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State v. Spady: The Constitutionality of the 24/7 Sobriety Program

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Recap: State v. Spady; The Constitutionality of the 24/7 Sobriety Program

Tyler Stockton

No. DA 14–0089 Montana Supreme Court

Oral Argument: Monday, April 27, 2015, at 9:30 a.m. in the Strand Union Building, Ballroom A on the campus of Montana State University, Bozeman, Montana.

I. TAMMY HINDERMAN FOR THE PETITIONER

Ms. Hinderman opened her argument by noting the 24/7 Sobriety Program was enacted by the Montana Legislature by an overwhelming majority to address a serious problem: there has never been an effective way to enforce pre-trial bail conditions to remain alcohol free. Research demonstrates repeat DUI offenders drive hundreds of times before being caught. The 24/7 Sobriety Program ensures those charged with a DUI do not do so before their trial.

Questions for the Petitioner largely centered on four topics: 1) the nature of the program and how it interacts with the bail statutes; 2) pre-trial punishments; 3) whether the 24/7 Sobriety Program is an impermissible search and seizure; and 4) the vagueness argument.

The nature of the 24/7 Sobriety Program was challenged on several fronts. Justices expressed concern over whether the program was actually being administered on an individualized basis as a condition of pre-trial release. Ms. Hinderman noted that the language of the statute is permissive, not mandatory. Therefore, even though a single, prior DUI conviction is enough for the judge to impose the 24/7 Sobriety Program, the district court may take into account other circumstances as well. In response to a question from Justice Rice regarding the facts of the case, Ms. Hinderman noted since this instant appeal is based on the contempt charges, the specific facts and circumstances involved in the underlying DUI charge and the ensuing pre-trial release conditions are not before the Court. If they had been, there would be the ticket for the DUI and careless driving, the arresting officer's determination of probable cause, and the record of the prior DUI conviction.¹

Questions regarding pre-trial punishments focused on two categories: 1) whether the fact that a contempt charge could be raised by either failure to appear or failing the breath test was a pre-trial punishment, and 2) whether the fees themselves for the testing were a pre-trial punishment. Chief Justice McGrath inquired whether the fact

¹ This is one of the procedural issues present in the instant case.

that one could be charged with contempt for failing a pre-trial condition was actually a pre-trial punishment. Ms. Hinderman responded it is not—because charging someone with contempt is not a punitive charge. For example, in partner family member assault charges, the court may release an individual on a pre-trial condition requiring they have no contact with the victim. If that pre-trial condition is breached, they may be charged with contempt. The 24/7 Sobriety Program is no different. Justice Cotter specifically asked why the fees paid during the program are not refunded if the prosecutor drops the charges or the arrestee is found not-guilty. Ms. Hinderman responded that the fees are not a punishment and therefore allowed. The fees are only for the administration of the program and they are similar to fees allowed for administering the bail system. Further, the district court has broad power to determine how the fees are paid. For example, the district court could remove the fees if they imposed a hardship.

Ms. Hinderman noted that the 24/7 Sobriety Program is not an unreasonable search and seizure for several reasons: 1) there are lowered expectations for those in pre-trial release, 2) the intrusions for breath tests are minimal, and 3) the program advances a governmental special need (protecting the public from prior convicted drunk drivers who are charged with another DUI) beyond the ordinary detection of crime. Mr. Spady meets these factors because he has a prior DUI conviction, was arrested and probable cause found for another DUI and a careless driving charge, and he was unambiguously aware of the sobriety condition and the 24/7 Sobriety Program in his pre-trial release. Justice McKinnon specifically inquired whether using the breath testing program was an appropriate use of evidence for a new criminal charge of contempt and, which if true, would cause the program to fall outside special needs exception. Ms. Hinderman responded that the primary purpose of the program was to protect public welfare by deterring drunk driving. DUI checkpoints have been upheld under similar grounds: there is a search and then a new charge (the DUI) based on that search. The Court upheld the checkpoints because they served a public protection aspect beyond ordinary detection of crime. The 24/7 Sobriety Program is similar.

Finally, Justice Shea inquired whether the lookback period really was lifetime and if a very old DUI would qualify the arrestee for the program. Ms. Hinderman noted that, yes, it would enable to district court judge to impose the program; however, there is no requirement that the judge do so. The 24/7 Sobriety Program is not mandatory and therefore, the judge can consider it when evaluating the totality of the circumstances.

II. KOAN MERCER FOR THE RESPONDENT

Mr. Mercer opened his argument noting the 24/7 Sobriety Program could be constitutional with two changes: 1) remove the criminal contempt charges, and 2) collect testing fees at sentencing from *only* those who have been actually convicted to meet the requirements of Due Process. Further, as a pre-trial sentencing procedural matter, Due Process also requires that the district court must make an individualized determination to place someone in the 24/7 Sobriety Program.

Questions from the justices focused on several areas: 1) the nature of the statute in practice; 2) the vagueness and delegation problems; and 3) fees.

