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Search Incident to Arrest – Drug Dealers

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❖ Introduction

It is a common practice for drug dealers to hide their "stash" (drugs) in parts of their bodies or clothing to conceal them from the police. Often, when making an "on site" drug arrest, police will have a reason to believe that the suspect is concealing drugs.

Drugs have been secreted in a suspect's anus, vagina, under testicles, in underwear, and otherwise concealed in clothing. The law is clear that police may perform a search incident to arrest. Searches incident to arrest usually involve a "pat-down" of the suspect, the emptying of pockets, purses, bags, etc.

A contentious issue is how far a search incident to arrest may go – especially in a public place. Can an arresting officer perform a strip search or body cavity search at the scene of the arrest – even when the officer otherwise has probable cause for the arrest?

This article discusses some recent appellate court decisions exploring this issue and offers some suggestions as to how to conduct such searches.

❖ *Bell v. Wolfish* (1979)

The Supreme Court of the United States has not yet addressed the reasonableness of a strip search incident to arrest. It has, however, addressed the reasonableness of such a search in connection with the search of pre-trial detainees in a correctional facility. In *Bell v. Wolfish*, #77-1829, 441 U.S. 520 (1979), 559, the Court said:

> "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." 441 U.S. at 559

Before turning to the permissible scope of searches incident to arrest, it is important to try to define the various categories of searches that may implicate Fourth Amendment privacy issues.

There are three generally accepted categories of such searches. They were described by the U.S. Court of Appeals for the First Circuit in *Blackburn v. Snow*, # 84-1736, 771 F.2d 556 n. 3 (1st Cir. 1985):

> "A *strip search*, though an umbrella term, generally refers to an inspection of a naked individual, without any scrutiny of the subject's body cavities. A *visual body cavity search* extends to a visual inspection of the anal and genital areas. A *manual body cavity search* includes some degree of touching or probing of body cavities." [Italics added].

There seems to be some general agreement as to these categories. One commentator has described a strip search as involving the removal of clothing for inspection of the under-wear and body but does not involve a visual or manual inspection of the genitals or anus. A visual body cavity search was described as a search where there is a visual inspection of a person's genitals or anus but no physical contact or intrusion.

Manual body cavity searches have been described as "not only those [searches] performed by insertion or manipulation with the fingers, but also endoscopic examinations and the use of gynecological devices." See William J. Simonitsch, Visual Body Cavity Searches Incident to Arrest: Validity Under the Fourth Amendment, 54 U. Miami L. Rev. 665, 667-68 (April 2000).

Police are allowed to conduct a search incident to arrest [1] in order to remove any weapons that the arrestee might use to resist arrest or effect an escape or to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. *Chimel v. California*, #770, 395 U.S. 752, 763 (1969).

The Supreme Court further explained in *U.S. v. Robinson*, #72-936, 414 U.S. 218 (1973) that after a custodial arrest, the search incident to the arrest permits a search of the arrestee's waist, pants, and pockets – as well as the contents of the arrestee's pockets because of the need "to disarm the suspect in order to take him into custody as well as the need to preserve the evidence on his person for later use at trial."

The justices rejected the contention that a search incident to arrest was limited to a frisk of the arrestee's outer clothing. Before *Chimel* and *Robinson*, the Supreme court had held in *Schmerber v. California*, #658, 384 U.S. 757, 768 (1966) that the Fourth Amendment protects an arrestee's privacy rights in his person and prohibits bodily intrusions that are "not justified in the circumstances or which are made in an improper manner."

Under the Fourth Amendment, any warrantless search is *per se* unreasonable unless the search comes under one of the recognized exceptions to the warrant requirement. A warrantless search incident to arrest is one of the recognized exceptions to the Fourth Amendment preference for a warrant. *Illinois v. Rodriguez*, #88-2018, 497 U.S. 177, 185 (1990).

- Warrantless searches incident to arrest are based on an exigency rationale – the safety of the officer and the preservation of evidence.

The search incident to arrest exception is typically interpreted narrowly. Generally, it has been held that the mere existence of probable cause for the arrest does not, of itself, entitle the police to conduct a more invasive search

The necessity for more invasive searches incident to arrest then turns on the exigency of the circumstances and the reasonableness of the search. See, for example, *Stackhouse v.*

State, #4-ST-1983, 298 Md. 203, 217, 468 A.2d 333, 341 (1983); *Coolidge v. New Hampshire*, #323, 403 U.S. 443, 455 (1971) ("The burden of establishing exigent circumstances is on the state and the facts and circumstances upon which the question of reasonableness must be viewed in light of established Fourth Amendment principles").

Even though the Supreme Court has not yet decided the scope of a search incident to arrest, it is clear that under the Fourth Amendment, an arrestee has a reasonable expectation of privacy in intrusive searches incident to arrest.

❖ ***Paulino* decision (2007)**

Two police detectives had reliable information from a confidential informant that John Paulino would be at a certain location in possession of a quantity of drugs. [2] The informant told the officers that Paulino typically hides his "stash" in his buttocks. The police set up surveillance on the parking lot of a carwash facility. As soon as Paulino pulled into one of the bays of the carwash, [3] he was arrested.

