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United States District Court, N.D. Illinois, Eastern Division.

William KLEIN, Mike Hollingsworth, Carl Von Koeppen and James Taurisano, Plaintiffs,
v.
Edward LUNDMARK, Richard Doria, and Edward Burdett, Defendant.

No. 85 C 3430. | Oct. 17, 1989.

Opinion

MEMORANDUM AND ORDER

MORAN, District Judge.

***1** Several pretrial detainees, held on felony charges at the DuPage County Jail several years ago, brought a § 1983 action against Richard Doria, Sheriff of DuPage County, Edward Burdett, Chief Deputy and Chief of the Corrections Bureau, and Edward Lundmark, Burdett's first assistant with responsibility for overseeing the day-to-day operations of the jail in 1983–1984. Three plaintiffs, William Klein, Carl von Koeppen and James Taurisano, pursued their claims through trial. Those claims relate to jail procedures in 1983 and 1984 regarding visual body cavity searches and the shackling of prisoners when they were patients in the infirmary.

Considering the nature of the case there is remarkably broad agreement about what those procedures were. They can best be understood in the context of the physical and functional constraints then existing. In 1983 DuPage County was constructing a new jail, which became operational on December 31, 1983. In the meantime the old jail was overcrowded and understaffed. A prisoner like the plaintiffs, who had been arrested on felony charges and was being retained on those charges, was subjected to a visual body cavity search when he entered the facility. That search required the prisoner to remove all his clothing, including his moving his genitals and bending over and spreading his buttocks while a guard observed. Plaintiffs do not complain about that search, and their complaints about strip searches, in the sense of having to remove their clothes, is muted. Their primary complaint about searches is the rectal examination routinely required upon leaving for and returning from court, and it is that kind of visual body cavity search to which we hereafter refer as a cavity search.

Prisoners such as plaintiffs were housed in one of six dormitories on the second floor. Each dormitory, which contained a sleeping area and a day room, could be secured. At one end of the floor there was a small infirmary and a room in which prisoners could use telephones and see visitors. A desk for the officer's post was situated near the door to the infirmary. The infirmary contained one or two beds and, sometimes, a cot and the medical officer's desk. A small closet or storage area off the infirmary contained medical supplies, including drugs, and the infirmary telephone was also located there. The medical officer carried keys to both the storage area and the infirmary.

When prisoners were going to court (which was adjacent to the jail area) they stripped in the hallway outside the dormitory area and were subjected to a cavity search. Other guards or inmates not going to court may have observed searches from time to time while in the hallway or from an adjacent cell. The prisoners then could change into other clothing, if they wished, for their court appearance; they were handcuffed, usually with their hands in back, and were taken by one or two guards to a holding cell or bullpen in the court section of the building. There the cuffs were removed and there the prisoners remained, under the supervision of court bailiffs also employed by the sheriff, until their case was called. When a prisoner went from the bullpen to the courtroom he passed along public hallways, accompanied by a bailiff and cuffed, and was in proximity to whoever was in the hallway. He was uncuffed in a room back of the courtroom. After the court appearance he returned the same way and, once back to the hallway in the jail was again subjected to a cavity search. The same procedure applied to prisoners whether they were housed in a dormitory or in the infirmary.

***2** The new jail was built several miles away. Prisoners were, for a while, subjected to cavity searches in a separate room prior to transport by van to the old jail, where, generally, the movement from bullpen to court and back was similar to the prior procedure. Prisoners were again subjected to a cavity search upon return to the new jail. Sometime in 1984 the cavity searches ended for prisoners going to court, and only pat searches are now customarily used. One reason for ending the procedure for prisoners going to court undoubtedly has been an increased confidence in the security afforded by a new, less crowded facility with significantly increased staff. Another reason, as Edward Lundmark testified, was to assist in obtaining accreditation from the American Corrections Association, since its guidelines provide that a pat search upon leaving is sufficient. Cavity searches upon return continue.

In the old jail the standing special order provided that infirmary patients should be leg-cuffed to their beds when a medical officer was present (and, conversely, by implication, that they not be cuffed when the medical officer was not present). The evidence established that the order was usually but not always observed. Sometimes the medical officer did not bother to cuff the prisoner while present and sometimes he did not bother to uncuff the prisoner when he left, either because the prisoner was sleeping or because uncuffing was too much trouble. Usually, however, the prisoner was cuffed by a shackle to the ankle, with a short length of chain to another shackle affixed to a bed rail. If it was affixed to the top rail the prisoner had more movement on the bed but could stand next to the bed only with difficulty; if affixed to the lower rail the movement was more restricted but standing was easier.

