IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 19-0734

WILLIAM SCOTT ROGERS, et al.,

Plaintiffs/Appellants,

-vs-

LEWIS AND CLARK COUNTY, et al.,

Defendants/Appellees.

On appeal from the Montana First Judicial Court, Cause No. DV-2018-1332
Hon. Michael McMahon, District Judge, Presiding

Brief of *Amici* Montana County Attorney's Association and Montana Sheriff's and Peace Officers Association

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STATEMENT OF THE ISSUE

Were Appellees/Defendants (hereafter "County") acting under an exception to the requirements of §46-5-105, MCA, when its jailers strip searched the Appellants/Plaintiffs (hereafter "Appellants")?

STATEMENT OF THE CASE

The Montana County Attorney's Association and Montana Sheriff's and Peace Officer's Association ("*Amici*") agree with the County's Statement of the Case.

STATEMENT OF THE FACTS

Amici agree with the County's Statement of the Facts.

STANDARD OF REVIEW

Amici agree with the County's Standard of Review.

SUMMARY OF THE ARGUMENT

"The difficulties of operating a detention center must not be underestimated by the courts". *Florence v. Board of Chosen Freeholders of the County of Burlington*, 566 U.S. 318, 327, 132 S.Ct. 1510, 182 L.Ed. 2d 566 (2012).

The recognition of the difficulties of operating a jail, and appreciation of the resulting challenges to keep inmates and staff safe and secure from harm, should be central to this Court's decision to affirm the district court's grant of summary

judgment to the County.

Appellants have significant privacy interests at stake. No one should be subjected to an intrusive process like a warrantless strip search without proof of a compelling state interest justifying such a search.

Montana statute law provides that, unlike persons arrested for a felony, persons arrested for a "traffic offense or an offense that is not a felony" may be strip searched only when law enforcement or jail staff establish reasonable suspicion that the arrestee is concealing "a weapon, contraband, or evidence of the commission of a crime". §46-5-105, MCA.

Montana has codified the concept of judicially approved exceptions to the warrant requirement for searches. §46-5-101(2), MCA. This Court has repeatedly emphasized that such exceptions are to be limited in number, and that the scope of such searches must be carefully circumscribed.

After this Court balances all the interests at stake, the interests of keeping Montana's jail inmates and employees safe from harm should prevail. This Court therefore should approve an exception to the warrant requirement for strip searches in Montana's jails, and affirm the district court.

If the strip search is determined to be lawful, then with the exception of the four Plaintiffs named by the district court, Ord., App.Ex.F, pg. 4, all of Appellants'

constitutional and state tort claims have no merit, and summary judgment in favor of the County on those issues should also be affirmed.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S RULING AND CREATE A JUDICIAL EXCEPTION FOR STRIP SEARCHES OF ALL ARRESTEES, INCLUDING MISDEMEANANTS.

A. Appellants were lawfully arrested and taken to jail, thus their expectations of privacy were reduced.

Appellants have never questioned the lawfulness of their arrests. Given that law enforcement had the authority to make the arrests, Appellants were going in the jail for as long as it took the County's employees to perform the administrative functions that precede release on bail. Such functions include the search of each arrestee and his or her possessions for "weapons, dangerous instrumentalities, or hazardous substances which may harm him or herself or others". *State v. Pastos,* 269 Mont. 43, 50, 887 P.2d 199 (1994).

This Court has approved of such jailhouse searches notwithstanding the greater privacy protections afforded Montana's citizens under Art. II, Section 10, of Montana's Constitution. *Id.* at 52-3 (privacy interests are not absolute and must yield to a compelling state interest). Such compelling state interests were described by this Court in *Pastos* as follows:

> In discussing the compelling state interest which we conclude justifies the search at issue here, we first must, necessarily, acknowledge the reality of the times in which we live . . .
>
> The reality of violence and the potential for violence in our society dictates that it is a proper and legitimate concern of law enforcement officers that an arrestee may have concealed on his or her person or in his or her possession weapons, dangerous instrumentalities such as explosives or incendiary devices or hazardous substances, which could be used to injure the police, fellow inmates, employees and members of the public in and about the station house.

