98-6144

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SHARON MAGILL AND SHERRER HUDMON,

Appellants,

vs.

LEE COUNTY, ET AL.,

Appellees,

Case No.: 98-6144

ON APPEAL FORM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA,
EASTERN DIVISION
CV-96-01140

BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

Submitted by:
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Attorney for Appellants

MAGILL, ET AL., V. LEE COUNTY, ET AL.,
DOCKET NO.: 98-6144

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

Counsel for Appellant certifies that the following is a complete list of the trial judges, attorneys involved in the case, and all persons, associations of persons, firms, partnerships, and corporations having an interest in the outcome of this case:

Albritton, Harold W., United States District Judge;

United States District Court, Southern District of Alabama;

Lee County, Appellee;

Sheriff Chapman;

Sharon Magill, Appellant;

Sherrer Hudmon;

Bennitt, Jeffrey W., Attorney for Magill and Hudmon;

Ken Webb, Attorney for Lee County and Sheriff Chapman

MAGILL, ET AL., V. LEE COUNTY ET AL.,
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CERTIFICATE OF TYPE SIZE AND STYLE

Pursuant to 11th Cir. R. 28-2(d) the following brief is in 14 point Times New Roman print.

STATEMENT REGARDING ORAL ARGUMENT

Appellant believes that oral argument would aid the court in deciding the issues.

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STATEMENT OF JURISDICTION

Jurisdiction with the Eleventh Circuit is grounded on 28 U.S.C. §1291, which authorizes the Court of Appeals to review all final district court decisions.

STATEMENT OF THE ISSUES

Did the District Court err in determining that the defendants' strip search policy was reasonable in light of Bell v. Wolfish, 441 U.S. 520 (1979) and Justice v. City of Peachtree City, 961 F.2d 188 (11th Cir. 1992)

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITIONS IN THE COURT BELOW

The complaint of the plaintiff was filed against defendant on August 4, 1995. (R1-1-1). An amended complaint was filed on September 6, 1995. (R1-2-1). The defendant answered on October 17, 1995. (R1-5-1). Discovery was had and done.

Defendant filed their motion for summary judgment on November 22, 1996. (R1-29-1). Plaintiff responded on December 13, 1996. (R1-33-1). Summary Judgment was granted on Janury 21, 1997. (R1-36-1), with an opinion by the District Court. Notice of Appeal was filed on January 24, 1997. (R1-37-1)

B. STATEMENT OF THE FACTS

This case involves the juxtaposition of the United States Constitution, more precisely, the fourth amendment's ban against unlawful searches and seizures with the state's need to utilize strip searches as tools in maintaining security and locating contraband in institutions. The factual items under scrutiny will be (1) the strip search policy of Sheriff Chapman; (2) the two plaintiffs and the charges against them, their jail status, the types of persons they are, and the circumstances involving the stripping off of their clothes to their undergarments.

Sheriff Chapman's policy, (plaintiffs' exhibit one), says:

1. 1. **Strip Search**: A search during which an inmate is required to remove his clothing.

2. 3. **Strip Searches shall be done** at the following times:

a. **After an inmate who is housed in the facility is booked,** unless prohibited by law.

3. 3. **Body Cavity Search:** A visual, manual, or instrument inspection of an inmate's anal or vaginal cavity.

4. 5. **Body Cavity Searches shall be done** only by medical personnel and upon the order of the Chief Deputy Sheriff or his designee.

Sheriff Chapman's deposition, (plaintiffs' exhibit two), details the policy.

He states that the room where the searches were done was done with his approval, (Chapman depo, page 9) and that this was the search room pursuant to the jail policy for strip searching inmates. This room has a window in the door so that anyone in the area can look inside, (plaintiffs' exhibit, three). Sheriff Chapman states that there was no magistrate available to get a search warrant because he believed the law gave him the power search inmates without a warrant. (Chapman depo, page 11).

