IN THE COURT OF APPEALS OF THE STATE OF IDAHO

IN THE INTEREST OF JANE DOE I, A CHILD UNDER 18 YEARS OF AGE.	)	
STATE OF IDAHO,	)	
	)	**Docket No. 33997**
Plaintiff-Respondent,	)	
	)	
v.	)	
	)	
JANE DOE II,	)	
	)	
Real Party of Interest-Appellant.	)	
	)	
	)	
IN THE INTEREST OF JANE DOE I, A CHILD UNDER 18 YEARS OF AGE.	)	
STATE OF IDAHO,	)	
	)	**Docket No. 34008**
Plaintiff-Respondent,	)	
	)	
v.	)	**2008 Opinion No. 95**
	)	
JOHN DOE I,	)	**Filed: November 13, 2008**
	)	
Real Party of Interest-Appellant.	)	**Stephen W. Kenyon, Clerk**
	)	

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. John P. Luster, District Judge; Hon. Robert B. Burton, Magistrate.

Appellate decision of the district court affirming the magistrate's order that parents of juvenile probationer submit to random drug testing, reversed.

Palmer George & Madsen, PLLC, Coeur d'Alene, for appellant Jane Doe II. Christopher D. Schwartz argued.

Brown, Justh & Romero, PLLC, Coeur d'Alene, for appellant John Doe I. Jonathan Hull argued.

Hon. Lawrence G. Wasden, Attorney General; Daniel W. Bower, Deputy Attorney General, Boise, for respondent. Daniel W. Bower argued.

LANSING, Judge

These consolidated appeals by the parents of a juvenile offender challenge a magistrate court's order requiring that the parents submit to random drug tests as a condition of their daughter's juvenile probation. We conclude that the magistrate's order must be reversed because it violates the parents' Fourth Amendment rights to be free from unreasonable searches.

I.
BACKGROUND

Jane Doe I, a minor, was charged under the Juvenile Corrections Act ("JCA"), Idaho Code section 20-501, *et seq*., with two counts of petit theft, I.C. §§ 18-2403(1), 18-2407(2). She admitted to these crimes, and the magistrate placed her on informal probation for one year. As a term of the juvenile's probation, her parents, John Doe and Jane Doe II (collectively "the parents" or "the Does"), were required to submit to random drug and alcohol testing. They did not challenge this term at that time. Six months later, the State alleged that the juvenile had violated the terms of her probation in a number of ways. Additionally, the magistrate received information that the parents had been using marijuana and that both had tested positive for that drug. The magistrate converted the juvenile's informal probation into a formal probation and again included the term that the parents must submit to random urinalyses and not violate any controlled substance law. The parents appealed this order to the district court, which affirmed. They again appeal.

II.
ANALYSIS

The Does contend that the magistrate's order compelling them to submit to drug testing is invalid, both because it exceeds the magistrate's statutory authority and because it constitutes a violation of their privacy rights under the Fourth Amendment to the United States Constitution. We consider first the statutory inquiry.

A. Statutory Authority

The magistrate's order that the Does submit to random urinalyses was issued pursuant to I.C. § 20-520(1)(i), which then provided:

> (1) Upon the entry of an order finding the juvenile is within the purview of the act, the court shall then hold a sentencing hearing in the manner prescribed by the Idaho juvenile rules to determine the sentence that will promote accountability, competency development and community protection. . . .

> (i) In support of an order under the provisions of this section, the court may make an additional order setting forth reasonable conditions to be complied with by the parents . . . including, but not limited to, restrictions on visitation by the parents or one (1) parent, restrictions on the juvenile's associates, occupation and other activities, and requirements to be observed by the parents.[1]

A parent who violates such an order is subject to contempt proceedings. I.C. § 20-520(5).

