No. 93315-4

NO. 46886-7-II

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

STATE OF WASHINGTON,

Appellant,

v.

BRITTANIE OLSEN,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR JEFFERSON COUNTY

The Honorable Keith Harper, Judge

BRIEF OF RESPONDENT

CATHERINE E. GLINSKI
Attorney for Appellant

Glinski Law Firm PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

TABLE OF CONTENTS

A. RESTATEMENT OF THE ISSUE 1

B. STATEMENT OF THE CASE 1

D. ARGUMENT 3

THE ORDER FOR RANDOM, SUSPICIONLESS SEARCHES VIOLATES OLSEN'S CONSTITUTIONAL RIGHTS, AND THE SUPERIOR COURT PROPERLY VACATED IT. 3

a. It is well established under Washington law that a probationer is not subject to search absent a well-founded suspicion of a probation violation. 4

b. Washington courts have not adopted a special needs exception to the state constitution's warrant requirement. 8

E. CONCLUSION 15

TABLE OF AUTHORITIES

Washington Cases

In re Juveniles A, B, C, D, E, 121 Wn.2d 80, 847 P.2d 455 (1993).. 10, 11, 14

Robinson v. City of Seattle, 102 Wn. App. 795, 10 P.3d 452 (2000)..... 10

State v. Acevedo, 159 Wn. App. 221, 248 P.3d 526 (2010)..... 8

State v. Curran, 116 Wn.2d 174, 804 P.2d 558 (1991)..... 10

State v. Deskins, 180 Wn.2d 68, 322 P.3d 780 (2014)..... 7

State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999)..... 4

State v. Langford, 67 Wn. App. 572, 837 P.2d 1037 (1992)..... 7

State v. Lucas, 56 Wn. App. 236, 783 P.2d 121 (1989)..... 4

State v. Massey, 81 Wn. App. 198, 913 P.2d 424 (1996)..... 4, 6

State v. Meacham, 93 Wn.2d 735, 612 P.2d 795 (1980)..... 10

State v. Myrick, 102 Wn.2d 506, 688 P.2d 151 (1984)..... 3

State v. Olivas, 122 Wn.2d 73, 856 P.2d 1076 (1993)..... 10, 11, 14

State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999)..... 3

State v. Patterson, 51 Wn. App. 202, 752 P.2d 945 (1988)..... 4

State v. Riles, 135 Wn.2d 326, 957 P.2d 655 (1998)..... 8

State v. Rose, 146 Wn. App. 439, 191 P.3d 83 (2008)..... 4, 5, 13

State v. Surge, 160 Wn.2d 65, 156 P.3d 208 (2007)..... 12, 13

State v. Vant, 145 Wn. App. 592, 186 P.3d 1149 (2008)..... 8

York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 178 P.3d 995 (2008)..... 5, 8, 9, 10, 12, 13, 15

Federal Cases

City of Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) 14

Ferguson v. City of Charleston, 532 U.S. 67, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001) 14

Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) 10, 11

United States v. Scott, 450 F.3d 863 (9th Cir.2006) 13

Statutes

RCW 3.66.067 6

RCW 46.61.502 1

RCW 46.61.5055 7

RCW 46.61.5055(5)(b) 7

Constitutional Provisions

Wash. Const. art. I, § 7 3

Other Authorities

Kenneth Nuger, The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis, 32 Santa Clara L.Rev. 89, 95 (1992) 14

A. RESTATEMENT OF THE ISSUE

Whether the superior court correctly vacated the order permitting random, suspicionless searches of respondent while on probation for a misdemeanor offense.

B. STATEMENT OF THE CASE

On June 11, 2014, Respondent Brittanie Olsen pled guilty in Jefferson County District Court to one count of driving under the influence in violation of RCW 46.61.502, a misdemeanor offense. CP 5. The court imposed a sentence of 364 days, with 334 days suspended. As a condition of her suspended sentence, the court ordered that she not consume alcohol, marijuana, or non-prescribed drugs. CP 5. Over defense objection, the sentencing court ordered Olsen to submit to "random urine analysis screens … to ensure compliance with conditions regarding the consumption of alcohol and controlled substances." RP 8-10; CP 5.

