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Expert Analysis

Strip-Searched for Failing to Pay a Speeding Ticket? *Florence* And the Fourth Amendment

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The U.S. Supreme Court recently heard oral argument in *Florence v. Board of Chosen Freeholders of Burlington County* — or what is known widely as "the strip-search case." The question before the court is fairly straightforward: Does a jail's practice of strip-searching every arrested individual — even if arrested for a minor offense, and even where there is no reason to suspect the individual is smuggling contraband into the jail — violate the Fourth Amendment's protection against unreasonable searches?

Because the policies in place at jails across the country vary — and because roughly 14 million Americans are arrested every year — the court's decision in *Florence* could have far-reaching effects.

BACKGROUND

In 1998 Albert Florence pleaded guilty to the charge of hindering prosecution and obstructing the administration of law, after fleeing the police during a traffic stop. He was sentenced to two years' probation and a fine, which he arranged to pay over time. But he fell behind on his payments, and a bench warrant was issued for his arrest in 2003.

Florence promptly paid the fine and was given a certified receipt for his payment. Because he was a finance director at a car dealership, Florence drove nice cars. And because he was a black man driving nice cars, Florence kept his proof of payment with him, in his car. Just in case.

In 2005 Florence was with his pregnant wife and their 4-year-old son, on their way to a family dinner to celebrate the Florences' purchase of a new home, when they were pulled over for speeding. Florence's wife tried to show the certified receipt to the officer, but because the New Jersey state computer still showed an outstanding warrant for Florence's arrest, his wife and son watched as Florence was removed from the car, handcuffed and hauled off to jail.

Both New Jersey law and Burlington County jail policy barred officials from strip-searching a person arrested for a minor offense (such as failing to pay a fine) without a search warrant, consent or reasonable suspicion that the arrestee possessed contraband.[1]

And officials admitted they had no such suspicion of Florence. Nevertheless, at the Burlington County jail, Florence was asked to strip naked, to open his mouth and lift his tongue, and to lift his genitals, as an officer visually searched him.

To make matters worse, instead of being presented immediately to a magistrate judge for a probable cause hearing — where he could have proven the fine had been paid— and obtained his release — Florence sat for five days in Burlington County jail.

On the sixth day, he was transferred to a jail in Essex County, where the warrant had been issued. Florence was strip-searched again — this time more thoroughly (being asked to "squat and cough") and in front of other arrestees who were in the room with him — because the Essex County jail required a detailed strip search of all admittees, no matter what the circumstances.[2]

Finally, a full week after his arrest, Florence was transported to the Essex County courthouse, where the judge was advised of the mistake and ordered Florence's immediate release. Florence then sued the two counties and their officials pursuant to 42 U.S.C. § 1983.

The strip-search policies at issue affected all arrested individuals, so Florence's case was certified as a class action. The parties cross-moved for summary judgment, and the District Court ruled that the strip searches violated the Fourth Amendment. That ruling was then certified for appeal, while Florence's other claims (for wrongful arrest, etc.) remain pending.

THE FOURTH AMENDMENT

The Fourth Amendment protects against unreasonable searches, and following the Supreme Court's ruling in *Bell v. Wolfish,* 441 U.S. 520 (1979), federal courts had, for decades, uniformly held that suspicionless strip searches of minor offenders violate the Fourth Amendment. *See, e.g., Roberts v. Rhode Island,* 239 F.3d 107 (1st Cir. 2001); *Weber v. Dell,* 804 F.2d 796 (2d Cir. 1986); *Logan v. Shealy,* 660 F.2d 1007 (4th Cir. 1981); *Stewart v. Lubbock County, Tex.,* 767 F.2d 153 (5th Cir. 1985); *Masters v. Crouch,* 872 F.2d 1248 (6th Cir. 1989); *Mary Beth G. v. City of Chicago,* 723 F.2d 1263 (7th Cir. 1983); *Jones v. Edwards,* 770 F.2d 739 (8th Cir. 1985); *Hill v. Bogans,* 735 F.2d 391 (10th Cir. 1984).