There were various businesses in the area of the carwash. Several officers were present. After he was arrested, Paulino was put on the ground in the carwash bay.

After his pants were down, one of the detectives put on a pair of gloves, lifted his shorts; spread the cheeks of his buttocks, and removed a package of drugs. The drugs were not visible before the detective spread the cheeks of his buttocks.

There was a dispute as to how many people were around during the search but admittedly there were several other officers and perhaps some citizens. [4] The carwash was open for business. Paulino contended that the search of his buttocks constituted an impermissible strip search.

Paulino did not challenge the probable cause for his arrest nor the right of the police to conduct a "normal" search incident to arrest. He claimed that the search was not justified by exigent circumstances. In *Paulino v. State*, #75-ST-2006, 399 Md. 341, 924 A.2d 308 (2007) the Maryland Court of Appeals [5] agreed with him and suppressed the drugs.

The court noted that without the constitutional safeguards of exigent circumstances and reasonableness, every search incident to arrest could result in a strip search. The facts

relating to his arrest did not present the police with an emergency or exigent circumstances.

Despite the prosecution's argument to the contrary, [6] the court found that the search constituted both a strip and visual body cavity search. Not only did the police move around his clothing to better view his buttocks, they also manipulated his buttocks to get a better view. The drugs were not visible until his cheeks were spread apart.

> "Notwithstanding the search incident to arrest exception to the warrant requirement, the search conducted by the police must be reasonable in light of the exigencies of the moment... The fact that the police can lawfully initiate the search of a suspect does not then give the police *carte blanche* authority to conduct an unreasonable search." 399 Md. 341, 354 (2007).

❖ *Allen* and *Smith* (2011)

Octavian Allen and Drew Smith were on a street corner in an area well known as a location for drug trafficking. Officers had the area under surveillance. Allen and Smith were standing on a corner with other individuals. As cars passed by, people on the corner, including Allen and Smith, shouted "We got fat 20's here" The officers knew that meant $20 worth of cocaine.

The officers saw the group "bum rush" cars that would stop. The officers saw a truck pull over and Smith and Allen approach the truck. The driver gave Allen money and Allen gave the driver small object. The police concluded that drug transactions were taking place and called in an arrest team.

Allen was arrested. The arrest took place near several parked cars. There were no residences on the block where the arrest took place. There were some garages, which were all closed. The officers searched his pockets and pants legs and then checked for "slits" in the waistband area of his pants.

They did not find anything. They then pulled back Allen's pants and saw a plastic bag "protruding" from between his buttocks. While holding out the waistband, the police ordered Allen to spread his legs and squat. When he complied, a bag of cocaine dropped from between his buttocks to his underwear area.

The police retrieved it and it contained 28 Ziploc® bags of narcotics. The police did not touch Allen during the search and the only people present during the search were the officers on the arrest team. Another officer stood behind him while the search went on and nobody could have seen Allen's buttocks.

There was a similar search of Smith. The police pulled back his waistband and saw a plastic baggie "coming through cheeks." The bag was half concealed in Smith's buttocks. The police reached in and pulled it out and found 24 Ziploc® bags of narcotics.

Citing *Paulino* and other cases, Allen and Smith claimed that the recovered drugs should be suppressed because on the invasive nature of the search. They argued that the searches were unreasonable, because they amounted to strip searches not justified by exigent circumstances and that the police failed to take any steps to protect their privacy while in a public location and in the presence of other officers.

The place where the search was done was on the side of a street which had only storage garages. There were residences on the other side of the block. At the time there was nobody in the area, other than the officers, Allen, and Smith.

The search was done in such a way that nobody, including other officers, could see their buttocks. Their genitalia or their anuses were not exposed and there was no manipulation. The prosecutor described the searches as "reach-in searches" rather than strip searches, and no private body parts were publically exposed.

The court held that under the circumstances the search of Allen and Smith was reasonable as a search incident to arrest. A "reach-in" may be less invasive than asking or ordering someone to remove their clothing. But to the extent that a reach-in search allows an officer to view a suspect's private areas it is still intrusive and demeaning.

The court held that whether it was classified as a "reach-in" or a "strip search," either version is not the kind of search that is automatically allowed incident to arrest. The court used the four factors described in *Bell*:

1) the scope of the intrusion;
2) the manner in which the search is conducted;
3) the justification for the search; and
4) the place where it was conducted.

After applying those factors the Maryland Court of Special Appeals [5] held that the search was reasonable. *Allen v. State*, #1963-ST-2009, 2011 Md. App. Lexis 15.

Why? How did this differ from *Paulino*?

It was a search incident to arrest and the officers had reasonable suspicion to believe that Allen and Smith had drugs in their possession. It is well known to officers that drug dealers often secrete drugs in body cavities and underclothing.

The court said that "This knowledge supports our holding that, when a person is arrested for drug dealing, the nature of the offense provides reasonable suspicion to believe that the arrestee is concealing drugs on his or her person."

