UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-2035

KELLI SWAIN,
Plaintiff-Appellant

vs.

LAURA SPINNEY, EDWARD HAYES
and THE TOWN OF NORTH READING,
Defendants-Appellees

On Appeal from a SummaryJudgment
in the United States District Court
for the District of Massachusetts

APPELLANT'S BRIEF AND SUPPLEMENT

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Annotation: Fourth Amendment as Prohibiting Strip Searches of Arrestees or Pretrial Detainees, 78 ALR Fed. 201: 13, 20

JURISDICTIONAL ALLEGATION

This is an action for violation of the Federal Civil Rights Act, 42 U.S.C. sec. 1983, and the Massachusetts Civil Rights Act, Mass. Gen. L. c. 12, secs. 11H & I. Jurisdiction over this action was vested in the District Court by 42 U.S.C. sec. 1983, by 28 U.S.C. sec. 1331 (federal question), and by the doctrines of ancillary and pendant jurisdiction. Jurisdiction over this appeal is vested in this Court pursuant to 28 U.S.C. 1291 (appeal from final decision of District Court).

ISSUES

I. What standard governs the right of the police to strip-search an arrestee - probable cause, or reasonable suspicion?

II. Did the Defendants have adequate grounds for conducting a strip-search of Kelli Swain?

III. Does the qualified immunity afforded police officers in the performance of their official duties entitle the individual Defendants at bar to summary judgment dismissing the case against them?

IV. Does the record raise a genuine issue of material fact as to whether the Defendant Town may also be liable in this case?

STATEMENT OF THE CASE

This is a civil rights action brought pursuant to 42 U.S.C. sec. 1983 and its Massachusetts counterpart, G.L.c. 12, sec. 11I. The Plaintiff, Kelly Swain, alleges that the Defendants, Edward Hayes and Laura Spinney, two police officers employed by the Defendant, Town of North Reading, without justification or excuse, violated her constitutional and civil rights of privacy and to be free from unreasonable searches and seizures, when they forced her to undergo an illegal strip search and body cavity search while she was detained as an arrestee at the Defendants' police station, awaiting transport to the local Court for arraignment .

The Defendants moved for summary judgment, Fed.R.Civ.P. 56, upon the following, respective grounds: the individual Defendants, Hayes and Spinney, alleged that the strip search was legal and that, in any case, they are protected from liability by the qualified immunity vouchsafed such public officers in the performance of their official duties. The Defendant Town alleged, in essence, that the Plaintiff had failed to allege a set of facts upon which municipal liability could be found. The Plaintiff opposed the motion and argument was heard by Judge O'Toole. Ultimately, Judge O'Toole allowed the Defendants' motion in its entirety, and entered a final judgment dismissing all counts of the complaint. This appeal followed.

SUMMARY OF ARGUMENT

I. The police must have probable cause to believe that the arrestee is concealing weapons or contraband upon her person before they may strip-search her. A strip-search is not a routine search, and thus requires a greater threshold showing in order to justify such an invasive procedure. Moreover, under Massachusetts constitutional law, any search must be supported by full probable cause. Further, the Defendant Town's own regulations require probable cause in order to conduct a strip-search. Finally, probable cause was required in this case because the strip search included a visual body cavity search. (PP. 13-19)

II. The Defendants did not have adequate grounds for conducting the strip-search of Kelli Swain. The facts of record did not even support a reasonable suspicion that Kelli Swain may have been concealing contraband or weaponry upon or within her physical person. (PP. 19-22)

III. The qualified immunity afforded police officers in the performance of their official duties does not entitle the individual Defendants at bar to summary judgment dismissing the case against them. Kelli Swain's right to be secure from the strip search cum body cavity search was firmly established as a matter of both federal and state law. Moreover, the objective facts in the record belied any contention that the strip search cum body cavity search was objectively reasonable. (PP. 23-27)

IV. The record raises a genuine issue of material fact as to whether the Defendant Town may also be liable in this case. The record was sufficient to raise the issue of whether the Town's agents acted with conscious indifference to the personal civil rights of the Plaintiff. (PP. 27-29)

FACTS

Agreed Upon Facts

The parties stipulated to the following facts in their pretrial memorandum:

"The plaintiff, Kelli Swain, was arrested on May 18, 1993 for illegal possession of a Class D substance, receiving stolen property and shoplifting. All of the criminal charges against the plaintiff were ultimately continued without a finding or nol prossed.

The arrest of the plaintiff was prompted by a call from employees at Monahan Lumber that an individual, later identified as Christopher Milbury, the plaintiff's boyfriend, was shoplifting. There is no evidence that Kelli took part in the shoplifting activities. Officer Marchionda followed Mr. Milbury's motor vehicle in which the plaintiff was a passenger and directed it to pull over to the side of the road. After the motor vehicle came to a stop, Officer Marchionda found a bag of marijuana on the grass beside the passenger side of the motor vehicle. The plaintiff and her boyfriend were placed in a cruiser and transported to the North Reading Police Station.

At the North Reading Police Station, the plaintiff was fingerprinted, photographed and asked to sign a card pertaining to her rights. Also, the plaintiff's pocketbook was searched by one of the officers. At the station, Kelli was subjected to a routine inventory search. As a result of the inventory, no stolen property or contraband were discovered on Kelli or in her purse. While conducting the search of her pocketbook, rolling papers were discovered. The plaintiff was then placed in a holding cell at the North Reading Police Station by Matron Laura Spinney.

Lt. Hayes had a conversation with the plaintiff and subsequently Matron Laura Spinney advised the plaintiff that she would be strip searched.

In instructing the plaintiff on the procedure of the strip search, Matron Spinney asked the plaintiff to remove her clothing, leaving her bra on, and bend over and spread her buttocks. Matron Spinney never touched the plaintiff during the procedure.

Later that day, the plaintiff was transported to the Woburn District (Court)."