Chapman claims in his deposition that the written policy means something different than what it says. Chapman tells us that where the policy says "clothing"--see above, it really means "outer clothing". (Chapman depo, page 14). Any inmate who takes off his clothing after being ordered to take off his clothing is not obeying the policy. (Chapman depo, page 15).

The searches were conducted in a room with a window and the deputies were instructed to stand in front of the windows. The deputies were also instructed to visually search the the entire body of the inmate, front and back. Normal search procedure is for the searching person to move while the person being searched stands still. It was part of Sheriff Chapman's policy to conduct searches in a room with a window. (Chapman depo, page 18).

When asked about the extent of the strip search policy, Sheriff Chapman

answered as follows:

Q: Do you have a policy of strip-searching, under your definition of strip search in plaintiffs' exhibit one, female detainees without any reasonable suspicion of them having weapons or contraband under their outer clothing?

A: I have a policy that everybody that comes in that jail and put under arrest and may stay in there any length of time, other than just to make bond and walk out, that they be searched-

Q: Strip-searched?

A: -for contraband or drugs.

Q: Is that under the strip search definition?

A: Right.

Sheriff Chapman said that he approved of the strip searches of the plaintiffs and said that the searches were done within his policy. (Chapman depo, page 21).

Evelyn Maxine Glines, a jailer for Sheriff Chapman at the time of the incidents, testified about the strip search policy and the room, (Plaintiffs' exhibit four).

She stated that one could see through the window of the room where the searches were conducted. She said that sometimes up to twenty searches a day

were done in that room. (Glines depo, page 40-43). She stated it was the sheriff's policy to strip search all people who are booked and put in a holding cell. (Glines depo, page 40 &41).

Gonophore Lynx Reason was a jailer for Sheriff Chapman and she was the booking officer when Ms. HUDMON was searched, (plaintiffs' exhibit five).

She said that Ms. HUDMON was put into a holding cell while her husband used the phone to contact a bondsman. She said that the reason Ms. HUDMON was strip-searched was because they put her in the holding cell, while her husband used the phone, (Reason depo, page 32-33). Ms. Reason also verified the reason Ms. HUDMON was searched--and her husband was not--was because she was in the holding cell and her husband was using the phone. (Reason depo, pages 12,13 & 33).

Ken HUDMON stated that he saw them strip-search his wife and in that twenty foot area, there were prisoners who could see also, (Hudmon affidavit, plaintiffs' exhibit six). He stated that they were responding to a card that they had received from the bad check division. They were not even aware that they were going to be arrested.

Sherrer Hudmon stated that they told her to take off her clothes. She stated that there were people in the booking area that could look inside. She

stated that the police woman who did the search was getting an "eye full". (Hudmon deposition, pages 61,64-67,72-74, plaintiffs' exhibit seven).

Sharon Magill was also strip-searched by a jailor working for Sheriff Chapman and following his policy. Ms. Magill was following her girlfriend to the hospital where her girlfriend was going to have a baby. Ms. Magill and her girlfriend were picked up for speeding, Ms. Magill charged with D.U.I. . Ms. Magill was strip-searched in the same room with the window, where Ms. Hudmon was searched. (Magill depo, page 31-32, plaintiffs' exhibit eight). Ms. Magill was not put in the general population, but in a holding cell for the required time to get over the D.U.I. . She stayed in the holding cell for five hours. (Magill depo, page 36). Magill signed a personal bond to get out after her five hours were up. (Magill depo, page 37). Magill was strip-searched to her bra and panties.

Both plaintiffs were strip-searched without any consideration about whether they had any contraband inside their clothes pursuant to the automatic strip search policy of Sheriff Chapman.

STATEMENT OF THE STANDARD OF REVIEW

The district court's conclusions of law and its application of law to the facts is de novo review. Massaro v. Mainlands Section 1 & 2 Civic Assn., Inc., 3 F.3d 1472 (11th Cir. 1993).

