

**SUPREME COURT OF WASHINGTON**

**State v. Surge**

160 Wash. 2d 65 (2007) · Decided April 19, 2007

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**OPINION**

JOHNSON, J.

¶1 This case asks us to determine if RCW 43.43.754, a statute authorizing the collection of biological samples for DNA (deoxyribonucleic acid) identification purposes from those convicted of certain crimes, violates article I, section 7 of the Washington State Constitution or the Fourth Amendment.

The six petitioners in these consolidated cases were convicted of felonies and, pursuant to the challenged statute, ordered to submit to compulsory DNA sampling. The petitioners appealed the requirement. The Court of Appeals affirmed the trial court's sentencing requirement and held the State's collection of the biological samples constitutes a special need for which a warrant is not required.

We affirm the Court of Appeals and hold the compelled collection of DNA from convicted felons does not invade a recognized private affair under the state constitution, nor is it prohibited under the Fourth Amendment. C. Johnson, J. FACTUAL AND PROCEDURAL HISTORY ¶2 Petitioner Antoine Surge pleaded guilty to murder in the second degree. Petitioner Christopher Yarbrough was convicted of two counts of robbery and one count of burglary.

Petitioner Shabray McMurry was convicted of bail jumping. Petitioner James McClinton pleaded guilty to unlawful possession of cocaine. Petitioner Ricardo Guzman-Gil entered an Alford plea to one count of third degree rape of a child and one count of second degree assault. Petitioner Allen Bowman entered an Alford plea to one count of possession of stolen property in the second degree.

Pursuant to the challenged statute, each petitioner was ordered to provide a biological sample for DNA identification analysis and inclusion in the State's DNA database. All six appealed, arguing the compulsory collection of DNA under RCW 43.43.754 constituted an unreasonable search under the Fourth Amendment.

The Court of Appeals affirmed the requirement, finding the special needs analysis from *State v. Olivas*, 122 Wn.2d 73, 856 P.2d 1076 (1993) dispositive. *State v. Surge*, 122 Wn. App. 448, 450, 94 P.3d 345 (2004). The court noted that even if the special needs analysis is no longer valid under federal law, the statute is constitutional under the minimally intrusive search analysis advanced by the concurring opinion in *Olivas*.

Surge, 122 Wn. App. at 459. All six defendants petitioned this court for review, this time arguing the statute violated their rights under both article I, section 7 and the Fourth Amendment. We granted review at 153 Wn.2d 1008 (2005). ANALYSIS ¶3 When presented with arguments under both the state and federal constitutions, we review the state constitution arguments first.

State v. Carter, 151 Wn.2d 118, 125, 85 P.3d 887 (2004). Under the Washington Constitution, it is well established that article I, section 7 qualitatively differs from the Fourth Amendment and in some areas provides greater protections than does the federal constitution. State v. McKinney, 148 Wn.2d 20, 29, 60 P.3d 46 \*71(2002).

Accordingly, a Gunwall<sup>3</sup> analysis is unnecessary to establish that this court should undertake an independent state constitutional analysis.<sup>4</sup> State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003); McKinney, 148 Wn.2d at 26.

The only relevant question is whether article I, section 7 affords enhanced protection in the particular context. McKinney, 148 Wn.2d at 26-27. Article I, Section 7 ¶4 Article I, section 7 reads, “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” The language of article I, section 7 requires a two-part analysis.

We begin by determining whether the action complained of constitutes a disturbance of one’s private affairs. If there is no private affair being disturbed, no article I, section 7 violation exists. If a valid privacy interest has been disturbed, the second step in our analysis asks whether authority of law justifies the intrusion.

In general terms, the “authority of law” required by article I, section 7 is satisfied by a valid warrant. However, the protections of article I, section 7 and the authority of law inquiry are triggered only when a person’s private affairs are disturbed or the person’s home is invaded. Carter, 151 Wn.2d at 126. ¶5 The “private affairs” inquiry focuses on “ ‘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. Young, 123 Wn.2d 173, 181, 867 P.2d 593 (1994) (quoting State v. Myrick, 102 Wn.2d 506, \*72511, 688 P.2d 151 (1984)).

Private affairs are not determined according to a person’s subjective expectation of privacy because looking at subjective expectations will not identify privacy rights that citizens have held or privacy rights that they are entitled to hold.

We begin by examining the historical treatment of the interest asserted, which may disclose that the interest is one a citizen has held. McKinney, 148 Wn.2d at 27. For example, in Gunwall, we relied in part on a statute first enacted in 1909 to establish the historical treatment of the interest asserted in that case. If history does not show whether the interest is one entitled to protection under article I, section 7, we then turn to the question whether the expectation is one that a citizen of this state is entitled to hold.