(Appendix, pp. 62-63, hereinafter A. 62-63. See also Judge's Memorandum and Decision, in the Supplement hereto, pp. 1-3, hereinafter S. 1-3)

Although not part of the stipulation of the parties, the Defendants never contested the following facts: at no time did the North Reading Police have a warrant authorizing a strip-search or a

body-cavity search of Kelli Swain; and at no time did the North Reading Police attempt to obtain a warrant authorizing a strip-search or a body-cavity search of Kelli Swain. (A. 118)

Additional Facts on the Record

At the station, the Police permitted Kelli to call her attorney, and she did so. (Swain deposition, pp. 34; 51-52)[1]

At the conclusion of the booking procedure, Kelli was placed in a cell for approximately an hour. (Swain, p. 42)

During this time, the Defendant Hayes appeared outside Kelli's cell and, despite the fact that the police knew that she had retained counsel, began to interrogate her in a fashion that caused her to break down and cry. (Swain, pp. 42-47; accord: Judge's Memorandum and Order, S. 2)

Having gotten nothing from her, Defendant Hayes left, visibly angry. (Swain, p. 45; accord: Judge's Memorandum and Order, S. 2)

Lt. Hayes testified that he cannot recall whether or not he interrogated Kelli. (Hayes, p. 28)

However, Officer Marchionda, who was the arresting officer on this case, testified that Hayes must have spoken to Kelli, because he (Hayes) told Marchionda that Kelli had told him (Hayes) that certain stolen property had come from a store in Gloucester, MA.

[1] All of the depositions in their entirety have been reproduced in the Transcript Volume submitted by the Plaintiff-Appellant.

(Marchionda, p. 39)

A short time later, the Defendant Spinney appeared at Kelli's cell, and informed her that she was under orders to subject her to a strip search. (Swain, p. 47; accord: Judge's Memorandum and Order, S. 2)

Both Matron Spinney and Lt. Hayes testified that it was Lt. Hayes who gave the order to strip-search Kelli Swain. (Spinney, p. 34; Hayes, p. 29; accord: Judge's Memorandum and Order, S. 2)

There was a closed-circuit monitor in Kelli's cell, and Kelli had no way of knowing whether it was on or off. (Swain, p. 48, Spinney, pp. 32-33; accord: Judge's Memorandum and Order, S. 3)

According to Chief Purnell, the cameras are always on. (Purnell, p. 10.)[2]

Kelli was then ordered to completely disrobe (except for her bra) and then to bend deeply at the waist and spread her buttocks. (Swain, pp. 48-49; accord: Judge's Memorandum and Order, S. 2-3)

Officer Marchionda testified that strip-searches do not always involve ordering the subject to spread, and that it depends upon the facts of the particular case. (Marchionda, p. 29)

She complied reluctantly, tearfully, and fearful that the whole affair was being photographed. (Swain, p. 49; accord: Judge's

[2] This statement in the record is at odds with the Court's finding that, "Swain offered no evidence that the camera was actually operating ...." (S. 3, note 2)

Memorandum and Order, S. 3)

At no time was Kelli's boyfriend, Chris Milbury, subjected to a strip-search. (Milbury, p. 42)

According to the "Revised Inventory Search Policy" issued to North Reading Police Officers by Lt. Edward Nolan on or about August 18, 1989, and still in force and effect within the said Department, "(a) strip search of an arrestee is warranted only if the police have probable cause to believe that the arrestee is concealing contraband or weapons on his body." (See: "Inventory Searches of Arrestees - Procedures and Guidelines, par. 4, A. 105)

According to the "Police Manual Policies and Procedures" published by the Municipal Police Institute and adhered to by the North Reading Police Department,

"A strip search of an arrestee is warranted only if officers have reasonable suspicion to believe that an arrestee is concealing contraband or weapons on his body.

1. All body strip-searches must be approved by the officer in charge, who shall consider the following question: Is the crime one that is normally associated with weapons or contraband? Only if the answer to this question is yes and there is a reasonable suspicion that the arrestee has weapons or contraband on his person will a body strip-search be authorized.

2. Body cavity searches should not be conducted without the express approval of the officer in charge, and require a search

warrant signed by a judge."

(See: "Booking Procedures and the Holding Facility, par. H, pp. 660-13 and 660-14, A. 110-111)

Chief Henry Purnell testified on deposition that the North Reading Police Dept. was governed by the aforementioned "Revised Inventory Search Policy" and "Police Manual Policies and Procedures." (Purnell, pp. 17-18, and exhibits)

Chief Purnell also testified that it is Department policy to strip-search all arrestees when drugs are in any way involved. (Purnell, pp. 44-45; 60)

Yet, the Chief also admitted that the mere presence of drugs somewhere in the circumstances surrounding the arrest is not sufficient basis for a strip-search. (Purnell, pp. 60-61)

Yet, both Lt. Hayes and Matron Spinney testified at their depositions that they were completely unaware of any policies and procedures governing strip-searches. (Hayes, pp. 12-13; Spinney, pp. 23-24, 41).

Indeed, Lt. Hayes went so far as to intimate that every officer is free to follow his own "policy" as to whether or not arrestees ought to be searched! (Hayes, p. 52)

Officer Marchionda testified that he is unaware of any official policy mandating the strip-searching of all drug-related arrestees; however, he said that that is usually done. (Marchionda, pp. 24-

25)

Chief Purnell testified that the "officer in charge" or the "shift commander" has the authority to order the strip-search of an arrestee. (Purnell, pp. 30-31)

But Officer Marchionda's understanding is that any police officer who suspects that an arrestee is concealing contraband may order a strip-search. (Marchionda, p. 31)

Lt. Hayes was not involved in the arrest or booking of Kelli Swain. (Hayes, pp. 17-18)

For himself, Lt. Hayes testified that he orders strip-searches of all female arrestees where drugs are involved in the arrest - even, e.g., where the only drugs found were in the car in which the arrestee was riding. (Hayes, pp. 33-34)

Lt. Hayes has never discussed "his" policy of strip-searching all female arrestees whenever drugs are in any way involved in the arrest with Chief Purnell, and he has no idea of whether the Chief is aware of the policy. (Hayes, pp. 44-45)

Lt. Hayes also testified that he would have ordered a strip-search of Kelli Swain even if the drugs had been found only on Chris Milbury. (Hayes, p. 44).

