

No. 97452-7

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

DON WESLEY WINTON,

Petitioner,

vs

STATE OF WASHINGTON,

Respondent.

NO. 52371-0 II

REPLY TO THE RESPONSE OF
THE INDETERMINATE SENTENCE
REVIEW BOARD

COMES NOW the Petitioner, Don Wesley Winton, by and through his attorney, and submits this Reply to the Response of the Indeterminate Review Board.

Following the filing of this petition, the Indeterminate Sentence Review Board (hereinafter "the Board") modified Mr. Winton's conditions of release, eliminating geographic restrictions which barred his entry into the City of Seattle, Clallam County, Skamania County, and the State of Oregon north of Highway 20. As a result, the only remaining issues to be addressed in this matter are (1) whether the geographic restriction prohibiting Mr. Winton from entering Clark County unconstitutionally restricts his travel, and (2) whether the requirement that Mr. Winton submit to urinalysis testing constitutes an unconstitutional intrusion into Mr. Winton's private affairs.

1 A. Geographic Restriction

2 The Board-imposed restriction on traveling to or through Clark County is not narrowly
3 tailored to serve a compelling governmental interest. In determining whether a geographic
4 restriction impermissibly infringes upon an offender's constitutional right to travel, the court
5 should consider the five factors set forth in *State v. Schimelpfenig*, 128 Wn. App. 224, 228-29,
6 115 P 3d 338 (2005):

7 (1) whether the restriction is related to protecting the safety of the
8 victim or witness of the underlying offense; (2) whether the
9 restriction is punitive and unrelated to rehabilitation; (3) whether
10 the restriction is unduly severe and restrictive because the
11 defendant resides or is employed in the area from which he is
12 banished; (4) whether the defendant may petition the court to
temporarily lift the restriction if necessary; and (5) whether less
restrictive means are available to satisfy the State's compelling
interest.

13 The Board fails to identify a compelling governmental interest to justify the imposition
14 of a travel ban. The only basis the Board provides in its Response for the county-wide
15 restriction is that the trial court imposed no contact orders with respect to the two complaining
16 witnesses, who now presumably reside in Clark County. There is no indication that Mr.
17 Winton has ever attempted contact in violation of those orders, nor has the Board presented any
18 reason for believing Mr. Winton presents a danger of violating the order.

19 Even if there was a compelling governmental interest at stake, the travel restriction
20 imposed by the Board is overly broad to meet that interest. As the Board noted, there are no
21 contact orders in place. The court in *Schimelpfenig* found that a prohibition on residing within
22 the county where witnesses and family members of the murder victim were living was
23 impermissibly broad, as the no contact orders were sufficient to serve the compelling
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1 governmental interest at stake, to-wit: protecting those individuals from being reminded of the
2 defendant and from a possible continuing threat. *Id.* at 229. Similarly, in *State v Simms*, 152
3 Wn. App. 526, 216 P.3d 470 (2009), the court held that a travel ban prohibiting the Defendant
4 from entering the county where the victim resided except when traveling through the county to
5 another locale, which was imposed for the purpose of protecting the mental well-being of the
6 victim and her family, was unconstitutionally overbroad as more narrowly tailored restrictions
7 would have accomplished that purpose. The Board fails to show that the no-contact orders in
8 the present case are insufficient to serve the governmental interest of prohibiting Mr. Winton
9 from contacting a complaining witness.
10

11 The Board argues that the travel restriction at issue in this case is not a “true
12 banishment.” However, the order at issue in this case is more restrictive than the order that
13 was deemed unconstitutional in *Schimelpfenig*. In that case, the banishment order did not
14 prohibit travel through or within the county; it merely prohibited the Defendant from residing
15 in Clark County. *Id.* It is also more restrictive than the order deemed unconstitutional in
16 *Simms*, which specifically authorized travel through the county. *Simms*, 152 Wn. App. 526.

17 Moreover, the Board argues that Mr. Winton has a mechanism for requesting that the
18 order be temporarily lifted. However, while Mr. Winton may be able to petition the Board for
19 temporary relief from the order, and employ its limited internal appeal procedure, he is not able
20 to seek redress with the *court*. The fourth factor of the non-exhaustive list the *Schimelpfenig*
21 court set forth to determine whether or not a travel ban is unconstitutional concerns an accused
22 person’s right to seek redress in the court, not merely an internal review process. *Id.* at 226.
23 An internal review procedure hardly assures Mr. Winton’s constitutional rights will be
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1 protected. This is demonstrated by the fact that the Board failed to acknowledge, when Mr.
2 Winton employed this internal review procedure, that its other travel restrictions, prohibiting
3 him from traveling to northern Oregon, Seattle, and Clallam Counties, were unconstitutional
4 until shortly before it responded to Mr. Winton's Personal Restraint Petition.

