

Argued and submitted November 28, 2018, affirmed September 11, 2019

In the Matter of K. R. M.,
a Child.
DEPARTMENT OF HUMAN SERVICES,
Petitioner-Respondent,
and
K. R. M.,
Respondent,
v.
A. M. B.,
Appellant.
Lane County Circuit Court
17JU08181; A167767
451 P3d 264

This appeal arises out of a juvenile dependency proceeding, in which the Department of Human Services required mother to participate in observed urinalysis. Before the juvenile court, mother argued that the observed urinalysis violated her state and federal constitutional rights, and she sought an order for DHS to provide her unobserved urinalysis, which the court denied. *Held:* The juvenile court did not err in denying the mother's motion for unobserved urinalysis. The Court of Appeals determined that the record was inadequate to reach her constitutional claims.

Affirmed.

Josephine H. Mooney, Judge.

Adrian T. Smith argued the cause and filed the briefs for appellant.

Carson L. Whitehead, Assistant Attorney General, argued the cause for respondent Department of Human Services. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Ginger Fitch filed the brief for respondent K. R. M.

Before Powers, Presiding Judge, and Egan, Chief Judge, and Landau, Senior Judge.*

* Egan, C. J., *vice* Garrett, J. pro tempore.

POWERS, P. J.

Affirmed.

POWERS, P. J.

This appeal arises out of a juvenile dependency proceeding, in which mother was required to participate in drug testing as directed by the Department of Human Services (DHS). After completing a substance abuse evaluation, DHS assigned mother to the urinalysis hotline, which directed mother to a laboratory for an observed urinalysis or UA on random days. Before the juvenile court, mother argued that observed urinalysis violated her state and federal constitutional rights and sought an order for DHS to provide her unobserved urinalysis, which the court denied. We have jurisdiction under ORS 419A.205(1)(d), which provides for jurisdiction of post-judgment orders that “adversely affect[] the rights or duties of a party,” and, based on this record, we affirm.

The pertinent facts are mainly procedural and uncontested. Mother admitted two bases for juvenile court jurisdiction, including that her substance abuse, if left untreated, interfered with her ability to safely parent. In taking jurisdiction in the underlying dependency case, the court ordered mother to participate in a substance abuse evaluation and to follow any and all recommendations for treatment. Mother completed the substance abuse evaluation, and the evaluator concluded that she did not need treatment. DHS then assigned mother to participate in the urinalysis hotline, which requires participants to call the hotline each day to see if they have been randomly selected for a urinalysis that day.

At a dispositional review hearing, mother objected to being observed while producing a urine sample and asked the court for an order permitting unobserved urinalysis.

“[MOTHER’S COUNSEL]: Essentially, Your Honor, unbeknownst to us, the Lane County Department of Human Services has a requirement that any urinalysis test be observed. And I’ll give that argument to the Court at the proper time, but we’re arguing that that’s an unreasonable requirement when applied broadly to all people who are required to do observed UAs.

“THE COURT: Okay. Well, are you going to call witnesses or are you just going to argue or—

“[MOTHER’S COUNSEL]: I’m not.

“THE COURT: Okay. So why don’t you make your argument, and then I can get everybody else’s position.”

During the hearing, the parties focused on mother’s legal arguments and no party offered any sworn testimony or any documentary evidence to support their respective legal arguments. At the conclusion of the hearing, the juvenile court set a briefing schedule that included an opportunity for mother to file a written brief and for DHS to file a brief with its position. The court explained that it would then issue a ruling based upon the oral arguments and the written record that it received.

Mother’s post-hearing brief first provided brief background on the case and then focused on her legal arguments under both the Oregon and federal constitutions. Mother included a two-page affidavit with her post-hearing brief that described the process of the observed urinalysis, her reaction to that process, and why she was seeking a court order for unobserved urinalysis. DHS responded by first agreeing with part of the background of the case and then highlighting that “mother did not provide evidence of any DHS contracts concerning observed testing at any collection site.” After setting out its position on mother’s state and federal constitutional claims, DHS urged the juvenile court to deny mother’s request for unobserved UAs because she had not provided sufficient evidence to support her claimed violations.

The juvenile court denied mother’s motion for unobserved urinalysis testing, and mother appeals from that order.

On appeal, mother asserts that the juvenile court erred by denying her motion because DHS’s requirement to participate in observed urinalysis violates her right to be free from unreasonable searches under Article I, section 9, of the Oregon Constitution, and the Fourth Amendment to the United States Constitution. She further contends that her right to privacy and bodily integrity under the Fourteenth Amendment to the United States Constitution has been

violated. Mother does not challenge, however, the court's order to engage in a substance abuse evaluation and to follow any treatment recommendations. Similarly, mother does not challenge the requirement by DHS to submit to random urinalysis; rather, mother's argument focuses on the procedure used to obtain the urinalysis. Thus, the issue for us to decide on appeal is a narrow one: whether the juvenile court erred in denying mother's motion for unobserved urinalysis. As explained below, we cannot conclude on this record that the juvenile court erred in denying mother's motion. Accordingly, we affirm.

