Stanley v. Gentry

United States District Court for the Southern District of Indiana, Terre Haute Division
March 22, 2002, Decided
Cause No. TH 00-53-C-T/H

Reporter: 2002 U.S. Dist. LEXIS 17063

LOLITA STANLEY and LAURENCE STANLEY, Plaintiffs, v. RORY A. GENTRY, Individually and In His Official Capacity as police officer for the City of Terre Haute, MICHAEL KELLER, Individually and In His Official Capacity as police officer for the City of Terre Haute, ROBERT L. DEAL, Individually and In His Official Capacity as a police officer for the City of Terre Haute, CITY OF TERRE HAUTE, INDIANA, ANITA HENSON [1], FEMALE EMPLOYEE OF VIGO COUNTY SHERIFF'S DEPARTMENT, WILLIAM R. HARRIS, in his official capacity as VIGO COUNTY SHERIFF, and LT. JEFFERY ENNEN, in his official capacity as VIGO COUNTY JAIL COMMANDER, Defendants.

Subsequent History: [*1] Adopting Order of June 5, 2002, Reported at: 2002 U.S. Dist. LEXIS 14710.
Adopted as modified, objections overruled, summary judgment granted, summary judgment denied, motion to strike denied, Stanley v. Gentry, 2002 U.S. Dist. LEXIS 14710 (S.D. Ind. June 5, 2002).

Disposition: [*1] Magistrate's recommendation: Plaintiffs' motion to strike should be GRANTED and Plaintiffs' and Defendants' cross-motions for summary judgment should be GRANTED, in part, and DENIED, in part. Defendants William R. Harris, Jeffrey Ennen, and Anita Henson should be DISMISSED.

Counsel: For STANLEY, LOLITA, PLAINTIFF(S): MARILYN A MOORES, COHEN & MALAD, P.C., INDIANAPOLIS, IN.

For GENTRY, RORY A, KELLER, MICHAEL, DEAL, ROBERT L, CITY OF TERRE HAUTE, DEFENDANT(S): CAREN POLLACK, MANDELL POLLACK, INDIANAPOLIS, IN.

For DOE, ANITA, SHERIFF OF VIGO COUNTY, ENNEN, JEFFREY LT DEFENDANT(S): CRAIG M MCKEE, WILKINSON GOELLER MODESITT WILKINSON & DRUMMY, TERRE HAUTE, IN.

Judges: William G. Hussmann, Jr., Magistrate Judge, United States District Court, Southern District of Indiana.

Opinion by: William G. Hussmann, Jr.

Opinion

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This case is before the court upon the parties' cross-motions for summary judgment. The plaintiffs, Lolita and Laurence Stanley, filed their motion on July 30, 2001, and the defendants, Anita Henson, William R. Harris and Jeffrey Ennen, filed their motion on July 30, 2001. United States [*2] District Judge John Daniel Tinder referred the parties' motions to the undersigned United States Magistrate Judge for a report and recommendation pursuant to *28 U.S.C. § 636(b)(1)(B)* and Local Rule 72.1(d)(1)(c). For the following reasons, the Magistrate Judge recommends that the parties' motions be **GRANTED, in part,** and **DENIED, in part.**[2]

I. Stipulated/ Undisputed Facts

1. Plaintiff Lolita Stanley ("Mrs. Stanley"), age 32, was arrested at her home by the Terre Haute Police on the night of January 30, 1998. She was charged with battery on a police officer and resisting arrest (both misdemeanors). As a result, she was taken to the Vigo County Jail. (Stipulation of Facts at 1).

2. Defendants William R. Harris ("Harris"), [*3] the Vigo County Sheriff, Jeffrey Ennen ("Ennen"), the Vigo County Jail Commander, and Officer Anita Henson ("Henson") were not involved in Mrs. Stanley's arrest. (*Id.* at 2-3).

3. The police officer who delivered Mrs. Stanley to the Vigo County Jail (the "Jail") did not provide the defendants with any official paper ordering the confinement of Mrs. Stanley. Nor did the defendants have any paper ordering the confinement of Mrs. Stanley in the Jail. (*Id.* at 6-8).

4. Henson was on duty at the time Mrs. Stanley was brought to the Jail. Henson was the only officer who

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[1] Anita Henson, originally joined as Anita Doe, signed a waiver of service on April 4, 2000, and she filed an answer on January 9, 2001. (Docket Items 18, 40).