5
6 B. Urine Collection and Testing

7 The Board argues that it is entitled, without any suspicion of wrongdoing or nexus to
8 the offense behavior, to collect Mr. Winton's bodily fluids and conduct an analysis of those
9 fluids. Our state recognizes that nonconsensual removal of bodily fluids is invasive and
10 implicates privacy interests protected by WA Const. Art. 1, Sec. 7. *State v. Olsen*, 189 Wn 2d
11 118, 124, 399 P 3d 1141 (2017); *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 307-
12 08, 178 P 3d 995 (2007). Such an invasion requires authority of law. *Olsen*, 189 Wn 2d at
13 126. While offenders have a reduced expectation of privacy, a probationer is not subject to
14 suspicionless exploratory searches; a warrantless search of a probationer or parolee must be
15 supported by a well-founded suspicion that a violation has occurred, and there must be a nexus
16 between the search and the well-founded suspicion. *Olsen*, 189 Wn 2d at 134; *State v. Lucas*,
17 56 Wn. App. 236, 243-44, 783 P.2d 121 (1989); *State v. Parris*, 163 Wn. App. 110, 119, 259
18 P.3d 331 (2011). The State fails to acknowledge the Petitioner's privacy interests which are
19 implicated by random, suspicionless collection and analysis of his bodily fluids.

20
21 The Judgement and Sentence does not authorize such an invasion into Mr. Winton's
22 private affairs. The court's order is clear that Mr. Winton is not prohibited from consuming
23 alcohol, marijuana, or other legal substances. In addition to the numerous sections of the
24 Judgement and Sentence where the court either declined to impose drug and alcohol related
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1 restrictions or urinalysis testing, the court specifically incorporated the terms of the plea agreement
2 into the Judgement and Sentence, thereby adopting those provisions as a part of the court's
3 sentence. The incorporated plea agreement clearly indicates that the court did not intend to restrict
4 alcohol or drug use, nor did it intend to require the defendant to submit to urinalysis testing. The
5 only restriction the court neglected to scratch out in the boiler plate is the requirement that Mr.
6 Winton "not consume controlled substances except pursuant to lawfully issued prescriptions."
7 Judgement and Sentence at pp. 7. This provision merely requires that Mr. Winton comply with
8 the law, as everyone else in the State of Washington is required to do.¹
9

10 Even if the Judgement and Sentence did authorize intrusive suspicionless searches, the
11 Judgement and Sentence cannot serve as the authority of law to justify a warrantless search unless
12 the search is narrowly tailored to serve a compelling governmental interest. *State v. Olsen*, 189
13 Wn.2d 118, 399 P.3d 1141 (2017). The Board failed to identify a compelling governmental
14 interest in collecting and analyzing Mr. Winton's urine. Unlike the DUI probationer in *Olsen*,
15 there is no connection between Mr. Winton's offense and the ingestion or possession of
16 substances, Mr. Winton is not participating in any drug or alcohol rehabilitative programs, and
17 there is no basis to believe that Mr. Winton is violating (or ever has violated) the law by
18 possessing and using illicit drugs. Thus, there is no compelling interest justifying a program of
19 routine suspicionless searches, even if the Judgement and Sentence had authorized them.
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23 ¹ While the Petitioner maintains that warrantless searches are not, and cannot be, authorized by the Judgement and
24 Sentence, in response to the argument by the Indeterminate Sentence Review Board that the condition requiring
25 that Mr. Winton "not consume controlled substances except pursuant to lawfully issued prescriptions" gives rise to
the unlawful restraint, Petitioner served a copy of the Personal Restraint Petition on the Clark County Prosecuting
Attorney's Office so that it may respond.

1 Further, according to the Board's Response, the Department of Corrections tests, at its
2 discretion, offenders for legal substances such as Tetrahydrocannabinol (THC) and synthetic
3 cannabinoid. By testing Mr. Winton for legal substances, the State collects information about Mr.
4 Winton's personal habits that is irrelevant to Mr. Winton's release requirements. The Department
5 also tests, as a matter of course, for substances that are contained in legal prescription medications,
6 such as amphetamine, benzodiazepine, and oxycodone. Such testing opens up offenders such as
7 Mr. Winton to even further personal intrusions. Should Mr. Winton test positive for a possibly
8 legal substance, he would be required to produce confidential information regarding his medical
9 treatment and prescriptions in order to avoid sanction. Moreover, every scientific measurement
10 and test is subject to false positives, so subjecting Mr. Winton to regular warrantless and
11 suspicionless testing exposes him to potential false positives and sanctions.
12

13 DATED this 16th day of August, 2018.
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16 
17 ELIZABETH MOUNT PENNER
18 WSBA No. 44261
19 Attorney for Petitioner
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1 CERTIFICATE OF SERVICE:

2 I declare under penalty of perjury under the laws
3 Of the State of Washington that the following is a true
4 and correct. That on this date, I delivered via USPS,
5 a copy of this Document to:

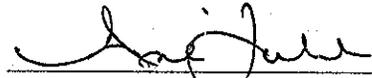
6 Washington State Attorney General's Office
7 PO Box 40116, Olympia, WA 98504

8 Department of Corrections
9 PO Box 41100 Mail Stop 41100, Olympia, WA 98504-1100

10 Indeterminate Sentence Review Board
11 PO Box 40907, Olympia, WA 98504-0907

12 Clark County Prosecuting Attorney's Office
13 1013 Franklin St, Vancouver, WA 98660

14 SIGNED in Kent, Washington this 16 day of August, 2018

15 

16 _____
17 ANGEL LOMBARDO

NEWTON AND HALL, ATTORNEY AT LAW, PLLC

August 16, 2018 - 5:04 PM

Transmittal Information

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