IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAVAR CALVIN, et al.,	)	
	)	
Plaintiff,	)	
	)	No. 03 CV 3086
-vs-	)	
	)	*(Judge Gettleman)*
SHERIFF OF WILL COUNTY,	)	
	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON LIABILITY

On August 17, 2005, the Court set a schedule for summary judgment submissions, accepting defendants' suggestion that the legality of the Sheriff's challenged strip search policies — the existence of which has been conceded by defendants — should be adjudicated without further discovery.[1]

Rule 56 of the Federal Rules of Civil Procedure requires that a case be resolved without a trial when "the pleadings, depositions, answers to

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1. Plaintiffs had intended to support their summary judgment motion with data (sought in an outstanding discovery request) about the number of times in which contraband had been discovered either in a strip search of persons arrested on warrants in misdemeanor cases and in a strip search of a person returning from court after that person's release had been ordered. *See Mary Beth G. v. City of Chicago,* 723 F.2d 1263, 1274 (7th Cir. 1983) ("The City introduced several affidavits of security personnel and one statistical survey in an attempt to show that weapons and contraband can be and have been concealed in the vagina.") The Court indicated that plaintiffs could obtain this data if required to respond to the Sheriff's defense of his policies.

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Waite v. Board of Trustees of Illinois Community College District No. 508*, 408 F.3d 339, 345 (7th Cir. 2005). This rule is properly applied to this case because all of the material facts concerning the Sheriff's challenged policies are undisputed.

I. THE POLICIES CHALLENGED BY THE CLASS

This case involves two policies of the Sheriff of Will County: the first policy mandates the strip search of any person arrested on a warrant issued for failure to appear in a misdemeanor, ordinance violation, or traffic case. The second policy requires the strip search of all persons following a court appearance at which their release is ordered. Each policy is challenged by a subclass that the Court certified under Rule 23(b)(3) in its order of May 12, 2004:

> Subclass One Any person who, from May 8, 2001, to the date of entry of judgment has been, is, or will be arrested on a warrant issued for failure to appear in a misdemeanor or traffic case and, following arrival at the Will County Adult Detention Facility, is or was strip searched without any individualized finding of reasonable suspicion or probable cause that he or she was concealing contraband or weapons.
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> Subclass Two Any person who, from May 8, 2001, to the date of entry of judgment has been, is, or will be in the custody of the Sheriff of Will County on a traffic or misdemeanor charge (or on a warrant issued for failure to appear on a traffic or misdemeanor charge), taken to court from the Will County Adult Detention Facility, ordered released by the court, or otherwise became entitled to immediate release, was returned to the Will County Adult Detention Facility to be processed out of the custody of the Sheriff of Will County, and was

> strip searched without any individualized finding of reasonable suspicion that he or she was concealing contraband or weapons.

We show below that the policy challenged by each sub-class is undisputed and unconstitutional.

II. THE FACTS MATERIAL TO THE SHERIFF'S POLICIES ARE UNDISPUTED

The Sheriff's strip search policies are contained in "Policy #5080" of the "Will County Adult Detention Facility Policy and Procedures." (Plaintiffs' Rule 56.1 Statement, par. 4.) These policies were explained at a Rule 30(b)(6) deposition by Sergeant Brian Fink.[2] (Fink Dep. 3, Plaintiff's Exhibit 2.)

The strip search conducted at the Will County jail is defined in Policy #5080 as a "visual body cavity search." (Plaintiffs' Rule 56.1 Statement, par. 5.) Sergeant Fink provided details about this type of search at the Sheriff's Rule 30(B)(6) deposition (Plaintiffs' Rule 56.1 Statement, par. 6):

> Defense Counsel: Can you explain for us the practice?
> Sergeant Fink: First off, we explain to the inmates that we have to do a strip search before you return back to the jail population and we are going to ask you to please cooperate with us. First off we would ask the inmate to remove each

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2. Sergeant Fink was an appropriate person to have been designated by the Sheriff to explain the strip search policies — Fink is the author of the written policy, (Plaintiffs' Exhibit 2, Fink Dep. 5), and he testified "concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Fed.R.Evid 801(d)(2)(D).

> layer of clothing individually and to shake it out in front of us, or in some cases to hand it to us to actually search the pockets.
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> Once the inmate has removed all of his clothing, he is instructed to — Now the [47] clothing — or he has nothing on. The inmate is instructed to show his hands so he is not — we know that he has not taken anything out of his clothing during the time he was handling it. Show the front, the back, the palms, to lift his arms to be able to examine underneath his arms, to then take his hands and run them behind his ears, and then to take his hands and bend forward and shake his hair out vigorously.
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> Then he is once again asked to show his hands. The inmate is then told to please turn around and to show the bottoms of his feet, and then to bend over and spread the cheeks of his buttocks with his hands. He is then asked to then stand straight up again, turn around, face the officer, and to life his genitals. At that time we would then ask to see his hands again, and then we allow the inmate to redress.