Olsen appealed, arguing that the random UA provision subjected her to unconstitutional searches in violation of the Fourth Amendment and article I, section 7, of the Washington Constitution. CP 7. Olsen noted that Washington courts have long held that a warrantless search of a probationer must be based on a well-founded suspicion that the

probationer has violated a condition of his or her sentence. CP 9. Olsen argued that because random urine testing does not comport with this requirement, the condition is unconstitutional. CP 10.

The State responded, citing provisions of the Sentencing Reform Act and cases interpreting those provisions. It argued that random urine testing is a monitoring tool, rather than a condition of community placement, which is authorized by the SRA. CP 12-13. In reply, Olsen argued that the SRA applies only to felony offenders and thus does not control in this case. CP 14-15.

On October 14, 2014, the Jefferson County Superior Court entered a Memorandum Opinion and Order vacating the district court sentence and directing the district court to resentence Olsen without the requirement that she submit to random urine tests. CP 29-32. The court noted that the SRA does not apply to misdemeanor offenders and thus the cases and statutes cited by the State were inapplicable. CP 30. The court cited case law holding that a warrantless search of a probationer requires a well-founded suspicion that a probation violation has occurred, and the collection of biological samples is a search under the state and federal constitutions. CP 30. Because the sentencing provision for random urine testing would permit a warrantless search of Olsen without any well-

founded suspicion of sentence violation, the provision was not constitutionally permitted. CP 30-31.

The superior court denied the State's motion for reconsideration. CP 54-55. This Court granted the State's motion for discretionary review.

D. ARGUMENT

THE ORDER FOR RANDOM, SUSPICIONLESS SEARCHES VIOLATES OLSEN'S CONSTITUTIONAL RIGHTS, AND THE SUPERIOR COURT PROPERLY VACATED IT.

Both article I, section 7 of the Washington constitution and the Fourth Amendment to the federal constitution protect individuals from warrantless searches. Our state constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I, § 7. "It is by now axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment." State v. Parker, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). While article I, section 7 encompasses those legitimate expectations of privacy protected by the Fourth Amendment, its scope is not limited to subjective expectations of privacy. Its broader protection encompasses "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984); Parker, 139 Wn. App. at 493-94. The emphasis of article

1, section 7 is on protecting the individual's right to privacy, while the emphasis of the Fourth Amendment is on curbing governmental actions. State v. Rose, 146 Wn. App. 439, 455, 191 P.3d 83 (2008); State v. Lucas, 56 Wn. App. 236, 240, 783 P.2d 121 (1989).

a. **It is well established under Washington law that a probationer is not subject to search absent a well-founded suspicion of a probation violation.**

With a few narrowly drawn exceptions, a warrantless search is unreasonable per se. Rose, 146 Wn. App. at 455 (citing State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999)). One such exception is recognized for probationers. Because they have a diminished expectation of privacy, a warrant based on probable cause is not required for search of their persons, homes, or effects. Instead, probationers are subject to search based on a well-founded suspicion that a probation violation has occurred. State v. Massey, 81 Wn. App. 198, 200, 913 P.2d 424 (1996); Lucas, 56 Wn. App. at 243; State v. Patterson, 51 Wn. App. 202, 204-05, 752 P.2d 945 (1988).

In Massey, the sentencing order required Massey to submit to testing and other searches by a community corrections officer to monitor compliance with his conditions of community placement. The order did not explicitly state that the searches must be based on reasonable suspicion, and Massey appealed. Massey, 81 Wn. App. at 199-200. The

Court of Appeals held that the challenge was not ripe for review, because Massey had not been charged with violating the order. The court also reiterated the recognized exception to the warrant requirement for probationers, noting that the search of a probationer is reasonable if an officer has a well-founded suspicion that a probation violation has occurred. While the trial court was not required to include reference to that standard in its sentencing order, the reasonable suspicion standard would apply to any searches conducted pursuant to the order: "We note that, regardless of whether the sentencing court includes such language in its order, the standard for adjudicating a challenge to any subsequent search remains the same: Searches must be based on reasonable suspicion." Massey, 81 Wn. App. at 425-26.

