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NO. 93315-4 *4/3*

IN THE SUPREME COURT OF WASHINGTON

BRITTANIE J. OLSEN,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

Court of Appeals No. 46886-7-II
Jefferson County Superior Court No. 14-1-00120-2

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 ORIGINAL

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

I. STATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT.....3

1. The Trial Court has the constitutional authority to order compliance monitoring to enforce provisions of its judgment and sentence.....3

a)The collection of a probationer’s urine to ensure compliance with a court order is not a disturbance of a probationer’s private affairs.....4

b) The collection of urine to ensure compliance with a judgment and sentence constitutes a special need under the constitution, which justifies a departure from the typical rights and procedures associated with search and seizure7

c)Assuming, *arguendo*, that the collection of a probationer’s urine is a search, it is done *with* the authority of law.....10

d) An individual’s right to due process means that certain rights can suspending or terminated following a finding of guilt.....12

e)The Petitioner’s arguments rest on cases that are inapplicable to the present matter.....13

IV. CONCLUSION.....15

TABLE OF AUTHORITIES

Washington Supreme Court Cases

1. *In re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 847 P.2d 455 (1993).....6
2. *State v. Cayenne*, 165 Wn.2d 10, 195 P.3d 521 (2008).....11
3. *State v. Chenowith*, 160 Wn.2d 454, 158 P.3d 595 (2007).....3, 10
4. *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999).....3, 10
5. *State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998).....11
6. *State v. Strasburg*, 60 Wn. 106, 110 P. 1020 (1910).....12
7. *State v. Surge*, 160 Wn.2d 65, 156 P.3d 208 (2007).....5, 6, 8
8. *State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751, (2009).....8
9. *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994).....3, 5
10. *State v. White*, 97 Wn.2d 92, 640 P.2d 1061(1982).....3
11. *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 178 P.3d 995 (2008).....4, 5, 12, 13

Washington Court of Appeals Cases

1. *Robinson v. City of Seattle*, 102 Wn. App. 795, 10 P.3d 452 (2000)...5
2. *State v. Anderson*, 151 Wn. App. 396, 212 P.3d 591 (2009).....13
3. *State v. Lampman*, 45 Wn. App. 228, 724 P.2d 1092 (1986).....5, 7
4. *State v. Lucas*, 56 Wn. App. 236, 783 P.2d 121 (1989).....4
5. *State v. Massey*, 81 Wn. App. 198, 913 P.2d 424 (1996).....12, 13
6. *State v. Olsen*, 194 Wn. App. 264, 374 P.3d 1209 (2016).....2, 3, 5
7. *State v. Parris*, 163 Wn. App. 110, 259 P.3d 331 (2011).....4
8. *State v. Reichert*, 158 Wn. App. 374, 242 P.3d 44 (2010).....4, 11
9. *State v. Rose*, 146 Wn. App. 439, 191 P.3d 83 (2008).....5
10. *State v. Vant*, 148 Wn. App. 592, 186 P.3d 1149 (2008).....11

Federal Cases

1. *Griffin v. Wisconsin*, 483 U.S. 868,, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987).....8
2. *Kaley v. United States*, --U.S.--, 134 S. Ct. 1090, 188 L.Ed.2d 46 (2014).....10
3. *Skinner v. Railway Labor Executives' Assn'n*, 489 U.S. 602, 109 S. Ct. 1402, 103 L.Ed.2d 639 (1989).....8
4. *U.S. v. Duff*, 831 F.2d 176, (9th Cir. 1987).....8, 9

SUPPLEMENTAL BRIEF OF RESPONDENT

State of Washington v. Brittanie J. Olsen, No. 93315-4

Statutes

1. RCW 3.66.067.....11
2. RCW 9A.20.021.....12
3. RCW 9.41.040.....12
4. RCW 9.94A.....13
5. RCW 9.94A.631.....13
6. RCW 10.95.030.....12
7. RCW29A.08.515.....12
8. RCW 46.61.502.....7
9. RCW 66.44.270.....9

Washington State Constitution

1. Article 1, section 7.....1, 2, 3, 8, 10

United States Constitution

1. Fourth Amendment.....7, 8, 10

I. STATEMENT OF THE ISSUES

1. Whether the trial court exceeded the scope of authority of article 1, section 7 of the Washington State Constitution, when it found an individual guilty of driving under the influence and subsequently ordered her, as part of her judgment and sentence, to not consume alcohol or non-prescribed drugs and ordered that this provision of her sentence be enforced with random urinalysis?