The Does argue that I.C. § 20-520(1)(i) does not authorize a magistrate to order parents to conform to conditions against their will because such an interpretation contradicts the express terms and the legislative intent of a related statute, I.C. § 20-522. Section 20-522 provides, *inter alia*, that "[w]henever a juvenile is found to come under the purview of [the JCA], the court shall have jurisdiction and authority to have the juvenile and the juvenile's parent(s) . . . sign a probationary contract with the court containing terms and conditions that the juvenile and the juvenile's parent(s) . . . must adhere to as a condition of the juvenile's probation." In *State v. Watkins*, 143 Idaho 217, 141 P.3d 1086 (2006), the Idaho Supreme Court held that the term "contract" as used in that statute contemplated a voluntary commitment and therefore did not empower a magistrate to order a parent to sign a contract under threat of jail. Because the contract at issue in *Watkins* was compelled and therefore invalid, the Court said, sanctions could not be imposed on the father for failure to comply. *Id.* at 220-21, 141 P.3d at 1089-90.

The Does rely upon *Watkins* in their challenge to the order at issue here, but *Watkins* has no application in this case, for the magistrate here did not purport to act pursuant to I.C. § 20-522, nor did he order the Does to sign a contract. Instead, the magistrate acted under I.C. § 20-520(1)(i), which expressly authorizes magistrates to order parents to comply with reasonable conditions. In *Watkins*, it was specifically noted that the legislature "equipped the courts dealing with juvenile offenders with authority under I.C. § 20-520 that is not based on consent." *Id.* at 221, 141 P.3d at 1090. Section 20-520 could hardly be clearer in its authorization for magistrates to order parents' compliance with reasonable conditions and to enforce such orders through contempt proceedings. Therefore, the Does' argument that the magistrate lacked statutory authority to order them to conform to conditions against their will is without merit.

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[1] Idaho Code § 20-520 was amended by 2007 Idaho Sess. Laws ch. 308 (S.B. 1142). Subsection (i) has been recodified as subsection (j). The content was not changed.

B. Fourth Amendment

The Does next argue that even if it was statutorily authorized, the order for their submission to drug tests is unconstitutional because it infringes upon the protection against warrantless searches afforded by the Fourth Amendment to the United States Constitution.

The Fourth Amendment safeguards "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." To comply with the Fourth Amendment, searches generally must be authorized by a warrant issued upon a showing of probable cause to believe that the intended search will yield evidence of a crime. *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *State v. Josephson*, 123 Idaho 790, 792-93, 852 P.2d 1387, 1389-90 (1993); *State v. Wilson*, 130 Idaho 213, 215, 938 P.2d 1251, 1253 (Ct. App. 1997). Searches conducted without a warrant are presumptively unreasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *State v. Anderson*, 140 Idaho 484, 486, 95 P.3d 635, 637 (2004); *State v. Cutler*, 143 Idaho 297, 304, 141 P.3d 1166, 1173 (Ct. App. 2006). Nevertheless, limited exceptions to the warrant requirement are recognized; the ultimate measure of the constitutionality of a governmental search is one of reasonableness. *Vernonia Sch. Dist. 47J v. Action*, 515 U.S. 646, 653 (1995); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). To determine whether a warrantless search satisfies this reasonableness standard, courts must balance the intrusion upon the individual's Fourth Amendment privacy interest against the government's legitimate interest in conducting the search. *Action*, 515 U.S. at 652-53; *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). The United States Supreme Court has held that the Fourth Amendment is not offended in circumstances where "special needs" render a search reasonable even if it is not justified by any level of individualized suspicion. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 828 (2002); *Skinner*, 489 U.S. at 624. It is this special needs doctrine upon which the State relies in the present case to justify the magistrate's order that the Does submit to random urinalyses.

The "special needs" label was coined by Justice Blackmun in *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) and later adopted by the Court in *O'Connor v. Ortega*, 480 U.S. 709, 720 (1987), and *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). It refers to circumstances, beyond the normal need for law enforcement, that render the warrant and probable cause requirements impracticable. Warrantless and suspicionless searches that the Supreme Court has held meet constitutional muster under the special needs doctrine include drug

testing of students as a precondition to their participation in school athletics or other extracurricular activities, *Earls*, 536 U.S. 822; *Action*, 515 U.S. 646; searches of probationers, *Griffin*, 483 U.S. 868; drug testing of railroad employees involved in train accidents, *Skinner*, 489 U.S. 602; drug testing of United States Customs Service employees seeking promotion to certain sensitive positions, *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); and government employer searches of employee offices, *O'Connor*, 480 U.S. 709. As noted by the Tenth Circuit,

> The Supreme Court has not told us what, precisely, this set of cases has in common, but the cases seem to share at least these features: (1) an exercise of governmental authority distinct from that of mere law enforcement . . . ; (2) lack of individualized suspicion of wrongdoing, and concomitant lack of individualized stigma based on such suspicion; and (3) an interest in preventing future harm, generally involving the health or safety of the person being searched or of other persons directly touched by that person's conduct, rather than of deterrence or punishment for past wrongdoing.

