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United States District Court, D. Kansas.

Sarah L. ALLEN, Plaintiff,
v.
The BOARD OF COMMISSIONERS OF the COUNTY OF WYANDOTTE, Owen L. Sully, Wyandotte County Sheriff's Department, Joan A. Grogan, Roger C. Riley, Theodore Robinson, State of Kansas, Kansas Board of Regents, University of Kansas, B.D. Harrelson, and Sandy Omtvedt, Defendants.

Civ. A. No. 90–2059–O. | Aug. 6, 1991.

Attorneys and Law Firms

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John M. Duma, Kansas City, Kan., Catherine R. Hutson, Wm. Terry Fitzgerald, Gregory F. Maher, Stephen P. Doherty, Niewald, Waldeck & Brown, Overland Park, Kan., for defendants.

Opinion

MEMORANDUM AND ORDER

EARL E. O'CONNOR, Chief Judge.

***1** This matter comes before the court on the motion of plaintiff Sarah L. Allen (hereinafter "Allen") for partial summary judgment. After Kansas University police officers charged Allen with driving on a suspended license and expired tags, plaintiff alleges that she was strip searched by the Sheriff's Department. The court previously entered summary judgment on plaintiff's common law claims of battery, false imprisonment, negligent imprisonment, negligence, and negligence *per se* as well as her requests for punitive damages. We also granted defendants' summary judgment motion as to Allen's claim that the duration of her detainment constituted an unreasonable seizure in violation of the Fourth Amendment. In addition, summary judgment was entered on all of plaintiff's claims as to defendants Sully, Riley, and Robinson. In plaintiff's remaining claim under 42 U.S.C. § 1983, she contends that a strip search conducted by Deputy Joan A. Grogan (hereinafter "Grogan") was unreasonable within the meaning of the Fourth Amendment, thus depriving her of her civil rights in violation of 42 U.S.C. § 1983. We do not believe that oral argument would be helpful in this case. Plaintiff's request pursuant to Local Rule 206(d) for oral argument will therefore be denied. For the reasons stated below, the court will deny plaintiff's motion for partial summary judgment.

I. *STATEMENT OF FACTS*

Defendant officers B.D. Harrelson (hereinafter "Harrelson") and Sandra Omtvedt (hereinafter "Omtvedt"), members of the Kansas University Medical Center (hereinafter "KUMC") police department, stopped the driver of a 1985 Ford Mustang on March 11, 1989, at approximately 9:30 p.m., after they observed the expiration of the vehicle's license tag. At the officers' request, the driver, Allen, displayed her license. The state's computer system revealed that plaintiff's driver's license had been suspended. Harrelson and Omtvedt thereupon performed a pat-down search, handcuffed plaintiff, and placed her under arrest. She was then driven to the KUMC police station.

Allen was later transported to the Wyandotte County jail by Harrelson. The jail was in the charge and custody of Sheriff Owen L. Sully (hereinafter "Sully"). Sergeant Roger C. Riley (hereinafter "Riley"), Deputy Theodore Robinson (hereinafter "Robinson"), and Deputy Joan A. Grogan (hereinafter "Grogan") were on duty during Allen's confinement. At the jail, plaintiff was placed in a holding area for approximately forty minutes. After Allen was escorted to the fifth floor of the jail, she alleges that she was unlawfully detained and subjected to a strip search by defendant Grogan.

Grogan, according to plaintiff, ordered her to remove her clothing, exposing her breasts as well as her genitals, buttocks and anus. Allen also alleges that Grogan reached up under her brassiere and touched her breasts. In addition, plaintiff claims the strip search was conducted "in a rude, insolent, abusive, and violent manner." More specifically, plaintiff contends that she was strip searched in a closet at the jail. Allen states that the closet door remained open so anyone outside the closet could observe the strip search taking place. After the strip search, plaintiff was confined with other prisoners while awaiting her release. At approximately 3:00 a.m. on March 12, Allen was released, having been charged with driving on a suspended license and expired tags.