McKinney, 148 Wn.2d at 29. This part of the inquiry includes looking at the nature and extent of the information which may be obtained as a result of the governmental conduct. McKinney, 148 Wn.2d at 27-29. The extent to which the information has been voluntarily exposed to the public is also a consideration because it may show, objectively, that there is no expectation of privacy. ¶6 In this case, the “private affairs” inquiry focuses on a convicted felon’s asserted privacy interest in his or her identity, not on the privacy interests of the ordinary citizen.

The distinction is important to our inquiry because the statute involved in this case applies only to the narrow class of individuals who have been convicted of the listed crimes, and the focus must be on their rights. ¶7 The State argues that convicted felons have always had a diminished privacy interest in their identity.

The State points out that upon conviction, the defendant’s name, date of birth, physical features, race, distinguishing scars or tattoos, and fingerprints all become part of the person’s criminal history and this information is maintained as to these individual identifying characteristics.

The State contends that DNA sampling,<sup>5</sup> which further \*73identifies a defendant, is no more of an intrusion into the defendant’s privacy rights than collecting fingerprints or other identifying data. As to monitoring this information for further use, the State points out that fingerprints are filed and regularly compared to fingerprints found at crime scenes or used to identify bodies with no other means of identification.

The State notes that the constitutionality of any of the above identification requirements is unchallenged and that no case or statute exists recognizing a heightened privacy interest held by convicted felons in these identifying requirements. ¶8 Petitioners argue article I, section 7 provides greater protection in all warrantless search situations and no exceptions apply.

Petitioners’ argument assumes ordinary citizens and convicted felons enjoy the same privacy interests under the state constitution and, therefore, our article I, section 7 analysis will not vary based on the status of a petitioner. Petitioners rely on one sentence in *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980), to assert article I, section 7 recognizes an individual’s right to privacy with no express limitations and, therefore, any invasion into a person’s privacy requires either a warrant or a narrowly drawn exception to the warrant requirement. ¶9 Petitioners read *Simpson* too broadly.

In *Simpson*, we focused our analysis on the Fourth Amendment to find the challenged search unreasonable. Also, in *State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003), we declared article I, section 7 recognized an individual’s right to privacy with no express limitations but explicitly analyzed *Cheatam*’s claim under state constitutional principles, and found *Cheatam*, as an arrestee, had lost any privacy interest in his personal items that had already been lawfully exposed to police view.

Thus, while article I, section 7 does not expressly limit the right to privacy, not every asserted right qualifies as a “private affair.” We still analyze the interest under state constitutional principles to determine if a valid privacy interest exists. \*74¶10 We find the petitioners’ arguments unpersuasive for two additional reasons.

First, the constitutional rights afforded to a person often depend on his or her status. In Washington, a person’s privacy rights under article I, section 7 may vary based on that person’s status as an arrestee, pretrial detainee, prisoner, or probationer. See, e.g., *Cheatam*, 150 Wn.2d at 642 (holding an arrestee loses any privacy interest in personal items already searched and stored pursuant to a valid inventory search); see also Charles W. Johnson, *Survey of Washington Search and Seizure Law: 2005 Update*, 28 Seattle U. L. Rev. 467, 689-92 (2005) (discussing how incarcerations and convictions diminish search and seizure protections). ¶11 Further, petitioners assume they have a valid privacy interest in their identities under article I, section 7 and begin their analysis with the second step of our two-step inquiry — whether authority of law exists for the search.

As stated above, we reach the second step of the analysis only after we have found a valid private affair has been disturbed. ¶12 Here, we do not find a private affair has been disturbed because collecting identifying information from convicted felons does not infringe on a privacy interest that convicted felons of this state have held, or should be entitled to hold, safe from government trespass.

It is a well established practice of government to collect fingerprints from convicted felons for identification purposes. We find no distinction between that practice and the collection of DNA. In this case, the collection of identifying information authorized by the statute is limited to the same purposes as fingerprints, photos, or other identifying information.

Under RCW 43.43.754, the purpose of collecting a DNA sample is for identification only, which does not constitute a disturbance of their private affairs. Because no private affair is implicated, we need not reach the second step of the inquiry — whether authority of law exists for the search. ¶13 Petitioners further contend the Court of Appeals erred in relying on the special needs approach and the \*75traditional balancing test because those tests conflict with our article I, section 7 jurisprudence.

