[Cite as *Washington v. Ohio Dept. of Rehab. & Corr.*, 2003-Ohio-4435.]

IN THE COURT OF CLAIMS OF OHIO

BEATRICE WASHINGTON	:	
Plaintiff	:	CASE NO. 2001-11839
v.	:	DECISION
DEPARTMENT OF REHABILITATION AND CORRECTION	:	Judge J. Warren Bettis
Defendant	:	

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{¶1} Plaintiff brought this action against defendant alleging that an agent of defendant, Officer Jennifer Tibbetts, of the Ohio Adult Parole Authority (APA), conducted an unlawful strip search of her person and that such search also constituted an invasion of her privacy and/or right to seclusion. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} The search in question occurred on November 1, 2000. At that time, plaintiff resided in Middletown, Ohio, with her husband, Robert Washington. Mr. Washington was on parole and plaintiff had been notified that he was in violation of the conditions of his parole and was going to be arrested. When the APA officers arrived, along with two Middletown police officers, plaintiff answered the door and allowed them to enter. Mr. Washington was placed in handcuffs and arrested without incident. A search of the residence was then conducted and the officers seized drug paraphernalia, cocaine, a nightstick, two knives, ammunition, photo

albums, and a pornographic videotape.[1] Mr. Washington was charged with possession of drugs and drug paraphernalia, as well as the violations of his parole.

{¶3} After the ammunition, knives, and nightstick were discovered, Officer Tibbetts, the only female officer present, asked plaintiff to accompany her to a bathroom. Plaintiff testified that she was asked to lift her blouse and shake out her bra, which caused part of her breasts to be exposed. She contends that she was embarrassed; that she did not think she had done anything to warrant suspicion; that the process was humiliating, in part, because Officer Tibbetts was an APA officer and not a policewoman, and because she knew the officers did not have a warrant to search. Afterward, plaintiff returned to the living room and a criminal record check was conducted. When an active warrant was revealed on a charge of passing a bad check, plaintiff was also arrested.

{¶4} The conditions under which a body cavity or strip search may be performed are set forth in R.C. 2933.32.

{¶5} That statute provides, in pertinent part:

{¶6} "*** 'Strip search' means an inspection of the genitalia, buttocks, breasts, or undergarments of a person that is preceded by the removal or rearrangement of some or all of the person's clothing that directly covers the person's genitalia, buttocks, breasts, or undergarments and that is conducted visually, manually, by means of any instrument, apparatus, or object, or in any other manner while the person is detained or arrested ***.

{¶7} "Except as authorized by this division, no law enforcement officer, other employee of a law enforcement agency,

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[1] The conditions of Mr. Washington's parole prohibited him from having such materials because he had previously been convicted for a sex offense.

*** shall conduct or cause to be conducted a *** strip search. ***

{¶8} "(2) A *** strip search may be conducted if a law enforcement officer or employee of a law enforcement agency has probable cause to believe that the person is concealing evidence of the commission of a criminal offense, including fruits or tools of a crime, contraband, or a deadly weapon, *** that could not otherwise be discovered. ***

{¶9} "(5) Unless there is a legitimate medical reason or medical emergency that makes obtaining written authorization impracticable, a *** strip search shall be conducted only after a law enforcement officer or employee of a law enforcement agency obtains a written authorization for the search from the person in command *** or from a person specifically designated by the person in command to give a written authorization ***.

{¶10} "(C)(1) Upon completion of a *** strip search *** the person or persons who conducted the search shall prepare a written report concerning the search ***."

{¶11} Plaintiff contends that defendant violated the provisions of R.C. 2933.32 because there was no legitimate medical reason or emergency to justify the search of her person, thus, Officer Tibbetts was required to obtain written authorization from an APA commander and to prepare a report subsequent to the search.[2] There is no question that Officer Tibbetts did not follow those statutory dictates, in fact, she testified at trial that she was not even familiar with the statute itself. Rather, she stated that she followed APA policies, which authorize "suspicionless" searches of any person present at the arrest of a parole violator.

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[2] There is no dispute that defendant had authority to conduct the search of plaintiff's residence without a warrant; the conditions of parole specify that such searches may be conducted at any time.

{¶12} Plaintiff further argues that, even though R.C. 2933.32(B)(2) provides a probable cause exception to the aforementioned requirements, there was no probable cause to justify the strip search conducted in this case. Moreover, it is plaintiff's contention that, even assuming probable cause did exist, Officer Tibbetts could have conducted a less intrusive pat-down search instead of the strip search she performed.

{¶13} Finally, plaintiff maintains that an unwarranted examination of a woman's breasts constitutes a tortious invasion of her privacy and seclusion pursuant to *Hidey v. Ohio State Highway Patrol* (1996), 116 Ohio App.3d 744.