II. *SUMMARY JUDGMENT STANDARDS*

***2** In considering a motion for summary judgment, the court must examine all the evidence in a light most favorable to the nonmoving party. *Barber v. General Elec. Co.,* 648 F.2d 1272, 1276 n. 1 (10th Cir.1981);

Mahomes–Vinson v. United States, 751 F.Supp. 913, 916 (D. Kan.1990). A moving party who bears the burden of proof at trial is entitled to summary judgment only when the evidence indicates that no genuine issue of material fact exists. Fed.R.Civ.P. 56(c); *Maughan v. S.W. Servicing, Inc.,* 758 F.2d 1381, 1387 (10th Cir.1985); *see also* 6 J. Moore, *Moore's Federal Practice* ¶ 56.04 (1990) (court is authorized to examine materials outside complaint to determine whether there is genuine issue of material fact to be tried). If the moving party does not bear the burden of proof, he must show "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). This burden is met when the moving party identifies those portions of the record which demonstrate the absence of material fact. *Id.* at 323; *Deines v. Vermeer Mfg. Co.,* 752 F.Supp. 989, 993 (D. Kan.1990).

Once the moving party meets these requirements, the burden shifts to the party resisting the motion, who "must set forth *specific facts* showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby,* 477 U.S. 242, 256 (1986) (emphasis added). It is not enough for the party opposing a properly supported motion for summary judgment to "rest on mere allegations or denials of his pleading." *Id.* Genuine factual issues must exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250; *Tersiner v. Union Pac. R.R. Co.,* 740 F.Supp. 1519, 1522–23 (D. Kan.1990).

III. *ALLEGED DEPRIVATION OF RIGHTS*

The Civil Rights Act of 1871 (hereinafter "the Act") establishes a civil action for the deprivation of federal rights. Plaintiff Allen claims that the Sheriff's Department, acting under the color of state law, violated rights guaranteed to her by the Fourth and Fourteenth Amendments.[1] The Act is embodied in 42 U.S.C. § 1983 and provides in pertinent part as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in the action at law, suit in equity, or other proper proceeding for redress.

Section 1983 does not create substantive rights. Rather, this provision provides a recovery mechanism for the deprivation of federal rights. *Watson v. City of Kansas City, Kan.,* 857 F.2d 690, 694 (10th Cir.1988); *Williams v. Anderson,* 562 F.2d 1081, 1101 (8th Cir.1977). In order to establish a cause of action under section 1983, a plaintiff must allege: (1) the deprivation of a federal right (2) by a person acting under color of state law. *Gomez v. Toledo,* 446 U.S. 635, 640 (1980); *Martinez v. State of Calif.,* 444 U.S. 277, 284, *reh'g denied,* 445 U.S. 920 (1980).

IV. *STRIP SEARCH OF PLAINTIFF*

***3** The Sheriff's Department claims that it was permitted and indeed required by Kansas statutory law to conduct a strip search of Allen.[2] Plaintiff was charged with violating K.S.A. 8–262. Subsection (a)(1) of K.S.A.1989 Supp. 8–262 prohibits any person from driving a motor vehicle on a state highway "at a time when such person's privilege to do so is ... suspended."[3] K.S.A.1989 Supp. 8–2104(a)(2) provides that a person stopped by a law enforcement officer for violation of K.S.A. 8–262 "shall be taken into custody and taken without unnecessary delay before a judge of the district court."[4]

Ordinarily, a person arrested for violation of a traffic offense is not to be strip searched "unless there is probable cause to believe that the individual is concealing a weapon or controlled substance." K.S.A. 22–2521(a).[5] Neither the arresting officers nor the guards at the jail possessed probable cause to believe that Allen was harboring any contraband or weapons. Subsection (b) of K.S.A. 22–2524 provides, however, that the foregoing provision shall not apply "when a person accused of a crime is, *of necessity,* confined with other prisoners in a jail while awaiting appearance before a magistrate." K.S.A. 22–2524(b) (emphasis added). Defendants note that "[Allen] was, in fact, confined with other prisoners."[6]

