IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

DEANGELA WILSON, by and through Paula DuVall, her mother and next friend,

Plaintiff;

v.

SHELBY COUNTY, ALABAMA, *et al.*

Defendants.

Case No. CV 99-TMP-110-S

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This cause is before the court on defendants' motion to dismiss plaintiff's claims. The motion has been briefed by all parties, and oral argument was heard on March 17, 1999. Defendants claim that all of plaintiff's claims are due to be dismissed based upon sovereign immunity, discretionary function immunity, and qualified immunity.

Procedural History

On January 20, 1999, the plaintiff, a minor, filed a complaint in this matter, seeking damages[1] in the amount of $1,000,000 against Shelby County, Alabama, and Sheriff James Jones.[2] The

[1] There is no request for injunctive or declarative relief.

[2] The complaint also names as a defendant "an unknown deputy sheriff"; however, fictitious pleading has no effect in federal court, and the deputy is not deemed to be a party.

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complaint arises from the arrest of the minor plaintiff and the subsequent strip search conducted at the Shelby County Sheriff's Department. According to the complaint, the 18-year-old female plaintiff was stopped by Shelby County sheriff's deputies at a driver's license checkpoint on or about May 1, 1998. The plaintiff showed deputies a valid driver's license. Plaintiff alleges that the deputies then searched a closed cooler on the back seat of the car. In the cooler, deputies found unopened cans of beer.

The complaint further alleges that plaintiff was then given a breath alcohol test, which registered a reading below the legal limit. Plaintiff was then charged with DUI and an additional breath alcohol test was given to plaintiff, the results of which indicated that plaintiff's blood alcohol level exceeded the legal limit. Plaintiff was subsequently taken to the Shelby County Jail, where a third breath alcohol test was administered. Plaintiff has not alleged the results of the third test.

After being taken to the Shelby County Jail, plaintiff alleges that she asked permission to use the bathroom, was allowed to use the bathroom, and then was strip searched in the jail bathroom by a female deputy. The strip search included the removal of undergarments and a visual inspection of body cavities. The deputy performing the search also allegedly attempted to remove a ring

from the plaintiff's navel, and plaintiff alleges that the removal caused physical injury and infection.

Plaintiff alleges that the sheriff's office has a policy of strip searching all persons who, following arrest, are confined in the Shelby County Jail. Plaintiff alleges that the policy and the deputy's actions constitute an unreasonable search violative of the Fourth Amendment to the United States Constitution. She also alleges that the initial search of the closed cooler was without probable cause, in violation of her Fourth Amendment rights. Plaintiff brings this action pursuant to 42 U.S.C. § 1983, and also alleges state law claims for invasion of privacy and false imprisonment.

On February 22, 1999, defendants Shelby County and Sheriff James Jones responded to plaintiff's complaint by filing a motion to dismiss.[3] As grounds for the motion, defendants state that no claims are made against Shelby County, and no claims arising from plaintiff's arrest may properly be made against Shelby County because the sheriff is a state employee rather than a county employee. Defendants further state that the sheriff is entitled to

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[3] The motion is also brought on behalf of the "unknown deputy"; however, because that fictitious defendant is not properly before this court, the court treats the motion as being brought on behalf of the remaining defendants, Shelby County and Sheriff James Jones.

absolute sovereign immunity from state law claims pursuant to Article 1, Section 14 of the Alabama Constitution of 1901, and to discretionary function immunity from state law claims pursuant to Alabama Code § 6-5-338 (1975). Defendants further assert that the sheriff is absolutely immune from the Section 1983 claim brought against him in his official capacity. Additionally, defendants assert that the Fourth Amendment claims are due to be dismissed pursuant to the doctrine of qualified immunity because the sheriff reasonably could have believed that the conduct did not violate clearly established federal law. Finally, defendants assert that plaintiff's allegations relating to the search of the cooler and the administration of the breath alcohol test fail to state a claim upon which relief can be granted.

