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United States District Court, D. Nebraska.

Kenneth L. SMITH, Plaintiff,
v.
DAWSON COUNTY, NEBRASKA, et al.,
Defendants.

No. CV 86–L–851. | Aug. 4, 1987.

Attorneys and Law Firms

Beverly Evans Grenier, Lincoln, Neb., for plaintiff.

David Pederson, North Platte, Neb., for defendant.

Opinion

REPORT AND RECOMMENDATION

***1** Pending before the court is the motion of the plaintiff for partial summary judgment on the issue of liability in this action brought pursuant to 42 U.S.C. § 1983. The plaintiff contends that the defendants are liable as a matter of law for the implementation of a policy, which has since been discontinued, in which all persons brought to the Dawson County Jail were strip searched and then sprayed with an insecticide. The defendants deny that the constitutional rights of the plaintiff have been violated. As discussed below, I determine that the plaintiff has established a prima facie case on the issue of liability.[1]

I

Under Rule 56 of the Federal Rules of Civil Procedure the purpose of a motion for summary judgment is to determine whether genuine issues of material fact exist. All inferences of fact must be drawn against the moving party, who carries the burden of showing that no issue of material fact exists and that it is entitled to judgment as a matter of law.

Although not without contradiction, the various depositions, affidavits, and documents, viewed most favorably to the defendants and giving the defendants the benefit of all favorable inferences to be drawn from them, disclose the following facts relevant to the allegations in the amended complaint.

As a part of the routine booking procedure at the Dawson County Jail, all persons that are to be incarcerated are subjected to the usual requirements of answering questions concerning medical history and medication, and are also pat searched, fingerprinted, and photographed. In addition, at all times relevant to this suit, all such individuals were further subjected to a strip search, during the course of which they would be sprayed with an insecticide from an aerosol can. As indicated on the product, the insecticide was to be used on humans for the purpose of killing crab, body, and head lice, as well as nits and chiggers. (Exhibit 6).[2]

This blanket procedure was conducted on all incarcerated individuals, whether they were initial arrestees or sentenced prisoners returning on work release, and regardless of the charges filed against that particular person. (Mandelko Deposition 14:14–15:5; Boom Deposition 26:9–16 & 38:3–39:1; Coover Deposition 12:1–12).[3] The individual was accompanied by a correctional officer of the same gender, and was first required to completely disrobe. The room in which this was done was not open to view from passers-by or others in the jail, so that only the jailer conducting the examination would see the individual while he or she was nude. After observing the individual remove his or her clothing, the correctional officer would then require the individual to raise his or her arms to shoulder level, and hold a folded towel over his or her face, especially the mouth and nose. The correctional officer would then spray the body of the individual from the shoulders down, both front and back, including under the arms and in the genital and anal areas. While the spraying was conducted, the correctional officer would undertake a visual examination of the individual's body, including the genital and anal areas, looking for open sores, scars, lice, or any other evidence of a contagious disease that the individual failed to mention during the medical history questioning. (Boom Deposition 21:11–23 & 22:2–13; Coover Deposition 13:17–14:15, 15:6–9, 15:22–16:4, & 18:20–25). In conducting the visual examination, the correctional officer would not physically touch the individual, nor would the individual be required to bend over and spread his or her buttocks. In addition, no visual inspection would be made into the other body cavities, such as ears, eyes, nose, or mouth, nor would a close inspection of the fingers or toes be conducted. (Boom Deposition 34:9–13; Coover Deposition 16:5–8, 18:5–8, 18:20–25, & 57:20–58:14). The individual would be completely nude and under the scrutiny of the correctional officer for a period of about two or three minutes, with the spraying taking only a few (approximately five) seconds. (Coover Deposition 19:1–9 & 19:12–15). The fumes from the spray were strong and unpleasant. (Boom Deposition 41:23–42:8; Coover Deposition 15:10). Although the room in which the spraying was conducted was fairly small, approximately ten feet by twelve feet, and did not

have an exhaust fan, it appears that it was ventilated by keeping a window open, at least part of the time. (Boom Deposition 42:9–14; Coover Deposition 55:9–56:2). A few seconds after the individual was sprayed, he or she would then be directed to take a shower (Boom Deposition 18:11–17; Coover Deposition 54:3–20).[4] The individual would then be required to put on a jail uniform, and then be taken to the appropriate cell.

