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Case Analysis

PRESERVING REASONABLE SUSPICION
Why Montana Should Not Follow Florence v. Burlington

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Introduction

Would it surprise you to learn that failing to pay a speeding ticket could result in a forced strip search and visual body cavity inspection? In *Florence v. Burlington*, 132 S.Ct. 1510 (2012), a narrow majority of the U.S. Supreme Court held that a jail can strip search any and all detainees prior to admitting them to general population. The court held strip searching detainees, which includes visual inspection of body cavities by jail personnel, are constitutional even when the person was arrested on a warrant for not paying a fine, he has not yet been charged with a crime, his suspected offense is non-violent and non-drug related, and no reasonable suspicion exists that he may be carrying contraband. *Florence* reversed the long-existing rule and current federal practice of allowing strip searches of detainees only upon reasonable suspicion.

The Federal Bureau of Prisons and U.S. Immigration and Customs Enforcement (ICE), continue to require reasonable suspicion prior to a strip search of detainees based on the privacy invasion inherent in such searches. With Montana's heightened constitutional protections and emphasis on the right to privacy, we should retain our unique constitutional standard regarding unreasonable searches and seizures that implicate invasions of privacy, and, at the very least, require reasonable suspicion prior to searches of detainees arrested for minor non-violent and non-drug related crimes or warrants. Ten other states have enacted statutes requiring reasonable suspicion prior to strip searching an individual arrested for a non-violent and non-drug related reason.

Background

A "strip search" is a totally nude visual inspection of a detainee by jail personnel that may include "directing detainees to shake their heads or to run their hands through their hair to dislodge what might be hidden there; or it may involve instructions to raise arms, to display foot insteps, to expose the back of the ears, to move or spread the buttocks or genital areas, or to cough in a squatting position." [1] Federal courts have long recognized that visual cavity searches are a "severe, if not gross interference with a person's privacy." [2]

The Federal Bureau of Prisons' policy states that detainees charged with misdemeanors, committed for civil contempt, or held as material witnesses "may not be searched visually unless there is reasonable suspicion that he or she may be concealing a weapon or other contraband." [3] Similarly, the ICE Detention Standards provide "[a] strip search will be conducted only when

there is reasonable suspicion that contraband may be concealed on the person, or when there is a reasonable suspicion that a good opportunity for concealment has occurred, and when properly authorized by a supervisor." [4]

"Reasonable suspicion" is defined as "suspicion that would lead a reasonable correctional officer to believe that a detainee is in possession of contraband. It is a more permissive (lower) standard than probable cause, but it is more than a mere hunch." *Id.* It includes unusual or suspicious appearance or behavior, evasive or inconsistent responses to questions, discovery of contraband in less-invasive searches, criminal history involving crimes involving violence, weapons, contraband or illegal substances, whether the arrest involved drugs or violence, and any history of confinement. The ICE Detention Standards require "[b]efore strip searching a detainee to search for contraband, an officer should first attempt to resolve his or her suspicions through less intrusive means." [5]

These policies evidence a consistent practice of only allowing strip searches for minor offences upon reasonable suspicion or belief. This is consistent with the bulk of federal law that existed until the last two years, which has consistently held that reasonable suspicion is necessary prior to strip searching detainees arrested for minor offenses. [6] The logic behind this is that arrestees for minor offenses are not yet charged or found guilty of a crime, and the nature of their arrest and alleged offense does not suggest they are dangerous to a degree sufficient to justify the extreme personal invasion inherent in strip searches with visual inspection of body cavities.

Florence v. Burlington

In April of this year, the U.S. Supreme Court solidified the growing trend authorizing blanket strip searching of all detainees entering a jail's general population. Albert Florence was stopped in his automobile by a state trooper in Burlington County, New Jersey. The officer arrested Florence due to an outstanding warrant which was based on an error in a statewide database showing he had not paid a fine. In fact, Florence had paid the fine. There was no other basis for Florence's arrest, and he was not charged with any crime.

Florence was taken to the Burlington County Correctional Detention Center, where he was showered with a delousing agent, and subjected to a strip search in which he was required take off all of his clothes, and "open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals." [7] After ***14** being held for six days, Florence was transferred to the Essex County Correctional Facility where he was subjected to a delousing shower, pat-frisk, clothing search, and was then searched in the Body Orifice Screening System ("BOSS") designed to identify hidden metal. Despite these precautions, he was again subject to a strip search in which he "was required to lift his genitals, turn around, and cough in a squatting position as part of the process." [8] These searches were conducted pursuant to policies requiring strip searches of all arriving detainees regardless of the circumstances of the arrest, the suspected offense, the detainee's behavior, or their demeanor or criminal history.

Florence brought suit alleging that this blanket policy allowing strip searches of all detainees regardless of the nature of the alleged offense and without a finding of reasonable suspicion violated the Fourth Amendment's protection from unreasonable search and seizure. The U.S. Supreme Court held that the blanket policy requiring strip searches of all detainees released into the jail's general population was constitutional based on peneological concerns including protecting inmates in general population, preventing the spread of lice and diseases, treating injuries or wounds of the arrestee, checking for gang-related tattoos, and obtaining contraband. The majority emphasized that "[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals," and determined that it would be an administrative hardship for jail personnel to determine each arrestee's suspected offense and criminal history. [9]

Both the majority and the concurring justices emphasized the narrowness of the Court's holding by emphasizing that it only applies where a facility introduces detainees into the jail's general population. Justice Kennedy noted that "[t]his case does not require the Court to rule on the types of searches that would be reasonable in instances where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees ... The accommodations provided in these situations may diminish the need to conduct some aspects of the searches at issue." [10]

In his concurrence, Justice Roberts pointed out that the plaintiff was "not detained for a minor traffic offense but instead pursuant to a warrant for his arrest, and that there was apparently no alternative, if Florence were to be detained, to holding him in the general jail population." [11] This observation suggests that strip searching arrestees who are detained without a warrant for minor non-violent non-drug related offenses remains unconstitutional.