Article I, section 9, of the Oregon Constitution, provides:

"No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

Among that provision's guarantees, "[a]ny intrusion of state power upon a constitutionally protected interest, be it for civil or criminal investigative purposes, must comply with constitutional standards." *State v. Bridewell*, 306 Or 231, 239, 759 P2d 1054 (1988). One species of civil investigative searches is the administrative search. As we have explained:

"An administrative search is a recognized exception to the warrant requirement. In general, a search qualifies for the exception if it is conducted for a purpose other than law enforcement, *State v. Anderson*, 304 Or 139, 141, 743 P2d 715 (1987), pursuant to a policy that is authorized by a politically accountable lawmaking body, *Nelson v. Lane County*, 304 Or 97, 106, 743 P2d 692 (1987), if the policy eliminates the discretion of those responsible for conducting the search. *State v. Atkinson*, 298 Or 1, 8-10, 688 P2d 832 (1984); *State v. Coleman*, 196 Or App 125, 129, 100 P3d 1085 (2004), *rev den*, 338 Or 16 (2005). Typical examples include health and safety inspections and certain inventory searches of lawfully seized automobiles."

State v. B. A. H., 245 Or App 203, 206, 263 P3d 1047 (2011).

Mother's state constitutional argument focuses on the reasoning in *Weber v. Oakridge School District 76*, 184 Or App 415, 56 P3d 504 (2002), *rev den*, 335 Or 422 (2003), to support her contention that the juvenile court should have granted her motion. Her argument on appeal focuses on the three conditions of reasonableness discussed in *Weber* for an administrative search to pass constitutional muster and concludes that the unobserved urinalysis met none of those requirements.

In *Weber*, we concluded that random urinalysis of student athletes constituted a search under Article I, section 9. *Id.* at 428. To reach that conclusion, we prefaced that holding with a discussion on which party bore the burden:

“[B]ecause this is a civil declaratory judgment action, plaintiffs have the burden of demonstrating the unconstitutionality of the policy. Directly on point in that regard is *Smith v. Washington County*, 180 Or App 505, 43 P3d 1171, *rev den*, 334 Or 491 (2002). In that case, the plaintiffs brought a civil declaratory judgment action challenging the constitutionality of a courthouse security policy. We held that, ‘because this is a civil declaratory judgment action, “plaintiff[s] have] the burden of demonstrating claimed illegalities.”’ *Id.* at 517 (quoting *Nelson v. Lane County*, 304 Or 97, 101, 743 P2d 692 (1987) (plurality)) (brackets in *Smith*). That merits some emphasis, because it is different from the assignment of burdens in a criminal case. *See, e.g., State v. Barnes*, 172 Or App 408, 412, 18 P3d 1108 (2001) (in a criminal case, the burden is on the state to establish the lawfulness of a warrantless search or seizure). In order to prevail in this case, plaintiffs must affirmatively establish the unlawfulness of the policy; it is not sufficient for plaintiffs to assert that the district has failed to demonstrate its lawfulness.”

Weber, 184 Or App at 425. Although the constitutional dispute in this case arises in the context of a dependency proceeding, rather than in a declaratory judgment action, the parties have assumed that the allocation of the burden is the same. Because mother did not dispute that she had the burden before the juvenile court and does not dispute the issue on appeal, we also assume without deciding for the purposes of this particular case that mother, like a plaintiff in a declaratory judgment action, had the burden of

demonstrating before the juvenile court the unconstitutionality of observed urinalysis.

Mother's burden to prove her constitutional claims included the burden of production. *See* OEC 307(2) ("The burden of producing evidence as to a particular issue is initially on the party with the burden of persuasion as to that issue."). As DHS argued before the juvenile court, mother failed to provide evidence to substantiate her constitutional claims. Other than mother's affidavit, the majority of the factual assertions in the record derive from unsworn statements by the parties' lawyers and their respective legal arguments, which are not evidence. For instance, although the parties reference the contract DHS had with the provider that administers the urinalysis hotline, the record does not include copies of any contracts or relevant contract language for the provider. Similarly, it is not clear from the record what policy or policies DHS may have had surrounding when a urinalysis is to be observed or when it can be unobserved.

Given that the record on appeal is sparse, it is impossible to assess whether this type of administrative search is reasonable under Article I, section 9. *See State v. Snow*, 247 Or App 497, 504, 268 P3d 802 (2011) (identifying five factors to determine reasonableness of an administration search); *Weber*, 184 Or App at 435-37 (identifying three conditions of reasonableness). For example, without a developed factual record, it is difficult to assess mother's contention that it was unreasonable to require her to provide an observed urinalysis because DHS allegedly had different contracts with other providers that allowed for unobserved tests. We likewise conclude that the record is inadequate to reach mother's federal constitutional arguments to the extent that they were preserved for appellate review. *See Department of Justice v. Spring*, 201 Or App 367, 374, 120 P3d 1 (2005), *rev den*, 340 Or 483 (2006) (addressing a Fourth Amendment challenge to a required paternity test by evaluating whether the scope is limited to its purpose and whether it was applied to all who were required to submit a sample).

In short, because the record is bereft of evidence by which we can measure reasonableness under the state or

federal constitutions, we reject mother's assertion that the juvenile court erred in denying her motion for unobserved urinalysis.

Affirmed.