The plaintiff complains of this procedure in two capacities: (i) as an initial arrestee, and (ii) as a sentenced prisoner on work release status.

***2** In the initial arrest complained of, on March 2, 1984, the plaintiff had been arrested for driving under the influence and refusing to submit to a breath test. The correctional officer conducting the strip search and spraying was Officer Coover. (Coover Deposition 21:8–17 & 13:17–14:15). In the other arrest situation complained of, the plaintiff had been arrested on January 25, 1986 for driving under a suspended license, and on this occasion Officer Boom conducted the strip search and spraying procedure. (Boom Deposition 22:14–16 & 36:2–7). On each occasion the plaintiff was detained overnight, and was released on his own recognizance the next morning after posting bail. (Smith Deposition 31:11–14).

In addition, while serving time as a sentenced prisoner, the plaintiff was subjected to this strip search and spraying procedure each night he returned from working at Monroe Auto Equipment in Cozad, Nebraska, while on work release status. (Boom Deposition 38:21–23; Smith Deposition 37:23–38:3). The plaintiff was on work release status during three sentences for traffic offenses, one for driving under the influence and two for driving under a suspended license. In each of his first two sentences, which began on November 21, 1984, and April 1, 1985, respectively, he served 46 days of a 60 day sentence, and was on work release for the duration of each sentence. (Smith Deposition 9:22–10:10, 10:11–15, & 11:9–17). In his third sentence, which began on March 25, 1986, he served 69 days of a 90 day sentence, and was on work release status for all but the last three weeks of this sentence. (Smith Deposition 10:22–23 & 11:9–17).[5]

Throughout all of the aforementioned strip searches and sprayings, the plaintiff was cooperative. (Boom Deposition 25:3; Coover Deposition 18:1–4). At no time was any evidence of vermin or communicable disease found on his person, and the correctional officers had no reason to suspect that he would be carrying any such affliction. (*See* Coover Deposition 14:16–24). Correctional officers also had no suspicion that plaintiff was at any time concealing contraband, such as weapons or drugs, on his person under his clothing. (*See* Coover Deposition 16:14–18).

II

At the outset, I reject the defendants's rather strained suggestion that what the plaintiff was required to endure was neither a "search" nor a "strip search." As the Supreme Court has recently observed, "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen,* 466 U.S. 109, 113 (1984). There is no contention that arrestees have no Fourth Amendment interest in bodily privacy, and any such contention concerning sentenced prisoners must be similarly rejected. As former Chief Justice Burger recognized in a related context, "Inmates in jails, prisons, or mental institutions retain certain fundamental rights of privacy; they are not like animals in a zoo...." *Houchins v. KQED, Inc.,* 438 U.S. 1, 5 n. 2 (1978). It cannot be seriously argued that such a privacy interest is not infringed by requiring the person to completely disrobe before correctional officers and then subjecting him or her to a close visual examination of his or her nude body. Although not impossible, it is surely difficult to imagine a much more humiliating and degrading experience, short of strip search involving a visual body cavity inspection.

Contrary to the position taken by the defendants, a "strip search" is not synonymous with a "visual body cavity search." *See Goff v. Nix,* 803 F.2d 358, 366 n. 10 (8th Cir.1986) *reh'g denied,* 809 F.2d 530 (1987), *petition for cert. filed.* Throughout their brief, the defendants make much of the fact that the plaintiff was not required "to bend over, spread his buttocks, [and] lift his genitals." (Defendants' Brief at 18). The fact that the plaintiff was not required to endure the most intrusive aspects of a visual body cavity search does not in any manner alter the fact that he was subjected to a strip search. See, e.g., *Giles v. Ackerman,* 746 F.2d 614, 616 (9th Cir.1984), *cert. denied,* 471 U.S. 1053 (1985); *Hill v. Bogans,* 735 F.2d 391, 395 (10th Cir.1984) (strip searches of minor traffic offense arrestees not involving visual body cavity searches found unconstitutional).