Yet, apparently, the reverse is not true, for as we have seen, Chris Milbury was never strip-searched. (Milbury, p. 42)

Chief Purnell does not believe that a strip-search is invasionary. (Purnell, p. 48)

Lt. Hayes does not consider strip-searching a female to be unusual, and he does not know whether it is demeaning. (Hayes, p. 46)

Yet, Matron Spinney testified that only a small minority of female arrestees are strip-searched. (Spinney, p. 52)

Chief Purnell testified that a strip-search is warranted only out of concern for concealed weapons or contraband, and that it should occur immediately after the booking. (Purnell, pp. 30, 39)

Indeed, Chief Purnell stated that it would be a violation to place an arrestee in a cell for an hour and then strip-search him or her. (Purnell, p. 47)

Chief Purnell has no knowledge about Kelli Swain's having been in the cell for forty-five minutes or more before being strip-searched. (Purnell, p. 39)

Yet, Matron Spinney testified that Lt. Hayes did not order her to strip-search Kelli when she first took her to the cell. (Spinney, p. 37)

Matron Spinney also testified that when she discussed the results of the inventory of Kelli's pocketbook with Lt. Hayes, Hayes did not order the strip-search. (Spinney, p. 43)

Lt. Hayes admitted that at the time he ordered the strip-search of Kelli Swain, he knew that she had been arrested for possession of marijuana, but that no contraband had been found on her person. (Hayes, pp. 30-31)

Matron Spinney testified that since this lawsuit hit, she has had no discussions about the case with Lt. Hayes, and no discussions about strip-searches with other officers. (Spinney, pp. 47, 51)

Lt. Hayes testified that he has had no discussions with Chief Purnell about strip-search policies and procedures either before or since this lawsuit hit. (Hayes, pp. 52-53)

Lt. Hayes also testified that since this lawsuit hit, there have been no investigations of this incident by anyone within the Department. (Hayes, p. 56)

Chief Purnell testified that since this lawsuit hit, he had one (1) discussion with Lt. Hayes, and one (1) discussion with the Town Manager about the suit, and that nobody has requested any written reports about this incident. (Hayes, pp. 41-42)

When provided with the fact pattern surrounding Kelli Swain's arrest, detention, and strip-search, and asked what in that fact pattern gave rise to probable cause to believe that weapons or contraband might be found on or within Kelli Swain's body, Chief Purnell replied, "I really can't answer." (Purnell, pp. 59-64)

ARGUMENT

I. The police must have probable cause to believe that the arrestee is concealing weapons or contraband upon her person before they may strip-search her.

"The development of the law regarding strip searches of persons arrested by the police reflects a trend toward the view that a lawful arrest standing alone will not entitle the police to conduct a strip search; some additional foundation, ranging under the various decisions anywhere from a reasonable suspicion to probable cause to believe that the arrestee possesses weapons or contraband or is concealing evidence on his or her person, must support the strip search before it will be found reasonable under the Fourth Amendment." *Annotation: Fourth Amendment as Prohibiting Strip Searches of Arrestees or Pretrial Detainees*, 78 ALR Fed. 201, sec. 2.

There are four (4) grounds for holding that probable cause is the proper standard to be applied at bar:

First, *United States v. Montoya de Hernandez*, 472 U.S. 531 (1985), observed that, "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior," id., at 538, and went on to hold that, "the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal"; id, at 541.

In a footnote, the Court added that, "(i)t is also important to note what we do not hold. Because the issues are not presented today we suggest no view on what level of suspicion, if any, is required for nonroutine border searches such as strip, body cavity, or involuntary x-ray searches"; id., at 541, footnote 4.

Cf. *United States v. Braks*, 842 F.2d 509, 512-513 (1988) (characterizing strip searches and body cavity searches as non-routine and thus outside the scope of the "no suspicion" standard governing routine border checks).

Now, then: if a traveler entering this country enjoys a lesser degree of Fourth Amendment protection than a citizen in the interior; and if a non-routine detention of such a traveler must be supported by a *reasonable suspicion*; it must necessarily follow that the citizen - who enjoys the full measure of Fourth Amendment protection - may not be subjected to a police procedure as humiliating and invasive as a strip-search on anything less than a showing of full probable cause.

Indeed, the police should have obtained a warrant before subjecting the Plaintiff to a strip-search, for "'(o)nce the suspect is in custody ... the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention may be

more serious than the interference occasioned by arrest .... When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty.' *Gerstein v . Pugh*, 420 U.S., at 114 ....," quoted in *United States v. Montoya de Hernandez*, *supra,* at 553, footnote 21 (Brennan, J., dissenting).

Secondly, even if federal constitutional law did not require a showing of probable cause prior to performing the strip-search, Article Twelve of the Massachusetts Declaration of Rights provides broader coverage for the citizen in search and seizure situations than does the Fourth Amendment. *Commonwealth v. Upton*, 394 Mass. 363, 369-377 (1985). See also *Rodriques v. Furtado*, 410 Mass. 878, 884, footnote 8 (1991), wherein the Supreme Judicial Court questioned whether body cavity searches would be permissible at all under Article Fourteen.

"The requisite for a search and seizure in this Commonwealth is probable cause, and not the 'articulable suspicion' of *Terry*." *Commonwealth v. Borges,* 395 Mass. 788, 798 (1985) (Hennessey, C.J., concurring).