[2] The plaintiffs and defendant City of Terre Haute settled their portion of this case in May 2001. With respect to that settlement, the plaintiffs filed a petition for attorney fees on July 6, 2001. That petition is still pending before this court.

administered pre-admissions and admissions procedures on Mrs. Stanley during her admission into the Jail. (*Id.* at 12-14).

5. The applicable policies and procedures, in effect on January 30, 1998, concerning admissions and pre-admissions into the Jail are in the Vigo County Sheriff Department's written policies. (*Id.* at 15).

6. Pursuant to Procedure C, Officer Henson conducted a pat search outside the exterior clothing of Mrs. Stanley when she was brought to the Jail. Henson found no weapons or contraband and had no suspicion that Mrs. Stanley was concealing weapons or contraband on her person. (*Id.* at [*4] 16-17).

7. Mrs. Stanley was not charged with any narcotics offense at the time she was admitted to the Jail, nor was she charged with a felony. (*Id.* at 18).

8. Officer Henson has no specific recollection if Mrs. Stanley did or said anything which provided her with a reasonable suspicion or probable cause to believe that she was in possession of or concealing weapons, drugs or contraband. (*Id.* at 19-21).

9. Mrs. Stanley had no prior arrest record at the time of her admission in the Jail. (*Id.* at 22).

10. Henson escorted Mrs. Stanley to a small room off to the side of the booking area. The room has no door and is partially divided by a cinder block half-wall which is about four feet tall and which partially extends across the width of the room. Shielded behind the cinder block wall, in the rear of the room, there is a commode/ toilet. (*Id.* at 23).

11. Henson took Mrs. Stanley to the front portion of the room and ordered her to remove all her exterior clothing except her underpants. (*Id.* at 24).

12. Henson remained with Mrs. Stanley and observed her during the entire time she was stripping of her clothing. (*Id.* at 25).

13. Henson informed Mrs. Stanley that [*5] she could not keep the T shirt she had because it had writing on it. (*Id.* at 26).

14. Mrs. Stanley did not have on a brassiere or undershirt when she arrived at the Jail, nor at the time Henson ordered her to remove the T shirt. (*Id.* at 27).

15. Mrs. Stanley observed a video surveillance camera mounted on the wall in the booking area which appeared to her to be observing the area where Henson ordered her to strip of her clothing. The defendants deny that the camera covers the area where Mrs. Stanley changed into her jail uniform, and there is no contrary evidence in this case. (*Id.* at 28).

16. Henson did not touch Mrs. Stanley during the time she was removing her clothing and putting on the jail clothing. (*Id.* at 30).

17. According to Mrs. Stanley, it took approximately two minutes for her to remove her clothing and to put on the jail clothing given to her by Henson. (*Id.* at 31).

18. The county's employees, agents and officers observe substantially all prisoners admitted into the Jail who are not going to be immediately released on their own recognizance, while the prisoner disrobes to whatever undergarments he or she is or is not wearing, and changes into [*6] the jail uniform, under substantially the same circumstances as Mrs. Stanley. (*Id.* at 32).

19. The applicable policies and required procedures, in effect on January 30, 1998, relating to clothing exchange for inmates of the Jail are contained in the Vigo County Sheriff Department's written policies. (*Id.* at 33).

20. The applicable policies, definitions and required procedures, in effect on January 30, 1998, relating to search procedures in the Jail are contained in the Vigo County Sheriff Department's written policies. (*Id.* at 34).

21. Mrs. Stanley was never taken to a cell block for females. Instead she remained in the holding cell in the reception area just a few steps away from where she changed into the jail clothing. (*Id.* at 35).

22. Later in the morning of January 30, 1998, officers of the Terre Haute Police Department informed personnel of the Jail that no charges were being filed against Mrs. Stanley, and she was to be released on her own recognizance. (*Id.* at 36).