The Sheriff's written policy requires "a reasonable belief that the inmate is carrying contraband or other prohibited material" before a "visual body cavity search" may be performed. (Plaintiffs' Rule 56.1 Statement, par. 7.) This policy may well be constitutional if it required an individual determination that there was "reasonable suspicion that the particular arrestee or detainee" is concealing weapons or drugs. *Thompson v. The County of Cook*, No. 03 C 7172, N.D.Ill. (Mem.Op., August 8, 2005, 15.) The Sheriff, however, does not require any individual determination of reasonable suspicion in the two settings challenged in this case.

The Sheriff's policy assumes that there is a "reasonable belief" that a person is carrying contraband whenever that person has been arrested on a warrant. (Plaintiffs' Rule 56.1 Statement, par. 8.) Accordingly, the Sheriff mandates a

strip search of every person arrested on a warrant even when the warrant had been issued in a traffic, ordinance/regulatory or misdemeanor case. (Id.)

Subclass One challenges this presumption, asserting that it is not reasonable to assume that a person arrested on a warrant will have sought to hide contraband in a spot where it can only be discovered by a strip search.

The Sheriff also assumes that there is "a reasonable belief that the inmate is carrying contraband or other prohibited material" whenever a prisoner returns to the jail from a court appearance. (Plaintiffs' Rule 56.1 Statement, par. 9.) On this presumption, the Sheriff requires that all inmates returning from court be strip searched, including those who are to be immediately released. (Plaintiffs' Rule 56.1 Statement, par. 10.) Subclass Two contends that this presumption is not rationally related to any legitimate penological purpose when it is applied to detainees, like those in Subclass Two, who are about to be released.

III. THE SHERIFF'S POLICIES ARE UNCONSTITUTIONAL

Under Fourth Amendment principles that the Seventh Circuit approved in its affirmance of *Tinetti v. Wittke,* 620 F.2d 160 (7th Cir. 1980), and applied in *Mary Beth G. v. City of Chicago,* 723 F.2d 1263 (7th Cir. 1983), the policies challenged in this case are unconstitutional.

Tinetti v. Wittke arose from a policy of the Racine County jail to require the strip search of persons arrested for non-misdemeanor traffic offenses "due to an unwillingness or inability to post bond before their initial appearance in court." 620 F.2d at 160. The Court of Appeals noted that "[t]he search were conducted despite the absence of any probable cause to believe that the detainees were concealing contraband or weapons on their bodies." Id. The

district court found the strip search policy to be an unreasonable invasion of privacy, 479 F.Supp. 486, 491 (E.D.Wis. 1979), and the Seventh Circuit affirmed on the district court's opinion. 620 F.2d at 161.

The Seventh Circuit extended this reasoning beyond "non-misdemeanor traffic offenses" to misdemeanor charges in *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983). The Court of Appeals carefully analyzed the difference between a "full search" and a strip search, 723 F.2d at 1269-70, and concluded that "the strip searches bore an insubstantial relationship to security needs so that, when balanced against plaintiffs-appellees' privacy interests, the searches cannot be considered 'reasonable.'" (citation omitted) 723 F.2d at 1273.

District courts have applied these principles to invalidate strip search practices at the Calumet City police department, *Doe v. Calumet City,* 754 F.Supp. 1211, 1220 (N.D.Ill. 1990), and at the Cook County jail. *Gary v. Sheahan*, 1998 WL 547116 (No. 96 C 7294, N.D.Ill. August 20, 1998). This circuit does not stand alone on this issue: each circuit that has considered the question has concluded that a person arrested on a misdemeanor charge may not be strip searched upon being placed in the general jail population unless there is reasonable suspicion to believe that he (or she) is concealing a weapon or other contraband. *Savard v. Rhode Island,* 320 F.3d 34, 39-40 (1st Cir. 2003); *Shain v. Ellison,* 273 F.3d 56, 64-66 (2d Cir. 2001); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981); *Watt v. City of Richardson,* 849 F.2d 195 198-99 (5th Cir. 1988); *Masters v. Crouch,* 872 F.2d 1248, 1355 (6th Cir. 1989); *Jones v. Edwards,* 770 F.2d 739, 741 (8th Cir. 1985); *Giles v. Ackerman,* 746 F.2d 6145. 615 (9th Cir. 1984); *Hill v. Bogans,* 735 F.2d 391, 393-94 (10th Cir. 1984);

Wilson v. Jones, 251 F.3d 1340, 1342-43 (11th Cir. 2001). These principles require the invalidation in this case of the Sheriff's policies.