In 2008, however, in *Powell v. Barrett,* 541 F.3d 1298 (11th Cir. 2008) (*en banc*), the 11th U.S. Circuit Court of Appeals overturned its prior precedent and broke from this post-*Bell* consensus.

Bell had involved pretrial detainees — people who were incarcerated already, but who had not yet been tried — who were being required "to expose their body cavities for visual inspection following contact visits." *Bell*, 441 U.S. at 523, 528. The Supreme Court noted "prison inmates retain certain constitutional rights," but identified "maintaining institutional security and preserving internal order and discipline" as "essential goals that may require limitation or retraction of the retained constitutional rights of ... pretrial detainees." *Id.* at 545-546.

And though, of the practices being challenged, visual strip searches following "every contact visit with a person from outside the institution" gave the court "the most pause," the court nevertheless determined the searches were reasonable "under the circumstances," given the jail's interest in preventing "the smuggling of weapons, drugs, and other contraband into the institution." *Id.* at 558.

The balancing approach in *Bell* had led courts to hold that suspicionless strip searches of minor offenders were impermissible. But in Powell, the 11th Circuit emphasized that the Supreme Court had upheld the visual strip searches at issue in *Bell*.

The appeals court decided the "security needs" justifying the searches at issue in *Bell* — which involved inmates re-entering the prison population after contact visits with people from outside the institution — were "no greater than those that justify searching an arrestee when he is booked into the general population for the first time." *Powell*, 541 F.3d at 1302.

Therefore, a categorical policy of strip-searching "all arrestees as part of the process of booking them into the general population of a detention facility, even without reasonable suspicion to believe that they may be concealing contraband, is constitutionally permissible," so long as the search is "no more intrusive" than the one the Supreme Court upheld in *Bell*. *Id.* at 1300, 1302.

In 2008, the 11th Circuit was alone in this view. When considering Florence's case, the New Jersey federal court rejected the 11th Circuit's decision as noncontrolling, relying instead on the "overwhelming weight of authority" that supported a finding that Florence's right against unreason-able searches had been violated by the two jails. *Florence v. Bd. of Chosen Freeholders of Burlington County,* 595 F. Supp. 2d 492, 513 (D.N.J. 2009).

But in doing so, the District Court acknowledged *Powell* as part of "a new trend" of allowing strip searches in broader circumstances. *Id.* at 507. And this trend grew stronger when, in *Bull v. City and County of San Francisco,* 595 F.3d 964 (9th Cir. 2010) (*en banc*), the 9th Circuit overturned its own prior precedent to join the 11th Circuit in holding that *Bell* permits a categorical policy of strip-searching all arrestees who are entering the general population of a jail.

In considering Florence's case on appeal, the 3rd Circuit confronted this "newly minted circuit split" and — in a divided opinion — sided with the 9th and 11th circuits and reversed the District Court. *Florence v. Bd. of Chosen Freeholders of Burlington County,* 621 F.3d 296, 304-308 (3d Cir. 2010).

The majority agreed that "detainees maintain some Fourth Amendment rights against searches of their person upon entry to a detention facility." But it concluded "the security interest in preventing smuggling at the time of intake" is great enough to justify a "blanket policy" of strip-searching all arrestees — regardless of the nature of the offense, or the absence of any suspicion of smuggling. *Id.* at 306-311.

Florence filed his petition for *certiorari*, and the Supreme Court granted review.

THE ARGUMENTS

In their briefs, the parties took predictable positions.

Florence relied on the post-*Bell* decisions holding suspicionless strip searches of minor offenders violated the Fourth Amendment. He pointed to the fact that "[m]ore than half of all Americans live in the 18 states that prohibit suspicionless strip searches." Brief for Petitioner at 13-15, *Florence v. Bd. of Chosen Freeholders of Burlington County,* No. 10-945, 2011 WL 2508902 (U.S. June 20, 2011).