Standard Of Review

When ruling on a motion to dismiss, the court must assume that the factual allegations in the complaint are true. Neitzke v. Williams, 490 U.S. 319, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989); Fed. R. Civ. P. 12(b)(6). Furthermore, assuming that the facts alleged are true, a complaint may be dismissed only if it is clear that the plaintiff could not prove any set of facts in support of her claims that would entitle her to relief. See, Hishon v. King & Spalding, 467 U.S. 69, 73; 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59

(1984); Roberts v. Florida Power & Light Co., 146 F.3d 1305, 1307 (11th Cir. 1998). Therefore, the court accepts plaintiff's allegations as true, and views those allegations in the light most favorable to the plaintiff.

Claims Against Shelby County

Plaintiff does not dispute that Shelby County is not a proper party to this action. The parties agree that Shelby County is not liable for a sheriff's official acts that may be found to be tortious; therefore, the county is due to be dismissed pursuant to Turquitt v. Jefferson County, Alabama, 137 F.3d 1285, 1288-89 (11th Cir. 1998) (holding that the sheriff acts exclusively for the state, rather than for the county, for purposes of imposing liability for injuries plaintiff sustained in a county jail). Consequently, this court finds that the motion to dismiss all claims against Shelby County is due to be granted.

State Law Claims

Plaintiff also concedes that under Alabama law, the defendant sheriff, both in his official and individual capacities, is entitled to absolute, sovereign immunity from suit based on state law claims. See McMillian v. Johnson, 101 F.3d 1363 (11th Cir. 1996); Tinney v. Shores, 77 F.3d 378 (11th Cir. 1996). Accordingly, defendants'

motion to dismiss plaintiff's state law claims based upon Article 1, Section 14 of the Alabama Constitution is due to be granted.

Section 1983 Claims

Defendant asserts, and plaintiff does not dispute, that the plaintiff's Section 1983 claims against the sheriff in his official capacity are due to be dismissed because the defendant is absolutely immune pursuant to the Eleventh Amendment to the United States Constitution. See Carr v. City of Florence, 916 F.2d 1521 (11th Cir. 1990). However, plaintiff contends that her Section 1983 claims arising from the strip search remain viable against the sheriff in his individual capacity.[4]

Plaintiff asserts that the search was conducted pursuant to the sheriff's "blanket policy," a policy that is violative of federal law, and the sheriff is therefore individually liable.[5] Defendants

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[4] Plaintiff's response to defendants' motion to dismiss does not address the viability of plaintiff's claims relating to the cooler search or to administration of the breath alcohol test. The court will nevertheless determine, *infra*, whether these claims are due to be dismissed.

[5] In the alternative, the plaintiff argues that: (1) the search was conducted in violation of the department policy, and the deputy is individually liable; or (2) both the sheriff and the deputy are individually liable if portions of the policy are unlawful and the deputy acted outside the scope of the policy. However, as discussed *supra* at n.2, the unknown deputy is not a party to this action.

contend that the sheriff is shielded from liability by the qualified immunity doctrine.

Under federal law, it is well settled that qualified immunity protects government officials performing discretionary functions from civil suit, and from liability, where their conduct does not violate "clearly established statutory or constitutional rights." Lassiter v. Alabama A & M Univ., 28 F.3d 1146, 1149 (11th Cir. 1994)(citing Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982))(additional citations omitted). Furthermore, it is the general rule that qualified immunity will protect government actors from liability, and only in "exceptional cases" will the immunity be unavailable as a shield. Id. Even so, qualified immunity does not apply in those instances where the law has "been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place," that the actions violate federal law. Id. It is not necessary that the facts of the cases relied upon as the "clearly established law" be the same as in the instant case, but they "do need to be materially similar". Id. at 1150.