The challenged order in this case provides that "random urine analysis screens will be used to ensure compliance with conditions regarding the consumption of alcohol and controlled substances". CP 5. It is well recognized that the collection and testing of biological samples, such as urinalysis, is a search implicating constitutional protections. York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 307, 178 P.3d 995 (2008); Rose, 146 Wn. App. at 455.

In Massey, as in this case, the court authorized searches to monitor compliance with conditions of community placement. The order in

Massey could be applied without violating constitutional rights by requiring reasonable suspicion of a probation violation to conduct a search. Here, on the other hand, the challenged order specifically eliminates the reasonable suspicion requirement, stating that Olsen is subject to random UAs. Because searches of probationers must be based on a well-founded suspicion of probation violation to pass constitutional muster, the superior court correctly struck this provision from Olsen's sentencing order.

Citing RCW 3.66.067, the State argues that the district court has authority and discretion to impose random urine screens as a condition of probation. Br. of App. at 2. That statute provides that the district court may suspend a portion of the defendant's sentence, place the defendant on probation, and prescribe conditions of probation. RCW 3.66.067. Olsen has not challenged the court's authority to prohibit the consumption of drugs and alcohol or to order her to submit to searches to monitor her compliance. Those searches must still comport with constitutional protections, however. As the Court of Appeals recognized in Massey, searches of probationers must be based on reasonable suspicion. Massey, 81 Wn. App. at 426. The district court's order specifically eliminated this constitutional standard, providing that Olsen would be searched randomly.

Nothing in the statute gives the district court discretion to order searches that violate this constitutional standard.

The State also relies on RCW 46.61.5055. Br. of App. at 3-4. That statute sets out a penalty schedule for those convicted of driving under the influence. It provides for monitoring by use of ignition interlock devices and authorizes the court to order 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). This statute does not speak to searches via the collection of biological samples or the standards for such searches. While the district court had authority to order biological searches to monitor compliance with the conditions of probation, those searches must still be based on reasonable suspicion.

The State further argues that, since the district court has broader sentencing discretion than the superior court, which is constrained by the Sentencing Reform Act, and since random UAs have been permitted under the SRA, it follows that the district court may require random UAs to monitor compliance with probation conditions. Br. of App. at 10-13. First, the SRA applies only to felony sentences. State v. Deskins, 180 Wn.2d 68, 78, 322 P.3d 780 (2014); State v. Langford, 67 Wn. App. 572, 587-88, 837 P.2d 1037 (1992). Moreover, the cases relied on by the State

address only the statutory authority of the court under the SRA to order specific conditions of probation and the court's ability to enforce those conditions. See State v. Riles, 135 Wn.2d 326, 340, 957 P.2d 655 (1998) (addressing community custody conditions under SRA); State v. Vant, 145 Wn. App. 592, 603-04, 186 P.3d 1149 (2008) (condition prohibiting consumption of controlled substances permitted under RCW 9.94A.700(4)(c), and ability to enforce condition stems from statutory authority); State v. Acevedo, 159 Wn. App. 221, 231-34, 248 P.3d 526 (2010) (court had authority under first-time offender provision of SRA to impose community custody conditions and monitor compliance). The cases do not address whether random searches violate the constitutional protections of probationers, and they therefore do not help resolve the constitutional issue presented in this case.

b. **Washington courts have not adopted a special needs exception to the state constitution's warrant requirement.**

Finally, the State argues that random UAs are permitted under a special needs exception to the warrant requirement. Br. of App. at 13-17. The Washington Supreme Court has not recognized a special needs exception under article I, section 7. York, 163 Wn.2d at 314 ("we have not created a general special needs exception or adopted a strict scrutiny type analysis that would allow the State to depart from the warrant

requirement whenever it could articulate a special need beyond the normal need for law enforcement.")