Dubbs v. Head Start, Inc., 336 F.3d 1194, 1213-14 (10th Cir. 2003).

The question presented to this Court is whether the State has an interest amounting to a special need that outweighs the Does' privacy interests and justifies the magistrate in ordering the Does to submit to warrantless, random drug testing as a condition of their daughter's juvenile probation for the crime of petit theft.

1. The Does' privacy interest

We begin with consideration of the Does' privacy interest that is invaded by the ordered urinalyses. There is no question that the Does possess a legitimate expectation of privacy that is invaded by the testing of their urine. As the United States Supreme Court has noted, "collecting the samples for urinalysis intrudes upon 'an excretory function traditionally shielded by great privacy.'" *Action*, 515 U.S. at 658 (citing *Skinner*, 489 U.S. at 626). The degree of intrusion is impacted by the manner in which production of the urine sample is monitored and the level of privacy afforded while the sample is produced. *See Earls*, 536 U.S. at 832-33 (negligible intrusion when urine sample produced in restroom stall with monitor listening outside); *Chandler v. Miller*, 520 U.S. 305, 318 (1997) (testing method relatively noninvasive when candidate permitted to provide the urine sample in the office of his or her private physician); *Action*, 515 U.S. at 658 (manner of monitoring and producing urine sample no more intrusive than ordinary use of a public restroom); *Skinner*, 489 U.S. at 626 (regulations did not require that urine samples be furnished under the direct observation of a monitor). In this case, the urine samples

were apparently to be collected at the office of Jane Doe I's juvenile probation officer. Beyond this, there is no evidence about the manner of producing the urine samples.

In some of its special needs cases, the United States Supreme Court has noted that in the circumstances presented, the subjects of the searches had inherently lessened expectations of privacy. *See Action*, 515 U.S. 646 (lessened expectation of privacy of minor students while at school); *Skinner*, 489 U.S. at 627 (expectation of privacy of railroad employees diminished by participation in pervasively regulated industry). No comparable diminished expectation of privacy is applicable here. Although the State draws our attention to the rule that probationers, by the very nature of probation, have a reduced expectation of privacy, *see United States v. Knights*, 534 U.S. 112, 120 (2001); *Griffin*, 483 U.S. 868, that rule is inapposite because in this case it was the daughter who was on probation, not the parents. The State further argues, however, that the Does' privacy expectations were reduced because they resided with a probationer. The State directs us to cases recognizing that those who choose to share a residence with a probationer or parolee assume the risk that areas of the residence they share in common with the offender will be subject to warrantless searches in some circumstances due to the offender's status and the terms of probation or parole, *see, e.g., State v. Barker*, 136 Idaho 728, 731-32, 40 P.3d 86, 89-90 (2002); *State v. Misner*, 135 Idaho 277, 280-81, 16 P.3d 953, 956-57 (Ct. App. 2000). We are unpersuaded by this argument, for it is only the expectation of privacy in common areas of the residence that is affected by cohabitation with a probationer, not the individual's expectation of privacy in bodily fluids. The privacy interest in question here was not diminished by the Does' status as parents of a juvenile probationer.

Accordingly, we hold that the Does had a reasonable and legitimate expectation of privacy that is infringed by the magistrate's order for random drug testing.

2. The State's special need

The State contends that the special need at stake here is the government's interest in rehabilitating a juvenile offender who is on probation and living in an environment where drugs are being used. The United States Supreme Court has said that a "special need for drug testing must be substantial--important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." *Chandler*, 520 U.S. at 318. The *Chandler* Court held that a statute

requiring candidates for public office to submit to drug testing was not justified when the special need was merely the State's interest in protecting its own image.