In this case, the Eleventh Circuit Court of Appeals has spoken on the precise issue at bar: the permissible limits of a strip search conducted on a minor female. See Justice v. City of Peachtree City, 961 F.2d 188 (11th Cir. 1992). In Justice, a 14-

year-old female was lawfully arrested in Peachtree City, Georgia, for loitering and truancy. Id. at 189. The officers approached a car, being driven by a male juvenile, with a juvenile female as the sole passenger. As the officers approached the car, they observed the driver give something to the passenger. The officers conducted a pat-down search of the driver at the scene, searched the purse of the passenger, and then transported both juveniles to the police station. Id. at 190. At the station, two female officers took the female to an empty room, where they conducted a strip search. They allowed her to remain in her undergarments, and they did not conduct a body cavity search. Id.

To determine the issues presented in Justice, the court first noted that the Fourth Amendment is violated when the government conducts an unreasonable search in an area where a person has a reasonable expectation of privacy. Id. at 191. The court further considered it "axiomatic" that people have a reasonable expectation of privacy in their "private parts." Id. Recognizing the demeaning, degrading and humiliating nature of a strip search on any person, the court noted that a minor would be "especially susceptible" to possible trauma or psychological damage caused by a strip search. Id. at 192, quoting Flores v. Meese, 681 F. Supp. 665, 667 (C.D. Cal. 1988), rev'd on other grounds, 507 U.S. 292, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993).

The court in Justice evaluated the reasonableness of the search by applying a balancing test set forth by the Supreme Court. Justice, 961 F.2d at 192-94, citing Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, L. Ed. 2d 447 (1979). In Bell, the Supreme Court examined the legality of a correctional facility's routine strip searches, with visual body cavity searches, conducted on all prisoners after a contact visit with any person from outside the institution. The Court in Bell stated:

> The test of reasonableness under 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. Courts must 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.

Bell, 441 U.S. at 559, 99 S. Ct. at 1884. The Supreme Court did not address the legality of such searches on minors, but held that strip searches were not *per se* illegal. However, the Court noted that there must exist some objective standard, such as reasonable suspicion, although the search need not be premised on so high a standard as "probable cause". Bell, 441 U.S. 560. The searches at issue in Bell were designed both to discover and to deter the smuggling into the facility of contraband, and apparently had been successful in doing both. Id. at 558-60. The Court reiterated that

the strip search must be "reasonable" under the circumstances. Id. Bell stands for the limited proposition that visual body cavity searches are permissible on adult prisoners, after they have had a contact visit and before returning to the cells, because contact visits are known to provide an opportunity for the smuggling of weapons, money, or drugs.

The Eleventh Circuit Court of Appeals applied the Bell test in affirming the district court's ruling that the search in Justice did not violate the Fourth Amendment. The Eleventh Circuit first assumed that the juvenile was lawfully in custody. Justice, 961 F.2d at 191. The court next examined the scope, manner, and place of the search. The scope of the search in Justice was limited to exclude the body cavities, and to allow the minor to wear her panties. Id. at 193. The manner of the search was by two female deputies. Id. The place of the Justice search was an empty room available only to the female officers and the juvenile. Id. "Without doubt," the court noted, "the officers conducted the strip search in the least intrusive" way possible. Id.

The court then examined the justification for the search and specifically held that strip searches of juvenile arrestees for minor offenses are permissible only when based upon a "reasonable suspicion to believe that the juvenile is concealing weapons or contraband." Id. at 193. In Justice, the justification for the

search arose from the officers' observation of the driver giving something to the passenger. Id. Because the search in Justice was as unintrusive as possible, and was prompted by a reasonable suspicion, the search was not violative of the Fourth Amendment. Justice, then, clearly stands for the proposition that a strip search of a minor must be conducted in the least intrusive manner possible and is not permissible in the absence of reasonable suspicion.[6]

Defendant has pointed out that another judge in another case in this district determined that the Shelby County strip-search policy is not unconstitutional. In Mumpower v. Jones, in the United States District Court for the Northern District of Alabama, Southern Division, CV-98-J-1097-S (April 14, 1999), the court had before it a summary judgment motion in a case that involved the lawful arrest of two female adults. That court also relied, as defendant urges this court to, upon Magill v. Lee County, 990 F.Supp. 1382 (M.D. Ala. 1998), aff'd, 161 F. 3d 22 (11th Cir. 1998). In Magill, the