A. Routine Strip Searches of Persons Arrested on Warrants Issued in Traffic, Ordinance Violation, and Misdemeanor Cases is Unconstitutional

The Sheriff acknowledges in his written policy that persons arrested in traffic, ordinance violation, and misdemeanor cases that involve neither weapons nor drugs should not be routinely strip searched.[3] There is no rational basis for applying a different rule to persons arrested on a failure to appear warrant issued in a traffic, ordinance or misdemeanor case.

Illinois law authorizes issuance of a "failure to appear" warrant, also known as a "bench warrant," when an accused has failed to appear in court. 725 ILCS 110-3. Although "a bench warrant does not amount to a judicial finding of probable cause to arrest in the traditional sense, i.e., that a crime had been committed and that defendant had committed it," (citation omitted) *People v. Allibalogun*, 312 Ill.App.3d 515, 518, 727 N.E.2d 633, 636 (2000), such a warrant authorizes the Sheriff to "book" a person arrested (or surrendering) on a bench warrant. *Doe v. Sheriff of DuPage County*, 128 F.3d 586, 588 (7th Cir. 1997). A "bench warrant," however, does not authorize the Sheriff to incarcerate the arrestee, but instead requires the Sheriff to bring the arrestee before

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3. Section L of Policy 5080 states that "[n]o person arrested for a traffic, ordinance/regulatory or misdemeanor offense, except in cases involving weapons or a controlled substance arrest, shall be strip searched." (Plaintiffs' Rule 56.1 Statement, par. 11.)

"the nearest and most accessible judge." 725 ILCS 5/109-1.

The Sheriff appears to concede that there is no rational basis for a presumption that persons arrested on a failure to appear warrant in traffic, ordinance violation, or misdemeanor cases are likely to have secreted contraband on their body. "[A]rrestees do not ordinarily have notice that they are about to be arrested and thus an opportunity to hide something." *Shain v. Ellison*, 273 F.3d 56, 64 (2d Cir. 2001).

Rather than seeking to defend this irrational presumption, the Sheriff argues that it is lawful to strip search persons arrested on failure to appear warrants in misdemeanor, ordinance violation, and traffic cases because such persons "are legally in custody under [13] the authority of a judge as opposed to an arrest without warrant just by a police officer." (Fink Dep. 12-13, Plaintiffs' Exhibit 2.) This argument is a lengthy non-sequitur: Issuance of a bench warrant does not constitute a finding that there is a reasonable basis for a strip search; the only judicial finding underlying a bench warrant is that a criminal defendant failed to comply with a condition of pre-trial release, such as appearing in court.

Equally without merit is the Sheriff's argument that Illinois law authorizes the strip search of persons arrested on bench warrants. (Defendants' Response to Plaintiffs' Motion to Stay Discovery from Individual Class Members, Record Item No. 44, at 6.) The statute on which defendants rely, 725 ILCS 5/103-1(j), provides that the state law prohibition of strip searching persons arrested for a traffic, regulatory, or misdemeanor cases (other than in cases involving weapons or a controlled substance) "shall not apply when the person is taken into custody by or remanded to the sheriff or correctional institution pursuant to a court

order." If this case was governed by Illinois law, plaintiffs would argue that 725 ILCS 5/103-1(j) does not apply to a person arrested on a bench warrant, who is in the custody of the sheriff only until he (or she) can be brought before "the nearest and most accessible judge." 725 ILCS 5/109-1. Illinois law, however, is not controlling on the Fourth Amendment claims at issue in this case: "A discriminatory state law is not a defense to liability under federal law; it is a source of liability under federal law." *Quinones v. City of Evanston*, 58 F.3d 275, 277 (7th Cir. 1995).

The irrationality of the Sheriff's presumption that persons arrested on warrants is reflected in the policy of the DuPage County Jail. General Order COR 6-9.8 of the DuPage County Jail, (Plaintiff's Exhibit 3) governs searches of inmates. (Plaintiffs' Rule 56.1 Statement, par. 14.) Section III (C)(1)(a) of this rule authorizes a strip search when the inmate has been arrested on a new charge involving drugs or weapons, as long as "there is *reasonable belief* established that the inmate has **additional drugs or paraphernalia on his/her person, which is not detectable in a complete, accurate, and thorough pat search.**" (emphasis in original) (Plaintiffs' Rule 56.1 Statement, par. 15.) The rule expressly states, however, that an arrest on a new charge does not include arrests on a "failure to appear warrant." Id.