Justices inquired whether a judge could have implemented the 24/7 Sobriety Program before it was codified and whether its permissive nature allowed individualized determinations. Mr. Mercer responded that yes, a judge could have implemented the 24/7 Sobriety Program, with the exception of the testing fees, before the Legislature took action. Pre-trial accused are presumptively allowed release. For convicted, the default is confinement. Due Process *only* allows confinement pre-trial if there is no set of conditions that would protect the public. That determination must be made on an individualized basis. Mr. Mercer noted, however, there is a misunderstanding present in Montana. Some judges think that the 24/7 Sobriety Program can and should be applied to *anyone* charged with alcohol related offenses. Justice Shea asked how other pre-trial restrictions that impose a contempt charge if violated, such as Partner Family Member Assault, can do so. Mr. Mercer noted those programs are constitutional because there is an individualized determination made at the pre-trial hearing. He admitted that if the 24/7 Sobriety Program is accompanied by an individual determination, and the fee question is resolved, testing would not be per-se unconstitutional.

Justice McKinnon asked whether the vagueness and delegation issues were still a concern if the Court upheld the program under the bail statutes. Mr. Mercer noted that those two issues were drafting violations by the Montana Legislature that have now been fixed. The Legislature clarified that the DUI lookback period from the DUI sentencing statutes is the appropriate lookback period and required that the Department of Justice take affordability into account when setting program fees. Mr. Mercer conceded that they had been fixed going forward, but requested the Court still find the errors in the prior version of the statute unconstitutional as applied to Mr. Spady.

Finally, the Court focused on the fees for the 24/7 Sobriety Program. Mr. Mercer argued there can be no punishment prior to a conviction. A pre-trial punishment is one that 1) has historically been a punishment; and 2) is excessive in comparison to its putative non-punitive purposes. Mr. Mercer argued the fees imposed through the 24/7

Sobriety Program meet both elements because this is the very same program and fees that can be imposed on convicts and the fees are excessive because there is no guarantee of conviction. Justices asked how the program has “historically” been a punishment, when *the* classic definition of punishment has always been incarceration, but one can be held in jail pre-trial. Mr. Mercer noted that part of the answer relates to the second element, where the fees are being imposed before there has actually been a conviction. If an individualized determination is made, the testing is not a problem, but the fees are still applicable to a person presumed innocent, therefore creating the excessive nature of the program. Justices then inquired why is it permissive to test, but not to collect the fees for that test and, why this program is not akin to the bail provisions. Mr. Mercer noted that bail has always been bail—not a punishment—and that the fee imposed through bail statutes either goes to the bondsman or to the clerk of court if the clerk administers the bail. Bail is always optional

III. TAMMY HINDERMAN FOR THE PETITIONER—REBUTTAL

Ms. Hinderman’s rebuttal made two specific points. First, the 24/7 Sobriety Program was implemented in Montana simultaneously as a pre-trial program and as a sentencing provision. Prior to 2011, the program did not exist and its simultaneous implementation in both pre and post-trial ensures that it is not something used historically as a punishment. Second, Ms. Hinderman noted the fees are reasonable and only used for administering the program, they are not a punishment on the pre-trial accused. However, if the fee were moved to sentencing and only allowed for those convicted, the Montana Legislature would have to appropriate funds to pay for the program for those arrested but never convicted.

IV. PREDICTIONS

The Court’s primary concern with the 24/7 Sobriety Program centered on the fees imposed for the program prior to sentencing and paid whether an accused was found guilty or not. This concern was also one of the two issues Mr. Mercer noted needed to be resolved for the program to be constitutional. Questions from the justices were mixed from both sides and did not reveal that the Court was leaning in one direction or another. Some questions seriously wondered whether the fees are a punishment imposed pre-trial and are paid whether the accused is convicted or not. Others noted how the bail system already allows for administrative fees and that the 24/7 Sobriety Program is simply a logical extension of the bail structure. This issue could be resolved in either

direction and it will be up to the Court to determine how the fees are construed.

Respondent's final bar to the constitutionality of the 24/7 Sobriety Program was the criminal contempt charges. On this ground, Petitioner's argument regarding Partner Family Member Assault is notable. If an individual is charged with Partner Family Member Assault, the court can issue a no-contact order.² Violation of the no-contact order gives rise to a fine up to \$500, imprisonment for up to 6 months, or both.³ Like the 24/7 Sobriety Program, violating the conditions of pre-trial release that contain a no-contact order gives rise to a separate offense. As such, a decision finding that the contempt charges in the 24/7 Sobriety Program are unconstitutional would put the no-contact order's status into question.

The procedural problems with this case continued to spring up throughout the oral arguments. Although the Court issued a Writ of Supervisory Control to clear up the issues before the Court for oral argument, that does not limit the Court's authority in deciding this issue on procedural grounds.

To be cautious, the Court might emphasize how lower courts are to use the program, specifically focusing on an individualized determination that takes into account the underlying facts. However, as noted by the precap on this case, given a valid legal argument for the Court to uphold the Legislature's enactment, the Court will likely uphold the 24/7 Sobriety Program.

² Mont. Code Ann. § 45-5-209 (2013).

³ *Id.*