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[6] The Eleventh Circuit opinion in Justice is consistent with the law in other circuits, where it has been determined that a strip search-body cavity search of adult arrestee charged with a minor offense must be based on reasonable suspicion. See Weber v. Dell, 804 F.2d 796 (2d Cir. 1986)(reversing district court's summary judgment in favor of the sheriff where adult arrestee was subjected to a strip search and body cavity search); Kennedy v. Los Angeles Police Dep't, 901 F.2d 702 (9th Cir. 1989)(finding that policy of conducting strip search and body cavity search on all felony adult arrestees violated constitutional rights).

court granted summary judgment for defendants in a case involving strip searches of inmates, but those searches did not require the removal of undergarments, did not involve any body cavity search, and did not address the application of that policy to juveniles. Furthermore, the court in Mumpower applied the Justice reasoning by requiring that the search be based on "reasonable suspicion." Mumpower, at p.10. Consequently, the holdings of Mumpower and Magill do not change the clear mandate of the Eleventh Circuit as set forth in Justice.

Nothing in the complaint, the motion, or in oral argument suggests that the Shelby County deputies had any reasonable suspicion, or any suspicion at all, that the plaintiff was concealing weapons or contraband. The fact that plaintiff allegedly was allowed to use the bathroom prior to the search belies any contention that the deputies suspected the plaintiff of concealing weapons or contraband because plaintiff could have flushed any such substances down the toilet prior to the search. Also absent is any suggestion that the search by the Shelby County deputies was designed to deter the smuggling of contraband. Indeed, the deterrence factor so important in Bell is absent here, where the subject of the search was not already an inmate and had no expectation, at the time of her traffic stop, of being placed in jail. Even more important is the fact that the search at issue here

was not conducted in the least intrusive manner possible, as clearly required by Justice, because the plaintiff was forced to remove her undergarments and was subjected to a visual body cavity search. The place of this search was likewise less private than the place in Justice. Plaintiff was placed in a bathroom apparently open to any other women, rather than the empty room available only to the deputy who conducted the search, as in Justice. Consequently, assuming as true the facts alleged in the complaint, the plaintiff's claim relating to the strip search is viable, and the sheriff in his individual capacity is not protected by qualified immunity because the search of the plaintiff violated the "clearly established law" set forth in Bell and Justice.[7] Consequently, defendants' motion to dismiss is due to be denied as to the Section 1983 claims against the sheriff because the plaintiff's claims arising from the strip search could sustain a cause of action pursuant to Section 1983.

Additional Claims

In tandem with her complaint regarding the manner of the strip search, plaintiff complains that the deputies caused physical injury

[7] The court's conclusion does not necessarily mean that defendant will not be able to successfully defend this claim on summary judgment or at trial, but, based on the limited information before this court and the standards regarding determinations of a motion to dismiss, the plaintiff succeeds in stating a claim.

by attempting to remove a belly button ring from the plaintiff's navel. It has been held that it is proper for law enforcement officers to remove property, including jewelry, from an arrested person who is to be placed in jail. See Rodriguez-Mora v. Baker, 792 F.2d 1524, 1526 (11th Cir. 1986). It is conceivable that the manner of the removal of the ring, as alleged in the complaint, was so injurious as to state a civil rights claim. However, the plaintiff does not allege that the sheriff implemented any policy concerning the removal of such jewelry, nor does plaintiff allege that the sheriff participated in, or was even aware of, the deputies' actions relating to removal of the ring. Consequently, plaintiff's claim relating to the removal of jewelry is due to be dismissed because the complaint fails to state a claim against the sheriff in his individual capacity for which relief could be granted.