Florence emphasized the Fourth Amendment's requirement of "reasonableness." He argued that:

Question before the court: Does a jail's practice of strip-searching every arrested individual — even if arrested for a minor offense, and even where there is no reason to suspect the individual is smuggling contraband into the jail — violate the Fourth Amendment's protection against unreasonable searches?

- "Ordinary Fourth Amendment principles govern."
- A strip search "constitutes a significant intrusion on an individual's privacy."
- The individual's privacy interest is not outweighed by the government's interest in preventing the smuggling of contraband into jails — particularly given the alternative means by which the government can protect that interest (such as body scanners, etc.).

Id. at 18-35.

In response, both Burlington County and Essex County relied on *Turner v. Safley,* 482 U.S. 78 (1987), among other cases, to argue that, in the context of incarceration, the Fourth Amendment has a more limited application. *See generally* Brief for Respondent Burlington County, *Florence*, No. 10-945, 2011 WL 3706116 (U.S. Aug. 19, 2011); Brief for Respondent Essex County, *Florence*, No. 10-945, 2011 WL 3739474 (U.S. Aug. 19, 2011).

In *Turner*, the Supreme Court declared that, "[w]here a state penal system is involved, federal courts have ... reason to accord deference to the appropriate prison authorities," and that, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 85, 89. According to the two counties, the strip searches conducted on Florence were reasonably related to the jails' interest in preventing the smuggling of contraband; therefore, the Fourth Amendment did not apply.

In his reply, Florence argued this "reasonably related" test would permit jails to conduct searches even more invasive than the visual strip searches at issue, because a more invasive search would likewise be reasonably related to the jail's interest in preventing the smuggling of contraband. Reply Brief for the Petitioner at 6-7, *Florence*, No. 10-945, 2011 WL 4500813 (U.S. Sept. 19, 2011).

Pointing again to *Bell* and other cases, Florence argued the reasonableness of the search depends instead "on a *balance* of the individual's privacy interests and the government's justification for the search." *Id.* at 8 (emphasis in original; internal quotations omitted).

The U.S. solicitor general, who filed a brief in support of the two counties, agreed there is a balancing involved, but argued Florence's privacy rights "are necessarily diminished" in the jail context. Like the 11th Circuit in *Powell* and the 3rd Circuit below, the solicitor general emphasized that in *Bell* the Supreme Court had found "the institution's compelling interest in preventing smuggling of weapons, drugs, and other contraband outweighed privacy concerns." Brief for the United States as *Amicus Curiae* at 7–8, *Florence*, No. 10-945, 2011 WL 3821404 (U.S. Aug. 26, 2011).

The solicitor general also rejected the distinction between "minor" offenders and others, arguing, "it would be wrong to assume that certain classes of offenders do not pose a smuggling threat." *Id.* at 9.

Importantly, both sides agreed that observing an arrestee strip naked and shower was always permissible and that the dispute was over the permissibility of a visual body-cavity search (asking an arrestee to lift his genitals, or to squat and cough) without a reasonable suspicion that he was smuggling contraband.

ORAL ARGUMENT

The parties argued the case before the Supreme Court Oct. 12, and the court focused on two questions. *See* Transcript, *Florence*, No. 10-945, 2011 WL 4836171. First, the court focused on when strip searches can be conducted, that is, whether jails can categorically strip-search all arrestees at intake or whether a reasonable suspicion of smuggling contraband is required, at least for minor offenders.

Seemingly in support of a rule permitting strip searches for all arrestees, Justice Sonia Sotomayor, Justice Anthony Kennedy and Chief Justice John Roberts expressed concerns about an intake officer's ability to conduct individualized inquiries to develop the reasonable suspicion needed to justify a strip search, while also effectively preventing the smuggling of contraband. *Id.* at 17-20.