***3** In order to qualify as a strip search, an individual need merely be required to disrobe before a correctional officer and be subjected to a visual inspection of the nude body. *United States ex rel. Wolfish v. Levi,* 439 F.Supp. 114, 146–48 (S.D.N.Y.1977); *aff'd in relevant part sub nom Wolfish v. Levi,* 573 F.2d 118 (2d Cir.1978), *rev'd on other grounds sub nom Bell v. Wolfish,* 441 U.S. 520, 559 (1979); *see also Goff,* 803 F.2d at 372 (Bright, J., dissenting). In the present case, the plaintiff was required to remove all of his clothing and, while standing in the nude, was subjected to a close visual examination of his skin to determine whether he had any cuts, abrasions, open sores, crabs, lice, or signs of any other contagious

infections that he failed to mention during the medical history questioning. This unquestionably constitutes a search for Fourth Amendment purposes, and additionally constitutes a strip search under the relevant case law. See, e.g., *Giles,* 746 F.2d at 616; *Hill,* 735 F.2d at 395.

III

The Fourth Amendment to the Constitution prohibits only "unreasonable" searches. As the Supreme Court has observed:

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 v. Wolfish, 441 U.S. 520, 559 (1979). As the discussion below details, I find that the strip search and insecticide sprayings that the plaintiff was required to endure cannot pass the reasonableness requirement, and thus violated the plaintiff's Fourth Amendment rights.

In considering the scope of the intrusion and the manner in which it was conducted, I find that, although the strip searches and insecticide sprayings were not conducted in an especially disrespectful or offensive manner, the scope of the intrusion was great indeed.

I note here that other courts, in describing strip searches involving the close visual inspection of the anal and genital areas, have treated such practices as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." *Tinetti v. Wittke,* 479 F.Supp. 486, 491 (E.D.Wis.1979) (*quoting Sala v. County of Suffolk,* (E.D.N.Y. Nov. 28, 1978 (unpublished decision)), *aff'd,* 620 F.2d 160 (7th Cir.1980). The Eighth Circuit has observed that "a strip search, regardless of how professionally and courteously conducted, is an embarrassing and humiliating experience," involving an "extensive intrusion on personal privacy." *Hunter v. Auger,* 672 F.2d 668, 674 (8th Cir.1982). In the present case, as the defendants correctly point out, the evidence, considered in the light most favorable to the defendants, indicates that there was no visual body cavity search undertaken of the plaintiff, therefore making the particular searches less intrusive than they otherwise might have been. The same concerns nonetheless apply. Although I in no way intend to denigrate the extent of the additional invasion occasioned by a visual body cavity search, the defendants' argument grossly underestimates the inherent intrusiveness attendant in a basic strip search. This conclusion is buttressed by the fact that, with respect to all of the cases concerning strip and visual body cavity searches of prisoners and arrestees, I have found no case in which the court has drawn a distinction of constitutional magnitude between the two searches, approving of one and disapproving of the other.[6]

***4** Concerning the justification for the search and the nature of the facility in which it is conducted, I conclude that, although the searches were conducted in as private a location as possible, the purported health justification is insubstantial in comparison to the invasion of privacy rights of the plaintiff, who, while subjected to these strip searches at the Dawson County Jail, was either a mere arrestee or a minimum security prisoner on work release.[7] In *Bell* the Court, in upholding the defendants' security interest justification for the body cavity searches, noted that "[a] detention facility is a unique place fraught with serious security dangers." 441 U.S. at 559. In contrast, by analogy, there is nothing in the record to indicate that the Dawson County Jail posed any especially dangerous health or hygiene risks. There has been no allegation or evidence that the jail has either experienced such health problems or that there is any great risk that such an outbreak would occur in the absence of the strip search and insecticide spraying policy.

While the need to assure the health of the incarcerated individuals is a legitimate concern, it is by no means as substantial as the governmental interest put forward in all of the cases upholding the constitutionality of strip searches: the safeguarding of institutional security, which the Court recognized in *Bell* as the central objective of prison administration. 441 U.S. at 547. In *Bell,* correctional officials testified that the strip searches were necessary to discover as well as deter the smuggling of drugs and weapons, items which pose obvious security dangers. 441 U.S. at 558. In the present case, however, the defendants have in no manner asserted, let alone sought to substantiate, such a security interest justification.[8] Instead, the defendants seek to justify their policy of strip searching and insecticide spraying merely as a prophylactic hygiene measure to prevent incarcerated individuals from becoming infected with lice, other vermin, and perhaps other visually detectable communicable diseases. Without meaning to underestimate the potential inconvenience that could arise from such a health outbreak, such non-life-threatening concerns are far less urgent or critical to the operation of the jail than the potential for conflict, violence, and escape attendant with the smuggling of contraband.

