AELE Monthly Law Journal

ISSN 1935-0007
Cite as: 2013 (2) AELE Mo. L. J. 301
Jail & Prisoner Law Section – February 2013

An Update on Jail Strip Searches of General Population Detainees

❖ Introduction

Strip searches at jails and other detention facilities has been a controversial and troublesome topic. For many years, the linchpin of the case law revolved around the concept of reasonable suspicion to believe a detainee might be in possession of weapons, drugs, or other contraband, threatening the safety and security of the facility thereby making a strip search imperative.

Four prior articles have addressed the topic; three of those focused on cross-gender strip searches. Much of what was presented in those prior articles remains valuable and useful, including the numerous resources and references listed at the end of those articles. Links to them are included at the end of this piece.

In 2012, the U.S. Supreme Court, in a 5-4 vote, decided *Florence v. Board of Chosen Freeholders*, #10-945, 132 S. Ct. 1510, 2012 U.S. Lexis 2712. It changed the landscape, abandoning a focus on the need for a detailed analysis of the presence or absence of reasonable suspicion to justify the carrying out of a strip search. For the Court's majority, the focus shifted to a less murky dividing line, based on whether an incoming detainee, regardless of what they are charged with or whether there is reasonable suspicion concerning them, is about to enter the general population of the jail or other detention facility.

This article examines the facts and reasoning of that decision in some detail, including both the majority and dissenting approaches. It will also try to briefly spell out what the Court's decision did not decide, and some of the considerations that may enter into deciding the search policy for a facility in light of the new legal landscape on the subject.

At the conclusion of the article is a section taken from Routine Strip Searches to Combat Contraband, 2010 (4) AELE Mo. L. J. 301, published in 2010. It remains an excellent summation of things to consider when deciding on policies and procedures for strip searches.

❖ Facts of the Case

Albert Florence, a New Jersey motorist, was arrested on a bench warrant issued when he fell behind on paying a court-mandated fine in monthly installments. At the time of his arrest, he had actually paid off the outstanding balance two years before, but the warrant mistakenly remained active in a statewide computer database. He was taken to the Burlington County's Detention Center, spending six days there before he was transferred to the Essex County's Correctional Facility.

At the first facility, he was compelled to shower with a delousing agent, as well as asked to open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals. He was subsequently taken to the largest county jail in New Jersey, where he was placed in the general population, which contained numerous gang members.

Because Essex County had a similar "blanket" strip search policy similar to Burlington's, he was again strip searched. Though even under the reasonable suspicion premise a strip search would have reasonable (because of his transfer from one jail to another jail), it was the "blanket" nature of the searches that generated Essex County's inclusion in the class action.

A visual strip search was conducted of all arriving detainees as a general policy regardless of their suspected offense, the circumstances of their arrest, their criminal record, demeanor or behavior. He was mandated to lift his genitals, turn around, and cough in a squatting position. After a day there, the charges against him were dropped and he was released.

His subsequent lawsuit challenged these routine suspicionless strip searches, arguing that those arrested for minor offenses should not be subjected to the indignity of having his naked body inspected in this manner when there was absolutely no individualized suspicion that he might have a concealed dangerous weapon, drugs, or other contraband. He claimed that doing so violated his Fourth and Fourteenth Amendment rights. His

lawsuit was certified as a class action on behalf of those subjected to a visual strip search after being admitted to the general jail population on a non-indictable offense.

❖ Florence Majority Ruling

The Court's five-person majority noted that running a detention facility is a difficult and dangerous undertaking, requiring the use of expertise to maintain safety and order. Accordingly, they asserted, it was important to give deference to correctional officials and to uphold policies and procedures that might impinge on inmate's constitutional rights if reasonably related to legitimate penological interests.

They recited the past history of cases that had upheld strip searches of detainees after contact visits from outside persons, even when such searches did not detect a flood of weapons, drugs or contraband since the routine searches themselves could help deter their presence.

Factors that often make it difficult to single out particular detainees for enhanced scrutiny represented by a strip search include the brevity of many individual's confinement, the constantly changing composition of the inmate population, and the unknown existence, perhaps even among those arrested for minor offenses to be violent, attempt to escape, or to smuggle in drugs.

Correctional officials must be allowed, the majority believed, to create reasonable search policies to both detect and deter contraband. They found that the strip searches conducted at the two county jails complained of were reasonable and not an exaggerated response to security concerns.

In addition to detecting contraband, strip searches can also aid in detecting health problems ranging from lice to contagious infections, some of which can be deadly and/or difficult to treat and contain. Strip searches can also detect gang tattoos and insignia.

Further, even the introduction of objects that are benign in the outside world, such as money, cigarettes, matches, lighters, and objects that be used in suicide attempts, can create security concerns in the jail environment. The Justices pointed out that inmates nationwide stage over 10,000 assaults on correctional personnel every year, and many more on each other, often using such everyday objects as ball point pens.

