ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

CASE SUMMARY

CHRISTINE STANLEY v. ROBERT R. McCARVER, Jr., M.D. ,
OSBORN NELSON & CARR PORTABLE X-RAY, INC.
CV-03-0099-PR

Parties and Counsel:

Petitioner : Dr. Robert McCarver, Jr., represented by Richard Kent, KENT & WITTEKIND, P.C.

Respondent: Christine Stanley, represented by Karen L. Lugosi.

Facts:

Mesa Christian Care (MCC), a nursing home, requested that Christine Stanley, a registered nurse, undergo a chest x-ray for employment purposes. Osborn, Nelson & Carr (ONC), a portable radiology service, performed the x-ray at MCC. Dr. McCarver, a radiologist retained by ONC, interpreted the x-ray. In his report, Dr. McCarver noted abnormalities that required serial x-rays for further evaluation. Dr. McCarver gave his report to ONC and ONC forwarded the report to MCC. MCC, however, never informed Stanley of the results. Ten months later, Stanley was diagnosed with lung cancer that, she alleged, would have been diagnosed more quickly if she had been notified of Dr. McCarver's report.

Stanley sued MCC, ONC, and Dr. McCarver for negligence. MCC was dismissed after it filed for bankruptcy. Relying on the holding in ***Hafner v. Beck***, 185 Ariz. 389, 916 P.2d 1105 (Ct. App. 1995), the trial court granted Dr. McCarver summary judgment because there was no physician-patient relationship with Stanley. ONC was dismissed because Dr. McCarver was an independent contractor.

The court of appeals reversed the judgment in favor of Dr. McCarver. The court found that when an employer has referred a person for an examination, a physician has a duty to exercise reasonable care in conducting the examination and this duty includes communicating any matter of concern or abnormalities about the examination directly to the person examined.

Issues:

The issue is whether a radiologist, to whom a person is referred, but not by a healthcare provider, who detects a medical condition for which further inquiry or treatment is appropriate, has a duty to inform that person.

ARIZONA SUPREME COURT
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CRAIG W. PETERSEN V. CITY OF MESA
CV 03-0100-PR

Parties and Counsel:

Petitioner : Craig Petersen is represented by David Abney.

Respondent: The City of Mesa is represented by Rosemary Rosales and Catherine Shovlin, Mesa City Attorneys' Office.

Facts:

Petersen, a Mesa firefighter, filed a complaint for declaratory and injunctive relief in Maricopa County Superior Court, alleging that the random, suspicionless drug and alcohol testing provisions of Mesa's proposed Alcohol and Controlled Substance Testing Policy and Procedure would violate his rights under the federal and Arizona Constitutions. He has not challenged provisions of the policy that provide for drug and alcohol testing based upon reasonable suspicion, following an accident, following a return to duty, or as a follow-up component after a previous misuse of alcohol or a controlled substance. He asked the court to declare that drug and alcohol testing conducted without a warrant that is based upon probable cause, or without reasonable suspicion that he had engaged in the use of illegal drugs or that he violated Mesa's policy regarding use of alcohol violates: (1) His privacy rights as guaranteed by Art. II, § 8, Ariz.Const, which states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law;" (2) His right to be free from unreasonable searches and seizures as guaranteed by Art. II, § 8 Ariz. Const; (3) His privacy rights as guaranteed by the penumbras of the U.S. Constitution (the 1s, 4th, 5th and 9th Amendments); and (4) His procedural and substantive due process rights as guaranteed by the Arizona and U.S. Constitutions. He also alleged that testing without reasonable suspicion violates the Fourth Amendment to the U.S. Constitution, but he did not separately request relief on that basis. Finally, he asked the court to permanently enjoin Mesa from conducting testing unless it is based upon a warrant based upon probable cause, or at least reasonable suspicion, that he used illegal drugs or violated the policy regarding use of alcohol.

Peterson sought a preliminary injunction prohibiting Mesa from implementing the random, suspicionless drug and alcohol testing part of the policy until final judgment issues on the policy's constitutionality. Mesa urged that the preliminary injunction be denied and the case be dismissed for failure to state a claim upon which relief can be granted.

The trial court ruled that it is clear, and that neither party disputes, that urine testing of a public employee under a drug and alcohol testing policy constitutes a search and seizure. *Skinner v. Railway Labor Executives, Ass'n*, 489 U.S. 602, 617, 109 S.Ct. 1402 (1989)(Customs Services drug testing program of urine testing constitutes a search and must meet the Fourth Amendment's reasonableness requirements). *See National Treasury Employees Union v. Von Raab,* 489 U.S. 656, 665, 109 S.Ct. 1384 (1989). The court noted that Arizona courts have not yet compared the application of either the Fourth Amendment or Article 2, § 8 to government employer drug and alcohol testing policies. However, the court observed that, in the context of Article 2, § 8 and the search of a home, this Court has stated that Arizona's constitutional provisions were both generally intended to incorporate federal protections, and specifically intended to create a right of privacy. *State v. Ault*, 150 Ariz. 459, 466, 724 P.2d 545, 552 (1986).