Although plaintiff challenges the constitutionality of the search of the cooler and the administration of the breath alcohol tests, plaintiff does not argue these issues in her response to defendants' motion to dismiss, or at hearing on the motion. Likewise, defendants' motion to dismiss does not discuss the claims relating to the search of the cooler and the administration of the breath alcohol test, except to baldly state that such allegations fail to state a claim. This court finds that, taking the

allegations in the complaint as true and viewing the facts alleged in the light most favorable to the plaintiff, the search of the cooler could be deemed to be a search violative of the Fourth Amendment. However, nothing in the complaint or the arguments before the court indicate that the sheriff could be liable for that conduct in his individual capacity. Plaintiff has not alleged that the cooler search was pursuant to any policy or practice promulgated by the sheriff, or that he was present, aware of, or participated in the search of the cooler. The sheriff is not liable for the action of his deputies merely because he is their employer. Monell v. Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Accordingly, the claim relating to the search of the closed cooler is due to be dismissed.

As to the final allegation, the court finds that the plaintiff's contention relating to the administration of the breath alcohol tests does not state a cognizable claim. Administration of the test is explicitly permitted under Alabama law. See Alabama Code § 32-5-192; Britton v. State, 631 So. 2d 1073 (Ala. Crim. App. 1993). Even if administration of the breath alcohol test did state a claim, the defendant would be immune from suit pursuant to the Eleventh Amendment to the United States Constitution, Section 14 of the Alabama Constitution, and the doctrine of qualified immunity because there is no clearly established federal law prohibiting the

use of the breath alcohol test as is alleged by the plaintiff. Accordingly, the breath alcohol test claim also is due to be dismissed.

Conclusion

Assuming the facts alleged in the complaint to be true, and viewing those facts in the light most favorable to the plaintiff, plaintiff has stated a viable claim that the sheriff, in his individual capacity, violated plaintiff's rights under 42 U.S.C. 1983, by implementing a policy that resulted in the strip search of the minor plaintiff with reasonable suspicion that she was carrying a weapon or contraband. However, plaintiff's claims against Shelby County and the sheriff in his official capacity are barred by the immunity granted pursuant to the Constitution, and by the statutes and doctrine explained *supra*. Consequently, defendants' motion to dismiss is due to be DENIED as to the sheriff, as an individual, relating to the strip search of the plaintiff. Defendants' motion is well taken and is due to be GRANTED as to Shelby County and the sheriff in his official capacity and individual capacity on all other claims.

Recommendation

Based upon the foregoing undisputed facts and legal conclusions, the magistrate judge RECOMMENDS that the motion to dismiss filed by defendants Shelby County and Sheriff James Jones be GRANTED in part and DENIED in part as follows:

1. That the motion be GRANTED as to all claims alleged against Shelby County, and that all such claims be DISMISSED WITH PREJUDICE.

2. That the motion be GRANTED as to all claims alleged against Sheriff Jones in his official capacity, and that all such claims be DISMISSED WITH PREJUDICE.

3. That the motion be GRANTED as to all state-law claims alleged against Sheriff Jones in his individual capacity, and that all such claims be DISMISSED WITH PREJUDICE.

4. That the motion be GRANTED as to plaintiff's claims against Sheriff Jones in his individual capacity for injury due to removal of her belly button ring and for violation of her fourth Amendment rights in relation to the search of the cooler and the breath alcohol test, and that such claims be DISMISSED WITH PREJUDICE.

5. That the motion be DENIED as to plaintiff's Fourth Amendment/strip search claim against Sheriff Jones in his individual capacity.

Any party may file specific written objections to this report and recommendation within fifteen (15) days from the date it is filed in the office of the Clerk. Failure to file written objections to the proposed findings and recommendations contained in this report and recommendation within fifteen (15) days from the date it is filed shall bar an aggrieved party from attacking the factual findings on appeal.

The Clerk is DIRECTED to serve a copy of this order upon counsel for all parties.

DATED this 23rd day of April, 1999.

T. MICHAEL PUTNAM
CHIEF MAGISTRATE JUDGE