SUMMARY OF ARGUMENT

The court's determination that the defendants' strip search policy did not violate the fourth amendment is contrary to law.

ARGUMENT

COUNTY LIABILITY

As happens in every case, the County, to which has the responsibility under law to maintain a jail within its county borders, Alabama Code, 11-14-10, requests summary judgment or dismissal claiming that they have no control or authority over the sheriff and the jail. And while that may be true, that also is not the law. The actual exercise of authority or control is not what controls. What controls is the power to exercise or control. If the county abdicates county authority to the sheriff, then the sheriff becomes the policy maker for the county. In McMillan v. Monroe County, Alabama, 117 S. Ct. 1734 (1997), the Supreme Court decided that "in determining a local government's Section 1983 liability, a court's task is to identify those who speak with final policymaking authority for the local governments." The Court went on to say that whether or not the sheriff acts for the county or the state depends on state law. The rest of the case was easy to decide. The court decided that only the sheriff has the authority to make policy in the area of law enforcement. A county simply has no law enforcement authority.

But we are not dealing in an area of law enforcement, but in the area of confinement. In this area, there is a dual function. The county has to maintain the

jail and the sheriff has to run the jail. The goals and policies are dual in nature and since the County has decided not to interfere with the sheriff, then so be it. That simply does not alter its duties and responsibilities as provided by Alabama Statute. If the Alabama legislature wants to make the county jails the state's responsibility, then they have only to pass that law. Until they do, the law is what it says it is: "Every county shall be required to maintain a jail within their county." Alabama Code, 11-14-10, 1975.

SHERIFF'S LIABILITY FOR UTILIZING AN UNCONSITUTUTIONAL POLICY

"According to the Eleventh Circuit, 'although Section 1983 does require proof of an affirmative causal connection between the official acts or omissions and the alleged constitutional deprivation, personal participation...is only one of several ways to establish the requisite causal connection.' Swint v. City of Wadley, Alabama, 51 F.3d 988 (11th Cir. 1995); Zatler v. Wainwright, 802 F.2d 397 (11th Cir. 1986). In Zatler, the court explained that a prison official may be held liable 'where a policy or custom that he established or utilized in deliberate indifference to an inmates constitutional rights.' Zatler, 801 F.2d 401. The court in Swint elaborated on the prior discussion in Zatler, stating that 'personal participation is not the sine qua non for the defendant to be found personally

liable under Section 1983. Liability may be imposed due to the existence of an improper policy or from the absence of a policy.' Swint, 51 F.3d 999, quoting Rivas v. Freeman, 940 F.2d 1491 (11th Cir. 1991)." (Memorandum opinion, Judge Albritton, May 20, 1997, Magill & Hudmon v. Lee County, et al.).

Under Alabama Law, the defendant Sheriff of Lee County, is responsible for the Lee County Jail and its policies. Ala. Code, Section 14-6-1 (1996). Alabama Code Section 14-6-1 states that "the sheriff has the legal custody and charge of the jail in his county and all prisoners committed thereto, except in cases otherwise provided by law...". Furthermore, Sheriff Chapman admits that he utilized the policy in effect at the time of the strip searches and that he approved of what the deputies did to the plaintiffs and that, in his opinion, those deputies were following the policy. (Chapman depo, page 21). So we are not dealing with any agency questions here. We are dealing with direct liability under Monell v. Department of Social Servs., 436 U.S. 658 (1978).

THE UNCONSTITUTIONAL POLICY: THERE WAS NO BALANCING TEST DONE

Plaintiffs claim that this particular policy subjected them to unreasonable searches in violation of the fourth amendment of United States Constitution. Plaintiffs claim that under this amendment, they have:

"...the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..."

The defendants argue that the plaintiffs lost their right to object to state officials looking at them without their clothes on (in their undergarments) when they were arrested and could not make bond quick enough to get out (ironically, the policy places a premium on a person's wealth as to whether or not they will have to reveal themselves). Both Reason and Glines testified that the reason Hudmon was strip-searched was because it was taking Mr. Hudmon so long to raise the money to get a bondsman. The court has stated on many occasions that pre-trial detainees do not lose all of their fourth amendment rights. Bell v. Wolfish, 441 U.S. 520 (1971).