First, petitioners assert a warrantless search justified by a special need traditionally does not rely on any level of individualized suspicion. Without individualized suspicion, the petitioners, citing *Kuehn v. Renton School District No. 403*, 103 Wn.2d 594, 599, 694 P.2d 1078 (1985), maintain the search is general and, therefore, categorically unauthorized. ¶14 The search in *Kuehn*, where school officials searched the luggage of a group of students, is easily distinguished from the searches challenged here.

We held the students had a valid privacy interest in their luggage, which, even assuming a lessened expectation of privacy, required at least a reasonable belief the students' luggage contained contraband. Conversely, petitioners here retain almost no privacy interest in their identity. Upon conviction, they lose the privilege of keeping their identity from becoming part of a government record.

The State already collects from convicted persons identifying information such as photographs and fingerprints; a DNA sample is simply another piece of identifying information routinely collected. Individualized suspicion is not required for the government to obtain and record the identity of a person convicted of a crime. ¶15 Petitioners also rely on *City of Seattle v. Mesiani*, 110 Wn.2d 454, 755 P.2d 775 (1988), and *City of Seattle v. McCready*, 123 Wn.2d 260, 868 P.2d 134 (1994), to support their contention that this court has repeatedly struck down statutes authorizing searches without individualized suspicion, even though the purpose of the searches could be considered a special need.

In *Mesiani*, we found a sobriety checkpoint program unconstitutional under article I, section 7, and we acknowledged a citizen does not lose any reasonable expectation of privacy simply by traveling in an automobile. *Mesiani*, 110 Wn.2d at 456-57.

Thus, the petitioners in *Mesiani* were entitled to a full privacy interest under article I, section 7. By contrast, a citizen does lose some expectation of privacy by the fact of conviction and incarceration. \*76¶ 16 In *McCready*, the nonconsensual inspection of residential apartments was conceded by the city of Seattle to be a disturbance of "private affairs" under article I, section 7.

Accordingly, we focused our analysis on whether there was authority of law to justify the searches. *McCready*, 123 Wn.2d at 271. The ordinary citizen status of the petitioners in *McCready* entitled them to the full privacy protections of article I, section 7.

Here, in contrast, the petitioners were convicted of felonies and sentenced to a term of confinement. Their privacy expectations are significantly reduced, particularly in their identities. ¶17 Moreover, petitioners contend the appellate court erred in its balancing of the rights of petitioners against the government's interest. They quote from our *Mesiani* opinion: " '[t]he easiest and most common fallacy in "balancing" is to place on one side the entire, cumulated "interest" represented by the state's policy and compare it with one individual's interest in freedom from the specific intrusion on the other side..

A fairer balance would weigh the actual expected alleviation of the social ill against the cumulated interests invaded." *Mesiani*, 110 Wn.2d at 459 (second alteration in original) (citation omitted) (quoting *State v. Tourtillott*, 289 Or. 845, 881, 618 P.2d 423 (1980) (Linde, J., dissenting)). Petitioners maintain the cumulated interest invaded here includes the privacy interest of any person who has a prior felony conviction, even if that person has served his or her term of

confinement, as well as the privacy interest of a person currently serving a sentence for a felony conviction.

Petitioners argue the privacy rights of a person who has served his or her sentence for a felony conviction are no longer diminished. Thus, they conclude, the diminished privacy right argument does not apply to the entire class of persons the statute targets.

We disagree. ¶18 On its face, the statute applies only to those convicted of the enumerated crimes who are still incarcerated. \*77RCW 43.43.754(4).<sup>6</sup> As the petitioners recognize in their brief, present incarceration diminishes a person's privacy interest.

Although the records are permanently maintained, this is true of the other identifying information collected from one convicted of a crime. Just as a person convicted of a felony who has served out his or her sentence normally cannot expunge his or her other identifying information from existing government records, the permanent retention of the DNA sample likewise does not violate a privacy interest. ¶19 The State has established that DNA extraction under RCW 43.43.754 is analogous to the routine collection of fingerprints, photographs, and other vital statistics from convicted felons in the context of state constitution privacy concerns.

These comparable requirements are so engrained in our traditional criminal procedure that they have not been subject to constitutional challenge. ¶20 Finally, petitioners argue their DNA has the potential to provide more than just identifying information and this additional information constitutes a disturbance of their private affairs. While we recognize the validity of petitioners' concerns, we feel they are adequately addressed by the statute itself.