The Fourth Amendment applies with its fullest vigor against any intrusion of the human body. *Horton v. Goose Creek Indep. School Dist.,* 690 F.2d 470, 478, *reh'g denied,* 693 F.2d 524 (5th Cir.1982), *cert. denied,* 436 U.S. 1207 (1983).[7] The test of reasonableness under the Fourth Amendment "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Bell v. Wolfish,* 441 U.S. 520, 559 (1979); *Levoy v. Mills,* 788 F.2d 1437, 1439 (10th Cir.1986).[8] A strip search is a substantial intrusion of personal rights. *Cruz v. Finney County, Kan.,* 656 F.Supp. 1001, 1005 (D.Kan.1987); *Shoemaker v. Handel,* 619 F.Supp. 1089, 1101 (D.N.J.1985), *aff'd,* 795 F.2d 1136 (3d Cir.), *cert. denied,* 479 U.S. 986 (1986).[9] Strip searches must be conducted with regard for the subject's privacy and be designed to minimize emotional and physical trauma. *United States v. Cameron,* 538 F.2d 254, 258 (9th Cir.1976); *see also* N. Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales through the Least Intrusive Alternative Analysis,* 63 N.Y.U. L.Rev. 1173, —— (1988) (strip searches should not be upheld unless government satisfies least intrusive alternative requirement).

Whether a person subject to a strip search was confined

with other prisoners or detained alone in a cell is only one factor to consider in judging the constitutionality of the search. *Hill v. Bogans,* 735 F.2d 391, 394 (10th Cir.1984) (citing *Smith v. Montgomery County, Md.,* 547 F.Supp. 592, 598–99 (D.Md.1982)).[10] A court must also consider "the scope of the particular intrusion, the manner in which it is conducted, ... and the place in which it is conducted." *Bell v. Wolfish, supra,* 441 U.S. at 559; *Bono v. Saxbe,* 527 F.Supp. 1182, 1185 (S.D.Ill.), *aff'd in part,* 620 F.2d 609 (7th Cir.1980).[11] Any policy permitting strip searches must be tightly drawn to assure that Fourth Amendment rights are not violated. Where the strip search of a person is conducted pursuant to a policy or statute encompassing all arrestees and there is no reason to suspect that the person is harboring drugs, weapons or contraband, the search is arbitrary and purposeless, and thus unconstitutional. *Kennedy v. Los Angeles Police Dep't,* 901 F.2d 702, 715–16 (9th Cir.1989); *Stewart v. Lubbock County, Tex.,* 767 F.2d 153, 156–57 (5th Cir.1985), *cert. denied,* 475 U.S. 1066 (1986); *Doe v. Calumet City, Ill.,* 754 F.Supp. 1211, 1220–21 (N.D.Ill.1990).

***4** In the present case, plaintiff claims that she was instructed by Deputy Grogan to remove her jacket, shirt, shoes, and brassiere. After issuing this instruction, Grogan allegedly reached under plaintiff's brassiere and touched her breasts. Plaintiff also contends that the deputy pulled the waistbands of her skirt, pantyhose, and panties out and looked inside these garments. Finally, plaintiff further alleges that Grogan left the door of the closet in which the search was allegedly conducted open so anyone outside the closet could observe the strip search taking place. Deputy Grogan, however, generally denies that the alleged strip search described by plaintiff ever took place.[12] In light of this most obvious question of fact, summary judgment cannot be entered.[13] Accordingly, plaintiff's motion for partial summary judgment will be denied by the court.

IT IS THEREFORE ORDERED that the summary judgment motion of plaintiff (Doc.No. 53) is hereby denied.