In Bell v. Wolfish, 441 U.S. 559, the Supreme Court set up a balancing of the need for the particular search against the invasion of personal rights that the search entails. They told courts to consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

The standard required must be "an objective standard". Justice v. Peachtree City, 961 F.2d 188 (11th Cir. 1992). Thus, all the subjective considerations of Sheriff Chapman and his jail administrator, Cary Torbert, Jr.

become irrelevant. It does not matter that if "we don't strip-search someone and they bring a gun in the jail, we could get sued". What matters is that the sheriff follow the law set out by Justice v. Peachtree City. Otherwise, as can be seen from defendant's brief, anything can be justified.

The court in Peachtree City says: "It is axiomatic that a strip search represents a serious intrusion upon personal rights." The court does not draw a distinction between the strip-search of a juvenile and an adult: " Although this result troubles us, our reading of Bell and our inability to find any substantial difference between the security and contraband considerations as they relate to an adult and to a juvenile lawfully in custody mandate our holding. They use the word mandate."

Peachtree City does not involve an automatic strip search policy, like the one that Sheriff Chapman had. In Peachtree City, the arresting officer took into consideration various objective items of information regarding the probability of contraband on the person of the plaintiff. No such considerations were made here. In fact, the arresting officer was not even there when the searches took place. In the case of Hudmon, there was no arresting officer. In the case of Magill, he simply dropped her off, (plaintiffs' exhibit nine). In our case, the defendant Sheriff admits that the plaintiffs were stripped because he has an automatic strip policy

of all people put into holding cells that aren't just out in the booking area awaiting bond.

Bell v. Wolfish, 441 U.S. 520 (1979) had a automatic strip-search policy. And it also involved pre-trial detainees. So, the defendant says that they must win. That the policy is the same, thus, they win.

The two situations are constitutionally different. Bell v. Wolfish admonishes that the fourth amendment "is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." In Bell, the court upheld the automatic strip-search. But, the institute in Bell, was a federal corrections facility, housing federal inmates for transport to other federal facilities, including pre-trial detainees. The automatic strip search in question was one done on already incarcerated persons, living in the prison population, inmates, and then, only after a contact visit from a person from the outside the institution. Neither plaintiff in our case was incarcerated, already incarcerated, had just had a contact visit--nothing more than "just visiting". Also, both of the plaintiffs were in the jail, awaiting bond. Also, both of the plaintiffs were only in the jail temporarily, awaiting bond to get out. Neither of the plaintiffs were put into the general population. Both of the plaintiffs were put into the holding cells in the

booking room, away from the general jail population. And, finally, different from Wolfish, is that both plaintiffs were arrested for minor offenses. Magill, for bad checks, which was really a civil matter, and Magill for driving under the influence.

Most cases which have upheld across the board strip search policies have similarly involved already-incarcerated persons who are routinely searched before or after some contact with the outside world. Daughtery v. Harris, 476 F.2d 292 (10th Cir. 1973). In this case, the court upheld the automatic strip search of a federal penitentiary inmate prior to a court appearance. In Bell v. Manson, 427 F. Supp 450 (D.Conn. 1976), the court upheld the strip search of pretrial detainees on return from court appearances and other outside visits).
In Harris v. Ostrout, 65 F.3d 912 (11th Cir. 1995), the court upheld the automatic strip search of a "close Confinement" inmate, citing that prisoners have no fourth amendment protection. The same court in Peachtree City said that pre-trial detainees did not lose their fourth amendment protection. And even in Harris, supra, prisoners have the right not to have strip searches used as a means of punishment. It is impossible for the court in Harris to mean anything but what they said in Harris.

