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Federal Appeals Court Reexamines Cross-Gender Strip Searches

Contents

- **Introduction**
- **Facts of the Case**
- **Reasoning of the Court's Majority**
- **Reasoning of the Dissent**
- **Conclusion**
- **Resources and References**

Introduction

While a two-part article in this publication last year extensively discussed the issue of cross-gender strip searches of prisoners, an important new federal appeals court en banc ruling by the Ninth Circuit Court of Appeals, [Byrd v. Maricopa County Sheriff's Dept.](#), #07-16640, 2011 U.S. App. Lexis 86 (9th Cir. en banc.), justifies revisiting the issue yet again, and examining the case in detail to illustrate some of the troubling issues that still remain controversial.

The appeals court was deeply divided, ultimately arriving at a decision by a 6-5 vote. The judges were even ultimately divided on just what constitutes a cross-gender strip search to begin with.

This article should be read together with parts [one](#) and [two](#) of last year's article on cross-gender strip searches, including the recommendations contained in part two, as well as [Routine Strip Searches to Combat Contraband](#), 2010 (4) AELE Mo. L. J. 301, which examines another important Ninth Circuit case on strip searches of prisoners in general. A few relevant resources and references are listed at the end of this article, and some others may be found in the earlier articles.

Facts of the Case

In *Byrd v. Maricopa County Sheriff's Dep't*, #07-16640, 583 F.3d 673 (9th Cir., 2009), a three-judge federal appeals panel ruled that a pretrial detainee failed to show that there was any discriminatory intent towards male detainees in subjecting him to a partial strip search and pat down of his groin area by a female cadet officer despite the nearby availability of male detention officers. The detainee was clad only in pink boxer shorts made of very thin material.

The search was held to be reasonably related to legitimate objectives and there was no showing of deliberate indifference to any pain the search might have caused because of its cross-gender aspect. Under these circumstances, the court also found, the search did not constitute “punishment.” Most importantly, the search was found to be reasonable under the Fourth Amendment.

Subsequently, the full Ninth Circuit Court of Appeals granted a rehearing en banc, and reached a different conclusion by a 6-5 vote.

The facts of the case are as follows.

While the plaintiff in the lawsuit, Charles E. Byrd, was a pretrial detainee in a minimum-security facility in Maricopa County, Arizona, officials in the jail decided to order a search of the approximately 90 inmates in his housing unit, because there had been a number of recent altercations and they suspected that contraband was present in the unit. They did not believe, however, that an emergency of any kind then existed.

Officers from a Special Response Team entered the unit, carrying both Tasers and pepper ball guns. Byrd, like other detainees, was ordered to remove all his clothes except for his very thin pink boxer shorts.

Detainees were lined up, and taken four to six at a time into a common area day room. Once there, they were searched by cadets in the detention officer training academy. Training supervisors were also present.

The twenty-five to thirty cadets were wearing white t-shirts with their last names printed on the back, but no other identification, and jeans. While there were ten to fifteen fully uniformed detention officers also present in the room, they did not engage in the searches of the prisoners. A videotape of the searches was made by at least one person.

The plaintiff detainee was subjected to a search by a female cadet, even though male detention officers were present watching. Only four inmates were searched at a time.

The female cadet told Byrd to raise his arms above his head, and to turn away from her. She then proceeded to pull the waistband of his shorts out several inches while wearing rubber latex gloves. She also felt the waistband for anything hidden, but did not look inside the shorts.

Placing a hand on his lower back holding the back of the shorts, she searched over his boxer shorts with her other hand, going from his outer thigh from his hip to the bottom of the shorts,

She “then moved her hand from his outer thigh to the bottom of the shorts on his inner thigh and applied slight pressure to feel his inner thigh for contraband.” With the back of her hand, she “moved Byrd’s penis and scrotum out of the way applying slight pressure to search the area,” followed by a search of the other side “using the same technique.”

The search concluded with her putting her hand on the bottom of Byrd’s buttocks, and running a hand up to separate his cheeks “while applying slight pressure, to search for contraband inside his anus.” This search took an estimated ten to twenty seconds, after which the detainee was told to go to the other side of the room, and sit facing the wall.

Byrd’s federal civil rights lawsuit claimed that the search violated his Fourth Amendment right against unreasonable searches, his rights under the Fourteenth Amendment to equal protection and his substantive due process protection against punishment.

Reasoning of the Court’s Majority

The six-judge majority of the eleven-judge en banc appeals court found that the facts raised a “peripheral equal protection” issue because a county contraband control policy made a distinction between the treatment of male and female prisoners during frisk searches.

The policy allowed frisk searches of males by either male or female officers, but provided that only female officers could frisk female inmates except when exigent circumstances were present. Because the plaintiff had not developed this issue in detail, the court did not quarrel with the dismissal of his equal protection claim.

But the opinion continued to note that the policy did not justify the search in the case as reasonable, since it also stated that a “strip search,” as opposed to a “frisk search” would be carried out by an officer of the same sex as the prisoner. The policy defined a strip search, however, as involving a “visual scan of the inmate’s skin after all clothing has been removed.”