Furthermore, unlike *Bell,* there has been no assertion, nor any supporting evidence, that the defendants' policy was necessary to effectuate its stated health goals. In fact, the only evidence is quite the contrary. As noted earlier, see

footnote 2, *supra,* the blanket strip searching and insecticide spraying policies were terminated in March and April of 1986, for the reasons that such were not necessary for health purposes.[9] Here, the need for the particular search, a strip search, is hardly substantial enough, in light of the evidence regarding the incidence of hygiene-related health problems found by the strip searching and insecticide spraying of all persons incarcerated at the jail, to justify the severity of the governmental intrusion.

IV

Liability of Sheriff Mandelko

***5** The plaintiff seeks to hold Sheriff Mandelko liable for the strip search and spraying policy of the Dawson County Jail. The defendant has not contested this portion of the motion. As discussed below, I find the plaintiff's position to be well taken, at least insofar as the defendant is sued in his official, as opposed to individual capacity.[10]

The plaintiff concedes that, with respect to the actual strip searches and insecticide sprayings forming the basis of this suit, Sheriff Mandelko neither personally conducted them nor was he physically present. The plaintiff, rather, seeks to hold the defendant liable in his supervisory role as the official responsible for making policy at the jail. *See Martin v. Sargent,* 780 F.2d 1334, 1338 (8th Cir.1985). In the present case there can be no serious argument that the Sheriff was not the one responsible for making the policy which resulted in the violations of the plaintiff's constitutional rights.

According to Sheriff Mandelko's testimony, the strip search and insecticide spraying policy was in force when he became the sheriff, and he continued to have it implemented. (Mandelko Deposition 10:15–19). Sheriff Mandelko adopted the standard operating procedures of the Dawson County Jail in his official capacity, with the expectation that jail personnel would follow them as they were directed to do, and the Sheriff was aware that jail personnel were following the strip search and insecticide spraying policy as directed. (Mandelko Deposition 8:15–9:6, 22:8–23:7, & 35:3–11). Officers Boom and Coover, in strip searching and spraying the plaintiff, did so pursuant to and in accordance with the policy as set forth by Sheriff Mandelko. (Mandelko Deposition 22:8–23:7; Boom Deposition 30:5–31:8 & 50:1–6; Coover Deposition 31:5–22). Therefore, Sheriff Mandelko should be found liable in his official capacity.

Liability of Dawson County

The plaintiff further seeks to hold the defendant Dawson County liable for the Sheriff's strip search policy. The defendant has again not contested this portion of the motion. I find the plaintiff's position well taken, and recommend that this portion of the motion also be granted.

Local governments are subject to liability under 42 U.S.C. § 1983 where an employee's unconstitutional act can be characterized as an execution of a governmental policy or custom. *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 690–91 (1978). Here, it is evident that the unconstitutional act occurred pursuant to "a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Id.* at 694. For here the undisputed evidence is that the strip search policy was promulgated by the Sheriff in his capacity as an official for the county, having final decisionmaking authority in the matter.[11] As the United States Supreme Court has recently held, a local governmental entity may be held liable for a single decision by one of its officials where that official exercises final decisionmaking authority, as opposed to mere discretionary power. *Pembaur v. City of Cincinnati,* 54 U.S.L.W. 4289, 4292–93 (March 25, 1986). *See also Harris v. City of Pagedale,* —— F.2d ——, No. 86–2022 (8th Cir. June 17, 1987); *Williams v. Butler,* 802 F.2d 296 (8th Cir.1986). From the facts submitted before the court, it is evident that the Sheriff had final decisionmaking authority for the County of Dawson with respect to the actions taken against the plaintiff. Thus, recovery from the governmental unit is appropriate here. *Weber v. Dell,* 804 F.2d 796, 802–03 (2d Cir.1986), *cert. denied,* 55 U.S.L.W. 3871 (1987).