II. STATEMENT OF THE CASE

On June 11, 2014, the Petitioner entered a plea of guilty to one count of Driving Under the Influence for an act that took place on May 13, 2014. (CP at 5). The court having found that the plea was knowingly, intelligently, and voluntarily made, found the Petitioner guilty and sentenced her accordingly. (RP at 5). The Petitioner was given a sentence of 364 days of confinement, with 334 days suspended. (CP at 5). The suspension was to last for 60 months, during which time the Petitioner was to be on supervised probation for 24 months. *Id.*

Conditions of her probation included, but were not limited to, abstaining from the consumption of alcohol or non-prescribed drugs. *Id.* A parenthetical, next to this provision of her Judgment and Sentence explained that this provision of her sentence would be enforced by random urinalysis. *Id.* The Petitioner's trial counsel objected to this aspect of her sentence, stating that he thought the random nature of the urinalysis was a

violation of the Petitioner's rights. (CP at 8-10). The trial court denied the Petitioner's objection and ordered that she be subject to random urinalysis to ensure compliance with her judgment and sentence. *Id.*

The Petitioner then sought review of the case in the superior court pursuant the Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ). The superior court reversed the trial court's requirement that the Petitioner be subject to random urinalysis as a condition of her probation for driving under the influence. (CP at 32). Specifically, the superior court held that the "random" nature of the urinalysis violated the Petitioner's right to be free of warrantless searches and seizures absent a well-founded suspicion. (CP 30-32).

The State sought and was granted discretionary review with Division II of the Washington Court of Appeals. On May 24th, 2016, the Court of Appeals entered a published decision reversing the superior court and reinstating the Petitioner's original sentence. *State v. Olsen*, 194 Wn. App. 264, 274, 374 P.3d 1209 (2016). Within the opinion, the Court of Appeals held that 1) the district court had the authority pursuant to statute to impose random urinalysis on the Petitioner as part of her judgment and sentence, and 2) that random urinalysis did not violate the Petitioner's rights under article 1, section 7, of the Washington State Constitution because a DUI probationer does not retain a privacy interest in his or her urine to prevent compliance monitoring. *Id.* at 266-67.

The Petitioner then sought and was granted review with the Washington Supreme Court. *State v. Olsen*, 186 Wn.2d 1017, 383 P.3d 2010 (2016).

III. ARGUMENT

1. The Trial Court has the constitutional authority to order compliance monitoring to enforce provisions of its judgment and sentence.

Unlike the Fourth Amendment to the United States Constitution, article 1, section 7 of the Washington Constitution affirmatively recognizes a right to privacy. *State v. Young*, 123 Wn.2d 173, 179-80, 867 P.2d 593 (1994). Consequently, it is understood that the Washington Constitution may provide “[g]reater protection” than the United States Constitution. *Id.* at 178-79 (citing *State v. White*, 97 Wn.2d 92, 108-09, 640 P.2d 1061(1982)). In its entirety, the operative section reads “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999). Analysis of article 1, section 7 is a two-step process, first the courts determine whether an intrusion into one’s private affairs has taken place, second, if an intrusion has occurred the courts determine whether it was done with the authority of law. *State v. Chenowith*, 160 Wn.2d 454, 463, 158 P.3d 595 (2007).

Probationers, unlike others who exist outside the scope of the criminal justice system, have a diminished expectation and right to privacy. *State v. Parris*, 163 Wn. App. 110, 117, 259 P.3d 331 (2011). This is because “they are persons whom a court has sentenced to confinement but who are simply serving their time outside the prison walls; therefore, the State may supervise and scrutinize a probationer or parolee closely”. *Id.* (citing *State v. Lucas*, 56 Wn. App. 236, 240, 783 P.2d 121 (1989)). The reduced expectation of privacy is a result of concerns for public safety and the effective operation of government. *See Parris*, 163 Wn. App. at 118. Generally, one does not need a warrant founded on probable cause to search a probationer because a probationer is someone that has been sentenced to confinement but released on probation and therefore remains “in the custody of the law.” *State v. Reichert*, 158 Wn. App. 374, 386, 242 P.3d 44 (2010).