23. At the time of her release, Mrs. Stanley had to undress from the Jail uniform back to her own personal clothing in the same place and under the same procedures as she did when she arrived [*7] at the Jail. However, Henson had gone off shift and a Vigo County officer named "Joanie" performed the procedure. *(Id.)*

II. Standard

Summary judgment is proper "if the pleadings depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *FED.R.CIV.P.*

56(c). A genuine issue of material fact exists for trial when, in viewing the record and all reasonable inferences drawn from it in a light most favorable to the non-movant, a reasonable jury could return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The movant bears the burden of establishing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). If the movant meets this burden, the non-movant must set forth specific facts that demonstrate the existence of a genuine issue for trial. *(Id.).* Because the purpose of summary judgment is to isolate and dispose of [*8] factually unsupported claims, the non-movant must respond to the motion with evidence setting forth specific facts showing that there is a genuine issue for trial. *Albiero v. City of Kankakee,* 246 F.3d 927, 932 (7th Cir. 2001). To successfully oppose the motion for summary judgment, the non-movant cannot rest on the pleadings alone, but must designate specific facts in affidavits, depositions, answers to interrogatories or admissions that establish that there is a genuine triable issue. *Selan v. Kiley,* 969 F.2d 560, 564 (7th Cir. 1992).

On cross-motions for summary judgment, each movant must individually satisfy the requirements of *Rule 56*. *Great West Cas. Co. v. Rogers Cartage Co.,* 2001 U.S. Dist. LEXIS 20486, 2001 WL 1607608, at *1 (N.D. Ill. 2001). Thus, the traditional standards for summary judgment still apply even though both parties have moved for summary judgment. *Blum v. Fisher and Fisher,* 961 F. Supp. 1218, 1222 (N.D. Ill. 1997). The Magistrate Judge thus considers the merits of each cross-motion separately and draws all reasonable inferences and resolves all factual uncertainties against the party whose motion is under consideration. [*9] *O'Regan v. Arbitration Forums, Inc.,* 246 F.3d 975, 983 (7th Cir. 2001).

III. Discussion

The plaintiffs brought this action, pursuant to *42 U.S.C. § 1983*, contending that the defendants violated her constitutional rights when Mrs. Stanley was detained. Specifically, the plaintiffs contend that the defendants strip searched Mrs. Stanley in violation of her *Fourth Amendment* rights. The defendants, on the other hand, contend that they did not violate the plaintiff's constitutional rights because they did not strip search Mrs. Stanley.

The parties have agreed to resolve the issues in this case through cross-motions for summary judgment. In their motions, the parties raise the following issues: (1) whether Mrs. Stanley was subjected to a strip search; (2) whether Mrs. Stanley's *Fourth Amendment* rights were violated; (3) whether the Department's policy and/ or practice, which requires the arrestees to change into jail clothing, is constitutional; and (4) whether Henson is entitled to qualified immunity. (*See* Plaintiffs' Brief at 10; Defendants' Brief at 2). The Magistrate Judge will now analyze each of these issues to determine whether [*10] there are any genuine issues of material fact.

Was Mrs. Stanley subjected to a strip search?

The plaintiffs contend that Mrs. Stanley was subjected to a strip search when she was detained. Specifically, they contend that, at the Jail, Officer Henson (a female) took Mrs. Stanley to a room and ordered her to remove all her clothing, except her underpants, and to put on a jail uniform. The plaintiffs contend that procedure was a strip search because Mrs. Stanley, who was not wearing a bra, had to expose her bare breasts to Henson as she changed clothes.

The defendants, on the other hand, contend that Mrs. Stanley was not subjected to a strip search. They contend that Mrs. Stanley was asked to change clothes as part of an inventory procedure. They contend that Mrs. Stanley's breasts were exposed because she was not wearing a bra, not because she was strip searched. The Magistrate Judge disagrees.

In the Seventh Circuit, an observation is a form of a search and a "visual search of a naked inmate without intrusion into the person's body cavities," is a strip search. *See Doan v. Watson,* 168 F. Supp.2d 932 (S.D. Ind. 2001) (citing *Johnson v. Phelan,* 69 F.3d 144, 145 (7th Cir. 1995), [*11] and *Peckham v. Wisconsin Dept. of Corrections,* 141 F.3d 694 (7th Cir. 1998)). While the Seventh Circuit has not directly addressed whether a visual search of a woman's bare breasts constitutes a strip search, other jurisdictions consider such an observation to be a strip search. *See Justice v. City of Peachtree City,* 961 F.2d 188, 191 (11th Cir. 1992) (treating as a strip search the order that arrestee "remove her outer garments, expose her breasts, and stand before [the officers] clad only in her panties."); *Masters v. Crouch,* 872 F.2d 1248, 1250, 1253 (6th Cir.) (treating the requirement that arrestee expose her breast area as a strip search), *cert. denied,493 U.S. 977 (1989)*; *Blackburn v. Snow,* 771 F.2d 556, 561 n.3 (1st Cir. 1985) ("A 'strip search,' … generally refers to an inspection of a naked individual, without any scrutiny of the subject's body cavities."); *Collier v. Locicero,* 820 F. Supp. 673, 680 (D. Conn. 1993) ("it is true, of course, that a 'strip search' can take place where the subject remains partly clothed but is required to reveal private areas--such as genitals [*12] or female breasts--for visual inspection.").

