University of Baltimore Law Forum

Volume 20
Number 3 *Spring, 1990*

Article 6

1990

Recent Developments: City of Annapolis v. United Food & Commercial Workers, Local 400: Drug Testing of City Police and Fire Fighters Was Not an Unconstitutional Search and Seizure When Conducted during a Regularly-Scheduled Physical Examination

Ellen W. Cohill

searched prior to the arrest is not a *de minimis* intrusion that may be ignored. *Id.* at 1098. The Court held that incident to the arrest, an officer, without probable cause or reasonable suspicion, could search places immediately adjoining the area of arrest from which an attack could be launched. *Id.* Beyond that, however, "there must be articulable facts which, taken together with the rational inferences from these facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger. . ." *Id.*

In so holding, the Court emphasized the limited scope of a protective sweep; that is, it should be confined to a cursory visual inspection, not a full search, of areas where a person may be found. It may last as long as is necessary to relieve the suspicion of danger but no longer than is necessary for the arrest and departure. *Id.* at 1099.

Moreover, the Court maintained that its holding did not conflict with *Chimel v. California*, 395 U.S. 752 (1969). *Buie*, 110 S. Ct. at 1099. *The Chimel* Court held that a warrantless but justifiable search incident to an in-home arrest was limited to the arrestee's person and the area from which he could obtain a weapon. The Court distinguished *Chimel* in two ways: 1) it was concerned with preventing a full blown search of a house for evidence unrelated to the arrest, unlike the more limited intrusion of a protective sweep; and 2) the justification for the search was the threat posed by the arrestee, not by unseen third parties. *Id.*

Relying on *Terry* and *Long*, the Supreme Court held that warrantless protective sweeps of private dwellings during an arrest are to be measured by a reasonable articulable suspicion standard. By relaxing the general rule requiring probable cause, abuse of police discretion in determining the necessity and scope of a protective sweep may result. However, the Court has yet to recognize the validity of such speculative concerns.

—Tena Touzos

City of Annapolis v. United Food & Commercial Workers, Local 400: **DRUG TESTING OF CITY POLICE AND FIRE FIGHTERS WAS NOT AN UNCONSTITUTIONAL SEARCH AND SEIZURE WHEN CONDUCTED DURING A REGULARLY-SCHEDULED PHYSICAL EXAMINATION**

In *City of Annapolis v. United Food & Commercial Workers, Local 400*, 317 Md. 544, 565 A.2d 672 (1989), the Court of Appeals of Maryland held that the mandatory suspicionless drug testing of police and fire fighters did not violate the fourth amendment. The court of appeals reasoned that the police and fire fighters' privacy interests were outweighed by the City's compelling interest in the safety of personnel, co-workers, and the public. *Id.* at 566, 565 A.2d at 683. Thus, the court of appeals reversed the trial court's ruling.

In September of 1986, the City of Annapolis proposed to the unions a drug testing plan, which required police and fire fighters, as part of their regularly-scheduled periodic physical examinations, to submit urine samples to ascertain the presence of illegal drugs. *Id.* at 546, 565 A.2d at 672-73. One year later, after the parties failed to reach an agreement regarding the details of the program, the City filed a complaint of unfair labor practices with the State Mediation and Conciliation Service. *Id.* The City alleged in its complaint that the unions failed to negotiate in good faith. *Id.* The State Mediation and Conciliation Service found that the drug testing program was not unconstitutional as an unreasonable search and seizure and allowed the City to implement its program. The unions, seeking to prevent implementation of the program, appealed to the Circuit Court for Anne Arundel County. *Id.* at 547-48, 565 A.2d at 673-74. The circuit court found that the plan was unconstitutional under the fourth amendment, because it was not based on individualized suspicion of drug use among the employees. *Id.* at 549, 565 A.2d at 674. The lower court then issued a writ of mandamus enjoining the city from implementing its program. *Id.* at 550, 565 A.2d at 675. The City appealed the circuit court's decision, and the Court of Appeals of Maryland granted certiorari prior to consideration by the court of special appeals. *Id.*