Langton v. Commissioner of Correction, 404 Mass. 165 (1989), dealing with the right of prison officials to routinely strip-search inmates, cited by the Defendants in their memorandum, is wholly inapplicable to the matter at bar. Cf. *Rodriques v. Furtado*, *supra,* at 884, footnote 8 ("We do not think that those cases are germane to the present case because of the 'diminished' Fourth

Amendment rights of prisoners").

Thirdly, the Defendant Town's *own rules and regulations* acknowledge a requirement of probable cause in order to strip-search an arrestee. According to the "Revised Inventory Search Policy" issued to North Reading Police Officers by Lt. Edward Nolan on or about August 18, 1989, and still in force and effect within the said Department, "(a) strip search of an arrestee is warranted only if the police have probable cause to believe that the arrestee is concealing contraband or weapons on his body." (See: "Inventory Searches of Arrestees - Procedures and Guidelines, par. 4, A. 105)

The Town's own rules and regulations thus modify the "Police Manual Policies and Procedures" published by the Municipal Police Institute, which require only a showing of "reasonable suspicion."[3]

Finally and crucially: It is indisputable that probable cause was required for the search that was performed upon Kelli Swain *because that search included a body cavity search.*

[3] Note, however, that even the MPI manual does not endorse the proposition that whenever there is a drug-related arrest, there is, *ipso facto*, justification for a strip-search. Thus the manual's two-pronged test:

"All body strip-searches must be approved by the officer in charge, who shall consider the following question: Is the crime one that is normally associated with weapons or contraband? Only if the answer to this question is yes *and there is a reasonable suspicion that the arrestee has weapons or contraband on his person* will a body strip-search be authorized." (Emphasis added.)

Bell v. Wolfish, 441 U.S. 520 (1979), correctly cited by the Defendants as the lead case in this area of the law, expressly dealt with, and distinguished, *visual body cavity searches* :

"Inmates at all Bureau of Prisons facilities ... are required to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution. Corrections officials testified that visual cavity searches were necessary not only to discover but also to deter the smuggling of weapons, drugs, and other contraband into the institution .... The District Court upheld the strip-search procedure but prohibited the body-cavity searches, absent probable cause to believe that the inmate is concealing contraband.... (T)he Court of Appeals affirmed."

Id., at 558.

The *Wolfish* Court expressly acknowledged that the question before it was, "whether visual body-cavity inspections as contemplated by the MCC rules can ever be conducted on less than probable cause"; id., at 560.

In its *Rodriques* decision, the Massachusetts Supreme Judicial Court acknowledged that Wolfish was a *body-cavity-search* case:

There is a large body of law on the constitutionality of body cavity searches in prisons. See, e.g., *Bell v. Wolfish*, 441 U.S. 520 (1979); *Langton v. Commissioner of Correction,* 404 Mass. 165 (1989); *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985); *Arruda v. Fair*, 710 F.2d 886 (1st Cir. 1983), cert. denied, 464 U.S. 999 (1984). We do not think that those cases are germane to the present case because of the 'diminished' Fourth Amendment rights of prisoners ....

Rodriques v. Furtado, *supra,* at 884, footnote 8.

With knowledge of this "large body of law on the constitutionality of body cavity searches," the Court forthrightly and categorically held that,

> at the very least, in the future, under the exercise of our general superintendence powers, we shall deem a warrant authorizing the search of a body cavity to be invalid unless issued by the authority of a judge, on a strong showing of particularized need supported by a high degree of probable cause.

Id., at 888.

In *Arruda v. Fair*, 710 F.2d 886, 887 (1st Cir. 1983), the Court of Appeals acknowledged, "as have all courts that have considered the issue, the severe if not gross interference with a person's privacy that occurs when guards conduct a visual inspection of body cavities."

Accord: *Blackburn v. Snow,* 771 F.2d 556, 564 (1985): "As the Seventh Circuit has recently noted, body cavity searches are 'demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission.'" Quoting from *Marybeth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983), quoting from *Tinetti v. Wittke*, 479 F.Supp. 486, 491 (E.D.Wisc. 1979).

At bar, Officer Marchionda acknowledged that a strip-search did not necessarily involve asking the subject to spread.

Thus, it is clear: the strip-search performed upon Kelli Swain included a visual body cavity search within the meaning and holdings of *Wolfish* and *Rodriques*. It is equally clear that, since

the *Rodriques* decision (August, 1991), any body-cavity search has required a warrant signed by a judge in order to be lawful.[4]

For all of the above reasons, the applicable standard in judging the legality of the strip-search *cum* body-cavity search at issue herein is *probable cause*.

II.The Defendants did not have adequate grounds for conducting the strip-search of Kelli Swain.

If, as argued hereinabove, the strip-search included a body-cavity search, the lawfulness of which was dependent upon a warrant signed by a judge, then no further argument on this point is necessary, since it is uncontested that the Defendants did not have a warrant signed by a judge. Therefore, the following argument is offered in the event that this Court declines to find that a body cavity search was performed.

Strip searches of persons arrested for drug offenses and not supported by full, probable cause, have been typically justified by the need to insure that the suspect is not smuggling contraband

[4] At bar, the Defendants argued that the strip-search did not involve a body-cavity search because it did not involve any touching of, or intrusion into, the body cavity. While is it true that the facts in *Rodriques* comprised the most intrusive and probing of body-cavity searches, of a sort admittedly not practiced upon the Plaintiff at bar, nonetheless, as we have seen, the Court decided the case in light of their knowledge of the existing law on body-cavity searches, including visual body cavity searches exactly like that performed upon the Plaintiff at bar. Thus, had the Court had full knowledge of both *physically intrusive* body cavity searches and *visual* body cavity searches, and could have limited its holding to the former variety, had that been its wish. That it did not do so - that its decision imposed the warrant requirement upon "body cavity searches," without qualification, should be dispositive of the issue at bar. Judge O'Toole's own discussion of the point is ambiguous and inconclusive; see: S.6, text and footnote 4.

into the jail or prison, or is not concealing on her person a weapon or other implement with which she might harm herself or others. See: *Annotation: Fourth Amendment as Prohibiting Strip Searches of Arrestees or Pretrial Detainees*, 78 ALR Fed. 201, sec. 4 and cases cited therein. *United States v. Klein*, 522 F.2d 296 (1st Cir. 1975), upheld such a strip-search on precisely these grounds.[5]

At bar, Chief Purnell acknowledged that these were the only grounds which could support a strip-search.