Here, the evidence indicates that: (1) Mrs. Stanley was ordered to change into jail clothes; (2) Henson took Mrs. Stanley to a "room and ordered her to remove all her

exterior clothing except her underpants"; and (3) Henson continuously observed Mrs. Stanley while she was changing clothes. (*See* Stipulated/ Undisputed Facts at 11-12). This evidence indicates that Mrs. Stanley was "ordered" to keep only her underpants, nothing else, while she changed clothes in the presence of Henson. *(Id.)*. Thus, Mrs. Stanley was subjected to a procedure where an officer ordered her to expose her breasts. Whether or not Mrs. Stanley was wearing a bra is not relevant because she had to expose her breasts in order to comply with Henson's order. Here, Henson's order caused Mrs. Stanley to expose her bare breasts, and Henson continuously observed them. Therefore, the Magistrate Judge finds that Henson searched Mrs. Stanley. *See Amaechi v. West,* 237 F.3d 356 (4th Cir. 2001) (arrestee, who was not wearing underpants, was strip searched because the officer's actions caused her to be exposed from the waist down).

Having made the [*13] determination that this was a search, the Magistrate Judge turns to the issue of whether this search constituted a "strip" search. As previously mentioned, the Seventh Circuit has not directly addressed whether a visual search of a woman's bare breasts is a strip search. However, the Magistrate Judge finds persuasive the decisions by other courts which consider this type of search a strip search. Therefore, the Magistrate Judge finds that Mrs. Stanley was subjected to a strip search. *See Leinen v. City of Elgin,* 2000 U.S. Dist. LEXIS 11747, 2000 WL 1154641 (N.D. Ill. 2000) (arrestee who was asked to remove her brassiere, but not her underpants, was subjected to a strip search).

The Magistrate Judge agrees with the defendants that, as part of an inventory procedure, they can collect and search an arrestee's clothes. *Illinois v. Lafayette,* 462 U.S. 640, 77 L. Ed. 2d 65, 103 S. Ct. 2605 (1983); *United States v. Edwards,* 415 U.S. 800, 39 L. Ed. 2d 771, 94 S. Ct. 1234 (1974). [3] However, even if such an inventory is proper, that inventory was accomplished by an order which requires a female to expose her bare breasts. The defendants also contend that because Henson [*14] never touched Mrs. Stanley's breasts, no "strip search occurred." But, whether or not Henson touched Mrs. Stanley's breasts is irrelevant to the inquiry of whether a strip search took place. As previously mentioned, an observation is a form of a search. Here, it is clear that Henson continuously observed Mrs. Stanley as she changed clothes. (*See* Stipulated/ Undisputed Facts at 12). Because neither of these two arguments changes the nature of the actions taken by Henson here, the Magistrate Judge concludes that Henson subjected Mrs. Stanley to a strip search.

Was Mrs. Stanley's strip search a violation of her Fourth Amendment rights?

In the Seventh Circuit, strip searches of individuals charged with misdemeanors or other minor offenses are lawful under the *Fourth Amendment*only when there is reasonable suspicion that the arrestee is concealing weapons or contraband [*15] on her person. *See Mary Beth G. v. City of Chicago,* 723 F.2d 1263, 1273 (7th Cir. 1983). Other jurisdictions have reached the same conclusion. *See Lee v. Perez,* 175 F. Supp.2d 673 (S.D.N.Y 2001); *Justice,* 961 F.2d at 193 (holding that law enforcement could strip search a juvenile arrested for a minor offense provided they had a reasonable suspicion to believe she had weapons or contraband); *Watt v. City of Richardson Police Dept.,* 849 F.2d 195, 197 (5th Cir. 1988) (holding that jail officials may strip search a person arrested for a minor offense and detained pending the posting of bond only if they possess a reasonable suspicion that he/ she is hiding weapons or contraband). A reasonable suspicion may arise from factors such as "the nature of the offense, the arrestee's appearance and conduct, and the prior arrest record." *See Kraushaar v Flanigan,* 45 F.3d 1040, 1045 (7th Cir. 1995) (quoting *Giles v. Ackerman,* 746 F.2d 614, 617 (9th Cir. 1984), *cert. denied,471 U.S. 1053, 85 L. Ed. 2d 479, 105 S. Ct. 2114 (1985))*.