Id. at 47. The district court understandably adopted this reasoning ("[T]his Court holds that Montana has a legitimate and compelling state interest in maintaining institutional security within jails such as the Detention Center in this case"). Ord., App.Ex. F, pgs. 16-17.

In *Deserly v. Department of Corrections,* 2000 MT 42, 298 Mont. 328, 995 P.2d 972, this Court decided whether the Department of Corrections could demand the strip search of an inmate's visitor.

This Court described Montanans' heightened expectations of privacy under Art. II, Sections 10 and 11 of the Constitution, and the common law cause of action that exists for invasion of one's privacy. *Id.,* ¶¶15, 17.

This Court recognized that visitor searches fulfill a legitimate need of correctional facilities to protect inmates, employees, and visitors alike. *Id.,* ¶21. This

Court found that the issue therefore came down to "balancing the legitimate governmental interest in and need for searching inmate and prison visitors against the intrusions into personal rights and residual interests that such searches entail". *Id.*, ¶22. This Court concluded that, as long as the institution had a reasonable suspicion that the visitor was engaged in wrongdoing, an inmate's visitor could be subjected to a strip search. *Id.*, ¶32.

The searches at issue in *Pastos* and *Deserly* took place in the setting of jails and penal institutions. This was an important factor in this Court's analysis of the Constitutional rights of the persons who underwent the searches. *See State v. Demontiney,* 2014 MT 66, ¶4, 374 Mont. 211, 324 P.3d 344, quoting *Maryland v. King,* 569 U.S. 435, 463, 133 S.Ct. 1958, 186 L.Ed.2d 1 ("The expectations of privacy of an individual taken into police custody necessarily are of a diminished scope"). Thus, Appellants' privacy expectations were reduced, notwithstanding the fact they were arrested for misdemeanor offenses.

B. The Appellants' position on the privacy interests involved is understandable and deserves respect.

No one can gainsay the impact upon an arrestee of the intrusion that would accompany a strip search. *See* the description of strip searches set forth in App.Brf., pg. 9.

Amici recognize that such searches, conducted as they are in front of strangers and under stressful conditions, are embarrassing. The County and the *Amici* therefore recognize the gravity in seeking this Court's ruling that warrantless strip searches of misdemeanants are lawful. The County and *Amici* support such a ruling only because, on balance, the County's and *Amici's* need to protect the inmates and employees of jails should prevail over Appellant's considerable privacy interests.

C. Lewis and Clark County's concerns about the safety and integrity of the jail is likewise understandable and worthy of respect.

This Court, and other appellate courts, have recognized the legitimacy of the County's concerns about contraband getting into jails. *See, e.g., Pastos, supra,* 269 Mont. at 52 ("to a certain extent, we must defer to police departments in their development and standardized administrative procedures which will best serve to protect the interests of the arrestee, the police, others incarcerated in jail, and society at large"); *Deserly, supra,* 2000 MT 42, ¶21; *Florence v. Board of Chosen Freeholders of the County of Burlington, supra,* 566 U.S. at 331 ("Correctional officials have a significant interest in conducting a thorough search as a standard part of the intake process").

Appellants made vigorous arguments to this Court in favor of their claims. Appellants' advocacy led them to take a dismissive view, however, of some of the

legitimate concerns raised by the County during the depositions of its officials and employees.

Appellants criticized Lewis and Clark County for "not [tracking] data to demonstrate that the general population strip-search policy stops the flow of drugs, weapons and/or contraband into the jail". App.Brf., pg. 14. The *Pastos* and *Florence* opinions unequivocally describe the ubiquitous presence of weapons, drugs and contraband in possession of arrestees. It is important that law enforcement officers keep such items out of jails. The district court also found as an undisputed fact that the purpose of a visual strip search was to keep such items out of the general jail population. Ord., App.Ex.F, pgs. 6-7, ¶7.

Given the courts' acceptance of the need to keep weapons, drugs and contraband out of county jails, the sheriff, his officers and employees should not be faulted for not keeping records of the routine discovery of such items on persons being held in the County's jail.