On the other hand, across-the-board strip search policies have been held

unconstitutional when applied to persons in plaintiffs' position. The case of Logan v. Shealy, 660 F.2d 1007 (4th Circuit 1981); cert. denied, is remarkably on point with Magill's case. The plaintiff in that case was arrested for driving while intoxicated and was required to be detained in the county jail for four hours or until a responsible person arrived to take her home. The county sheriff had established a policy that all persons to be **held** (in a holding cell) at the detention center would be strip-searched for contraband and weapons, regardless of their offense or length of stay. The court stated that, in the absence of cause in her specific case to believe she might possess such contraband, a strip search of the plaintiff pursuant to the county's blanket policy was in violation of Fourth Amendment rights. In Tinetti v. Wittke, 620 F.2d 160 (7th Cir. 1980), the court held that a blanket strip search policy by a county sheriff was in violation of the Fourth Amendment when they strip-searched the female plaintiff arrested for speeding, but unable to post the required forty cash bond.

The differences in the two sets of cases are the differences in the two sets of people. In one class of people, the people already confined, you have the high likelihood of smuggling. Already confined prisoners should expect strip searches. That awareness keeps them form caring around contraband or smuggling contraband at the next opportunity. Not so with our plaintiffs. Our plaintiffs do

not use drugs and commit violent crimes with guns. Their arrest was total shock. The liklehood of a newly-arrested violator concealing contraband on his body is simply not strong enough to authorize an across the board strip search of all of them. The balancing test of Peachtree City must be used. (Of course, there is also the possibility that true criminal smugglers could get themselves arrested on purpose on a minor offense, just to smuggle). However, since the plaintiffs were never put into the prison population, there could be no smuggling.

The rule should be the opposite of what Sheriff Chapman's policy says the rule is. The rule should be, and this court should adopt, that strip searches of temporary pre-arraignment detainees charged with minor offenses not normally associated with weapons or contraband are permissible under the Fourth Amendment only, if there is basis for reasonable suspicion that the particular detainee is concealing a weapon or contraband. That is exactly what the Eleventh Circuit said in Justice v. City of Peachtree City, supra, the rule is.

QUALIFIED IMMUNITY

It is impossible to believe that the court in Justice v. City of Peachtree City, supra, did not establish clearly defined law. And certainly Bell v. Wolfish established clearly defined law. That case is cited constantly all over the nation.

Justice v. City of Peachtree City is decided on the law of Wolfish, despite

the fact that it involved a juvenile. The court said that it had grave doubts as to the wisdom of its decision because a juvenile was involved, but went on to say that there was no law to distinguish how a juvenile or an adult should be treated. The fact that there was a juvenile involved then became irrelevant.

The plaintiff in Peachtree City was asked to take her bra off and the testimony here is that only one plaintiff took her bra off. Yet, the difference is that these plaintiffs were strip searched automatically. The plaintiff in Peachtree City was strip searched only after a balancing of interests as described by Wolfish.

The plaintiff in Justice was let go after the search proved negative. The plaintiffs in our case were let go after they made bond, and were only put in holding cells and not in the general population. And also, the plaintiff in Peachtree City was suspected of being involved in a very serious crime, while, our plaintiffs were not.

And finally, the admitted testimony of Sheriff Chapman is that no consideration of whether or not the plaintiffs were suicide threats was taken into account at the time of the searches. It is axiomatic that a search must be justified at its inception. New Jersey v. T.L.O., 469 U.S. 325 (1985). The defendants cannot come back later on and invent reasons to justify themselves.

IN CONCLUSION

The appellants request this Honorable Court to reverse the district court and return the case for trial on the merits against the appellees Lee County and Sheriff Chapman.

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CERTIFICTE OF SERVICE

I hereby certify that a copy of the above and foregoing brief and record excerpts of Appellant has been served upon counsel listed below by placing a copy of the same in the U.S. Mail, postage prepaid and properly addressed, this the 19th day of June, 1998.

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