The statute at issue expressly limits the use of DNA samples to "identification analysis and prosecution of a criminal offense or for the identification of human remains or missing persons." RCW 43.43.754(2). This limited purpose is also found in the administrative code which governs chapter 43.43 RCW.

The use of the DNA identification systems is restricted to three purposes: (1) identification of possible suspects, (2) data banking for convicted felons, and (3) identifying human remains or missing persons. WAC 446-75-030.

The use of DNA for "any research or other purpose not related to a criminal investi\*78gation, to identification of human remains or missing persons, or to improving the operation of the system established by the Washington state patrol and authorized by RCW 43.43.752 through 43.43.759" is prohibited. WAC 446--75-080.

Because the statute narrowly defines its purpose as the production of identifying information and this type of information has traditionally not been recognized as a protected interest of convicted felons, we find there is no disturbance of the defendants' private affairs under article I, section 7.

¶21 Additionally, the concurrence in dissent (Fairhurst, J. ) erroneously cites to cases to support its assertion that, here, a privacy interest exists under article I, section 7.

In fact, none of the cases cited in the concurrence in dissent (Fairhurst, J.) supports an article I, section 7 analysis where the class of persons involved is convicted felons who are incarcerated. For example, *In re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 96, 847 P.2d 455 (1993) is cited for the proposition that we recognize two types of privacy interests under article I, section 7.

However, a close reading of the case reveals that not only was *In re Juveniles A, B, C, D, E* decided under Fourth Amendment jurisprudence, but the types of privacy interests referred to originate from Fourteenth Amendment jurisprudence right to privacy, not article I, section 7.7 ¶22 Here, we deal with convicted felons who have, under any form of analysis, a minimal privacy interest in their identities.

The analogy to fingerprinting is extremely persuasive in that both DNA typing and fingerprinting impinge on similar privacy interests. The constitutionality of fingerprinting convicted persons is unquestioned. See *Olivas*, 122 Wn.2d at 106 (Utter, J., concurring). \*79 ¶23 Insofar as the use to which the DNA typing results can be put is concerned, the statute does not permit, as we have explained, any use other than for identity purposes.

It does not authorize, therefore, an impermissible invasion of bodily integrity through, for example, disclosure of medical conditions or similar information, and there is no basis to conclude that samples contained in these cases have been used for any improper purpose.

Therefore, contrary to the view of the dissenting opinions, the statute does not unconstitutionally authorize disturbance of an individual's bodily integrity by allowing the DNA results to be used for purposes other than identity. ¶24 The minimally invasive procedure involved under this statute is constitutional under article I, section 7 in any event.

As prisoners, petitioners' privacy interests are diminished, and the same interests that justify use of their DNA for identity purposes justify the minimally invasive procedures used to obtain the DNA. Fourth Amendment ¶25 Having determined RCW 43.43.754 does not violate article I, section 7, we now analyze if the statute violates the minimum protections afforded under the federal constitution.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and provides this right "shall not be violated, and no warrants shall issue, but upon probable cause...." U.S. Const, amend. IV. Petitioners acknowledge this court has affirmed the constitutionality of former RCW 43.43.754 (1990), the challenged statute's predecessor, in *Olivas*, 122 Wn.2d 73.

Former RCW 43.43.754 required DNA collection from individuals convicted of a felony sexual offense or felony violent offense. In finding the statute did not violate the Fourth Amendment in *Olivas*, we engaged in a special needs analysis.

Under this approach, a departure from traditional warrant and probable cause requirements may \*80be justified if the government has a special need beyond normal law enforcement. We found the DNA database would act as a deterrent to recidivism and, thus, the statute's purpose was not for "normal" law enforcement. *Olivas*, 122 Wn.2d at 92-93. Petitioners assert *Olivas* is no longer good law in light of two intervening United States Supreme Court opinions clarifying the scope of the special needs doctrine. ¶26 First, in *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S. Ct.

447, 148 L. Ed. 2d 333 (2000), the Court invalidated a highway checkpoint program whose primary purpose was the discovery and interdiction of drugs because the primary purpose was indistinguishable from a general interest in crime control.

The Court stated they were "particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends." *Edmond*, 531 U.S. at 43. Then again, in *Ferguson v. City of Charleston*, 532 U.S. 67, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001), the Court affirmed the limited nature of the special needs doctrine when it struck down a state hospital program that tested pregnant women for drug use and made the results of the test available for police use.

While the Court found a significant goal of the program was to protect the health of both the mother and the child, the Court noted "the immediate objective of the searches was to generate evidence for law enforcement purposes...." *Ferguson*, 532 U.S. at 83.