Some "non-violent" offenders may come in and out of the facility, sometimes serving weekend sentences, and therefore may be tempted to smuggle small objects in inside a body cavity, taped under an armpit, or elsewhere on their body. The Justices found that the seriousness of a charged offense was a "poor predictor" of who has contraband. They

pointed out that Oklahoma City federal building bomber Timothy McVeigh was stopped for driving without a license plate, and that one of the 911 terrorists was stopped and ticketed for speeding days before the attack.

New detainees may not yet be properly or fully identified, and may have far more dangerous criminal records than is initially known. The surest way to detect contraband and prevent it from entering the general population, the officials in charge of the jails involved in the case told the Court, was to eschew any rule that limited their ability to search particular categories of detainees.

The majority agreed, and upheld the routine suspicionless strip searches of all new detainees entering the facility's general population.

❖ Dissenting Opinion

The four dissenting Justices strongly disagreed, arguing that a visual strip search of a person arrested for minor offenses not involving violence or drugs was unreasonable and forbidden, absent individualized reasonable suspicion. They viewed the search involved as a major indignity and invasion of privacy, and viewed them as "inherently harmful."

While briefly acknowledging the security concerns pointed to by the majority opinion, and giving at least lip service to the need for some deference to the experience and expertise of correctional officials, the dissenters quickly gave it short shrift and found a strip search not necessary to achieve the stated goals, believing that the use of metal detectors, pat frisks, and requiring showers as well as searching detainees clothing was sufficient when no reasonable suspicion existed.

They also focused on the small number of actual instances in which the two jails had detected objects concealed in various body cavities, all but ignoring the point made by the majority of the searches possible deterrent effect.

The dissenters also point to the fact that many professional associations in the correctional field require reasonable suspicion before a strip search is conducted, and that ten states and seven federal appeal courts have impose a reasonable suspicion requirement before a strip search can be conducted on a person arrested for a minor offense.

❖ Remaining Concerns

The Court did not address what kinds of searches would be reasonable and justified for arrestees confined separately away from the general population and not in much contact

with other prisoners. Nor whether strip searches were appropriate when an arrestee has not yet had a review of their detention by a magistrate and when there are separate holding facilities to detain them in.

The majority further noted that they could not address, in this case, the problem of officers becoming abusive and inflicting intentional humiliation in some cases. Further, strip searches involving touching may involve even more complexities.

A separate concurrence by Chief Justice Roberts suggested that there might be room in the future, given the right developed facts, of an exception to the general rule announced.

A separate concurrence by Justice Alito noted that:

> "...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."

He suggested that it might be possible to segregate temporary detainees, likely to soon be released, who are minor offenders away from the general population, stating that currently the federal prison system and a few local jails do this.

One thing should be made clear: the Court's majority, in recognizing what the two jails involved in the case did as legal, did not necessarily endorse it as universally the best thing to do, or urge others to adopt it. Rather, they were giving deference to the considered evaluation of the officials involved that they believed that it was the right thing to do and perhaps necessary for their particular circumstances. Nothing prevents a facility from deciding to routinely subject those accused of major offenses to intake strip searches while restricting such searches for those accused of minor offenses to circumstances providing reasonable suspicion of possession of drugs, other contraband or weapons.

Conducting strip searches can be time-consuming and it requires the allocation of substantial numbers of personnel, and is accordingly costly. The suggestion of perhaps segregating minor and temporary detainees away from the general population, or course, requires its own special efforts and expenditures, but may, when possible, be more fruitful, and certainly better for public relations, than subjecting traffic offenders to routine strip searches.

Regardless, the depiction by the Court's majority of the urgency of the need to keep weapons and contraband out of facilities is well stated. While each department or agency must decide for itself what will work best for it, the parameters of the Court's ruling now allows for much more flexibility for administrators to adopt policies and procedures that they believe will work.

As a practical matter, when pretrial detainees are viewed as entering into the general population will vary greatly from one facility to another. Depending on the particular structure of a specific facility, for example, the "bright line" on one side of which you cannot reasonably strip search, and on the other side of which you can, may be at the entry threshold of a jail or other detention facility. In other instances, based on the availability of separate holding cells for new arrivals, that line may be at some point after a reasonable time to obtain judicial review of a detainee's status (such as by arraignment, bond hearing or first appearance) has elapsed.

The Supreme Court's decision does not really address in any detail what it means to be placed into a facility's "general population," so this may wind up being fleshed out further in lower court decisions, and may involve a very fact-specific inquiry into how newly arrived detainees arrested for relatively minor infractions are housed and processed. Much of this may revolve around the specific design features of an individual facility.