- a) The collection of a probationer’s urine to ensure compliance with a court order is not a disturbance of a probationer’s private affairs

Generally, Washington courts have held that the collection of urine samples constitutes a search. *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 307, 178 P.3d 995 (2008). As a search, the suspicionless collection of urine samples has been held unconstitutional. *See generally*,

*State v. Rose*¹, 146 Wn. App. 439, 455, 191 P.3d 83 (2008), *Robinson v. City of Seattle*², 102 Wn. App. 795, 812, 10 P.3d 452 (2000), and *York*³, 163 Wn.2d at 307. However, Washington courts do not appear to have addressed whether the random, suspicionless collection of urine samples of probationers constitutes an impermissible search under the gamut of the Washington State Constitution. *See Olsen*, 194 Wn. App. 270.

A person's privacy rights "may vary based on that person's status as an arrestee, pretrial detainee, prisoner, or probationer". *State v. Surge*, 160 Wn.2d 65, 74, 156 P.3d 208 (2007). In *Surge*, the Court observed that an individual's status as a convicted felon meant that their privacy rights were "significantly reduced" when compared to that of an "ordinary citizen." *Id.* at 76. As with convicted felons, misdemeanants on probation also have a significantly reduced expectation of privacy, which in turn means a reduced right of privacy. *State v. Lampman*, 45 Wn. App. 228, 233, 724 P.2d 1092 (1986). The reduced expectation of privacy means that searches of a probationer must be reasonable,⁴ which itself must be based on a well founded suspicion. *Id.* However, this analysis is only applicable

¹ In *Rose*, the Court of Appeals held that weekly suspicionless urinalysis of defendants on pre-trial release was unconstitutional.

² In *Robinson*, the court held that suspicionless pre-employment urinalysis testing was unconstitutional for job that do not have direct public safety concerns.

³ In *York*, the court held that random, suspicionless, urinalysis for student athletes is unconstitutional.

⁴ Normally, the privacy protections afforded by article 1, section 7 do not turn on reasonableness, but rather on whether the search was conducted with the authority of law, unlike the fourth amendment to the United States Constitution. *See Young*, 123 Wn.2d at 181.

if the state action constitutes a search, which itself must necessarily be a disturbance of one's private affairs. *Surge*, 160 Wn.2d at 71.

Previously, the Washington Supreme Court has held that the post-conviction collection of certain bodily samples does not violate the state constitution because the collection itself was not a *search* as it did not violate the individual's right to privacy. *Surge*, 160 Wn.2d at 74. In *Surge*, the defendant(s) challenged the post-conviction collection of a DNA sample. *Id.* at 70. The Washington Supreme Court held that the collection of DNA from individuals convicted of certain crimes was not a search because the post-conviction defendants no longer hold a privacy interest in their DNA. *Id.* at 74.

Similarly, the collection of blood for the purpose of conducting an HIV test for persons convicted of sex offenses does not violate the state constitution. *In re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 93, 847 P.2d 455 (1993). In *Juveniles*, the respondents challenged a law requiring the collection of blood samples for HIV testing from persons convicted of sex offenses. *Id.* at 84-85. The court denied the challenge observing that "for sex offenders in particular, their expectation of privacy in bodily fluids is greatly diminished because they have engaged in a class of criminal behavior which presents the potential of exposing others to the AIDS virus". *Id.* at 92-93. The court further noted that there was a "direct nexus between the criminal behavior and the government's action". *Id.* at 93.

In the present case the Petitioner has no expectation of privacy in her urine, which was to be collected to ensure that she did not violate the court's order that she not consume alcohol or non-prescribed drugs. While she was on probation she remained under "custody of the law" and was released on a suspended sentence rather than serve the whole sentence in confinement. As such, she did not have the same expectation of privacy as an "ordinary citizen". Furthermore, the scope of the court's action was narrow; it was tailored to monitoring a specific proscribed behavior that had a direct nexus with the Petitioner's previous criminal conduct. That conduct, included "class of behavior" that involved the consumption of alcohol⁵ or drugs. At this point, the Petitioner no longer held any privacy interest in her urine, meaning that the collection of it as challenged here did not constitute a "search."