Klein, who had been shot in the head in 1983, was disabled and in the infirmary from May 1983 until he was transferred to the new jail at the end of the year. He was not shackled at the new jail's infirmary, as the storage area and medical officer's desk were not in the infirmary in the new facility. He was shackled for over 200 days at least half the time and probably considerably more than that. He got progressively weaker until he was transferred, and his greater opportunity for movement thereafter led to improvement. Klein went to court a dozen or so times and was then subjected to cavity searches. He was no stranger to the criminal justice system, having been in other jails and prisons.

Von Koeppen was also in the infirmary, although for a shorter period, March 1, 1983 to May 13, 1983. He went to court approximately 20 times in 1983. He testified that he was shackled 18 to 20 hours a day. Both he and Klein agreed that they could ask to be unshackled to use the toilet and would be, but three times the medical officer left for lengthy periods without unshackling him and he had to relieve himself on the floor. It would appear that von Koeppen also was no stranger to the criminal justice system.

***3** Tourisano also was no stranger to the criminal justice system. Consistently with others, he testified that state prisons and other jails now use metal detectors and, in varying circumstances, use pat searches and strip searches but that they, customarily at least, do not require cavity searches. That testimony is consistent with current American Corrections Association and Illinois County Jail standards. Taurisano went to court twice from the old jail and approximately nine times during his first six months in the new jail.

The legal standards are established by *Bell v. Wolfish,* 441 U.S. 520 (1979). Pretrial detainees, having been only charged but not convicted, cannot be subjected to punitive measures, but the government can employ devices calculated to effectuate detention. We look to the purpose of the policy and, if it is to preserve institutional security and preserve internal order and discipline, rather than to punish, we must determine whether the means employed are rationally related to that purpose and whether they are excessive to accomplish the purpose. The judgments of prison officials respecting what they consider to be appropriate means is entitled to considerable deference.

The application of those standards has been troublesome for the courts. Judges are not experts in prison administration and necessarily must be cautious in intervening into the difficult and complex area of prison operations. On the other hand, excessive deference can (and in the not too distant past did) lead to systemic deprivations of constitutional guarantees. We recognize, as well, that an anal search "instinctively gives us the most pause," *id.* at 558, because it is " 'demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission....' " *Mary Beth G. v. City of Chicago,* 723 F.2d 1263, 1272 (7th Cir.1983). That does not mean, however, that they are never permissible. Plaintiffs concede, as they must, that such searches are permissible upon initial entry. They were determined to be reasonable searches after contact visits in *Bell v. Wolfish, supra,* and the practice has been upheld in a variety of circumstances at maximum security institutions housing long-term violent offenders, such as the level 6 federal facility at Marion, Illinois, *Bruscino v. Carlson,* 854 F.2d 162 (7th Cir.1988), *cert. denied,* —— U.S. ——, 109 S.Ct. 3193 (1989); *Campbell v. Miller,* 787 F.2d 217 (7th Cir.), *cert. denied,* 479 U.S. 1019 (1986); Leavenworth, Kansas, *Daugherty v. Harris,* 476 F.2d 292 (10th Cir.), *cert. denied,* 414 U.S. 872 (1973); and Walpole, Massachusetts, *Arruda v. Fair,* 710 F.2d 886 (1st Cir.), *cert. denied,* 464 U.S. 989 (1983). On the other hand, the Seventh Circuit strongly condemned such searches of women arrested for misdemeanor offenses and held in a local lockup while waiting to bond out. *Mary Beth G. v. City of Chicago, supra.*

The DuPage County Jail is somewhere in between. It is not a Marion. But plaintiffs were not charged with minor offenses and being only temporarily held. Defendants seek to justify the reasonableness of the searches on the ground that prisoners may seek to carry contraband in and out of the jail. And there was evidence that contraband is a continuing problem. One of the plaintiffs, Taurisano, recognized that there were instances in which drugs were introduced into the jail by transfers during court appearances. One difficulty with defendants' position, however, is that, with one exception, the contraband was secreted in hair or clothing and could be found by pat searches or, on rare occasions, by strip searches not involving cavity searches. The one exception was recent, in 1988, when a prisoner sought to carry back a Bic lighter in his rectum. The other difficulty is that the

evidence indicated that the problem is contraband coming in, not out.

