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OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

December 19, 1996

Richard D. Abney, Captain
Administrative/Support Services Division
Aiken Department of Public Safety
P. O. Box 1177
Aiken, South Carolina 29802

Re: Informal Opinion

Dear Captain Abney:

You note that "[t]he Aiken Department of Public Safety is in the process of developing policy on strip and body cavity searches." You further state that

> [s]ince this is such a sensitive and important subject, the Department would like to request any information you may offer dealing with strip and body cavity searches, especially an accepted definition for "strip search" and when it would be permissible to conduct a strip search in the field.

LAW / ANALYSIS

In Op.Atty.Gen., Op. No. 90-44 (July 5, 1990), this Office commented at length with respect to the constitutional law governing strip and body searches in the context of a policy of conducting a visual strip search of any arrestee who is brought into the secured area of a jail. We noted that "[a] visual strip search ... calls into questions the protections afforded by the Fourth Amendment to the United States Constitution ... ." Quoting Bell v. Wolfish, 441 U.S. 520, 529 (1979), the seminal case in this area, we stated that the following standard was applicable in conducting a visual strip search of a pretrial detainee who was unable to meet bond requirements and who had a contract visit with an individual from outside of the jail:

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> [i]n each case it requires a balancing of the need for the particular search against the invasion of the 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.

We noted that "the Bell v. Wolfish standard has been applied by numerous courts in various jurisdictions, including the Court of Appeals for the Fourth Circuit." That opinion is enclosed for your information.

In Logan v. Shealy, 660 F.2d 1007 (4th Cir.1981), the Fourth Circuit Court of Appeals reviewed a Sheriff's policy to conduct a visual strip search of all persons held at the Detention Center for weapons or contraband regardless of their alleged offense. In the particular instance before the Court, the defendant had been arrested for driving while intoxicated. Referencing Bell v. Wolfish and the balancing test mandated by that decision, the Court stated:

> [o]n the undisputed and stipulated evidence, Logan's strip search bore no such discernible relationship to security needs at the Detention Center that, when balanced against the ultimate invasion of personal rights involved, it could reasonably be thought justified. At no time would Logan or similar detainees be intermingled with the general jail population; her offense, though not a minor traffic offense, was nevertheless one not commonly associated by its very nature with the possession of weapons or contraband; there was no cause in her specific case to believe that she might possess either; and when strip-searched, she had been at the Detention Center for one and one-half hours without even a pat-down search. An indiscriminate strip search policy routinely applied to detainees such as Logan along with all other detainees cannot be constitutionally justified simply on the basis of administrative ease in attending to security considerations. See Tinetti v. Wittke, 479 F.Supp. 486, 490-91 (E.D.Wis.1979), aff'd, 620 F.2d 160 (7th Cir.1980).

660 F.2d at 1012.

Two recent decisions of the South Carolina Supreme Court are also instructive. In Washington v. Whitaker, 451 S.E.2d 894 (S.C.1994), a "drug raid" was made pursuant to a warrant authorizing a search of the premises and any person therein for illegal drugs. A confidential informant had informed one of the officers that he, the informant, had purchased drugs from a black male named "Dean".

Being told that Dean lived next door, the officers entered the apartment for which they had the warrant to search upon being let in by one of the occupants. Upon searching the apartment the officers found no drugs. Respondents Colette and Josephine Washington, who were in the apartment at the time, were taken individually by a female officer to the bathroom for a strip search. They were required to disrobe "and perform various movements, including bending over and lifting their buttocks." No narcotics were found.

The Court concluded that the City of Charleston had no specific policy governing strip searches and its officers had "received no training as to how and when to conduct the searches." Further, the Court stated "[i]t was the jury's province to determine from [the] ... evidence whether the City's failure to train or establish policy on strip searching constituted 'conscious indifference' to Respondent's Fourth Amendment rights." The Court recognized that "[s]trip searches may be necessary in a custodial setting where an individual has decreased expectations of privacy and the State has a legitimate security interest." Beyond the "custodial context", however, "strip searches must be premised upon a clear showing or exigent circumstances." Applying these general rules, the Court held that the officers was not entitled to qualified immunity in executing the search warrant by means of the strip search. Said the Court,

> [a] warrant to search does not absolve an officer from liability under § 1983. Rather, the focus is whether the warrant was executed in a reasonable manner. Duncan v. Barnes, 592 F.2d 1336 (5th Cir.1979).
>
> Here, the following facts demonstrate that Officer Whitaker knew or should have known that the strip search was not reasonable and, if unreasonable, violated Respondents' Fourth Amendment rights:
>
> 1. Immediately upon their arrival at 37H Flood Street, the officers were told that Dean lived next door;

> 2. Although only a male individual named Dean was suspected of selling drugs, the officers searched only the women present;
> 3. No "pat down" search was performed prior to the strip search;
>
> 4. The strip search was ordered even though no narcotics or evidence thereof were discovered in the search of the apartment;
>
> 5. Steven Grooms, an ex-police officer, testified as an expert that a strip search was not justified under the facts of this case;
>
> 6. Charleston Chief of Police, Reuben Greenberg testified that, under the facts of record, he would not have ordered a strip search.