- b) The collection of urine to ensure compliance with a judgment and sentence constitutes a special need under the United States Constitution, which justifies a departure from the typical rights and procedures associated with search and seizure

Under Washington law, probationers have a diminished right to privacy, meaning that warrantless searches must be reasonable. *Lampman*, 45 Wn. App. at 233. This is broadly similar to the protections of the Fourth Amendment to the United States Constitution, which forbids only *unreasonable* searches, contrasted with the full protections provided by

⁵ RCW 46.61.502

article 1, section 7 of the Washington State Constitution, which requires the “authority of law” for searches and seizures to be legal. *State v. Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751, (2009). Occasionally “a departure from traditional warrant and probable cause requirements may be justified if the government has a special need beyond normal law enforcement”. *Surge*, 160 Wn.2d at 79-80. The doctrine, know as *special needs*, turns on the reasonableness afforded by the Fourth Amendment. *Id.*

The special need can arise when the State’s conduct at issue is not necessarily to assist with prosecution but to prevent accident and casualties. *Skinner v. Railway Labor Executives’ Assn’n*, 489 U.S. 602, 620-21, 109 S. Ct. 1402, 103 L.Ed.2d 639 (1989). In *Skinner*, the Department of Transportation passed regulations requiring drugs and alcohol testing for individuals working on railroads. *Id.* at 602. The US Supreme Court held that such searches were permissible under the Fourth Amendment because the primary goal of the urinalysis was not prosecution, but the prevention of railroad accidents. *Id.* at 620-21. Thus under the Fourth Amendment there existed a special need to permit such testing that was beyond the normal need of law enforcement. *Id.* at 619-20.

Conducting random urinalysis on probationers is a *special needs* exception to the Fourth Amendment. *U.S. v. Duff*, 831 F.2d 176, 179 (9th Cir. 1987) (citing *Griffin v. Wisconsin*, 483 U.S. 868, 872-73, 107 S.Ct.

3164, 97 L.Ed.2d 709 (1987). However, the search itself must be reasonable and “must be based on the probation officer’s reasonable belief that the search is necessary to the performance of his or her duties.” *Id.*

The special needs exception applies to the present case because the Petitioner had the status of a probationer, searches of her person turned on reasonableness, not the authority of law. This placed her under the protection of the federal constitution where there exists a special needs exception. The present case is similar to *Skinner*, in that the court’s motivation for ordering the random urinalysis was one of safety, not prosecution. Indeed, at that point in time the Petitioner had *already* been prosecuted and the State is unaware of any laws that prohibit one from simply having alcohol or drugs in the bloodstream⁶ thereby removing the risk of subsequent additional prosecution. Indeed, federal appellate courts have held that random urinalysis for probationers *is* a special need under the Fourth Amendment and is permissible. Additionally, the protections of the Fourth Amendment in the form the exclusionary rule do not apply to probationary hearing, so while it is true that the Petitioner’s status as a probationer brings her, via the Fourth Amendment, into the framework of the special needs doctrine, it is also true that being a probationer under the Fourth Amendment means that the exclusionary rule does not apply.

⁶ One exception may exist, with other factors, under RCW 66.44.270(2)

- c) Assuming, *arguendo*, that the collection of a probationer's urine is a search, it is done *with* the authority of law

The Washington State Constitution prohibits government intrusions into one's private affairs without the "authority of law". *Chenowith*, 160 Wn.2d at 463. "Authority of law" is typically, but not exclusively, established with a search warrant issued upon probable cause. *Id.* at 465. Probable cause is a low legal threshold within the criminal justice system. *Kaley v. United States*, --U.S.--, 134 S. Ct. 1090, 1112, 188 L.Ed.2d 46 (2014) (CJ. Roberts dissenting). There also exists several exceptions to the warrant requirement; these include consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops. *Ladson*, 138 Wn.2d at 349.

A Judgment and Sentence also constitutes "authority of law". Like a search warrant, a judgment and sentence is a court order signed by a neutral magistrate. Unlike a search warrant, a judgment and sentence is executed after a criminal defendant has been afforded the opportunity to avail him or herself to the full due process guaranteed by law and is done in the presence of the defendant. This is contrasted with a search warrant, an *ex parte* court order that does not afford the subject of the search any input and consequently no due process. Furthermore, a search warrant stands on the factual basis of probable cause, one the lowest burdens of proof within the criminal justice system. A judgment and sentence on the

other hand is supported by a finding of guilt, either beyond a reasonable doubt at trial, or by plea with a sufficient factual basis to support such a finding. Either way, the factual basis upon which a judgment and sentence stands greatly exceeds that of a search warrant. Therefore, it logically follows that if a search warrant constitutes “authority of law” then a judgment and sentence with its much stronger factual and legal foundation must also constitute “authority of law”.