***4** That contraband has not been carried in the rectum is, it appears, the natural consequence of the procedures followed. The only reason for carrying contraband out, so far as we can determine, is to aid in an escape attempt. But again, the DuPage County Jail is not Marion, and the searches were routine, not selectively applied to those who were believed to pose serious security risks. Further, the opportunities to remove anything from the rectum were limited, if they existed at all, in view of how prisoners were moved. The jail standards referred to at trial saw no necessity for cavity searches before leaving a jail and the DuPage County Jail no longer has such searches. It can be argued, and was successfully argued in *Bell v. Wolfish, supra,* that the failure to find something can be an indication that searches deter. That argument reminds me of a Royko column from years ago, praising, with tongue in cheek, a somewhat bombastic state civil defense director for being so effective that no Soviet bomber had dared to penetrate Illinois air space. That contention has its place, but for the reasons stated it has little force here. We believe those searches were an excessive response amounting to punishment.

The searches upon return push the limits of reasonableness, but here the concept of deference tilts the result in favor of the defendants. There are a number of reasons for wanting to bring things into a jail—drugs, escape materials, weapons to settle private feuds, comforts. The ability to secrete an object was limited here, but guards could not be sure it was non-existent since a prisoner was beyond their supervision for extended periods. The opportunities for transfers were extensive, in the public hallways, in the courtroom and in the room off the courtroom. Present jail standards indicate that a cavity search on return is not necessary, but *Bell v. Wolfish* requires me, I believe, to defer to the DuPage County Jail on the return searches.

The shackling is another matter. The argument is that an unshackled prisoner in the infirmary might jump the medical officer for his keys to escape or to get into the medical storage closet or perhaps he might jump the medical officer when the medical storage closet door was open. Implicit in the argument is the assumption that space was at such a premium at the old jail that a small space had to do triple duty: infirmary, medical officer's office and medical storage, and that, in those circumstances, security measures not otherwise appropriate were in fact necessary. It does not follow, however, that because DuPage County then had an inadequate facility it could then use extraordinary measures in the interest of security. A jail could get along with a much smaller staff if all the prisoners were chained to the wall all day, but conditions as harsh as those are punishment if there are alternatives. *See Bell v. Wolfish, supra,* at 468, fn. 20. Freedom of movement has been described as a substantial right, *Wells v. Franzen,* 777 F.2d 1258 (7th Cir.1985), and courts take a hard look at procedures involving shackling to a bed to see that those procedures are reasonably necessary in the circumstances, *see French v. Owens,* 777 F.2d 1250 (7th Cir.1985), *cert. denied,* 479 U.S. 817 (1986); *Stewart v. Rhodes,* 473 F.Supp. 1185 (S.D.Ohio 1979), *appeal dismissed,* 661 F.2d 934 (6th Cir.1981).

***5** Here Klein was shackled to his bed for approximately 200 days and von Koeppen was shackled for 74 days, both for extended periods each day. And it was unnecessary. Lundmark recognized that there was a security problem only if the door was open. It is difficult to believe that a bed-ridden prisoner poses much of a security problem. Indeed, it is our understanding that the medical officers in the new jail are adjacent to ambulatory prisoners, without any security concerns. Even if we assume that there were a security problem, there were various alternatives. The door to the medical storage closet could have been kept locked and the prisoner shackled only when that door was opened to use the telephone or get supplies. The outside door could have been locked from the outside by the officer at the nearby officer's desk and the keys left there, and the medical officer could then request that officer to let him out. The medical officer could have used a desk in the hallway, as he often apparently did. The locks to the doors to the outside (which itself was a secured area) and to the storage area could have been electrically activated from the officer's desk. In short, there were numerous effective alternatives which did not require the shackling of patients for months at a time. We conclude that the shackling was effectively punishment.

Having concluded that some but not all searches and the shackling were impermissible, we turn to the issues of individual liability and damages. As a practical matter DuPage County is the interested party. Since this case involves procedures at a county institution, the county will undoubtedly pay any final judgment, and the reasons for the procedures were at least in part a response to an underfunded and overcrowded facility. The legal liability falls, however, on the individuals responsible for the operation of the jail, and each of the three defendants recognize that he had a direct responsibility for jail operations and that the procedures were in force during his watch. Each, therefore, is legally answerable.

What are the damages? The plaintiffs are not allegedly minor offenders having their first brush with the criminal justice system and being traumatized by that experience. Each anticipated significant restrictions upon his liberty interests and the testimony established that the plaintiffs, or at least some of them, recognized that cavity searches were expectable upon first entry and at least strip searches were expectable in various circumstances thereafter. The

humiliation and resentment arises less from the required submission itself than from the required submission when they recognized that it was unreasonable. The shackling was even more intrusive and, unlike the searches, far from momentary. We award damages of approximately $50 per search and $200 per day for the shackling. We therefore award damages to Klein in the amount of $41,000, Taurisano in the amount of $600, and von Koeppen in the amount of $16,000, together with costs.