Yet, the facts at bar belie any contention that the strip-search was motivated by any concerns that Kelli may have been smuggling contraband into the jail or prison, or concealing on her person a weapon or other implement with which she might harm herself or others:

Item: The inventory search of Kelli's clothing and handbag disclosed no contraband.

Item: The strip-search was not performed immediately after inventory and prior to incarceration; rather, it was performed only after Kelli had been in the cell for approximately one hour.

Item: Chief Purnell himself - while denying any knowledge of the specific facts of Kelli Swain's strip search - nonetheless acknowledged that a strip-search performed an hour after

[5] Judge O'Toole rested his decision that the Defendants violated no federal constitutional rights of the Plaintiff entirely upon the *Klein* decision - even while acknowledging that it predated *Bell v. Wolfish, supra*, and its progeny. See: Memorandum and Order, S. 3-5.

incarceration constitutes a violation.

Item: When the strip-search was performed, Kelli was never told to remove her bra - the most likely repository of any concealed contraband!

Item: The strip-search was not ordered by any arresting or booking officer, or by the "officer in charge," as required by the Defendants' own regulations. It was ordered by a detective sergeant (now Lieutenant) who came along after the arrest and booking and was investigating the facts of the case.

Item: Kelli's male companion and co-Defendant was never strip-searched.

Thus, had Kelli been concealing contraband on or in her person, she had ample opportunity to swallow it, flush it down the toilet, or otherwise dispose of it, by the time that Lt. Hayes ordered her strip-searched.

In other words, *viewed objectively* (see part III, *infra*), the search at bar could not have advanced any of the concerns which the well-settled law has recognized as supporting such a search. Cf. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (the scope of a search must comport with the justification for its inception).

These facts - at a bare minimum - raise a genuine issue of material fact as to whether concerns for the internal security of the jail warranted the strip-search that was performed upon Kelli Swain.

And as for the Defendants' argument that no liability can attach under the Massachusetts Civil Rights Act because the wrong was not perpetrated by means of "threats, intimidation or coercion," one may reply by asking: what is more threatening, intimidating or coercive than to be arrested and incarcerated?

Planned Parenthood League of Mass., Inc. v. Blake, 417 Mass. 467, 474-475 (1994), explained that, as used in the Act, a "threat" involves the exertion of pressure to make another fearful or apprehensive of injury or harm; "intimidation" includes putting a person in fear for the purpose of compelling or deterring conduct; and "coercion" is the application of force, physical or moral, to another so as to constrain her to do something against her will which she would not otherwise have done.

By these definitions, and on the factual record established in this case, the Defendants certainly "coerced" her into the strip search; arguably, they also "threatened" and "intimidated" her. Compare: *Commonwealth v. Borges*, 395 Mass 788 (1985), defining "arrest" as an official show of authority sufficient to compel compliance.[6]

[6] Judge O'Toole's abbreviated discussion (and rejection) of the Plaintiff's state claim (S. 6-7) failed to address this argument raised by the Defendants. He simply concluded that no violation of *Rodriques v. Furtado, supra*, had occurred, because the visual body cavity search performed by the Defendants was not *as intrusive* as the physical body cavity search condemned in that case. Judge O'Toole failed entirely to address the issue of whether *Rodriques* required a warrant signed by a judge for *any sort* of body cavity search (as argued by the Plaintiff) - in which case the acts of the Defendants would have amounted to a *per se* violation of the Plaintiff's state constitutional rights (unless protected by the doctrine of qualified immunity, discussed infra.)

III. The qualified immunity afforded police officers in the performance of their official duties does not entitle the individual Defendants at bar to summary judgment dismissing the case against them.

"(G)overnment officials performing discretionary functions generally are shielded from liability from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).[7]

Thus, for purposes of ruling on a motion for summary judgment, an objective standard is applied: was the official's action objectively reasonable in the light of the facts and the law as then known? See: Judge's Memorandum and Order, S. 5-6.

At bar, the objective standard affords the individual Defendants little succor. As previously noted hereinabove, the strip-search included a body-cavity search, the lawfulness of which was dependent upon a warrant signed by a judge, and it is uncontested that the Defendants did not have a warrant signed by a judge. Therefore, it is clear beyond peradventure that the actions of the individual Defendants were *per se* unreasonable - at the *very least,* under state constitutional and decisional law.

[7] In *Wood v. Strickland*, 420 U.S. 308, 322 (1975), the Court had held that the standard for qualified immunity had both an objective and a subjective component. I.e., in addition to the objective reasonableness of the official's action, inquiry was also to be made into his *motives.* The *Harlow* Court eliminated the subjective component from the qualified immunity standard for purposes of deciding a motion for summary judgment. This is not to say, however, that the official's motives are wholly irrelevant. Should the case proceed to trial, a showing of malice or bad faith will be pertinent, *inter alia*, to the question of whether punitive damages ought to be awarded.

Even if this Court concludes that a body cavity search requiring a warrant signed by a judge was not performed upon Kelli Swain, it must still conclude that the strip-search was objectively unreasonable, under clearly-established law, based upon the facts, authorities, and argument set forth in part II hereof, *supra*. And, because the strip-search was objectively unreasonable, the individual Defendants may not have summary judgment based upon the doctrine of qualified immunity.