Finally, petitioners rely on *United States v. Kincade*, 345 F.3d 1095 (9th Cir. 2003), where two judges of the three judge panel held forced blood extractions under the federal DNA statute violated the Fourth Amendment.

The court relied on both *Edmond* and *Ferguson* as intervening law to reach this conclusion. By the time petitioners' case reached this court, the *Kincade* opinion had been vacated and reversed by the Ninth Circuit sitting en banc. *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004), cert. denied, 544 U.S. 924 (2005).

The en banc court declined to find the \*81special needs analysis invalid in light of *Edmonds* and *Ferguson*, although it relied on a totality of the circumstances analysis instead. *Kincade*, 379 F.3d at 832. In addition to the en banc Ninth Circuit opinion, the federal courts which addressed the constitutionality of DNA sampling statutes found the statutes in accord with the Fourth Amendment.

*Padgett v. Donald*, 401 F.3d 1273, 1278 (11th Cir.), cert. denied, 546 U.S. 820 (2005). ¶27 The State urges this court to apply the totality of the circumstances approach as outlined by the concurring opinion in *Olivas*.

In the concurring opinion, after making a threshold finding that blood extractions are a minimal intrusion, Justice Utter would have balanced the government's need for a DNA database, the degree to which the testing serves that need, and the burden the testing imposes on individual privacy. *Olivas*, 122 Wn.2d at 104 (Utter, J., concurring). Justice Utter found this approach superior to the special needs analysis used by the majority because it conditioned the constitutionality of the statute on the class of persons being tested, it recognized the close fit between the purpose of the statute and the testing taking place, and he feared the use of special needs balancing in the context of law enforcement would lead to the eventual balancing away of the traditional warrant requirement whenever a strong governmental need was present.

*Olivas*, 122 Wn.2d at 107-08 (Utter, J., concurring). In the alternative, the State contends the special needs analysis of *Olivas* is still viable and distinguishes *Edmond* and *Ferguson* as involving the privacy interests of ordinary citizens who, unlike the petitioners here, enjoyed the full array of protections under the Fourth Amendment. ¶28 We find nothing in the federal cases which calls into question our analysis in *Olivas* under either the majority's special needs approach or the concurrence's balancing approach.

Certainly the concurring opinion in *Olivas* is more consistent with our cases interpreting article I, section 7. But under either approach, no cases support the conclusion that DNA sampling from persons convicted of felonies violates the Fourth Amendment. \*82CONCLUSION ¶29 We find RCW 43.43.754 does not violate article I, section 7 or the Fourth Amendment.

We affirm the Court of Appeals. Alexander, C.J., and Madsen and J.M. Johnson, JJ., concur. *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). RCW 43.43.754 applies to "[e]very adult or juvenile individual convicted of a felony, stalking under RCW 9A.46.110, harassment under RCW 9A.46.020, communicating with a minor for immoral purposes under RCW 9.68A.090, or adjudicated guilty of an equivalent juvenile offense...." RCW 43.43.754(1).

Thus, the statute applies to certain gross misdemeanors as well as to felonies. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) (setting forth the factors for evaluating whether an issue merits independent state constitutional interpretation).

We have said while the structural differences in federal and state constitutions means the federal analysis is not binding upon our state constitutional analysis, it can still guide us because both recognize similar constitutional principles; the structural differences in state and federal constitutions may require a different analytical approach. That does not mean, however, that our result will always be inconsistent with the United States Supreme Court.

State ex rel. Gallwey v. Grimm, 146 Wn.2d 445, 482, 48 P.3d 274 (2002). The method of securing a DNA sample is not challenged by the petitioners. The statute reads, in pertinent part, “[t]his section applies to all adults and juveniles who are convicted of [the enumerated crimes], on or after July 1, 2002; and to all adults and juveniles who were convicted or adjudicated guilty of such an offense before July 1, 2002, and are still incarcerated on or after July 1, 2002.” RCW 43.43.754(4) (emphasis added).

In re Juveniles A, B, C, D, E, 121 Wn.2d at 96 (recognizing two types of privacy interests) (citing O’Hartigan v. Dep’t of Pers., 118 Wn.2d 111, 117, 821 P.2d 44 (1991) (asserting the United States Supreme Court has identified two types of interests protected by the right to privacy (citing Whalen v. Roe, 429 U.S. 589, 599-600, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977) (quoting Roe v. Wade, 410 U.S. 113, 93 S. Ct.

705, 35 L. Ed. 2d 147 (1973))))).