The Fourth Amendment prohibits the routine strip search of persons arrested on traffic, ordinance violation and misdemeanor charges (which do not involve weapons or drugs). This rule applies with equal force when a person is in custody on a failure to appear warrant issued in a traffic, ordinance violation and misdemeanor case. Accordingly, summary judgment on liability should be entered in favor of Subclass One and against the Sheriff of Will County.

B. The Routine Strip Searches of Persons Returning from Court Who Are Awaiting Release from Custody Is Unreasonable

The Sheriff has to date failed to offer any defense of his practice of requiring the strip search of persons returning from court who are awaiting release from the jail. We note that a similar practice resulted in a sizable damage award in *Young v. City of Little Rock*, 249 F.3d 730, 735-36 (8th Cir. 2001).

In *Bell v. Wolfish*, 441 U.S. 520 (1979), the Court considered a challenge to a Bureau of Prisons rule that required the strip search of every inmate returning from a "contact visit with a person from outside the institution." Id. at 558. The Court concluded that the rule was related to stopping the "[s]muggling of money, drugs, weapons, and other contraband" into the institution, id. at 559, and upheld the rule by "[b]alancing the significant and legitimate security interests of the institution against the privacy interests of the inmates." Id. at 560. The Sheriff's rule of strip searching persons who are to be released from the jail flunks this balancing test.

The Sheriff's policy of "strip search before release" has no relationship to institutional safety, as the district court recognized in *Gary v. Sheahan*, 1998 WL 547116 (No. 96 C 7294, N.D.Ill. August 20, 1998). There, the court invalidated the routine strip search of detainees at the Cook County jail after they had been ordered released from custody by a judge on the following reasoning:

> [T]he question currently under review is whether the searches conducted on female detainees after they had been ordered released from custody by a judge is unreasonable under the circumstances. In order to determine reasonableness, the court must balance the prison's need for security with the privacy interests of the plaintiffs. A court in this district has explained the balancing test as follows:
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> > [I]f jail security is to justify the search the detainee must

> present some threat to jail security. The facts in the cases where searches have been upheld suggest some reasonable cause on the part of the authorities to suspect that the detainees might be trying to smuggle weapons or contraband into the jail. A person detained for a violent crime may presumptively be suspected of carrying a weapon. However, when an arrestee is being detained briefly awaiting the posting of bond on a traffic or misdemeanor offense, generally a strip-search can be made only on reasonable suspicion that the arrestee is carrying or concealing a weapon or contraband, unless authorities can demonstrate that misdemeanants regularly pose a threat to jail security.
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> *Simenc v. Sheriff of DuPage County*, No. 82 C 4778, 1985 WL 4896, at * 3 (N.D.Ill. December 9, 1985) (Moran, J.) (citations omitted).

Pursuant to this test, variety of courts have found that strip searches in the prison context may be unconstitutional. For example, in *Doe v. Calumet City*, 754 F.Supp. 1211, 1218 (N.D.Ill. 1990) (Shadur, J.), the court found that the Constitution prohibits blanket strip search policies that do not distinguish between arrestees. Similarly, in *Tinetti v. Wittke*, 479 F.Supp. 486, 491 (E.D.Wis. 1979), *aff'd*, 620 F.2d at 160 (7th Cir. 1980), the court concluded that strip searches of detainees for nonmisdemeanor traffic violations are unconstitutional absent probable cause to believe the offender is concealing contraband or weapons. This court's analysis of the case law leads to the conclusion that the defendant must—at the least—have a reasonable suspicion that the plaintiff class member is carrying or concealing a weapon or contraband. The plaintiffs, as women for whom there is no longer any basis for their detention, clearly have a privacy interest in their body parts which is as great, if not greater, than that of pretrial detainees. *See Tinetti, Mary Beth G., supra.* As such, the defendant's blanket policy of strip searching all court returns—including those who may proceed for release—is constitutionally suspect. *See Doe, supra.*

Gary v. Sheahan, 1999 WL 281347, *12-*13 (No. 96 C 7294, N.D.Ill. March 31, 1999)

The district court's reasoning in *Gary v. Sheahan, supra*, is fully applicable to this case. Accordingly, summary judgment on liability should be entered

in favor of Subclass Two and against the Sheriff of Will County.

IV. CONCLUSION

For the reasons above stated, the Court should grant summary judgment on liability in favor of each subclass and against the Sheriff of Will County.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing to be served on Kevin J. Clancy, Lowis & Gellen, 200 West Adams, Ste 1900, Chicago, Illinois 60606, by first class mail, postage prepaid, this 31st day of August, 2005.

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