Similarly, Justice Alito cautioned in his concurrence "the Court does not hold that it is *always* reasonable to conduct a full strip search of an arrestee whose detention has not been reviewed by a judicial officer and who could be held in available facilities apart from the general population." [12] Alito noted that for the majority of individuals arrested for minor offenses, they are released from custody prior to their initial appearance, their charges are dropped, or they are released on their own recognizance or with minimal bail. "For these persons" Alito wrote, "admission to the general jail population, with the concomitant humiliation of a strip search, may not be reasonable, particularly if an alternative procedure is available." [13] The loud message taken from the majority and concurrences is the suggestion that jails segregate arrestees, particularly those arrested for non-violent and non-drug related crimes, from general population as an alternative to subjecting them to invasive strip searches as a blanket rule.

The dissent took issue with the majority's finding that safety interests justified a blanket strip search policy that did not require reasonable suspicion. These four justices pointed out that a visual body cavity search does not detect lice, diseases, wounds or gang tattoos. The dissent further noted the absolute dearth of cases or examples in which a body cavity search revealed contraband where reasonable suspicion was not present. [14]

Montana Law regarding Search and Seizure and Invasions of Privacy

Ten states impose more restrictive safeguards by statute requiring reasonable suspicion before detainees arrested for minor offenses can be strip searched. A typical example of these statutes is Missouri Stat. Ann. §544.193.2 (2002), which states: "No person arrested or detained for a traffic offense or an offense which does not constitute a felony may be subject to a strip search or a body cavity search by any law enforcement officer or employee unless there is probable cause to believe that such person is concealing a weapon, evidence of the commission of a crime or contraband." Other states with similar laws include Kansas, Iowa, Illinois, Kentucky, Tennessee, Colorado, Florida, Michigan and Washington. [15]

Montana's Constitution provides numerous heightened protections beyond the U.S. Constitution. [16] Our Supreme Court has interpreted the Montana Constitution's inclusion of a right to privacy to require heightened protections against unreasonable search and seizure. *See State v. Hill*, 322 Mont. 165, 94 P.3d 752, ¶19 (2004) ("[t]he right to be free of unreasonable searches and seizures is augmented by Montana's right of privacy articulated in Article II, Section 10"). Pursuant to Montana law, to determine whether an unreasonable search or seizure has occurred, Montana courts must consider both whether the individual had an objectively reasonable expectation of privacy and whether the government had a compelling government interest in infringing that individual's privacy. *Id.*

The Montana Supreme Court has determined "[r]equiring a person to take off his or her clothing in front of another person or persons, no matter how professionally and courteously conducted, is a degrading, embarrassing, and humiliating experience, and an **invasion of personal privacy.**" *Deserly* v. *Dept. of Corrections*, 298 Mont. 328, 995 P.2d 972, ¶28 (2000). An individual arrested on a warrant for failure to pay a fine, or for a minor offense, such as a traffic violation, violation of a leash law, non-violent political protest, credit card fraud, writing a bad check, or unpaid parking tickets, has a reasonable ***15** expectation that such arrest will not include showing and manipulating his genitalia prior to being charged, arraigned, or found guilty. Where there is no reasonable suspicion that an individual is carrying contraband, there is no compelling interest to violate that person's right to privacy. Speeding up the booking process is not a compelling state interest. As stated by the U.S. Supreme Court, "the Constitution recognizes higher values than speed and efficiency." [17]

The necessary result pursuant to Montana law is that detainees entering a jail after arrest for a minor non-violent non drug-related offense should not be strip searched unless reasonable suspicion exists. Montana should adopt legislation requiring at least reasonable suspicion prior to conducting a strip search, thus ensuring that Montana continues to be at the forefront of protecting privacy rights and protecting citizens against unreasonable search and seizure.

Footnotes

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1 132 S.Ct. at 1515.

2 *Blackburn v. Snow*, 771 F.2d 556, 564 (7th Cir. 1985).

3 U.S. DOJ Program Statement 5140.38.

4 ICE/DRO Dec. 2, 2008 Detention Standard: Searches of Detainees.

5 *Id.*

6 *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981); *Stewart v. Lubbock County*, 767 F.2d 153 (5th Cir. 1985); *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986); *Swait v. Spiney*, 117 F.3d 1 (1st Cir. 1997); *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989); *Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984).

7 *Id.* at 1514.

8 *Id.*

9 *Id.* at 1520.

10 *Id.* at 1523.

11 *Id.*

12 *Id.* at 1524.

13 *Id.*

14 *Id.* at 1528-1531.

15 *See* Kansas Stat. Ann.22-25-21(a); Iowa Code 804.30 Ill. Comp. Stat., ch. 725, 5/103-1(c); 501 Ky. Admin. Regs. 3:120, Tenn. Code Ann. 40-7-119, Colo. Rev. Stat. Ann. 16-3-405(1), Fla. Stat. 901.211(2), Mich. 764.25a(2), Wash Rev. Code 10.79.130(1).

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16 *Butte Community Union v. Lewis*, 219 Mont. 426, 712 P.2d 1309 (1986) (overruled on other grounds, 282 Mont. 424, 938 P.2d 658 (1997) (our Supreme Court "need not blindly follow the United States Supreme Court when deciding whether a Montana statute is constitutional pursuant to the Montana Constitution").

17 *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973).

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