***6** IT IS THEREFORE HEREBY RECOMMENDED to the Honorable Lyle E. Strom, District Judge, pursuant to 28 U.S.C. § 636(b)(1)(B), that the motion for partial summary judgment, filing 12, be granted as against the defendant County of Dawson and Lawrence Mandelko in his official capacity as the Sheriff of Dawson County, on questions of liability only, and denied as to defendants Coover and Boom.

FURTHER, the defendants are hereby notified that unless objection is made within eleven days after being served with a copy of this recommendation, they may be held to have waived any rights they may have to appeal the court's order adopting this recommendation.

Footnotes

1 I am, however, precluded from recommending the granting of summary judgment on liability as against all of the defendants. In the answer to the original complaint, the defendants raised the defense of good faith or qualified immunity, which, in the affidavits filed in response to the motion for summary judgment, they apparently seek to renew. This issue has not been properly raised, and neither party has addressed the issue in their briefs. Assuming that it will be properly raised by the defendants, I make the following observations.

Qualified immunity, or good faith, is an affirmative defense, on which the defendants have the burden of pleading and proof. See, e.g., *Bauer v. Norris,* 713 F.2d 408, 411 n. 6 (8th Cir.1983); *Buller v. Buechler,* 706 F.2d 844, 850 (8th Cir.1983); Nahmod, *Civil Rights and Civil Liberties Litigation,* § 8.01. at 230 (1979). It provides a defense from money damages to individual officials for actions which were objectively reasonable and not in violation of clearly established constitutional law. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Under *Owen v. City of Independence,* 445 U.S. 622 (1980), local governmental units have no independent absolute or qualified immunity from liability for damages, and may further not plead the qualified immunity of its officials. Further, under *Kentucky v. Graham,* 473 U.S. 159, 165–67 (1985) and *Brandon v. Holt,* 469 U.S. 464, 471–73 (1985), a suit against a public official in his official capacity is in reality a suit against the entity that he represents, so that qualified immunity would not pertain to the individual defendants to the extent they are sued in their official capacities.

Although not entirely clear, the defendants appear to rely on a "quasi-judicial immunity," that is, an extension of judicial immunity for law-enforcement officials who are merely executing court orders. *McCurry v. Tesch,* 738 F.2d 271, 273 n. 2 (8th Cir.1984), *cert. denied,* 469 U.S. 1211 (1985). In the present case such an immunity is not applicable. Even assuming, without deciding, that the defendants acted in a purely ministerial manner, unlike *McCurry,* the "judicial order" purportedly relied upon is not a specific order entered in a pending case or controversy. It is instead a rule of general applicability enacted, pursuant to Neb.Rev.Stat. § 47–101 (Reissue 1984), by the Nebraska District Court Judges of the Thirteenth Judicial District acting in their legislative, rather than judicial, capacity. See *Supreme Court of Virginia v. Consumers Union,* 446 U.S. 719, 731 (1980). Accordingly, the defendants, in implementing a legislative act, are limited to good faith, or qualified immunity. *See Tennessee v. Garner,* 471 U.S. 1, 20–21 (1985). The same result would obtain if the district court judges, in enacting jail rules, were acting in an executive capacity, similar to prison administrators, who, under *Procunier v. Navarette,* 434 U.S. 555 (1978), are limited to qualified immunity.

In determining the good faith of the defendants in authorizing and implementing the blanket strip searching and insecticide spraying of (i) traffic offense arrestees and (ii) sentenced prisoners returning on work release, a determination must be made as to whether the constitutional law prohibiting such activity was clearly established at the time. *Anderson v. Creighton,* 55 U.S.L.W. 5092, 5093 (June 25, 1987). Although it is not necessary that the very action in question have previously been determined to be unconstitutional, the unconstitutionality of the conduct must be apparent from preexisting law. *Id.* For cases concerning the clarity of the law as to the propriety of strip searches, *see, e.g., Weber v. Dell,* 804 F.2d 796, 803–04 (2d Cir.1986), *cert. denied,* 55 U.S.L.W. 3871 (1987); *Goff v. Nix,* 803 F.2d 358, 370–71 (8th Cir.) *reh'g denied,* 809 F.2d 530, *petition for cert. filed; Brown v. Darcy,* 791 F.2d 1329, 1332–33 (9th Cir.1986), *cert. denied,* 55 U.S.L.W. 3871 (1987); *Jones v. Edwards,* 770 F.2d 739, 742 n. 4 (8th Cir.1985).