Here, it is clear that Mrs. Stanley was arrested [*16] for two misdemeanors which did not involve weapons or narcotics. It is also clear that Mrs. Stanley had no prior police record of any nature. In addition, the record shows no evidence to support a reasonable suspicion that Mrs. Stanley was hiding weapons or contraband. Therefore, the strip search conducted by Henson violated Mrs. Stanley's rights under the *Fourth Amendment*.

The defendants cite to *Morreale v. City of Cripple Creek,* 113 F.3d 1246, 1997 WL 290976 (10th Cir. 1997), an unpublished decision, to support their argument that Mrs. Stanley's strip search was lawful. However, the Magistrate Judge notes that the *Morreale* decision states on its face that it "is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel." Therefore, it is not proper to rely on that case. But even if it were proper to rely on *Morreale,* the strip search examined in that case was one that resulted after the arrestee was ordered to remove only her outer clothes. Here, unlike *Morreale,* Mrs. Stanley was ordered to remove everything but her underpants. Clearly Mrs. Stanley's situation is different from the one found in [*17] *Morreale.* Thus, even if it were proper to rely on

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[3] *Lafayette* and *Edwards* do not address circumstances in which a strip search would be appropriate under an inventory procedure.

Morreale, that case does not address the situation at hand. [4]

Is the Jail's policy, which requires inmates to change into jail clothing, unconstitutional?

The *Fourth Amendment* generally proscribes unreasonable searches and seizures. *U.S. CONST. amend. IV*. This prohibition requires that searches be reasonable under the circumstances. *Bell v. Wolfish,* 441 U.S. 520, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979). To determine the reasonableness [*18] of a search, the courts must apply the *Bell* balancing test defined by the Supreme Court:

> 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 its is conducted, the justification for initiating it, and the place in which it is conducted.*Id.* at 559 (citations omitted). "The more intrusive the search, the closer governmental authorities must come to demonstrating probable cause for believing that the search will uncover the objects for which the search is being conducted." *Mary Beth G.,* 723 F.2d at 1273. "It is beyond question that a strip search initiated without justification such as a blanket strip policy is unconstitutional." *Doe v. Village of Downers Grove,* 834 F. Supp. 244, 1992 WL 8720, at *2 (N.D. Ill. 1992).

Here, the plaintiffs contend that the defendants' procedure, which requires all new arrestees to change into jail clothing, is unconstitutional [*19] because it is a blanket policy that results in a strip search for all persons who enter the Jail. The plaintiffs contend that this procedure is a strip search because the procedure requires the arrestees to disrobe down to their underwear. However, the plaintiffs have not presented any case law which indicates that ordering arrestees to disrobe *down to their underwear,* without requiring them to expose their private parts, constitutes a strip search. Nor have they presented any case law indicating that such procedure is unconstitutional. Every case cited by the plaintiffs, with respect to this point, involves procedures where plaintiffs were required to expose their private parts. [5] The *policy* at issue here only *requires* a person to change outer clothing. Here, the evidence indicates two things: (1) that the defendants have a policy which requires new arrestees to change into jail clothes; and (2) that the arrestees are ordered to disrobe down to whatever undergarments they may have. This evidence does not indicate that arrestees are required to expose any *private parts.* Therefore, the policy does not subject all arrestees to a strip search.

[*20] In their efforts to support their argument that the Department's procedure is a blanket strip search, the plaintiffs cite *Doan v. Watson,* 168 F. Supp.2d 932 (S.D. Ind. 2001). [6] However, *Watson* involved a procedure different from the one at hand. In *Watson,* the procedure required arrestees to remove *all* their clothes (including *all* underwear). Here, the evidence indicates that, under the Department's procedure, arrestees are allowed to keep all their underwear. Clearly the situation in this case is different from the one in *Watson.*

In this case, Mrs. Stanley's *Fourth Amendment* rights were violated because the defendants, without a reasonable suspicion, subjected her to a strip search. However, the plaintiffs have not presented evidence which indicates that the Department conducts the same exact search procedure on every arrestee. Therefore, the Magistrate Judge finds that the defendants [*21] have not established that the Department's procedure is unconstitutional.