In York, the Washington Supreme Court considered whether random and suspicionless drug testing of student athletes violates article I, section 7 of the Washington State Constitution. York, 163 Wn.2d at 299. School district policy allowed random drug testing of all student athletes, and the school district claimed that suspicionless searches were constitutional under a "special needs" exception to the warrant requirement. Although such an exception has been recognized under the Fourth Amendment, the Supreme Court declined to adopt a special needs exception to the Washington State Constitution. Id. at 299, 303.

The Court recognized that there are "stark differences" between the Fourth Amendment and article I, section 7. While exceptions to Fourth Amendment protections are based on reasonableness, "our state constitutional analysis hinges on whether a search has 'authority of law'—in other words, a warrant." York, 163 Wn.2d at 305-06. Determining whether article I, section 7 provides greater protection in a particular context requires a two-part analysis. First, the court determines whether the state action constitutes a disturbance of private affairs. Second, if a privacy interest is disturbed, the court must determine if authority of law justifies the intrusion. The authority of law required by the constitution is

a valid warrant, "limited to a few jealously guarded exceptions." York, 163 Wn.2d at 306.

Applying this analysis, the Supreme Court first determined that collection of urine samples intrudes on the private affairs of the subject. The Court noted that both federal and state courts have held that interference in bodily functions constitutes a search, and the state constitution offers heightened protection for bodily functions. York, 163 Wn.2d at 307 (citing Robinson v. City of Seattle, 102 Wn. App. 795, 813 n. 50, 10 P.3d 452 (2000) (citing Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 617, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989)); In re Juveniles A, B, C, D, E, 121 Wn.2d 80, 90, 847 P.2d 455 (1993); State v. Olivas, 122 Wn.2d 73, 83, 856 P.2d 1076 (1993); State v. Meacham, 93 Wn.2d 735, 738, 612 P.2d 795 (1980); State v. Curran, 116 Wn.2d 174, 184, 804 P.2d 558 (1991)).

The Court noted that students have a lower expectation of privacy because of the nature of the school environment. Courts have nonetheless required reasonable and individualized suspicion to protect students from arbitrary searches while giving officials sufficient leeway to conduct their duties. York, 163 Wn.2d at 308. Even though students have a lower expectation of privacy, they maintain a genuine and fundamental privacy

interest in controlling their bodily functions, and a UA is a significant intrusion on a student's fundamental right of privacy. Id.

Because the Court determined that interfering with student athletes' bodily functions disturbs their private affairs, the court next considered whether the school district had the necessary authority of law to require random drug tests. The Court recognized that, under Fourth Amendment analysis, the special needs exception to the warrant requirement allows search and seizure when there are "special needs beyond the normal need for law enforcement and the warrant and probable-cause requirement [are] impracticable." Id. at 311 (internal quotes omitted). "For there to be a special need, not only must there be some interest beyond normal law enforcement but also any evidence garnered from the search or seizure should not be expected to be used in any criminal prosecution against the target of the search or seizure." Id. (citing Skinner, 489 U.S. 602).

The Court noted that when suspicionless searches have been allowed in Washington, it was either based entirely on federal law or in the context of criminal investigations or dealing with prisoners. See e.g., Juveniles, 121 Wn.2d at 90 (Court upheld mandatory HIV tests of convicted sexual offenders); Olivas, 122 Wn.2d at 83 (applying 4th Amendment analysis, court upheld blood tests of convicted felons without

individualized suspicion); State v. Surge, 160 Wn.2d 65, 156 P.3d 208 (2007) (collection of DNA sample from convicted felons was not intrusion into private affairs). The York court distinguished these cases from the testing of student athletes, noting that a felon has already been convicted beyond a reasonable doubt of a serious crime. York, 163 Wn.2d at 315. The Court declined to adopt a special needs exception under the state constitution in the context of randomly drug testing student athletes. Id. at 316.

Here, as in York, the question is whether random suspicionless searches are permitted under the Washington Constitution. The context in this case is misdemeanor probationers. Like students, probationers have a reduced expectation of privacy. They nonetheless maintain a fundamental interest in control over their bodily functions, so the challenged order allowing random searches intrudes on Olsen's private affairs. See York, 163 Wn.2d at 335 (J.M. Johnson, J., concurring) (requiring a suspicionless urinalysis is "an indisputable invasion of privacy").