2 This spraying was taken in conjunction with other measures implemented at the Dawson County Jail with the purpose of preventing any outbreak of lice or other vermin and maintaining the personal hygiene of incarcerated prisoners. The nurse employed by the Dawson County Sheriff's Office testified that the clothing of prisoners was washed with Clorox bleach to kill lice, (McConnell Deposition 12:3–13:21 & 14:13–15:10), and the evidence also indicates that the mattresses were cleaned with a disinfectant, such as Lysol or Pinesol, (Mandelko Deposition 27:19–21). There is nothing before me to support or refute the efficacy of such practices in preventing an outbreak of disease warranting health concerns.

The spraying policy was terminated by Sheriff Mandelko on April 9, 1986, acting upon the recommendation of Doctor Ford, the doctor employed by Dawson County. (Mandelko Deposition 24:1–3 & 25:5–13). The doctor had advised that such a policy was unnecessary after discussing the matter with Nurse McConnell, who had concluded that such a policy was not necessary, (McConnell Deposition 6:13–19, 7:19–8:1, & 9:22–10:10), apparently because it was not serving any real preventive health purpose. Under the new policy, incarcerated individuals are to be sprayed with insecticide only if the correctional officer sees evidence of vermin (such as crabs or nits). (McConnell Deposition, Exhibit 8). In addition, the blanket routine strip search policy was terminated in March of 1986. (Mandelko Deposition 30:5–11).

3 Defendant Boom testified that in conducting the visual skin examination he would take a closer, more thorough look at those who had been brought in on drug charges, but would otherwise conduct all examinations in the same manner. (Boom Deposition 24:15–24).

4 There is no evidence before me to either support or refute the efficacy of such a policy. I note here, however, that the use of the spray at the Dawson County Jail did not comport with the manufacturer's instructions. Sheriff Mandelko testified, for example, that he was unaware that the manufacturer's instructions, contained on the aerosol can, call for the individual to wash the area with soap and water before spraying and to wait 15 minutes after spraying before showering. (Mandelko Deposition 27:2–14; Exhibit 6). Suggested primary use is on the hair on the individual's head, an area that, during the spraying, the correctional officers specifically avoided. (Boom Deposition 21:24–25; Coover Deposition 15:6–7 & 15:19–20).

5 His work release status during the latest sentence was terminated when, in violation of the terms of the work release, he was seen purchasing two cans of beer in a Cozad liquor store on his way back to jail after work. (Smith Deposition 14:23–15:10). Although the record indicates that defendant Boom conducted some of these work release strip searches and sprayings (Boom Deposition 37:17–38:2), there is no indication as to which correctional officer(s) conducted the remainder.

6 The only courts to do so apparently have been the District Court and Court of Appeals in *Bell,* which, in doing so, were reversed by the Supreme Court. *But cf. Security and Law Enforcement Employees, District Counsel 82 v. Carey,* 737 F.2d 187, 207–08 (2d Cir.1984) (though corrections officers can be forced to undergo routine strip searches, probable cause is required prior to subjecting them to visual body cavity searches).

7 I note that although prisoners have a lesser legitimate expectation of privacy than do most others in our society, *Goff* 803 F.2d at 365, such a retraction of constitutionally protected rights is justified only where considerations underlying our penal system, such as legitimate concerns for security and order, reasonably necessitate such a result. See, e.g., *Bell,* 441 U.S. at 545–46. As a minimum security risk at the jail, therefore, the plaintiff stands in a far different position from that of the incarcerated persons in either *Bell* or *Goff,* the two cases the defendants look to for support. As the Seventh Circuit noted in *Mary Beth G. v. City of Chicago,* 723 F.2d 1263, 1272 (7th Cir.1983), the pretrial detainees in *Bell* "were awaiting trial on serious federal charges after having failed to make bond and were being searched after contact visits." In *Goff,* the security concerns put forth were even weightier, as the institution there was a maximum security penitentiary, and the challenged searches for the most part were directed against disruptive inmates confined to the segregation units within the facility. 803 F.2d at 365.