Unquestionably, the State has a legitimate interest in protecting minors and in limiting their exposure to illegal drugs. *See* I.C. § 16-1601; *Action*, 515 U.S. 646, and *Earls*, 536 U.S. 822. More particularly here, the State also has a weighty interest in rehabilitating juvenile offenders. One of the purposes of the Juvenile Corrections Act is to "assist the juvenile in developing skills to become a contributing member of a diverse community." I.C. § 20-501. Through I.C. §§ 20-520(1)(i) and 20-522, the legislature has announced that it is the policy of the State that the juvenile's parents participate in the child's rehabilitation, a policy that "makes a good deal of sense, since voluntary involvement of a parent in the rehabilitation of his or her child likely has a salutary effect." *Watkins*, 143 Idaho at 221, 141 P.3d at 1090. It is reasonable to conclude that a juvenile's rehabilitation will be facilitated by ensuring that the parents themselves are not unlawfully using controlled substances in the home where the juvenile probationer is living. Moreover, in this case the drug testing is not justified merely by a hypothetical risk of drug use, but by the parents' admissions that they had used and intended to continue to use marijuana in the home.

Beyond merely the strength of the government's interest in rehabilitating Jane Doe I, we must also consider the efficacy that testing her parents for drug use would have in advancing this State interest. *Action*, 515 U.S. at 660, 663; *Skinner*, 489 U.S. at 632. Jane Doe I did not commit drug crimes, but property crimes. Her subsequent probation violations also were unrelated to drugs. In these circumstances, the relationship between the daughter's rehabilitation and drug testing of the parents is not as strong as it might be if the daughter were abusing drugs. On the other hand, it is reasonable to conclude that the parents' cavalier attitude toward drug laws and their being in a state of drug-induced intoxication in the home undermines the State's interest in helping the juvenile probationer become a law-abiding member of society. Parents' drug abuse can create chaotic, neglectful or abusive environments for the minors who live with them (although there is no evidence of such in the record here), making more difficult the State's rehabilitation efforts. A threat of criminal contempt for refusing to submit to drug testing or a threat of prosecution for violating drug laws would tend to deter the parents from continuing with this counter-rehabilitative behavior.

We thus conclude that both a strong State interest and a laudable purpose are served by the magistrate's order here compelling the parents to submit to drug testing. Nevertheless, we also conclude that the special needs exception to the warrant requirement does not legitimize the order. We come to this determination based largely upon the most analogous United States Supreme Court decision applying the special needs doctrine, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). The Court there considered a program developed by hospital and law enforcement authorities to induce pregnant drug abusers to enter into substance abuse treatment for the protection of their fetuses. Concerns about the rising number of cocaine-using pregnant women being seen at a Charleston hospital led hospital officials, law enforcement, and other government authorities to adopt a protocol to "identify/assist pregnant patients suspected of drug abuse." It provided that the hospital would test a patient for cocaine through a urine drug screen if she met one or more of nine criteria indicative of drug abuse. The policy provided for education and referral to substance abuse treatment for patients who tested positive. A threat of law enforcement intervention provided an inducement for the patients to accept such treatment. Patients who refused treatment or missed an appointment with a substance abuse counselor would be arrested.

The United States Supreme Court held that this procedure violated the patient's Fourth Amendment rights. The Court first distinguished the procedure from the drug testing that it had permitted under the special needs doctrine, stating that in *Ferguson* the invasion of privacy was "far more substantial" than in the prior cases where there had been protections against the dissemination of test results to third parties. The Court said that "[t]he use of an adverse test result to disqualify one from eligibility for a particular benefit, such as a promotion or an opportunity to participate in an extracurricular activity, involves a less serious intrusion on privacy than the unauthorized dissemination of such results to third parties." *Id.* at 78. Of seemingly greater importance to the Court, however, was the nature of the special need asserted as justification for the warrantless searches. "In each of those earlier [drug testing] cases, the 'special need' that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State's general interest in law enforcement. . . . In this case, however, the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment." *Id.* at 79-80. The respondents argued that the policy's ultimate purpose--to protect the health of both mother and

child--was a beneficent one that qualified as a "special need." The Court noted, however, that the purpose actually served by the searches was "ultimately indistinguishable from the general interest in crime control," *id.* at 81, because the method used to effectuate the patients' treatment was the threat of arrest and prosecution of drug abusing mothers. It was found significant that police and prosecutors were extensively involved in the day-to-day administration of the policy. The Court explained:

> While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to reach that goal. The threat of law enforcement may ultimately have been intended as a means to an end, but the direct and primary purpose of [the hospital's] policy was to ensure the use of those means. In our opinion, this distinction is critical. Because law enforcement involvement always serves some broader social purpose or objective, under respondents' view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose. Such an approach is inconsistent with the Fourth Amendment. Given the primary purpose of the Charleston program, which was to use the threat of arrest and prosecution in order to force women into treatment, and given the extensive involvement of law enforcement officials at every stage of the policy, this case simply does not fit within the closely guarded category of "special needs."

Id. at 83-84 (emphasis in original). The Court ultimately held that the benign motive of the policy "cannot justify a departure from Fourth Amendment protections, given the pervasive involvement of law enforcement with the development and application of the [hospital] policy." *Id.* at 85.

The present case bears striking similarity to *Ferguson*. Law enforcement personnel and a general law enforcement interest permeate the circumstances that led to the challenged drug testing order. Indeed, the order was issued in the course of a quasi-criminal action in which a juvenile had been adjudicated guilty of a criminal offense under the JCA. As in *Ferguson*, although the ultimate purpose of the order may have been benign--the rehabilitation of the juvenile offender--the order sought to accomplish that end by subjecting the parents to a threat of criminal prosecution. If they refused to submit to testing, they could be held in criminal contempt; if they submitted and the tests disclosed drug use, presumably the test results could be used as the basis for criminal prosecution. As in *Ferguson*, nothing prohibited disclosure of test results to law enforcement. Indeed, it was the juvenile's probation officer who had authority to

demand the tests and receive the results. Nothing in the court's order or the statute on which it was predicated, nor in any established juvenile corrections policy or regulation disclosed in the record, prohibited use of the test results to prosecute the parents. The State contends that its sole interest is in giving the Does' daughter the best chance for rehabilitation by deterring her parents from violating drug laws. That may be true, but the means by which such deterrence is to be achieved is the threat of possible prosecution if a urinalysis discloses drug use.

In addition to the pervasive law enforcement interests in play, the coerciveness of the testing in this case distinguishes it from those United States Supreme Court cases where a special need was deemed to justify drug testing. Those cases involved only the withholding of some benefit if the individual chose not to participate in the testing, such as extracurricular activities, *Earls*, 536 U.S. 822; *Action*, 515 U.S. 646, employment in a particular industry, *Skinner*, 489 U.S. 602; *O'Connor*, 480 U.S. 709, or a promotion, *Von Raab*, 489 U.S. 656, rather than imposition of a penalty. That is, while the choice could not be called entirely voluntary, the individuals retained a choice. In this case, by contrast, the Does are given no alternative. They are ordered to submit to urinalyses, and refusal carries a threat of criminal contempt, revocation of their daughter's probation, and the possibility of losing custody of their daughter in a child protection action.[2] This element of coercion also likens the present case to *Ferguson*.

We acknowledge that the drug testing order here was not made in the complete absence of individualized suspicion--the parents had previously failed drug tests and admitted to their drug use. This does not distinguish our case from *Ferguson*, however, because there too patients were selected for the drug testing program on the basis of observed indicia of drug use.

In light of *Ferguson*, which we find substantively indistinguishable from the present case, we hold that the magistrate's order compelling the Does to submit to random urinalyses violates the Fourth Amendment and must be vacated.

III.

CONCLUSION

The magistrate's order compelling the Does to submit to drug testing did not exceed the magistrate's statutory authority conferred by I.C. § 20-520(1)(i), but violated the Does' Fourth

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[2] After the parents tested positive for drugs during Jane Doe I's informal probation, a child protection action was also initiated.

Amendment right to be free from unreasonable searches. Therefore, we reverse the district court's appellate decision that affirmed the magistrate's order.

Chief Judge GUTIERREZ and Judge PERRY **CONCUR.**