And Justice Kennedy even suggested the distinction between minor offenders and those arrested for more serious offenses might actually "imperil[] individual dignity in a way that a blanket rule does not." *Id.* at 6.

But on the other hand, seemingly in support of the reasonable-suspicion rule, Justice Stephen Breyer noted that the evidence showed "contrabanders" are extremely rare among minor offenders. *Id.* at 38. And Justice Samuel Alito appeared unsettled by the counties' position that people arrested merely "because they have a lot of tickets for being caught on speeding cameras" could be subjected to suspicionless "intrusive body cavity search[es]." *Id.* at 36-37.

Justice Kennedy and Justice Sotomayor also appeared to defend the effectiveness of the reasonable-suspicion standard during the solicitor general's argument. *Id.* at 55-57. And Justice Ruth Bader Ginsburg expressed concern over the counties' suggestion that there was no constitutional limit on their ability to conduct suspicionless visual body-cavity searches of all arrestees. *Id.* at 48.

In response to this concern, the counties admitted there was "obviously" a constitutional limit on their ability to conduct "manual physical body cavity search[es]." *Id.* at 49.

This only underscored the second question facing the court, regarding not *when* strip searches are permissible, but *what* those strip searches can entail. The court seemed troubled by the prospect that, on this question, the dispute might be reduced to overly specific and arbitrary line-drawing.

After the counties admitted there was a constitutional limit on their ability to conduct manual body-cavity searches, for example, Justice Antonin Scalia said: "You want us to write an opinion that applies only to squatting and coughing. Is that it?" *Id.* at 49.

After the counties appeared to admit that even some visual body-cavity searches would require reasonable suspicion, Chief Justice Roberts appeared almost surprised "that the only thing at issue here is how close the guard is going to be." *Id.* at 44. "[Florence] says two feet is too close ... you want to go to two feet," he said. "That's all the case comes down to?" *Id.*

Ultimately, Justice Breyer articulated the court's overarching concern: How should a rule be written "so that jail personnel all over the country ... [can] follow it and know exactly what they are supposed to do"? *Id.* at 26. The court seemed uncomfortable with a categorical rule permitting suspicionless strip searches for all arrestees — particularly those arrested for minor offenses — yet the court seemed equally uncomfortable with

delineating the precise difference between a permissible inspection of naked arrestees and a strip search that required reasonable suspicion.

POSSIBLE RAMIFICATIONS

Roughly 14 million people are arrested each year in the United States, and an estimated 700,000 go to jail for "minor" offenses. According to Florence, "[t]he class certified by the District Court in this case includes individuals who were strip-searched after being detained for infractions such as driving with a noisy muffler, failing to use a turn signal, and riding a bicycle without an audible bell." Petitioner's Br. at 11.

Meanwhile, the strip-search policies in place at jails across the country vary. The 3rd, 9th and 11th circuits have jurisdiction over about 117 million Americans, meaning, as things currently stand, at least 38 percent of the U.S. population could be lawfully subjected to a strip search if they so much as forget to pay a speeding ticket.

Most jurisdictions, however, still require reasonable suspicion before conducting a strip search — and if the Supreme Court sides with the majority view and reverses the 3rd Circuit, holding Florence's rights in this case were violated, the policies and practices in most places would remain unchanged.

But if the court adopts the minority view and affirms the 3rd Circuit's decision declaring the policy of categorical, suspicionless strip searches is constitutionally permissible, such a policy could become the national norm, as jails and prisons look for more ways to legally prevent the smuggling of contraband. If this happens, it would be wise not to forget to pay your speeding tickets.

NOTES

[1] *See* N.J. Stat. § 2A:161A-1; Burlington County Search of Inmates Procedure § 1186.

[2] *See* Essex County Dep't of Pub. Safety Gen. Order No. 89-17. Essex County has since changed its policy to mirror Burlington County's (requiring reasonable suspicion). *See* Petitioner's Br. at 6.

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