At bar, Judge O'Toole, in barely more than a page of discussion, held that the facts of record established that the Defendants enjoyed qualified immunity; with citations omitted, the entirety of the judge's discussion, appearing at pp. S. 5-6, was as follows:

> In any event, the defendants are entitled to qualified immunity from Swain's lawsuit. A police officer has the benefit of qualified immunity unless the plaintiff can establish that the right she asserts was clearly established at the time of the alleged violation.... That is certainly not the case here. Swain did not have a clear right in the circumstances not to be subjected to a strip search. Rather, Klein stood (and stands) for the opposite proposition.... Swain plausibly asserts that Hayes may have had a malicious state of mind when he ordered the strip search and did so to punish her for refusing to answer his questions. Assuming in her favor that a jury could find those facts, they are nonetheless "insufficient to pierce ... (his) defense of qualified immunity.... Lt. Hayes's subjective purpose in ordering the suit *(sic.)* is irrelevant given the objective standards of the qualified immunity inquiry....

The judge then went on to dismiss the claim under the Massachusetts Civil Rights Act as well, apparently upon the basis that the holding in *Rodriques v. Furtado, supra,* did not apply to the facts of this case (see discussion at S.6).

To the foregoing, the Plaintiff responds as follows:

It is simply incredible that the judge, "review(ing) the record and draw(ing) all reasonable inferences therefrom in the light most favorable to (the Plaintiff) (S. 1, footnote 1), could hold that no reasonable fact-finder could conclude that the strip-search-*cum*-visual-body-cavity-search that was performed upon Kelli Swain was *objectively illegal* - i.e. was not supported either by probable cause or even by articulable facts giving rise to a reasonable suspicion, given that:

- The inventory search of Kelli's clothing and handbag disclosed no contraband.

- The strip-search was not performed immediately after inventory and prior to incarceration; rather, it was performed only after Kelli had been in the cell for approximately one hour.

- Chief Purnell himself - while denying any knowledge of the specific facts of Kelli Swain's strip search - nonetheless acknowledged that a strip-search performed an hour after incarceration constitutes a violation.

- When the strip-search was performed, Kelli was never told to remove her bra - the most likely repository of any concealed contraband!

- The strip-search was not ordered by any arresting or booking officer, or by the "officer in charge," as required by the Defendants' own regulations. It was ordered by a detective sergeant (now

Lieutenant) who came along after the arrest and booking and was investigating the facts of the case.

- Kelli's male companion and co-Defendant was never strip-searched.

- Had Kelli been concealing contraband on or in her person, she had ample opportunity to swallow it, flush it down the toilet, or otherwise dispose of it, by the time that Lt. Hayes ordered her strip-searched.

Even assuming that *Klein* remains good law, unmodified by *Wolfish* and its progeny, *Klein*, itself, never stood for the blanket proposition that any suspect arrested for a drug-related offense may automatically be subjected to a strip-search-*cum*-visual-body-cavity-search. Even under *Klein*, the authorities had to have some factual basis for suspecting that the suspect might be smuggling contraband into the jail or prison, or might be concealing on her person a weapon or other implement with which she might harm herself or others.

Moreover, in the aftermath of *Wolfish, et al,* to the extent that *Klein* might be construed as conferring a blanket authority to strip-search drug arrestees, it is doubtful that it does remain good law.

Further, the District Court's facile willingness to assume that the personal rights of simple arrestees are analogous to, and no greater than, those of persons who have been convicted of crime

and subject to incarceration in a penal institution[8] is troubling. An arrestee has not been convicted of anything - indeed, may not at the time of the arrest have even been formally charged with anything (as was the case at bar). To hold that a simple arrestee may be subjected to the degradations and humiliations that are the lot of the convict makes a mockery out of the presumption of innocence.

Finally, the judge's dismissal of the pendant state claim is the most troubling of all. Whatever may have been the case under the federal law, at the time of the incident in question, Rodriques v. Furtado, supra, was the law in Massachusetts. The reasons why that case governed the matter at bar have been fully expounded hereinabove. If nothing else, the Plaintiff's state claim should therefore have survived the Defendants' motion for summary judgment.

IV. The record raises a genuine issue of material fact as to whether the Defendant Town may also be liable in this case.

Municipalities are not entitled to assert the defense of qualified immunity. *Owen v. Independence*, 445 U.S. 622 (1980).

A municipality may be held liable under 42 U.S.C. sec. 1983 on the basis of a conscious indifference to the rights of persons within its domain. *Fiacco v. Rensselaer*, 783 F.2d 319 (2d Cir. 1986).

[8] Cf. the Court's citation to *Langton v. Commissioner of Correction*, 533 N.E.2d 1375, 1376 (Mass. 1989) at S. 6-7.

A failure to properly train and supervise its employees which reflects a conscious indifference on the part of the municipality may suffice to establish municipal liability. *Canton v. Harris,* 489 U.S. 378 (1989).

Under 42 U.S.C. sec. 1983, a municipality is responsible for the decisions of its policymakers which violate the constitutional or legal rights of those within its domain, whether the act or omission occurs once or repeatedly. *Pembauer v. Cincinnati,* 475 U.S. 469 (1986).

The record at bar is ample to establish that the Town of North Reading, and its Police Chief, were following a "policy" of conscious indifference toward the legal rights of arrestees within its domain:

Item: No apparent efforts were made to communicate a uniform policy regarding when and by whom strip searches may be authorized.

Item: There was throughout the Department a *laissez faire* attitude on the part of the officers - from the Chief on down to the patrolmen - as to when and by whom strip searches may be authorized.

Item: The commencement of this lawsuit, and the serious allegations made herein, occasioned virtually no investigation on the part of Town officials into underlying facts and the possible merits of the complaint.

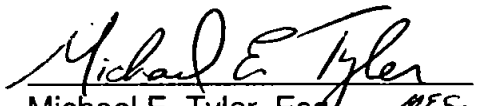
In sum, virtually nobody - before or after the commencement of the present lawsuit - considered the matter of a strip-search - "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission" - to be anything out-of-the-ordinary, governed by any particular standards or requiring any particular knowledge or training.