IT IS FURTHER ORDERED that the motion of plaintiff for oral argument (Doc.No. 61) is denied.

IT IS FURTHER ORDERED that defendants' motion for summary judgment as to all claims against the "Wyandotte County Sheriff's Department" as an entity (Doc.No. 51) is granted.

Footnotes

1 Plaintiff appears when she refers to the Wyandotte County Sheriff's Department to mean Sheriff Owen L. Sully. Allen makes no distinction between Sheriff Sully acting in his official capacity and the entity of the Sheriff's Department as a whole. Nothing in Kansas statutory or common law imposes liability upon sheriffs' departments for alleged violations of the rights of those detained in county jails. Rather, K.S.A. 19–811 states that the sheriff shall have "charge and custody" of the jail in his or her county and shall be liable for the acts of his or her deputy or jailer. We therefore hold that the "Wyandotte County Sheriff's Department" is an improper party and enter summary judgment in defendants' favor as to any claims against the Sheriff's Department.

2 A "strip search" is defined as the removal or rearrangement of "some or all of a person's clothing, by or at the direction of a law enforcement officer, so as to permit a visual inspection of the genitals, buttocks, anus or female breasts of such person." K.S.A. 22–2520(a). Strip searches "are not a novelty, and are often necessary in order to recover contraband or prevent the destruction of incriminating evidence." *United States v. Poe,* 713 F.2d 579, 584 (10th Cir.1983), *cert. denied,* 466 U.S. 936 (1984); *see also United States v. Mendenhall,* 446 U.S. 544, 566 (DEA agents lawfully stopped traveler changing planes and escorted her to office for strip search of her person), *reh'g denied,* 448 U.S. 908 (1980); *United States v. Fitzgibbon,* 576 F.2d 279, 284 (10th Cir.) (strip search of appellant by customs officials at airport was lawful), *cert. denied,* 439 U.S. 910 (1978); *State v. Ross,* 247 Kan. 191, 193, 795 P.2d 937, 939 (1990) (complete strip search of pretrial detainee at county detention center); *State v. Walker,* 217 Kan. 186, 187, 535 P.2d 924, 926 (1975) (officers conducted strip search before admitting arrestee into jail).

3 A person's first conviction under K.S.A. 8–262(a)(1) constitutes a class B misdemeanor. There is no indication that Allen had previously been convicted of driving a motor vehicle on a suspended license.

4 K.S.A. 1989 Supp. 22–2202(9) defines "custody" as "the restraint of a person pursuant to an arrest or the order of a court or magistrate."

5 Any reliance by Allen on K.S.A. 22–2521(a) is misplaced. It is entirely possible that the strip search of plaintiff was a violation of K.S.A. 22–2521(a). "Section 1983 does not, however, provide a basis for redressing violations of state law, but only for those violations of federal law done under color of state law." *Jones v. City & County of Denver, Colo.,* 854 F.2d 1206, 1209 (10th Cir.1988); *see also Spielman v. Hildebrand,* 873 F.2d 1377, 1385 (10th Cir.1989) (threshold inquiry in § 1983 action is whether any federal right has been violated); *United States v. Lopez,* 777 F.2d 543, 550–51 (10th Cir.1985) (validity of search and seizure depends on whether officers had probable cause under federal law). It is therefore irrelevant to plaintiff's action for deprivation of civil rights that the deputy conducting the strip search may have violated Kansas statutory law. *See Munz v. City of St. John, Kan.,* 1990 WL 260528, No. 88–1342, slip op. at 1 (D.Kan. Dec. 19, 1990) (violation of K.S.A. 22–2521 does not establish strip search

was unconstitutional). The only issue is whether the strip search in the case at bar violated Allen's constitutional right against unreasonable searches and seizures, as guaranteed by the Fourth and Fourteenth Amendments.

