STRIP SEARCH OF JUVENILE AT JUVENILE CORRECTIONAL FACILITY

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On February 21, 2017, the Fifth Circuit Court of Appeals of decided *Mabry v. Lee County*[i], in which the court discussed the Fourth Amendment as it relates to routine policies to strip search juveniles as they enter a juvenile correctional facility. The relevant facts of *Mabry*, taken directly from the case, are as follows:

> T.M. was a twelve-year old student at Tupelo Middle School. She was in a physical altercation with a fellow student on school property. Pursuant to the school's zero-tolerance policy, the school principal consulted with the Tupelo police officer assigned to be the School Resource Officer ("SRO"). Following that conversation, the SRO determined there was probable cause to arrest T.M. on charges of assault, disorderly conduct, and disruption of a school session. He called the Lee County Youth Court's judicial designee and was given authorization, based on the designee's determination of probable cause, to transport T.M. to the Lee County Juvenile Detention Center ("Center"). He then removed T.M. from school property, handcuffed her, and patted her down. No weapons or contraband were found.
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> Center intake procedures dictated that all juveniles processed into the Center were to be searched for contraband using a metal detecting wand and a pat down. In addition, procedures required that juveniles charged with a violent, theft, or drug offense who were to be placed into the Center's general population be subjected to a visual strip and cavity search. All juveniles brought to the Center were processed for placement in the general population unless the Youth Court specifically informed the Center that the juvenile was to be held as a "non-detainee."
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> Pursuant to these policies, a female corrections officer searched T.M. when she arrived at the Center. The officer first used the metal detecting wand and patted T.M. down, finding no contraband. At that point, the officer had no reason to suspect T.M. was concealing any contraband in or on her person. Because T.M. was charged with a violent offense, however, Center policy required that the officer strip and cavity search T.M. In a

> private setting, T.M. was made to strip naked, bend over, spread her buttocks, display the anal cavity, and cough. At no point did the officer touch T.M. during the search. No contraband was found. Following the search, T.M. showered, dressed, moved to a holding cell for approximately twenty minutes, and then entered the general population. She was released from the Center later that evening. No charges against T.M. were pursued.[ii]

Mabry filed suit on behalf of T.M. in federal court and alleged that Lee County's correctional facility policy caused a violation of T.M.'s Fourth Amendment right to be free from unreasonable searches when T.M. was strip searched upon entering the facility to be placed in general population. The county filed motions for summary judgment and the district court granted the motions and dismissed the suit in favor of the county.

Mabry appealed to the Fifth Circuit Court of Appeals. The issue on appeal was whether the county's visual strip and body cavity search of T.M., a juvenile who was detained for simple assault based on probable cause, as she entered a juvenile correctional facility and was being placed in general population, violated the Fourth Amendment.

On appeal, the Fifth Circuit first examined three relevant cases decided by the United States Supreme Court on the issue of strip searches. The first case discussed was *Bell v. Wolfish.*[iii] In *Bell,* a group of adult pre-trial detainees sued a New York correctional facility for its policy of searching "all inmates after every contact visit with a person from outside the institution." The searches were visual, meaning that the inmates were not physically touched. The court articulated the legal standard to apply as follows:

> 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.[iv]

In *Bell,* when the Supreme Court applied that standard, they held that, in balancing the legitimate security interests of the facility against the privacy rights of the inmates, the scale tipped in favor of the security of the correctional facility. Thus, the court held the searches in *Bell* were reasonable under the Fourth Amendment.

The next case the Fifth Circuit examined was *Safford v. Redding.*[v] In *Redding,* a school had a middle school girl who was detained for possible possession of pills "pull her bra out and to the side and shake it, and pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree."[vi] In discussing this case, the Fifth Circuit stated that

> [W]hen assessing the constitutionality of "searches by school officials[,] a 'careful balancing of governmental and private interests suggests that the public interest is best served'" by applying "a standard of reasonable suspicion." *Safford*, 557 U.S. at 370 (quoting *T.L.O.*, 469 U.S. at 341). In addition to having reasonable suspicion to conduct a search, the Court explained, school officials must also narrow the scope of the search such that "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of

> the infraction." *Id*. (quoting *T.L.O*., 469 U.S. at 342). Importantly for present purposes, the Court emphasized that the Fourth Amendment's interest-balancing calculus outlined in *Bell* is necessarily different when applied to minors, in part because "adolescent vulnerability intensifies the patent intrusiveness" of a strip search. *Id*. at 375.[vii]

Thus, the take-away applicable to T.M.'s case from *Redding* is that the reasonableness of a search is dependent upon whether it was "excessively intrusive in light of the age and sex of the student and the nature of the infraction." Further the case noted that balancing the interest of the government versus the rights of the juvenile must also consider the fact of "adolescent vulnerability."