{¶14} Defendant has denied liability on all of plaintiff's claims. According to defendant, plaintiff was not strip-searched in violation of R.C. 2933.32 inasmuch as Officer Tibbetts did not "inspect" plaintiff's breasts within the ordinary meaning of that term;[3] Officer Tibbetts simply requested that plaintiff lift her shirt and shake out her bra. Further, Officer Tibbetts could not recall whether she observed any portion of plaintiff's breasts at the time. In defendant's view, even if Officer Tibbetts actually saw plaintiff's breasts, she did not "inspect" them. Defendant also contends that plaintiff consented to the search and could have refused if she chose to do so.

{¶15} Additionally, defendant maintains that it had legal authority to conduct the search of plaintiff based upon the officers' legitimate fears for their safety and that, once ammunition was found, common sense dictated that the officers continue searching to determine whether there was a gun on the

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[3] Defendant relied on the American Heritage College Dictionary, Third ed., definition for "inspection": "The act of inspecting; official examination or review," and the definitions for "inspect": "To examine carefully and critically" or "to review or examine officially."

premises.

{¶16} Upon review of the evidence and arguments of counsel, the court finds for the following reasons that plaintiff has failed to prove her claims by a preponderance of the evidence.

{¶17} The court begins this analysis with the finding that a strip search took place. Defendant's arguments to the contrary are not persuasive. Similarly, the contention that plaintiff could have refused to be searched is not convincing. However, the court does agree with the argument that, assuming that a strip search did occur, it was justified by probable cause.

{¶18} In support of the probable cause argument defendant relies on the case of *State of Ohio v. Barnes*, (Montgomery C.A.) Case No. 15149, 1996 Ohio App. LEXIS 3847. In that case, the court held that a parole officer had the authority to pat-down an individual for safety purposes, and to subsequently arrest that person for carrying a concealed weapon, even though the person was not the parolee the officer had come to arrest but was merely present at the time the officers arrived. This court found no other case law dealing with the subject of third-party searches by parole officers.

{¶19} In *Barnes*, the court acknowledged that parole officers do not have the same degree of authority as "peace officers"; however, it noted that they do qualify as "law enforcement officers" pursuant to R.C. 2901.01(K)(2). As such, parole officers have a statutorily imposed duty to conserve peace and enforce laws, and the authority to arrest violators "within the limits of such statutory duty and authority." The limits of a parole officer's statutory duty and authority are described under R.C. 2967.15, which states, in part, that "any adult parole authority field officer who has reasonable cause to believe that any parolee *** under the supervision of the adult parole authority has violated or

is violating any term or condition of his pardon, parole, furlough, or release may arrest the person without a warrant or order any peace officer to arrest the person without a warrant." Thus, the *Barnes* court concluded that "[t]he critical issue for our consideration, then, is whether [the parole officers] possessed some ancillary authority to pat-down and arrest [a third-party] in the course of arresting *** a known parole violator."

{¶20} This case differs from *Barnes* in that the issue here concerns an alleged strip search as opposed to a pat-down search. Further, the pat-down search in *Barnes* resulted in an arrest for carrying a concealed weapon; consequently, if the pat-down search was illegal, the arrest and criminal charge would also be invalid. In the present case, nothing illegal was found as a result of the search, and plaintiff's arrest on the bad check charge is not being challenged. Nevertheless, the *Barnes* case is instructive in several respects.

{¶21} First, the *Barnes* case recognizes that protection from unreasonable searches is a closely guarded civil liberty. In holding that the parole officer's pat-down search of Barnes "constituted a permissible protective frisk for weapons pursuant to *Terry v. Ohio* (1968), 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868, and its progeny," the court quoted the following language from the *Terry* case:

{¶22} "There must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others

was in danger."

{¶23} Here, again, a strip search is involved, which is a more invasive process than a pat-down search, thus, the authority to conduct such search should logically be even more narrowly drawn. Additionally, the *Terry* case involves peace officers, as opposed to the parole officer's conduct in question in this case. Nevertheless, the court finds that the rationale in *Barnes* and *Terry* can be extended to justify Officer Tibbett's search of plaintiff herein.

{¶24} Specifically, the court in *Barnes* found from the record that "specific and articulable facts" existed to justify the officers' concern for their safety and the request to conduct a pat down. After listing those facts, the court held that, in addition to their statutory authority to arrest a parole violator, the officers also possessed the ancillary authority to conduct a weapons frisk of a third-party, non-parolee. In so holding, the court stated:

{¶25} "Indeed, it would be anomalous to hold that parole officers may carry weapons like peace officers, place themselves in peril like peace officers, and conduct lawful arrests like peace officers, yet not protect themselves in the face of apparent danger. Thus, within the context of their limited statutory authority to arrest parole violators, we hold that parole officers possess the concomitant authority to conduct a weapons frisk of a non-parolee when the facts and circumstances would warrant a reasonably prudent peace officer in doing the same."