6 Obviously, the alleged strip search conducted by the Sheriff's Department was not a random or unauthorized act. Defendants concede any request that Allen remove her clothing would have been made pursuant to an established state policy and procedure which requires persons who are accused of driving on a suspended license to succumb to a strip search where they are "of necessity, confined with other prisoners." *See* K.S.A.1989 Supp. 8–2104(a)(2); K.S.A. 22–2524(b); *Wyandotte County Sheriff's Office Detention Center Policies and Procedures,* E–150.

7 The Fourth Amendment, as incorporated into the Fourteenth Amendment, provides in pertinent part as follows:

> [T]he right of the people to be secured in their persons ... against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause....
>
> It is an established Fourth Amendment principle that "the greater the intrusion, the greater must be the reason for conducting a search." *Levoy v. Mills,* 788 F.2d 1437, 1439 (10th Cir.1986) (quoting *Blackburn v. Snow,* 771 F.2d 556, 565 (1st Cir.1985)).

8 *See also* L. McIntosh & J. Adams, *Nineteenth Annual Review of Criminal Procedure: Prisoners' Substantive Rights,* 78 Georgetown L.J. 1430, —— (1990) (courts closely scrutinize reasonableness of strip searches by balancing need for search against extent of invasion).

9 Judge Crow noted in the *Cruz* case that strip searches involving the visual inspection of the anal and genital areas are " 'demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission.' " *Marybeth G. v. City of Chicago, Ill.,* 723 F.2d 1263, 1272 (7th Cir.1983) (quoting *Tinetti v. Wittke,* 479 F.Supp. 486, 491 (E.D.Wisc.1979), *aff'd,* 620 F.2d 160 (7th Cir.1980)); *Cruz v. Finney County, Kan., supra,* 656 F.Supp. at 1005 (Crow, J.) (quoting *Tinetti v. Wittke,* 479 F.Supp. 486, 491 (E.D.Wisc.1979), *aff'd,* 620 F.2d 160 (7th Cir.1980)).

10 The Tenth Circuit concluded in *Hill* that a jail's "desire to maintain security, to avoid charges of discriminatory treatment, and to promote administrative convenience" do not justify routine strip searches of persons detained for minor traffic offenses. *Hill v. Bogans, supra,* 735 F.2d at 394–95; *see also Thompson v. City of Los Angeles, Cal.,* 885 F.2d 1439, 1447 (9th Cir.1989) (fact that arrestee was placed in contact with general jail population could not by itself justify strip search of arrestee for purposes of civil rights action); *Masters v. Crouch,* 872 F.2d 1248, 1255 (6th Cir.1989) (possibility of contact with other prisoners after alleged arrest for failure to appear for hearing on traffic violations was not sufficient justification for strip search), *cert. denied,* 493 U.S. 977, 110 S.Ct. 503 (1989). The court finds the rationale of *Hill, Thompson,* and *Masters* highly persuasive when the person is charged with a minor offense and strip searched simply as a precaution before placing him or her in the general jail population is confined in a facility which has the physical capacity to detain that person in a separate area.

11 In *Bell v. Wolfish,* 441 U.S. 520 (1979), the Supreme Court held that the practice of conducting routine body cavity searches of prisoners following contact visits with persons outside the prison was "reasonable" under the Fourth Amendment. The inmates in *Wolfish,* however, were charged with offenses more serious than mere traffic violations and were being held for substantial pretrial periods. *Id.* at 524.

12 More specifically, Deputy Grogan testified that she would not have performed a strip search of plaintiff unless Allen was charged with a drug offense and she (Grogan) had received authorization from the sergeant to conduct such a search. Grogan added that she did not remember plaintiff.

13 In light of the court's entry of summary judgment in defendants' favor as to plaintiff's common law claims of negligent imprisonment, negligence *per se,* and negligent training, supervision, and adoption of policies, there is no need to address Allen's request that defendants' comparative negligence defenses be stricken from this case.