Moreover, with respect to the health justification asserted by the defendants, there has been no reason put forward, and none has been discovered, for treating sentenced prisoners any differently than initial arrestees, for there is no reason to think that sentenced prisoners pose any greater threat of carrying communicable diseases or other health related risks to the institution than do initial arrestees. In fact, it would seem just the opposite. Unlike initial arrestees, correctional personnel are able to monitor the whereabouts of sentenced prisoners and thus are better able to ascertain their exposure to any potential health risks. This pertains especially to prisoners confined to the jail, and also to those prisoners on work release status, though to a somewhat lesser extent. Law enforcement officers know the location of the prisoner's place of employment, and, as demonstrated in the present case, see note 4 *supra,* can even monitor the prisoner's activity between the jail and the workplace.

8 In fact, as mentioned earlier, the defendants have expressly disavowed any use of a visual body cavity search, a practice which would appear all but essential if the defendants' purpose was the detection and deterrence of the smuggling of drugs and weapons, concerns which were critical to the security interest justification expressed in *Bell.* For this reason, the defendants, at page 18 of their brief, are wide of the mark in seeking to rely on the language of *Bell* indicating that "[p]rison administrators should ... be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." 441 U.S. at 547. The defendant has in no way attempted to rely upon such interests, and has provided no authority calling for such substantial deference in matters relating solely to inmate hygiene.

Moreover, it would not appear that such a security justification would have availed the defendants even if it had been relied upon. There is no indication that the defendants at any time suspected the plaintiff of concealing contraband on his person. He was arrested for traffic violations, "hardly the sort of crime to inspire officers with the fear of introducing weapons or contraband into the holding cell." *Jones,* 770 F.2d at 741; see also *Hill,* 735 F.2d at 394; *Logan v. Shealy,* 660 F.2d 1007, 1013 (4th Cir.1981), *cert. denied,* 455 U.S. 942 (1982); *John Does 1–100 v. Ninneman,* 612 F.Supp. 1069, 1071 (D.Minn.1985); *Smith v. Montgomery County,* 547 F.Supp. 592, 598 (D.Md.1982). As numerous courts have reasoned, the deterrence rationale so prominent in *Bell* is largely absent in the case of initial arrestees, who are in general unexpectedly taken to jail, and hence unable to plan ahead to attempt to smuggle in contraband to already incarcerated individuals. *See, e.g., Giles,* 746 F.2d at 617; *John Does,* 612 F.Supp. at 1071; *Hunt v. Polk County,* 551 F.Supp. 339, 344 (S.D.Ia.1982). This is especially true where the initial arrestees are not intermingled with the sentenced prisoners. As previously noted, see note 7, *supra,* the plaintiff, in his status as a work-release prisoner confined solely with three other work release prisoners (Boom Deposition 39:2–7), was in a far more trusted position than the pretrial detainees in *Bell* and the maximum security inmates in *Goff,* and hence posed far less of a security risk than was present in the cases relied upon by the defendants.

9 The only evidence concerning the detection of vermin or communicable disease was given by Officer Boom, who testified that he discovered one case of crab lice and one case of gonorrhea while at the jail. These discoveries, however, occurred not because the incarcerated individual was strip searched, but rather because the individual informed Officer Boom of these afflictions while answering the medical history questions. In fact, Officer Boom was unable to see any visual evidence of crabs on the one person who reported it. (Boom Deposition 44:16–45:11).

10 See footnote 1, *supra.* In the caption of both the original and amended complaints counsel for the plaintiff has failed to indicate in what capacity he seeks to hold defendant Mandelko liable. Judging by the substance of the complaint and the briefs in support of the motion for summary judgment, the plaintiff appears to be concerned solely with defendant Mandelko's activity in his official capacity as Sheriff of Dawson County. The discussion that follows proceeds under this assumption.

11 It was Sheriff Mandelko's understanding that he had final authoritymaking power with respect to the procedures at the jail, regardless of any action by the Dawson County Board of Commissioners. He understood that, although the state statute provides that the commissioners may take over jail operations if they choose, they have not done so. (Mandelko Deposition 18:1–9 &

18:21–25).