The last Supreme Court case examined was *Florence v. Board of Chosen Freeholders.*[viii] In *Florence,* an adult pre-trial detainee challenged a strip and cavity searches that were conducted pursuant to standard operating procedure during intake. In discussing this case, the Fifth Circuit stated

> The *Florence* Court held that "a regulation impinging on an inmate's constitutional rights must be upheld 'if it is reasonably related to legitimate penological interests.'" *Id*. (quoting *Turner v*. *Safley*, 482 U.S. 78, 89 (1987)). The Court further stressed the deference owed to correctional officials in designing search policies intended to ensure security, noting that, "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response . . . courts should ordinarily defer to their expert judgment in such matters." *Id*. at 1517 (*quoting Block v*. *Rutherford*, 468 U.S. 576, 584-85 (1984))…The Court concluded that, in the correctional context, the burden is on the plaintiff to prove with substantial evidence that the challenged search does not advance a legitimate penological interest.[ix]

It is important to note, however, the Supreme Court stated, in *Florence,* that they were not holding that it was always reasonable to conduct full strip searches pre-trial detainees where it was feasible to hold them apart from general population. The Fifth Circuit discussed this important aspect of *Florence* and stated

> Justice Alito highlighted 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. Most of those arrested for minor offenses are not dangerous, and most are released from custody prior to or at the time of their initial appearance before a magistrate. . . . For these persons, admission to the general jail population, with the concomitant humiliation of a strip search, may not be reasonable, particularly if an alternative procedure is feasible." *Id*. at 1524 (Alito, J., concurring).[x]

The Fifth Circuit then set out to determine which of the discussed cases from the Supreme Court most applied to Mabry (T.M.). The court stated that T.M.'s case was closest to *Redding* and *Florence*, but neither case addressed specifically a pre-trial detainee who is a juvenile at a correctional facility. The court did note that the Third Circuit Court of Appeals, in *J.B. ex rel. Benjamin v. Fassnacht*[xi], decided a case that involved a juvenile who was strip and body cavity searched pursuant to policy at a juvenile detention facility. The Third Circuit held that *Florence* applied in that situation. Thus, the plaintiff had the burden to show that the search did not advance a legitimate penological interest.

The Fifth Circuit then applied the same standard to T.M.'s case regarding her visual strip search and body cavity search. The court stated

> [W]e read *Florence* to mean that, in the correctional context—whether juvenile or adult—courts, which are not experts, should still defer to officials who are. The logic underlying *Florence*'s deferential test thus compels the conclusion that the deference given to correctional officials in the adult context applies to correctional officials in the juvenile context as well.[xii]

It is at this point the court set out to determine if Mabry put forth evidence to show that the search policy at Lee County was "not reasonably related to legitimate penological interests." The court stated that Mabry made

> no real effort to present evidence that the Center's search policy is exaggerated, unnecessary, or irrational in any way. Accordingly, she effectively concedes that she cannot prevail under *Florence*'s test.[xiii]

Interestingly, the court also noted that Lee County provided no explanation in its defense for their policy of placing all incoming juvenile pre-trial detainees into general population. The court stated

> Indeed, at no point in its brief does the County point to *any evidence whatsoever* legitimating *any* components of the Center's intake procedures, including the search policy.[xiv]

However, since the burden was on Mabry to show that the policy was not related to a legitimate penological interest, the Fifth Circuit affirmed the grant of summary judgment to the county.

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[i] No. 16-60231 (5th Cir. Decided February 21, 2017)
[ii] Id. at 2-3
[iii] 441 U.S. 520 (1979)
[iv] Id. at 559
[v] 557 U.S. 364 (2009)
[vi] Id. at 369
[vii] Mabry at 6
[viii] 132 S. Ct. 1510 (2012)
[ix] Mabry at 6-7
[x] Mabry at 8
[xi] 801 F.3d 336 (3rd Cir. 2015)
[xii] Mabry at 11
[xiii] Id. at 11-12
[xiv] Id. at 12