In reaching its decision, the court of appeals relied primarily on two recent Supreme Court cases that were decided after the lower court's ruling. In the first case, *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989), the Court upheld mandatory suspicionless drug testing of Customs Service employees involved in drug interdiction or who carried a firearm. *United Food*, 317 Md. at 551, 565 A.2d at 675. In the second case, *Skinner v. Railway Labor Executives Ass'n*, 109 S. Ct. 1402 (1989), the Court approved Federal Railroad Administration regulations that mandated testing of blood and urine samples for drug use by employees following major train accidents. *United Food*, 317 Md. at 551, 565 A.2d at 675. Both *Skinner* and *Von Raab* held that the collection and testing of urine was a "search" and implicated the proctection of the fourth amendment. *Id.* (citing *Skinner*, 109 S. Ct. at 1413; *Von Raab*, 109 S. Ct. at 1390). However, in *Skinner*, the Supreme Court stated that "where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Id.* at 552, 565 A.2d at 676 (quoting *Skinner*, 109 S. Ct. at 1417).

In applying the Supreme Court holdings of *Skinner* and *Von Raab* to *United Food*, the court of appeals focused on the degree of intrusiveness of the "actual" assaying of the urine sample for drug use, instead of the mandatory taking of the sample. *Id.* at 553, 565 A.2d at 676. The court reasoned that the employees had already been providing samples for analysis as part of their regularly-scheduled physical examinations. *Id.* Recognizing that the actual assaying of samples for drug use constituted a search, the court in *United Food* found that the instrusion on employees' reasonable expectation of privacy was not only "minimal" under *Skinner* and *Von Raab*, but negligible for four reasons. *Id.*

First, the employees in *United Food* received three distinct notices of testing: (1) that the physical would be during their "birthday" month; (2) within thirty days, they knew the week of the examination; and (3) within forty-eight hours, they knew the time of the physical. *Id.* at 554, 565 A.2d at 676-77. Second, the disclosure of "private facts," including evidence of physical infirmities or latent diseases, was already part of the regular physical examination. *Id.* at 554-55, 565 A.2d at 677. Therefore, no reasonable expectation of privacy existed with regard to the disclosure of private facts. *Id.* Third, employees were required to complete a medication form to determine whether a positive test could have resulted from an employee's *lawful* use of drugs. *Id.* at 555, 565 A.2d at 677 (emphasis added). Although certain private medical facts might be disclosed on the medication form, the same facts would be the subject of inquiry during a routine physical examination. *Id.* Thus, completion of the medication form was not a significant invasion of privacy. Fourth, regular physical examinations were used to promote physical fitness and treat employees with drug abuse problems. *Id.* at 555-56, 565 A.2d at 677-78.

The court of appeals next considered the governmental interests advanced by the drug tests. In *Von Raab*, the Supreme Court identified two governmental interests of a compelling nature which supported drug tests for certain Customs Service employees as "ensuring that front-line interdiction personnel are

physically fit, and have unimpeachable integrity and judgment." *Id.* at 561-62, 565 A.2d at 680 (quoting *Von Raab*, 109 S. Ct. at 1393). Likewise, drug use by employees required to carry firearms would jeopardize public safety. *Id.* The court of appeals compared the work of the customs' officers with that of police and fire fighters and found the City to have similar governmental interests. *Id.* at 562-63, 565 A.2d at 681. The court noted that the police are also involved in front-line drug interdiction within their jurisdiction and are permitted to carry firearms whether on duty or off. *Id.* In addition, fire fighters are "charged with duties to repond quickly and effectively at a moment's notice," and their actions have implications on the life and property of others. *Id.* Thus, the court of appeals held that the City's interest in the safety of personnel, co-workers, and the public outweighed the privacy interests of the police and fire fighters. *Id.* at 566, 565 A.2d at 683.

Finally, the court of appeals held that since there was not a great privacy expectation in the drug analysis of an employee's urine produced in regular examinations, requiring a warrant would add little protection to the individual's privacy. *Id.* at 563-64, 565 A.2d at 681. The purpose of a warrant is to protect the privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of the government. *Id.* The court of appeals concluded that the warrant purposes were not jeopardized in *United Food* because the City's program required suspicionless drug testing in the context of an employee's physical examination. *Id.* at 564, 565 A.2d at 682. Consequently, the City did not exercise discretion in determining when an employee would be tested for drugs. *Id.*

By its decision in *United Food*, the court of appeals has adopted the prevailing law set forth by the Supreme Court in its decisions in *Skinner* and *Von Raab*. Moreover, the court has broadened the suspicionless search exception to the fourth amendment to include drug testing of police and fire fighters when conducted during annual physical examinations.