The trial court also noted that other states, interpreting their state constitutions, have found that random, suspicionless drug and alcohol testing of public employees was an unreasonable intrusion on the employees' privacy and dignity, and constituted a search and seizure. *Anchorage Police Dept. Employees' Assoc. v. Municipality of Anchorage*, 24 P.3d 547 (Alaska 2001); *Doe v. City of Honolulu*, 8 Haw. App. 571, 816 P.2d 306 (1991); *Guiney v. Police Comm'r of Boston*, 582 N.E. 2d 523 (1991); *Robinson v. City of Seattle*, 10 P.3d 452 (Wash.Ct.App. 2000). Those courts, whether considering state constitutional privacy or search and seizure provisions, have analyzed the testing in terms of the reasonableness of the warrantless search and seizure.

The trial court then balanced the interests of reasonableness of the searches versus the firefighters' privacy interests. The court noted that Arizona has permitted warrantless administrative searches in the context of a closely regulated business where there was a substantial government interest in the regulatory scheme pursuant to which the inspection was made, and where privacy interests were therefore lessened, and where the warrantless inspections were necessary to further the regulatory scheme and the scheme had a properly defined scope and limited the discretion of the inspecting officers. The court also noted that Arizona courts have also upheld warrantless, suspicionless roadblock traffic stops as reasonable under the Fourth amendment and Article 2, § 8 where the gravity of the public concern for safety and deterrence was compelling, the seizure effectively advanced the public interest, and there was no less

intrusive alternative and the severity of the interference with individual liberty was minimal. *State v. Superior Court (Simmons)*, 143 Ariz. 45, 48-49, 691 P.2d 1073, 1076-77 (1984); *State v. Tykwinski*, 170 Ariz. 365, 824 P.2d 761 (App. 1991). The court then extensively discussed *Anchorage*, noting that the Alaska Constitution differs from Arizona's because Alaska's constitution has both a privacy provision and a search and seizure provision. However, the court held that the *Anchorage* court's statement that the two provisions together provide greater protection than the Fourth Amendment is also true for Arizona cases construing the Arizona Constitution's privacy provision. The court followed the Alaska Supreme Court's approach to this issue, analyzing the issue in search and seizure terms, stating that if the policy satisfied that state constitutional provision, the privacy provision would also be satisfied. Further, the court adopted the special needs analysis employed by the U.S. Supreme Court in *Skinner* and *Von Raab*. The court noted that in adopting a special needs analysis, those U.S. Supreme Court cases relied in part on precedents balancing privacy interests and government intrusion on such interests in the areas of administrative searches and roadblock traffic stops.

The court denied Mesa's motion, treating it as one for summary judgment. The court granted Peterson's request for a declaratory judgment and held that the random, suspicionless drug and alcohol testing component of Mesa's policy violated Art. 2, §8. The court granted the permanent injunction against Mesa's implementing that component of its policy, finding that such testing would cause Peterson irreparable harm and such harm outweighed any harm to Mesa.

Court of Appeals' Decision:

Mesa appealed. The court of appeals reversed, ruling that in the context of Mesa's drug and alcohol testing program, the bounds of Article 2, § 8 do not exceed those of the Fourth Amendment, and the random, suspicionless drug testing is not an unreasonable search prohibited by either the U.S. or Arizona Constitutions. Op. at 8-9, ¶ 14. The court held that Mesa's interest in ensuring that its firefighters are in optimum condition is compelling, and that firefighters have a reduced expectation of privacy compared to other workers because of their unique responsibilities to ensure public safety and to be available as soon as possible for emergencies. Accordingly, the court reversed the grant of summary judgment, vacated the injunction, and remanded for entry of summary judgment for Mesa.

Partial Concurrence and Partial Dissent:

Judge Hall concurred in part, agreeing that Arizona's Constitution affords no greater protection against drug testing than the Fourth Amendment. *See State v. Juarez*, 203 Ariz. 441, 444 ¶ 14, 55 P.3d 784, 787 (App. 2002)(except in cases involving

"unlawful" warrantless home entries, Arizona courts have not yet applied Article 2, § 8 to grant broader protections against search and seizure than the federal constitution provides).

However, Judge Hall dissented in part, stating that he believed that Mesa's public safety interest in requiring firefighters to submit to random, unannounced, and suspicionless drug testing does not outweigh Petersen's Fourth Amendment "right to be let alone - the most comprehensive of rights and the right most valued by civilized men." Op. at 22, ¶ 35 (citation omitted). Judge Hall noted that the majority states the applicable standard correctly: the reasonableness of a particular search is determined by balancing the degree of intrusion on individual privacy against the extent to which the intrusion promotes legitimate governmental interests. *See Skinner,* 489 U.S. at 619. Judge Hall opined that the majority misapplies the standard by giving too little significance to the degree to which random, unannounced, and suspicionless drug testing infringes on a person's bodily integrity and dignity, and by characterizing the policy as meeting a "compelling" safety need "in the absence of any facts demonstrating any actual problem that would justify dispensing with the right of the people to be secure in their persons."

Judge Hall concluded that Mesa's asserted special need to deter drug abuse, the incident of which is hypothetical, does not outweigh Petersen's right to be let alone absent individualized suspicion. Therefore, he would uphold the summary judgment and affirm the order enjoining the City from implementing the policy.

Issue Presented:

"Absent a history of drug misuse, does the Arizona Constitution or the U.S. Constitution give an Arizona city the right to conduct random, suspicionless urine testing of its firefighters?"