCJ* at 19-20.

However, the Amici's assertion presumes that the State maintains more or less constant surveillance of defendants released pre-trial. In a school setting, this would be essentially true, since teachers and administrators observe students throughout the day, on every school day. *See York*, 163 Wn.2d at 326 (Madsen concurrence). But, out in public, the same level of surveillance on an alleged DUI offender would be a gross intrusion upon the defendant's right to privacy.

The trial court could require a defendant to report daily to an officer of the court for observation to determine whether the accused has consumed alcohol or marijuana. CrRLJ 3.2(d)(4). But, such a requirement would be

tremendously burdensome to the defendant.² The real value of EtG and THC testing is that both tests determine whether an individual has consumed alcohol or marijuana anytime over the past several days. Because these tests capture a multi-day snapshot, they necessitate the defendant having substantially fewer contacts with the court in order for the court to adequately monitor the defendant's compliance with the lawful condition of release that the accused abstain from alcohol or marijuana. This monitoring is more reasonable for criminal defendants who, rather than reporting daily to the court, only need to report a few times a month at his or her convenience for EtG or THC testing.

3. Reduced Expectation of Privacy

Finally, the Amicus Brief from WAPA evaluates an important issue that militates in favor of pre-trial testing. An individual released prior to trial is entitled to the presumption of innocence, and has a greater expectation of privacy than a parolee. But that individual is still under the supervision of the court, and has a lower expectation of privacy than an ordinary member of the public. This should weigh into any calculation of whether the State's need outweighs the individual's expectation of privacy,

²The court would also be burdened with the daily observation of every DUI suspect who has been determined to present a danger to the community.

whether this Court analyzes that fact under the Federal special needs standard, or applies some form of stricter scrutiny.

B. THE TRIAL COURT COMPLIED WITH CrRLJ 3.2

Both the ACLU and the WFCJ amici briefs raise new arguments relating to CrRLJ 3.2. This Court will ordinarily decline to reach arguments raised only by an amicus. *State v. Duncan*, 185 Wn.2d 430, 440, 374 P.3d 83 (2016); *City of Seattle v. Evans*, 184 Wn.2d 856, 861 n.5, 366 P.3d 906 (2015). This Court should decline to do so here. In any event, the procedures followed comply with the CrRLJ.

CrRLJ 3.2(d) authorizes the trial court at arraignment to impose conditions of release to protect members of the community from potential harm caused by the released. This provision first requires a showing that there is a substantial danger the accused will commit a violent crime, among other provisions. While the Petitioners concede that the court could restrict alcohol consumption under subsection 3 of this provision, the ACLU argues that this provision does not apply at all because DUI is not a “violent” crime. The ACLU premises this argument largely on federal cases distinguishing crimes of negligence and recklessness from crimes of violence within the federal criminal code. *See Leocal v. Ashcroft*, 543 U.S. 1, 10, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004).

However, definitions of technical terms in the federal code do not inherently apply to those same terms in state statutes. Here, CrRLJ 3.2(a) extends the definition of violent crimes for the purposes of its rules beyond those defined as violent offenses under RCW 9.94A.030. That provision defines vehicular assault and vehicular homicide as violent offenses. RCW 9.94A.030(55). The nature of the conduct involved in a DUI is exactly the same as in a vehicular assault or vehicular homicide. The sole difference is that the offender (and society) was fortunate that no one was harmed as a result of that conduct. Consequently, DUI should be considered a “violent” crime under the CrRLJ 3.2.

Even if it is not, though, because it is the same conduct, a finding that there is a substantial likelihood the accused will commit the offense of DUI is necessarily a finding that there is a substantial likelihood the accused will commit the offense of vehicular assault or vehicular homicide. In fact, the findings of the trial court in these cases were based on the potential harms to persons, and so more accurately dealt with the potential for those felonies defined as “violent offenses,” not just another DUI.

Given the import of CrRLJ 3.2(d) to protect members of the community from potential harm to their person, the rules contemplate additional, pre-trial conditions of release on DUIs. Seen in this light, the WFCJ’s argument that the statutes concerning conditions of release violate

the separation of powers becomes specious. There is no conflict between that statute and the court rules. Rather, the court rules broadly authorize potential terms of release (CrRLJ 3.2(d)(10)), while the statute (RCW 10.21.030) gives guidance to trial courts on setting those conditions.

C. THE PETITIONER’S ABILITY TO PAY IS NOT AT ISSUE

The ACLU also raises a new argument that the statutory scheme inappropriately assigns costs for testing to the defendant. The ACLU premises this argument on the “principles announced by this Court in *State v. Blazina* and *State v. Hardtke*.” *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015); *State v. Hardtke*, 183 Wn.2d 475, 352 P.3d 771 (2015). Initially, this Court should decline to address this issue because it is solely raised by an amicus. Apart from that, though, the argument is not founded in fact or in law.