Is Officer Henson entitled to qualified immunity?

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[4] With respect to the defendants' reference to *Morreale,* the Magistrate Judge finds that the defendants have violated the Seventh Circuit rules regarding unpublished opinions. In the Seventh Circuit, an unpublished opinion cannot be cited or used as precedent except to support a claim of res judicata, collateral estoppel, or law of the case. Therefore, the Magistrate Judge recommends that the plaintiffs' motion to strike the defendants' references to the *Morreale* opinion be **GRANTED.**

[5] *Jones v. Bowman,* 694 F. Supp. 538 (N.D. Ind. 1988) (in this case, the plaintiff was required to expose her bare breasts); *Boren v. Deland,* 958 F.2d 987 (10th Cir 1992) (this case did not involve a strip search of an arrestee); *Chapman v. Nichols,* 989 F.2d 393 (10th Cir. 1993); *Bovey v. City of Lafayette, Ind.,* 586 F. Supp. 1460 (N.D. Ind. 1984) (this case involves a strip search of a plaintiff stopped for speeding and subsequently arrested for conduct at scene of stop. However, the specifics of the strip search are not clearly stated in the opinion); *Hill v. Bogans,* 735 F.2d 391 (10th Cir. 1984) (this was a strip search case because the plaintiff had to drop his underpants); *Giles v. Ackerman,* 746 F.2d 614 (9th Cir. 1984) (in this case, the plaintiff was required to take off all her clothes. The court stated that the plaintiff was subjected to a "skin search," thus, she was subjected to a strip search.); *Masters v. Crouch,* 872 F.2d 1248 (6th Cir. 1989) (this was a strip search case because the plaintiff was required to drop her underpants); *Newkirk v. Sheers,* 834 F. Supp. 772 (E.D. Pa. 1993) (this case involved a visual body cavity search).

[6] The plaintiffs submitted this case as additional authority pursuant to L.R. 7.1

Because the existence of a constitutional violation was established on Mrs. Stanley's strip search claim, the Magistrate Judge turns to the issue of whether Henson is entitled to qualified immunity. Qualified immunity shields a defendant from liability under claims brought pursuant to *42 U.S.C. § 1983* for harms arising from discretionary acts, as long as the discretionary acts do not violate clearly established federal statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 812, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). The "contours of the [established] right[s]," however, must be drawn in such a way as to provide notice to a reasonable person in the official's position that his conduct violated the indentified right. *See Anderson v Creighton,* 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987). If the law at [the time of the offense] was not clearly established, an official could not reasonably be expected to anticipate [*22] subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. *Harlow,* 457 U.S. at 818. Thus, in analyzing a qualified immunity defense, the court is to consider only the clearly established law and the information possessed by the official at the time the conduct occurred. *Tangwall v. Stuckey,* 135 F.3d 510 (7th Cir. 1998).

Given that the Seventh Circuit has not directly addressed whether a visual search of a woman's bare breasts constitutes a strip search, the Magistrate Judge finds that a reasonable person in Henson's position could, in good faith, have believed that the order given to Mrs. Stanley did not constitute a strip search. None of the Seventh Circuit cases directly establish a strip search on facts similar to those in the present case. Therefore, the Magistrate Judge finds that Officer Henson is entitled to qualified immunity from liability under *42 U.S.C. § 1983*.

IV. Recommendation

For the above stated reasons, **IT IS RECOMMENDED** that the plaintiffs' motion to strike be **GRANTED** and the plaintiffs' and defendants' cross-motions [*23] for summary judgment be **GRANTED, in part,** and **DENIED, in part.**

Based on this recommendation, the plaintiffs' claims against the defendants should be resolved. Specifically, the plaintiffs' claims against:

> (1) defendants William R. Harris and Jeffrey Ennen should be **DISMISSED** because the policy of the Vigo County Jail does not violate the Constitution; and
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> (2) defendant Anita Henson should be **DISMISSED** because she is entitled to qualified immunity.

Any objections to this report and recommendation must be filed within ten days from the date of this report. *28 U.S.C. § 636(b)(1)(C)* and Local Rule 72.1(d)(2). Failure to file objections within the specified time constitutes a waiver of subsequent review, absent a showing of good cause for such failure.

SO RECOMMENDED the 22 day of March, 2002.

William G. Hussmann, Jr., Magistrate Judge

United States District Court

Southern District of Indiana