> Although Officer Whitaker was acting under the authority of a search warrant, he exceeded the scope of the warrant by ordering the strip searches after the search of the apartment revealed no evidence of narcotics, or of the presence of Dean. There were no exigent circumstances or probable cause justifying such an intrusive search. Duncan, supra; Hill v. McIntyre, 884 F.2d 271 (6th Cir.1989).

State v. Dupree, 462 S.E.2d 279 (S.C.1995) involved a search by police officers of defendant's mouth for drugs. Upon entering a laundromat, the police saw Dupree holding a plastic bag containing a yellow substance in his hand. Dupree sought to leave out the back door, but found it locked. He placed the plastic bag in his pant pocket and put his hand to his mouth.

With these actions, the officers seized Dupree and searched his mouth, finding nothing. In the process of the officers searching his mouth, Dupree threw the plastic bag containing the yellow substance at the feet of the officers. Dupree was then arrested and the substance turned out to be crack cocaine.

The Court upheld the police search of the defendant's mouth. Recognizing that a search of a body cavity was different from an ordinary search of the person, the Court stated:

> [t]o search below the skin, however, the officers were required to have "a clear indication that in fact evidence would be found" in addition to probable cause. Schmerber v. California, 384 U.S. 757, 770, 86 S.Ct. 1826, 1835, 16 L.Ed.2d 908, 919 (1966); see also State v. Register, 308 S.C. 534, 419 S.E.2d 771 (1992). "In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search." Schmerber, 384 U.S. at 770, 86 S.Ct. at 1835, 16 L.Ed.2d at 919 (1966); see also State v. Register, 308 S.C. 534, 419 S.E.2d 771 (1992).
>
> The "clear indication" requirement, however, is not defeated merely because the officers did not find the thing for which they were searching. Rather, Courts have looked to the likelihood of finding the evidence coupled with the "exigent circumstances which [make] it probable that, unless [the invasion is made by the authorities], the evidence would be destroyed." State v. Strong, 493 N.W.2d 834 (Iowa 1992). Here, the officers acted on the belief that Dupree placed drugs in his mouth. Dupree's suspicious behavior coupled with the officers' past experience with the Wilson laundromat gave rise to a clear indication that unless they searched Dupree's mouth, evidence would be destroyed and Dupree may be injured. Finally, the search was reasonably performed as Dupree opened his mouth and allowed the officers to search without the use of force. Thus, contrary to Dupree's contention, the officers' actions were lawful.

The following represents a summary of the foregoing case law.

1. With respect to strip searches, our courts distinguish between such searches in the custodial context (jail) and in the field. In the custodial context, the Courts hold that strip searches must be deemed reasonable under all the facts and circumstances. Courts will generally not uphold a strip search policy of all pretrial detainees, but instead such search must bear a "discernible relationship" to security needs. The offense for which the defendant has been charged must be one commonly

associated by its very nature with the possession of weapons or contraband in order to uphold a custodial strip search.

2. Outside the custodial setting, a strip search must be premised upon a clear showing of "exigent circumstances". The Court will not condone a strip search simply because a search warrant has been procured. Instead, the Court will look to whether there are "exigent circumstances or probable cause justifying" the strip search.

3. For searches below the skin (cavity searches), our Courts applying the "clear indication" test. Officers are thus required to have "a clear indication that in fact evidence would be found" in addition to probable cause. However, the fact that evidence is not found does not mean that the "clear indication" test has not been met. The facts available to the officers at the time are determinative.

4. Finally, our Court has held that it is a jury question as to whether a governmental entity's failure to train or to have a policy regarding strip or body cavity searches constitutes "conscious indifference" of a defendant's Fourth Amendment rights.

5. Ultimately, the validity of any strip or body cavity search, just like any other search, will depend upon all the facts and circumstances existing at the time. I would suggest that you work closely with your local attorney in developing a particular policy in this area. This Office is, of course, supportive of law enforcement generally and I have simply attempted herein to provide existing case law and opinions for your assistance and guidance.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph
Enclosure