The result is that the court’s order that the Petitioner submit to random urinalysis could not have been without the “authority of law” because it was the law. And, logically follows that the court, having the authority to order this condition of probation⁷ also had the authority to monitor and enforce⁸ it. (*State v. Cayenne*, 165 Wn.2d 10, 14, 195 P.3d 521 (2008) (holding that courts exercise personal jurisdiction over defendants and have the authority to enforce crime-related prohibitions).

- d) An individual’s right to due process means that certain rights can be suspended or terminated following a finding of guilt

Following a finding of guilt, individuals can be deprived of certain rights. *Reichert*, 158 Wn. App. 386-87. These can include but are not limited to freedom of movement, loss of property, one’s right to a firearm,

⁷ RCW 3.66.067

⁸ See also *State v. Riles*, 135 Wn.2d 326, 341-46, 957 P.2d 655 (1998) (abrogated on other grounds) (holding that courts have the authority to impose monitoring conditions of sentence); *State v. Vant*, 148 Wn. App. 592, 604, 186 P.3d 1149 (2008) (holding that the trial court did not abuse its discretion when it ordered the defendant to abstain from alcohol and to submit to random testing to ensure compliance).

the right to vote, and in some circumstances even one's life. RCW §§ 9A.20.021, 9.41.040, 29A.08.515, 10.95.030. As long as one has had due process of law, rights can be suspended or terminated indefinitely. *See State v. Strasburg*, 60 Wn. 106, 112, 110 P. 1020 (1910).

As inviolate as constitutional rights appear to be, they are all subject to due process of law. The Petitioner, as a probationer, had already had her due process. Her right to be free of government intrusion into her bodily fluids was legally suspended for the duration of her probation. Having had her due process (the appellate process notwithstanding) there is no residual constitutional protection for the Petitioner to avail herself to. Therefore, there cannot have been a violation of her right to privacy as the right had effectively been suspended.

e) The Petitioner's arguments rest on cases that are inapplicable to the present matter

Petitioner's brief for discretionary review emphasizes the cases of *State v. Massey* and *York v. Wahkiakum Sch. Dist. No. 200* to support her argument that her right to privacy was violated by the trial court. (Petitioner's Brief at 4; 6-8). However, neither case is legally or factually applicable.

A well-founded suspicion must exist to be able to search a probationer or parolee on conditions of community custody. *State v. Massey*, 81 Wn. App. 198, 200, 913 P.2d 424 (1996). In *Massey*, the Court

of Appeals held that a condition of community custody requiring that the defendant be subject to searches was not ripe for review because the defendant had not yet been injured by the court's order. *Id.* The court added, in *dicta*, that, if it was to decide on the merits, statute⁹ requires a well-founded suspicion to justify a search of an individual on community custody. *Id.* at 200-01.

Student athletes cannot be required to provide suspicionless urine samples in order to monitor compliance with a school policy that student athletes not consume drugs or alcohol. *York*, 163 Wn.2d at 308. In so holding, the Court in *York* was particularly troubled by the lack of individualized suspicion being applied to the students in the case. *Id.* at 314-15.

Neither case is legally or factually applicable. In *Massey*, the defendant was on community custody for felony drug delivery. As result his sentence fell under the Sentencing Reform Act¹⁰ (SRA) and was therefore subject to affirmative grant of privacy by the state legislature¹¹. Misdemeanor convictions exist outside the SRA and the sentencing courts retain their broad discretion in determining sentences¹². The grant of privacy that the defendant in *Massey* had does not apply to the Petitioner.

⁹ RCW 9.94A.631 (recodified from 9.94A.195)

¹⁰ RCW 9.94A

¹¹ RCW 9.94A.631

¹² *State v. Anderson*, 151 Wn. App. 396, 402, 212 P.3d 591 (2009).

The students in *York*, unlike the Petitioner, have not been convicted of any offenses. They have not had due process and have not come under the court's jurisdiction. Consequently they have not had their rights suspended or diminished unlike individuals involved in the criminal justice system as is the central point to the case at present.

IV. CONCLUSION

For the aforementioned reasons the Respondent respectfully requests that the Court affirm the Court of Appeals decision.

Dated this 23 day of December, 2016

Respectfully submitted,

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I certify under the penalty of perjury of the law of the State of Washington that the foregoing is true and correct, signed on the 23rd day of December, 2016 in Port Angeles, WA.



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Please see the attached Supplemental Brief of the Respondent.

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