Such willful indifference to the rights of the citizen rises to the level of a "constitutional tort" under the authorities hereinbefore cited, and suffices - at the very least - to raise a genuine issue of material fact as to the potential liability of the Town on this case.

CONCLUSION

For all of the foregoing reasons, the Plaintiff, Kelli Swain, prays that this Honorable Court will vacate the judgment for the Defendants entered by the District Court, remand this case to the District Court for trial on the merits, and award the Plaintiff such other and further relief as may be appropriate.

Respectfully submitted
Kelli Swain, Plaintiff,
By Her Attorneys,



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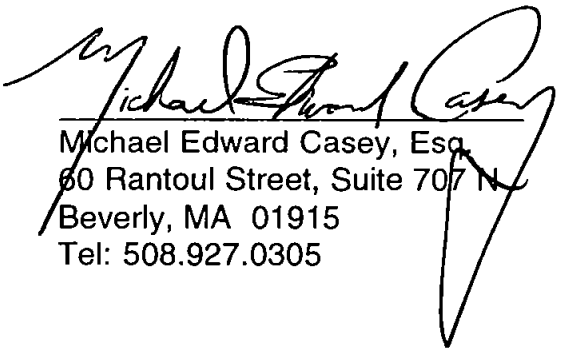

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 95-10765-GAO

KELLI J. SWAIN,
Plaintiff

v.

LAURA SPINNEY, EDWARD HAYES and
THE TOWN OF NORTH READING,
Defendants

MEMORANDUM AND ORDER

July 5, 1996

O'TOOLE, D.J.

In this action, the plaintiff Kelli Swain asserts that the defendants Police Officer Laura Spinney and Lieutenant Edward Hayes violated her federal and state rights by conducting a strip search and visual body cavity examination of her following her arrest for shoplifting and possession of marijuana. Swain also claims that the Town of North Reading, the individual defendants' employer, had a policy of conscious indifference to the legal rights of those within its domain. All defendants have moved for summary judgment, and the Court now grants their motion.

Most of the facts of this case are undisputed.[1] On May 18, 1993, North Reading police responded to a call that Christopher Milbury had been shoplifting at Moynihan Lumber Company in North Reading. Officer Robert Marchionda located and followed

[1] Where the parties are not in agreement, of course, Swain, as the non-moving party, is entitled to the familiar requirement that the Court review the record and draw all reasonable inferences therefrom in the light most favorable to her. Commonwealth v. Blackstone Valley Elec. Co., 67 F.3d 981, 986 (1st Cir. 1995).

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Milbury's car, in which Milbury and Swain, who was Milbury's girlfriend, were driving. Officer Marchionda directed the car to pull over. After the car had stopped, Marchionda saw Swain get out of the passenger side, place her hands behind her back, and drop an item on the ground. Marchionda retrieved the item and discovered it to be a bag of marijuana. He then arrested both Milbury and Swain, placed them in his police cruiser, and transported them to the North Reading Police Station.

At the station, Swain was fingerprinted, photographed and asked to sign a card acknowledging that she had been advised of her rights. A routine inventory search of Swain revealed no stolen property or contraband, although police did find cigarette rolling papers in her pocketbook. Officer Spinney then placed Swain in a holding cell.

After Swain had been alone in her cell about twenty minutes, Lt. Hayes came to see her. According to Swain, Hayes tried to interrogate her about the incidents surrounding the arrest, even though he knew that Swain was already represented by counsel. Hayes' questioning led Swain to break down and cry, but she apparently did not answer his questions or give a statement. Hayes left her cell visibly angry. The interview lasted about fifteen minutes.

Shortly after Hayes' visit, Spinney reappeared and told Swain that she was under orders to subject Swain to a strip search. Both sides agree that Hayes, Spinney's superior officer, ordered the search. Spinney told Swain to remove her clothing,

except for her brassiere. Having disrobed, Swain was instructed to bend deeply at the waist and spread her buttocks. Swain complied but did so reluctantly and tearfully. Swain was also afraid that, because of the presence of a video monitor in the cell, the whole search was being photographed. Spinney told her, however, that the camera was not turned on.[2]

Swain claims, under 42 U.S.C. § 1983 and Mass. Gen. L. ch. 12, §§ 11H, 11I, that the defendants violated her rights under the United States and Massachusetts constitutions by subjecting her to an unreasonable search. She seeks compensatory and punitive damages, as well as attorney's fees.

Insofar as Swain seeks to establish the search was unconstitutional under federal law, her argument seems foreclosed by the First Circuit's decision in United States v. Klein, 522 F.2d 296 (1st Cir. 1975). In that case, Klein was arrested for selling cocaine. Following his arrest, he was taken to a federal building and ordered to strip. After stripping almost completely, Klein removed fourteen $100 bills -- money that corresponded to funds federal agents had provided for a cocaine purchase -- from his underwear. Klein then continued to strip. Once naked, Klein was instructed to bend over and was examined visually. The Court concluded that such a post-arrest search fell fully within the bounds of the Fourth Amendment.

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[2] Swain offers no evidence that the camera was actually operating, and the defendants have denied that it was.

The facts of Klein are similar enough to the present case to require a similar result. Here, a police officer witnessed Swain try to discard concealed contraband. After her arrest, police legitimately discovered rolling papers -- useful for making marijuana cigarettes -- in her pocketbook. A short time after she was place in the holding cell, she was searched in a professional manner. Such a search is not unconstitutional.[3] See Id. at 300.