Based on this, the county argued that the search had been a frisk rather than a strip search, since Byrd kept his shorts on.

The appeals court majority upheld the rejection of the inmate’s substantive due process claim, as there was no evidence that the cadet (or the county sheriff) had an intent to punish the prisoner, or that the search was unrelated to a legitimate governmental objective.

The heart of the matter in the majority’s ruling involved the issue of the Fourth Amendment reasonableness or unreasonableness of the search. The trial court, later upheld by the three-judge appeals court panel, had granted judgment as a matter of law in favor of the cadet on the question of whether the search had been reasonable.

The six-judge en banc majority stood this on its head, ruling that the search conducted under these circumstances, which they clearly viewed as a strip search despite the continued wearing of the shorts, was unreasonable under the Fourth Amendment as a matter of law.

Whether a search is reasonable under the Fourth Amendment, the court stated, depends on a case-by-case balancing of the need for the specific search versus the personal rights invasion caused by the search.

The four factors for a court to consider are: (1) “the scope of the particular intrusion,” (2) “the manner in which it is conducted,” (3) “the justification for initiating it,” and (4) “the place in which it is conducted.” The majority proceeded to analyze these four factors.

Scope of the intrusion. The majority emphasized that, in this case, the issue had to be approached by recognizing that a desire to shield one’s unclothed figure from [the] view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.”

The majority also found it “not surprising” that “a connection has been made between cross-gender searches and the level of sexual impropriety between inmates and corrections personnel,” citing, among other things, the June, 2009 [National Prison Rape Elimination Commission Report](#). That report states that cross-gender searches “heighten the potential for abuse” of prisoners, with the risks present “whether the officers are male or female.”

The Commission’s recommended standard prohibits such cross-gender strip and visual body cavity searches by non-medical staff except in emergencies “because of their extraordinarily intrusive nature.” The majority also referenced a consistent standard adopted by the [American Correctional Association](#) (ACA), Standards For Adult Correctional Institutions (2003), Section 4-4194:

“Written policy, procedure and practice provide that, except in emergency situations, visual inspections of inmate body cavities are conducted by officers of the same sex, in private . . .”

Based on the factors to be examined, and in light of the Commission Report and ACA Standards, the majority found that the cross-gender strip search of Byrd was unreasonable as a matter of law. The female cadet:

“touched Byrd’s inner and outer thighs, buttocks, and genital area with her latex-gloved hand through very thin boxer shorts. She moved his penis and scrotum in the process of conducting the search. The scope of this intrusion totally thwarted any desire on Byrd’s part to ‘shield [his] unclothed figure from [the] view of strangers . . . of the opposite sex . . .’ The scope of the intrusion in this case far exceeds searches we have previously sanctioned and weighs in favor of a finding of unreasonableness.”

The majority distinguished past approved cross-gender interactions in which female officers occasionally viewed male inmates in various states of undress, conducted routine pat-down searches that did not involve intimate contact with male prisoner’s bodies, etc. In this case, the majority emphasized, Byrd was “barely clothed at all, and the female officer twice touched his penis and scrotum, and searched inside his anus.”

In a footnote, the majority characterized the shorts worn as “nearly see-through,” stating that in “most jurisdictions within this circuit, one could not appear in public dressed, (or more precisely undressed) in that manner.”

Manner in which the search was conducted. The opinion also found that the manner in which the search was carried out also weighed in favor of a finding of unreasonableness, given the way the female cadet was dressed, without much identification, with a large number of non-participating officers watching, and someone videotaping the search.

Justification for the search. While the search was for the legitimate purpose of detecting contraband, which weighed in favor of reasonableness, there was “no justification given for conducting a cross-gender strip search.”

Place of the search. The search was carried out in a day room, a common area, weighing in favor of reasonableness, since, with other prisoners present, it was “less likely that improper conduct would occur.”

Balancing of the four factors. Despite the purpose of the search and the place of the search weighing in favor of reasonableness, the majority opinion found that the effect of the first two factors, the level of the intrusion and the manner in which the search was conducted, were “so extreme” that “a conclusion of unreasonableness is compelled.”

The majority surveyed the caselaw, concluding that “Courts throughout the country have universally frowned upon cross-gender strip searches in the absence of an emergency or exigent circumstances.”

The opinion concluded by acknowledging that officials managing prison populations are due great deference, but pointedly stating that such deference cannot extend “to sanctioning a clear violation of an inmate’s constitutional rights,” which the judges plainly believed occurred in this case. They reversed summary judgment for the cadet and county on the Fourth Amendment claim, holding that the “cross-gender strip search” performed on the plaintiff was unreasonable as a matter of law under the facts of the case.

Reasoning of the Dissent

Five judges on the en banc court joined in a concurrence in part and dissent in part. They agreed with the majority’s conclusions rejecting the detainee’s equal protection and due

process “punishment” claims. But they believed that the deference owed to prison administrators, factual findings by a jury in the case (which found the search reasonable in the claims against the cadet), and the prior caselaw compelled the conclusion that the cadet’s actions were reasonable under the Fourth Amendment.