❖ Some Suggestions

Maryland Circuit Judge Emory A. Plitt, Jr., who serves as the course director for AELE's Jail and Prisoner Legal Issues Seminars, has made a number of suggestions designed to attempt to avoid problems, including litigation, arising in the context of strip searches. They should be carefully considered:

1. Except in extreme emergencies, strip and body cavity searches should only be performed by staff of the same sex as the prisoner.
2. Officers or staff of the opposite sex should not be allowed in the room where the search is being conducted except in the case of some compelling need such as a disturbance, security, an unruly prisoner, etc.
3. The room where the search is conducted should be shielded from outside observation. Consider also the use of translucent screens or 'modesty panels' to ensure some degree of privacy.
4. Any body cavity search that involves actual manual probing of body cavities should normally be done only by qualified medical personnel except in the most urgent circumstances. The argument that you might make that 'nobody was around' can be blown out of the water by a prisoner simply showing that he/she could have been secured and not allowed movement while someone was called.
5. Staff should always inquire to see if the prisoner has any medical problem or condition that might affect or be affected by the search. Imagine the humiliation of a female

prisoner who is menstruating, a male prisoner with a prostate problem, a person with hemorrhoids, etc. Any search that is needed when such a condition exists must take the condition into consideration.

6. Any time a strip or body cavity search is performed, a written record should be made of the fact and the reason(s) for it. Some departments have started or are seriously considering videotaping the search for their own protection. Videotaping is certainly not necessary, but if you consider it take care that the entire process is recorded with no selective editing. The tapes must be carefully stored and access limited. Do not, as one Midwestern city did, allow the tapes to be accessible to other employees for entertainment!
7. There should be a written policy that states when and under what circumstances body cavity and strip searches may be performed and who is authorized to order or approve them.
8. When such searches are being conducted, all employees must conduct themselves in a professional manner. This means no jokes, snide remarks or comments.
9. All prisoners must be made aware of the circumstances under which such searches can and will be done. Ideally as with many other things, if time and circumstances permit, give the prisoner a copy of the regulations (they may be in some kind of prisoner handbook, etc.) and have him/her sign an acknowledgement of receiving it. Keep it on file. Why? It helps to sweep away any argument they may make about an expectation of privacy when you show that they were put on notice right up front.
10. All staff must be trained in how to conduct such searches and the circumstances under which they may be done. Keep records of this activity so you can avoid a policy or procedure claim based on an allegation of failure to train or supervise.
11. Be consistent. If you have a policy that all prisoners who are housed in maximum security are to be strip-searched after visits, that's what it means. If you do not follow your own policy, you may face an argument that your use of these searches is arbitrary and not related to any legitimate governmental purpose.
12. Careful records must be kept of incidents that occur in the facility concerning contraband and/or weapons. A history of incidents and types can be very important in showing the justification for intrusive search policies.
13. Always try to have a witness present when any such search is done.
14. There should be some management oversight, on a periodic basis, to make sure that the standard procedures are followed.

❖ **Resources**

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

- Florence v. Board of Chosen Freeholders of the County of Burlington: Briefs and Documents.
- Florence v. Board of Chosen Freeholders. Oral Arguments.
- Florence v. Board of Chosen Freeholders. Wikipedia article.
- Strip Search. Wikipedia article.
- Strip Search: Prisoners. AELE Case Summaries.

❖ **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.
- Federal Appeals Court Reexamines Cross-Gender Strip Searches, 2011 (2) AELE Mo. L. J. 301.

❖ **References:** (*Chronological*)

1. "Florence, Atwater & The Erosion of Fourth Amendment Protections for Arrestees," by Julian Simcock, Stanford Law Review (Forthcoming 2012).
2. **"**Fourth Amendment – Strip Searches of Prisoners: Florence v. Board of Chosen Freeholders," 126 Harv. L. Rev. 206 (2012).
3. "Health Insurance and Strip Searches: The Public as Constitutional Thinkers," by Peter J. Woolley and Bruce Peabody, HuffPost Pollster (April 5, 2012).
4. "U.S. Supreme Court: Visual Strip Searches at Jail Intake of Persons Being Placed in General Population Need Not Be Supported by Reasonable Suspicion," by Jack Ryan (March 2012).
5. "Blanket Policies for Strip Searching Pretrial Detainees: An Interdisciplinary Argument for Reasonableness," by Daphne Ha, 79 Fordham Law Review 2721 (2011).

6. "Permitting Blanket Strip-Search Policies for all Arrestees Entering General Jail Population," by Michael Beler, Suffolk Journal of Trial & Appellate Advocacy 16: 284 (2011).

AELE Monthly Law Journal

Bernard J. Farber
Jail & Prisoner Law Editor
P.O. Box 75401
Chicago, IL 60675-5401 USA
E-mail: bernfarber@aele.org
Tel. 1-800-763-2802

- The purpose of this publication is to provide short articles to acquaint the reader with selected case law on a topic. Articles are typically six to ten pages long. Because of the brevity, the discussion cannot cover every aspect of a subject.
- The law sometimes differs between federal circuits, between states, and sometimes between appellate districts in the same state. AELE Law Journal articles should not be considered as "legal advice." Lawyers often disagree as to the meaning of a case or its application to a set of facts.

AELE Home Page --- Publications Menu --- Seminar Information