Although Klein predates the premiere Supreme Court case on strip searches, Bell v. Wolfish, 441 U.S. 520 (1979), it remains valid First Circuit law. Moreover, the standards and method of analysis of Wolfish, to the extent they are at all different, dictate the same outcome. In Wolfish, the Supreme Court noted that

> [t]he 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. The search in this case passes muster under that scrutiny. Swain had been arrested for possession of contraband, and the police were warranted in subjecting her person to a thorough search. The search itself was conducted out of public view in front of only one person of the same sex who,

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[3]As in Klein, "[t]here was no piercing or probing of [Swain's] skin nor forced entry beyond the surface of h[er] body. There was not even any touching of h[er] body." Klein, 522 F.2d at 300.

according the plaintiff's own deposition testimony, acted in a fully professional manner. The search was done in connection with the placing of Swain into a detention facility. And, as noted earlier, Swain was never touched during this procedure, a fact that distinguishes this search from other, more invasive ones. Cf. Blackburn v. Snow, 771 F.2d 556, 565 n.5 (1st Cir. 1985).

In any event, the defendants are entitled to qualified immunity from Swain's lawsuit. A police officer has the benefit of qualified immunity unless the plaintiff can establish that the right she asserts was clearly established at the time of the alleged violation. St. Hilaire v. City of Laconia, 71 F.3d 20, 24-25 (1st Cir. 1995), cert. denied, No. 95-1653, 1996 WL 206127 (June 24, 1996). That is certainly not the case here. Swain did not have a clear right in the circumstances not to be subjected to a strip search. Rather, Klein stood (and stands) for the opposite proposition. See also, Dobrowolskyj v. Jefferson County, Ky., 823 F.2d 955, 957-59 (6th Cir. 1987), cert. denied, 484 U.S. 1059 (1988); Durfin v. Spreen, 712 F.2d 1084, 1086-88 (6th Cir. 1983). Swain plausibly asserts that Hayes may have had a malicious state of mind when he ordered the strip search and did so to punish her for refusing to answer his questions. Assuming in her favor that a jury could find those facts, they are nonetheless "insufficient to pierce . . . [his] defense of qualified immunity." Tauvar v. Bar Harbor Congregation, 633 F. Supp. 741, 750 (D. Me. 1985), aff'd, 787 F.2d 579 (1st Cir. 1986), cert. denied, 479 U.S. 1038 (1987). Lt. Hayes's subjective purpose in ordering the suit is irrelevant given the

objective standards of the qualified immunity inquiry. See Anderson v. Creighton, 483 U.S. 635, 641 (1987); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); cf. Whren v. United States, 116 S. Ct. 1769 (1996).

Turning to Swain's rights under Massachusetts law, Article 14 of the Massachusetts Declaration of Rights provides that "[e]very subject has a right to be secure from all unreasonable searches . . . of his person . . . ." Although Swain does not make an extended argument on this point, she seems to suggest that Article 14 requires substantially more of police officers in the context of a strip search than does the Fourth Amendment. That argument is unavailing. To be sure, the Supreme Judicial Court has ruled that a warrant authorizing the search of a body cavity shall be invalid "unless issued by the authority of a judge, on a strong showing of particularized need supported by a high degree of probable cause." Rodrigues v. Furtado, 575 N.E.2d 1124, 1131 (Mass. 1991). Indeed, Rodrigues even questioned whether body cavity searches were completely precluded under Article 14, although it declined to reach the issue.[4] Id. at 1129 n. 8. But the case also recognized that different considerations and interests apply once a person has been arrested and placed in custody. Id. at 1128 n.8. That different situation is the one involved here, and no other Massachusetts

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[4] Rodrigues concerned the defendants' physical probing of a plaintiff's vagina in a search for cocaine. Without in any way diminishing the seriousness of the intrusion into Swain's privacy in this case, the Rodrigues facts were clearly more egregious. The type of search Rodrigues hinted might be entirely prohibited was the physical body-cavity search, not the visual search executed in the present case.

case suggests any divergence from comparable federal standards. Cf. Langton v. Commissioner of Correction, 533 N.E.2d 1375, 1376 (Mass. 1989) (declining to address the standards for strip searches of prisoners under the Massachusetts Constitution). In the absence of any law specifying a different standard, the Court is inclined to assume the applicability of Klein, especially given Rodrigues' overall reliance on federal case law. And even if Massachusetts did opt for a different standard, qualified immunity would necessarily attach here as well. See Rodrigues, 575 N.E.2d at 1127.

Swain's case against the Town is even weaker. A municipality faces liability under § 1983 only where a violation results from the municipality's policy or custom. Bordanaro v. McLeod, 871 F.2d 1151, 1155 (1st Cir.), cert. denied, 493 U.S. 820 (1989). To be actionable, the policy or custom must either directly authorize and encourage the violation of a right or must permit it through "gross negligence amounting to deliberate indifference" to the right at issue. Id; see also City of Canton v. Harris, 489 U.S. 378, 389-90 (1989).

Of course, Swain's argument fails at the outset because of the Court's determination that Hayes and Spinney violated none of her rights by respectively ordering and conducting the search. Even if her rights were violated by the individual defendants, Swain still cannot show why the Town should be held liable. Swain admits that North Reading's published policy regarding searches of arrestees was constitutionally adequate. Her claim

thus depends largely on the failure of the Town to communicate the policy adequately to several of the officers involved in this case or to investigate Swain's charges sufficiently. But those alleged deficiencies, if true, simply do not establish that North Reading was deliberately indifferent to its citizens' constitutional rights. Rodrigues v. Furtado, 950 F.2d 805, 813 (1st Cir. 1991); Burns v. Loranger, 907 F.2d 233, 239 (1st Cir. 1990); Bordanaro, 871 F.2d at 1156.

For the foregoing reasons, the defendants' motion for summary judgment is GRANTED.

SO ORDERED.

July 5, 1996
DATE

DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Kelli J. Swain
Plaintiff

V.

Laura Spinney, etal
Defendant

CIVIL ACTION: 95-10765-GAO

JUDGMENT

O'Toole, D.J. July 5, 1996

The court having allowed Defendants Motion for Summary Judgment on July 5, 1996, final judgment is hereby entered in favor of defendants.

By the Court,

DEPUTY CLERK

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RELEVANT STATUTES

42 U.S.C. Sec. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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 an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Mass.Gen.L. c. 12, sec. I:

Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court.