Appellants also cited to "the new jail design has a group holding cell so non-felony offenders can be held together without going through a 'general population strip search'". App.Brf., pg. 15. The County apparently has, through its plans for the layout of its new jail, taken steps possibly to eliminate the need to conduct future strip searches of misdemeanants. As there is no guarantee of the safety of the non-

felony offenders sitting together and awaiting either release or booking, this argument is a red herring. Any such future arrangements in a new County jail are not relevant to this appeal. This Court should not entertain Appellants' attempt to deflect this Court's attention from the County's compelling interests that support the searches that formed the basis of this appeal.

D. This Court should approve the creation of an exception to the warrant requirement involving strip searches in jails.

In its ruling on the summary judgment motions filed by Appellants and the County, the district court concluded that *Florence, supra,* created a judicially recognized exception to the warrant requirement, as codified under §46-5-101(2), MCA. Ord., Ex.F, pgs. 20-21.

Although the district court relied mainly on *Florence, supra,* in making its ruling, the ruling is supported by this Court's cases that have balanced the state's interests in conducting searches against the privacy interests of those persons searched. This Court should therefore affirm the district court and hold that a jail strip search for any arrestees is a judicially recognized exception to the warrant requirement in Montana.

Article II, Section 10, of the Montana Constitution expressly provides for the right of privacy for Montana's citizens. The privacy rights created thereby are fundamental rights, and "[w]hen the State intrudes upon a fundamental right, it must

demonstrate a compelling state interest for doing so that is closely tailored to effectuate only that compelling interest". *Demontiney, supra,* ¶13. *Accord, State v. Giacomini*, 2014 MT 93, ¶15, 374 Mont. 412, 327 P.3d 1054.

In Montana, warrantless searches are *per se* unreasonable, and are subject to only a few carefully drawn exceptions. *State v. Bieber,* 2007 MT 262, ¶29, 339 Mont. 309, 170 P.3d 444. The statutory basis for such exceptions is found at §46-5-101, MCA, which provides in pertinent part:

> A search of a person, object, or place may be made and evidence, contraband, and persons may be seized in accordance with title 46 when a search is made:
>
> . . .
>
> (2) in accordance with judicially recognized exceptions to the warrant requirement.

The exceptions to the warrant requirement authorized by this Court are few and are narrowly drawn. The exceptions include plain view searches, *State v. Weaselboy, Jr.,* 1999 MT 274, ¶22, 296 Mont. 503, 989 P.2d 836; consent to search, *Bieber, supra,* at ¶29; exigent circumstances, *State v. Gomez,* 2007 MT 111, ¶29, 337 Mont. 219, 158 P.3d 442; and incident to lawful arrest, *State v. Holzapfel,* 230 Mont. 105, 110-11, 748 P.2d 953 (1988). The exception found by the district court, that of a strip search for any lawfully arrested person taken to jail, may justifiably be added to this list.

It is noteworthy that Appellants believed the record created in the district court

was sufficient to warrant their motion for partial summary judgment. That record includes the extensive exhibits referenced in Appellants' Appendix Index. Appellants Statement of Undisputed Facts, Exhibit B, alone is 45 pages in length. Appellants apparently were satisfied with the record offered to support their constitutional and state tort claims.

In making its ruling on the cross-motions for summary judgment, the district court thoroughly reviewed the record established by the Appellants and the County. The record supports the district court's determinations that the parties' arguments, centered as they were on §46-5-105, MCA, should be decided in favor of the County.

As authorized by §46-5-101(2), MCA, and based on the cases discussed above, *Amici* believes the record supports this Court's creation of an exception to the warrant requirement. The exception should authorize strip searches of any person lawfully arrested and taken to jail, including misdemeanants.

CONCLUSION

This Court should affirm the district court's Order.

DATED this 29th day of May, 2020.

/ s / Marty Lambert
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a), M.R.App.P., I certify that this brief is printed with a proportionately-spaced Word for Windows Times New Roman typeface of fourteen points; is double-spaced; and contains 2,081 words, excluding the table of contents, table of citations, certificate of service, and certificate of compliance.

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The undersigned hereby certifies that the foregoing document was served upon the following counsel of record, by U.S. First Class Mail, postage prepaid, on the 29th day of May, 2020, addressed as follows:

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