Both *Blazina* and *Hardtke* address and interpret statutory rights. As the ACLU points out in its brief, the assignment of the costs at issue here is by statute. Br. of Amicus Curiae ACLU of Wash. at 13-14. The entirety of the ACLU’s challenge is to the prudence behind the policy, not its lawfulness or constitutionality. As such, it is an argument to be presented to legislators, not to be litigated here.

Furthermore, no statute or court rule necessitates an inquiry into the petitioners’ financial status at arraignment, and so the arguments presented

and harm alleged are purely hypothetical. We have no information in the record concerning the Petitioners' financial status. Consequently, this issue is not justiciable at this time.

IV. CONCLUSION

As laid out in the State's response brief, and further discussed here, the testing conditions imposed were reasonable and had full authority of the law. Consequently, the Superior Court correctly declined to issue a writ of review. Apart from that, this court should decline to review the additional issues raised for the first time by Amici.

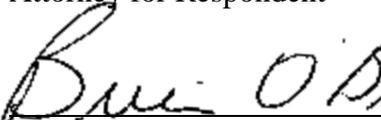
Dated this 23rd day of May, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney



Samuel J. Comi #49359

Deputy Prosecuting Attorney
Attorney for Respondent



Brian C. O'Brien #14921

Deputy Prosecuting Attorney
Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CORTNEY L. BLOMSTROM,
BROOKE M. BUTTON,
CHRISTOPHER V. COOPER,

Petitioners,

v.

The Honorable GREGORY J. TRIPP in
his official capacity as a Spokane County
District Court Judge and the SPOKANE
COUNTY DISTRICT COURT,

Respondents.

NO. 91642-0

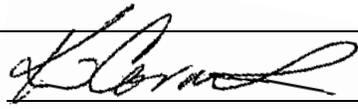
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on May 23, 2017, I e-mailed a copy of the Answer of Respondents to Briefs of Amici Curiae in this matter, pursuant to the parties' agreement, to:

Michael L. Vander Giessen mvandergiessen@spokaencounty.org	Ryan Robertson ryan@robertsonlawseattle.com
Jonathan Rands jrands@jonathanrands.com	Jason Lantz jason@sullivanpllc.com
George Bianchi george@thebianchilawfirm.com	Howard Stein howards@slsps.com
Pamela Loginsky pamloginsky@waprosecutors.org	April Benson and Leah Harris lalseaef@atg.wa.gov
James Lobsenz lobsenz@carneylaw.com	Nancy Talner talner@aclu-wa.org
Theresa Wang Theresa.wang@stokeslaw.com	Lance Pelletier Lance.Pelletier@stokeslaw.com

5/23/2017
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

May 23, 2017 - 8:26 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 91642-0
Appellate Court Case Title: Cortney L. Blomstrom, et al. v. Honorable Gregory Tripp, et al.
Superior Court Case Number: 15-2-00674-1

The following documents have been uploaded:

- 916420_Briefs_20170523082318SC780576_0177.pdf
This File Contains:
Briefs - Answer to Amicus Curiae
The Original File Name was Answer to AC Br - 052317.pdf

A copy of the uploaded files will be sent to:

- gverhoef@spokanecounty.org
- SJCOMI@spokanecounty.org
- lalseaef@atg.wa.gov
- jason@SullivanPLLC.com
- april.benson@atg.wa.gov
- pamloginsky@waprosecutors.org
- Lance.Pelletier@stokeslaw.com
- lobsenz@carneylaw.com
- ryan@robertsonlawseattle.com
- mvandergiessen@spokanecounty.org
- LeahH1@atg.wa.gov
- bobrien@spokanecounty.org
- thw@stokeslaw.com
- staff@thebianchilawfirm.com
- talner@aclu-wa.org
- jrand@jonathanrands.com
- scpaappeals@spokanecounty.org
- hstein@slsps.com
- lalseaef@atg.wa.gov
- george@thebianchilawfirm.com
- Theresa.wang@stokeslaw.com
- scpaappeals@spokanecounty.org

Comments:

Sender Name: Kim Cornelius - Email: kcornelius@spokanecounty.org

Filing on Behalf of: Samuel Joseph Comi - Email: SJCOMI@spokanecounty.org (Alternate Email: scpaappeals@spokanecounty.org)

Address:

1100 W Mallon Ave
Spokane, WA, 99260-0270

Phone: (509) 477-2873

Note: The Filing Id is 20170523082318SC780576