The dissenters characterized the search at issue as a “pat-down search” rather than a strip search, agreeing with the county’s argument on that question.

The dissenters believed that deference was due to the expertise of prison officials who “know better than a panel of judges how to run a prison.”

They stated that they were bound by the jury’s factual determinations that the female cadet did not “intentionally” squeeze or knead the detainee’s “penis or scrotum or improperly touch his anus through his underwear,” and that her search was “done for [an] identified security need.”

The majority had rejected the importance of these factual findings, noting that the trial judge had essentially limited the scope of the jury’s inquiry to these precise questions, preventing them from considering whether the cross-gender nature of the search made the search unreasonable under the circumstances.

Analysis of four factors. The dissenters began with an emphasis of the purpose of the search, finding dangerous contraband in the facility in light of recent inmate fights. Contraband is frequently concealed in inmate body cavities, or under clothing.

The dissenters also agreed with the majority that the place of the search weighed in favor of reasonableness.

But they completely disagreed on the issues of the scope and manner of the search. They argued first that past caselaw upholding both female officers’ visual observation of unclothed male inmates and their performing pat-down searches on males indicated that the majority was wrong on the scope of the search being too intrusive.

“The officers here searched the prisoners professionally, following a procedure that minimized physical contact to the extent possible.” The female cadet, they argued, searched the detainee “over his boxer shorts, and he doesn’t claim she ever looked

underneath them.” The entire search took no more than a minute. Thus its scope did not ‘far exceed’ what we have previously sanctioned.”

On the manner of the search, the judge writing the dissent admitted that the issue “gives me greater pause. Not lightly do I find reasonable a female officer’s probing search of a male detainee wearing only thin boxer shorts” But prior precedent and the facts were believed to compel that result, “unsavory to our sensibilities though that result may be.”

Conclusion

Clearly, there are contained, in the majority and minority opinions in this case, two greatly differing analyses of how intrusive a cross-gender search of this type (whether labeled a strip search or called a frisk search) is, and how much deference should be given to correctional officials to carry them out in non-emergency circumstances, as well as how much weight should be given to the expertise and recommendations of such organizations as the Prison Rape Elimination Commission and the American Correctional Association (ACA).

The need to conduct searches of prisoners for security purposes, including in non-emergency circumstances, is clear, and the ways in which contraband is concealed and smuggled necessitates that many such searches be more intrusive, such as strip searches, visual body cavity searches, and a variety of types of frisk or pat-down searches.

Whether other federal appeals courts will follow the approach of the Ninth Circuit majority on this issue remains to be seen. But it is clear that prison and jail administrators will be acting prudently if they try to limit, to the extent possible, cross-gender searches of detainees and prisoners, particularly the more intrusive ones.

Resources

The following are some useful resources related to the subject of this article.

- [National Prison Rape Elimination Commission Report](#) (June 2009).
- [Search: Body Cavity](#). Summaries of cases reported in AELE publications.
- [Search: Prisoners/Cells](#). Summaries of cases reported in AELE publications.
- [Strip Search: Prisoners](#). Summaries of cases reported in AELE publications.

Prior Relevant Monthly Law Journal Articles

- [Routine Strip Searches to Combat Contraband](#), 2010 (4) AELE Mo. L. J. 301

- [Cross Gender Strip Searches of Prisoners -- Part One](#), 2010 (5) AELE Mo. L. J. 301.
- [Cross Gender Strip Searches of Prisoners -- Part Two](#), 2010 (6) AELE Mo. L. J. 301.

References:

- Michael Dorf, Dorf on Law, "[Cross-Gender Strip Searches](#)," Jan. 10, 2011.
- Flynn L. Flesher, "[Cross-Gender Supervision in Prisons and the Constitutional Right of Prisoners to Remain Free From Rape](#)," 13 Wm. & Mary J. Women & L. 841 (Spring 2007).
- Jennifer R. Weiser, "[The Fourth Amendment Right of Female Inmates to be Free from Cross-Gender Pat-Frisks](#)," 33 Seton Hall Law Review 31 (2002).
- Teresa A Miller, "[Sex and Surveillance: Gender, Privacy & the Sexualization of Power in Prison](#)," 10 Geo. Mason U. Civ. Rts. L.J. 291 (Summer 2000).
- Judge Emory A. Plitt Jr., "Prisoner Privacy and Staff Employment," Corrections Legal Defense Quarterly, No. 98-1 (1998). Includes a discussion of issues relating to the use of employees of the opposite gender from the prisoner conducting or participating in a search, including a strip search.
- Judge Emory A. Plitt Jr., "Searches of Prisoners and Visitors," Corrections Legal Defense Quarterly, #96-1 (1996). Includes sections discussing strip and body cavity searches.
- Mary Ann Farkas and Kathryn R. L. Rand, "[Female Correctional Officers and Prisoner Privacy](#)," 80 Marquette Law Review 995 (1997).

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