{¶26} In this case, the search of plaintiff may be construed to have amounted to a strip search; however, even after very narrowly drawing Officer Tibbetts' authority to conduct such search, the court is convinced that specific and articulable facts existed which, along with the rational inferences from those facts, would

have warranted a reasonably prudent peace officer in doing the same. The relevant facts include: 1) that deadly weapons were found during an authorized search of the residence; 2) plaintiff admitted that she knew the weapons were present; 3) ammunition for a handgun was found; 4) drugs and pornographic videotape were found; 5) plaintiff herself posed for some of the photographs confiscated in the search; 6) plaintiff knew that her husband had violated the terms of his parole, she participated in certain violations and she knew that his arrest was imminent. Based upon these facts, it may logically be inferred that plaintiff might conceal a handgun for her husband while the search of the residence was in progress. Thus, the court concludes that plaintiff was not an innocent victim of a strip search; it was not in any sense a "suspicionless" search, and Officer Tibbetts' request to search was justified.

{¶27} Further, the court is persuaded that the search conducted by Tibbetts was the least intrusive search necessary under the circumstances. She did not touch plaintiff's breasts or body at any time; the entire incident lasted only a few minutes, and plaintiff stated that she was not even certain whether Officer Tibbetts actually saw her breasts. To the contrary, the weight of the evidence suggests that if plaintiff's breasts were exposed, it was through her own action rather than through any conduct on the part of Officer Tibbetts. For these reasons, this court concludes that probable cause existed for the search of plaintiff and that Officer Tibbetts' limited statutory authority to arrest parole violators included the right to conduct a search of plaintiff under the facts and circumstances of this case. Additionally, the court concludes that even if Officer Tibbetts did not know the Ohio Revised Code section that applied to her conduct, she was knowledgeable about the limits of her authority.

{¶28} Plaintiff's next cause of action is asserted for invasion of privacy and/or seclusion premised upon the decision in *Hidey v. Ohio State Highway Patrol*, supra. In that case, the Tenth District Court of Appeals held that the conduct of a State Highway Patrol officer in shining a flashlight down the front of a woman's pants, and down the back of her pants, thereby observing her buttocks, constituted an intrusion upon the woman's seclusion. The court made the determination in ruling upon the essential character of the case for the purposes of applying the appropriate statute of limitations; the merits of the claim were not addressed. Nevertheless, the court offered the following in definition of the claim:

{¶29} "[t]he Supreme Court of Ohio has recognized three actionable types of invasion of privacy: (1) the unwarranted appropriation or exploitation of one's personality; (2) the publicizing of one's private affairs with which the public has no legitimate concern; or (3) the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities. *Housh v. Peth* (1956), 165 Ohio St. 35, 133 N.E.2d 340, paragraph two of the syllabus."

{¶30} In this case, as in *Hidey*, plaintiff claims the third type of invasion of privacy. In order to prevail on such claim, plaintiff must show that the intrusion would be highly offensive to a reasonable person. Restatement of Law 2d, Torts (1965) 378, Section 652B. Here, the evidence simply does not substantiate such a finding. As previously stated, the strip search was perhaps the least intrusive form of such search that could be imagined: it took place in a private area; it was very brief; it was conducted by a woman; there was no touching, and the evidence is unclear as to whether Officer Tibbetts even looked at plaintiff's breasts.

Moreover, the court has found that probable cause existed for the search.

{¶31} In contrast, the officer in *Hidey* was a male, he pulled the female subject's pants away from her body, he shined a flashlight down the front and back of her pants, he actually observed the subject's buttocks and, following his request, he actually observed her bra and left breast. The search was conducted on the berm of an interstate highway, in view of passing traffic, after the subject's boyfriend was pulled over for driving 80 mph in a 60 mph zone. The officer's suspicions were aroused when he saw a lot of moving around in the vehicle, however, he found no illegal items after searching both parties. Although the court did not rule on the merits of the claim, it stated: "[w]hat is underneath [one's] clothing is private and a part of [one's] seclusion. The intrusion upon these private matters, especially while on the side of an interstate highway, would be highly offensive to a reasonable person and, indeed, [the woman] averred that such acts caused her humiliation, embarrassment and mental distress."

{¶32} In short, the circumstances here differ markedly from those in *Hidey*. For the reasons set forth above, the court finds that Officer Tibbetts' conduct would not be highly offensive to a reasonable person and did not intrude upon plaintiff's seclusion or violate her right to privacy.

{¶33} Accordingly, judgment shall be entered for defendant. As a final matter, the court notes that, at the outset of the proceedings, plaintiff's motion to reinstate her claim for attorney fees pursuant to R.C. 2933.32(C)(3) was GRANTED. In light of the decision rendered herein that plaintiff's claims are DENIED.

{¶34} This case was tried to the court on the issue of liability. The court has considered the evidence and, for the

reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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J. WARREN BETTIS
Judge

Entry cc:

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LH/cmd
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