The next question is whether there is authority of law for random, suspicionless searches. The State advocates for a special needs exception. While suspicionless searches of felons have been upheld as noted above, there is no justification for extending this exception to misdemeanor probationers. Exceptions to the warrant requirement of article I, section 7

must be narrowly applied. York, 163 Wn.2d at 323 (Madsen, J., concurring). Felons are subject to a different sentencing scheme; they have been convicted of serious crimes and therefore pose a greater threat to the community. These considerations may justify a special needs exception for felons as distinguished from misdemeanants. See e.g. Surge, 160 Wn.2d at 82 (Chambers, J., concurring) (concern that extension of RCW 43.43.754 DNA testing requirement to misdemeanants may violate article I, section 7).

To establish a special needs exception for the suspicionless searches ordered in this case, the State has to show that a special need outside of law enforcement justifies the significant intrusion on the fundamental right of privacy of someone on probation for only a misdemeanor. The State focuses on the need to supervise and ensure compliance with probation conditions in order to protect the community. Br. of App. at 16. Because protecting the community from misdemeanants released on probation is not outside the normal need for law enforcement, however, it does not justify departure from the well-founded suspicion standard. See Rose, 146 Wn. App. at 456 (citing United States v. Scott, 450 F.3d 863 (9th Cir.2006)(protecting community from criminal defendants released pending trial was not special need outside normal need for law enforcement)). See also Ferguson v. City of

Charleston, 532 U.S. 67, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001) (no special need for nonconsensual drug testing of pregnant hospital patients where results are conveyed to law enforcement); City of Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) (no special need for suspicionless highway checkpoint stops where primary purpose was crime control).

The State's attempt to balance the needs of the community with the need for a suspicion-based search standard is misleading. "[B]alancing tests without carefully prescribed limits can be inherently dangerous because 'when an individual's suspected harmful conduct is balanced against societal interests, individual privacy losses will appear negligible in relation to government's efforts to protect society.'" Olivas, 122 Wn.2d at 105 n. 88, 856 P.2d 1076 (Utter, J., concurring) (quoting Kenneth Nuger, The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis, 32 Santa Clara L.Rev. 89, 95 (1992)). Thus, suspicionless searches can be justified under a special needs exception only if the well-founded suspicion standard is unworkable. See Juveniles, 121 Wn.2d at 102, 847 P.2d 455 (Utter, J., concurring in part, dissenting in part).

Certainly, as the State contends, random, suspicionless UAs are effective in ensuring compliance with probation terms. Br. of App. at 16.

But the State has not shown, as it must, that the well-founded suspicion standard is unworkable. As the State acknowledges, not only are probationers required to maintain regular contact with probation officers, but probation officers are also able to conduct random visits with probationers. If any of these encounters gives rise to a suspicion that the probationer is using drugs or alcohol, a UA can be ordered. "Drug and alcohol use often involves observable manifestations that would supply the particularized suspicion necessary to support a search." York, 163 Wn.2d at 325 (Madsen, J., concurring). This already-relaxed standard of suspicion is sufficient to meet the State's need while protecting the misdemeanor probationer's right to privacy.

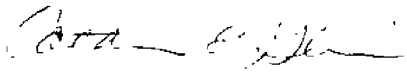
Washington Courts have not adopted a special needs exception to Washington Constitution. The only exception to the warrant requirement applicable here is the exception based on a probationers' limited expectation of privacy, which allows a search based on a well-founded suspicion rather than probable cause. The order for random, suspicionless UAs in this case violates Olsen's fundamental right to privacy, and the superior court correctly vacated it.

E. CONCLUSION

For the reasons addressed above, this Court should affirm the vacation of the sentencing order permitting random, suspicionless searches.

DATED August 26, 2015.

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

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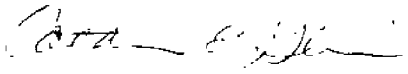

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