The court held that a reach-in search is less intrusive than a full strip search. Their clothing was not removed and the private areas of their bodies were not publically exposed. The officers took reasonable steps to protect their privacy so that no one, including other officers, could see any private areas.

While the search did take place on a public street, it was done out of public view, not near a residence, no one was on the street, and the search could not be seen from the nearby residences. Thus, a reach-in search even on a public street may be reasonable if the police take appropriate steps to protect the arrestee's privacy.

There was no manipulation of any of their body parts. This is why the search in *Paulino* was unreasonable while the searches of Smith and Allen were reasonable.

❖ **Four factor test – other courts**

Other courts that have dealt with this issue have also applied the four factor test from *Bell v. Wolfish*.

- *U.S. v. Williams*, #06-2448, 477 F.3d 974 (8th Cir 2007). A "reach-in" search of a clothed subject is less severe than a full blown strip search. The suspect was not searched on the street. He was taken to the police station parking lot where the police opened his pants, reached inside his underwear and retrieved contraband near his genitals.

- *Jenkins v. State*, #SC07-1738, 978 So.2d 116 (Fla. 2008). Where police pulled boxer shorts away from suspect's waist to look for drugs, and no body parts were exposed, the probe was not a strip search.

- *State v. Stone*, #505A06, 653 S.E.2d 414 (N.C. 2007). A search of intimate areas violates "social expectations;" areas referred to as private parts are so named for obvious reasons.

- *Safford Unified School Dist. v. Redding*, #08-479, 557 U.S. ---, 129 S.Ct. 2633 (2009). A school search that goes beyond outer clothes and backpacks to exposure of intimate parts requires reasonable suspicion that evidence is concealed under the clothing.

- *People v. Hall*, 10 N.Y.3d 303, 2008 NY Slip Op 02676, 886 N.E.2d 162 (N.Y. 2008), cert. denied, 129 S.Ct. 159. Reasonable suspicion justifying a visual body cavity search may be found by consideration of the crime charged, the particular characteristics of the suspect, and the circumstances of the arrest.

- *U.S. v. McKissick*, #98-6320, 204 F.3d 1282 (10th Cir 2000). A reach-in search of suspect's pants in a hospital parking lot was reasonable.

- *People v. Butler*, 27 A.D.3d 365, 2006 NY Slip Op 2296, 813 N.Y.S.2d 366 (2006). A reach-in search where the police briefly loosened and lowered the suspect's pants on a city street was reasonable where the suspect's buttocks were not exposed to public view and privacy precautions were taken.

- *McGee v. State*, #1408-00, 105 S.W.3d 609 (Tex. Crim. App. 2003). The suspect was taken to a fire station nearby; in a secluded area of the station he was ordered to "drop his pants, bend over, and spread his buttocks." The court held that the visual body cavity search was permitted because the police took steps to protect the suspect's privacy.

- The *McGee* court also referenced *Logan v. Sheely*, 660 F.2d 1014 (4th Cir 1981); cert. den., 102 S.Ct. 1435, which held that strip and body cavity searches involve such an intrusion that they should rarely be conducted in public places.

In *Chimel*, the Supreme Court explained that the reason for a search incident to arrest is "to remove any weapons... [and] to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction."

- The principle is well-established that a police officer may make a full custodial search in order to disarm a suspect or preserve evidence that may be in the suspect's possession. Officers must, however, be very careful to protect the privacy of suspects during such searches.

❖ Author's suggestions

1. A custodial arrest carries with it the authority to conduct a search incident to arrest.
2. Courts generally look at a reach-in search as being less intrusive than a strip or visual body cavity search – as long as no intimate body areas are exposed.
3. If a strip or body cavity search is justified by a reasonable suspicion that the suspect may be concealing contraband, the search must be conducted out of the public view, in a private area, and only in the presence of only the searching officer(s).
4. If exigent circumstances justify a strip search at the scene of an arrest, the suspect should be removed from public view and the search shielded from others, except the officer conducting the search.
5. The reasonableness of such searches will be measured by the need for the search, the efforts of the officers to protect the privacy of the suspect, the intrusiveness of the search, and the location where the search was done.
6. Such intrusive searches should only be done by officers of the same sex as the suspect – absent extreme and compelling circumstances.

❖ Notes

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1. This article deals exclusively with searches incident to arrest and not protective searches allowed under *Terry v. Ohio*, #67-, 392 U.S. 1 (1968).
2. The word "drugs" is used throughout this article and refers to any kind of controlled or prohibited substances.
3. Paulino was actually a passenger in the vehicle that pulled into the carwash bay.

4. The officer could not remember.
5. The Maryland Court of Appeals is the state's highest appellate tribunal. The Court of Special Appeals is the subordinate appellate body.
6. The state argued that because all the police had to do to remove the drugs was lift up his shorts and pull out the drugs.

❖ **References**

1. Searches Incident to Arrest, Alameda County District Attorney, 2011:1 *Point of View* 1-14 (Winter, 2011).
2. No Warrant Needed to Search a Cell Phone Found on an Arrestee, 2011 (3) AELE Mo. L. J. 401.

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