—Ellen W. Cohill

St. Luke Evangelical Lutheran Church, Inc. v. Smith: REASONABLE ATTORNEY'S FEES MAY BE CONSIDERED BY THE JURY WHEN AWARDING PUNITIVE DAMAGES

The Court of Appeals of Maryland in a 4-3 decision held that attorney's fees of a prevailing party may now be considered by a jury in determining an award of punitive damages. *St. Luke Evangelical Lutheran Church, Inc. v. Smith*, 318 Md. 337, 568 A.2d 35 (1990). The court's holding represents a departure from the American rule requiring each party to a lawsuit provide for his or her own costs of litigation.

Ginny Ann Smith sought compensatory and punitive damages from David Buchenroth, a pastor at St. Luke Evangelical Lutheran Church (St. Luke's). She alleged he defamed her character and invaded her privacy when he knowingly, or with reckless disregard for the truth, communicated false statements to church members about her sexual involvement with a married church official. Ms. Smith joined St. Luke's as a defendant on the theory that by dismissing her from her job it had ratified the injurious statements of its agent, Pastor Buchenroth.

At trial, the Circuit Court for Montgomery County permitted Ms. Smith to present evidence of the amount of her attorney's fees on the issue of punitive damages. The jury found in her favor and awarded her compensatory and punitive damages against both Pastor Buchenroth and St. Luke's.

The court of special appeals reversed, holding that during jury selection Ms. Smith was erroneously allowed twice the number of peremptory strikes permitted. Ms. Smith sought review of the decision in the court of appeals. St. Luke's cross-petitioned, contending that the trial court erred in allowing the jury to consider Ms. Smith's attorney's fees in its award of punitive damages. Both petitions were granted.

The peremptory strike ruling was overturned by the court which held that even if error had been committed the error was harmless. It then focused on the principal issue of the case – whether attorney's fees may be considered in determining punitive damages.

To begin its analysis, the court reviewed the English rule which awards the costs of litigation to the prevailing party. *St. Luke Church*, 318 Md. at 344, 568 A.2d at 38. The rule pre-dates the time of King Henry VIII and continues to be applied in English courts today. *Id.* at 344-45, 568 A.2d at 38 (citing C. McCormick, *Handbook on the Law of Damages* 234, 235 (1935)).

Following its declaration of independence, America began a move away from the English rule. Statutes fixing the amount of attorney's fees recoverable by a successful party gave way to attorney fee schedules established by a free market. In the American system of jurisprudence the notion that each litigant to a dispute should provide for his or her own costs of litigation evolved. There have been some exceptions; as where parties to a contract agree, in the event of litigation, the loser will bear all legal expenses, or where a statute allows an aggrieved party to recover attorney's fees. *Id.* at 345-47, 568 A.2d at 39.

After examining Maryland Rule 1-341, wherein attorney's fees are imposed upon a party acting in bad faith, the court stated, "[i]t is reasonable, therefore, to conclude that in this state, an award of attorney's fees serves, in general, as a legislative tool for punishing wrongful conduct." *Id.* at 347, 568 A.2d at 39. The court drew a nexus between attorney's fees imposed by statute and an award of punitive damages in a court proceeding. Both, the court observed, have as a main goal the punishment of wrongful conduct. *Id.* at 347, 568 A.2d at 40.

Despite the court's espousal of the American rule in *Empire Realty Co. v. Fleisher*, 269 Md. 278, 305 A.2d 144 (1973), the court distinguished the case explaining that punitive damages were not at issue and thus it had declined to decide whether fee shifting was appropriate in a punitive damages case. *St. Luke Church*, 318 Md. at 348, 568 A.2d at 40. The court, however, did agree with the prevailing view that attorney's fees not be considered when awarding compensatory damages in an attempt to make the successful claimant whole. The court said that where a party's wrongful conduct warrants the imposition of punitive damages, the remedy is appropriate. It found support for the premise in the Restatement (Second) of Torts § 914 and comment a (1979). *St. Luke Church*, 318 Md. at 350, 568 A.2d at 41.

The court next noted, of the seventeen states having considered the issue, nine have adopted the view that in cases where punitive damages are properly at issue, the costs of litigation may be considered in the measurement of an award. *Id.* at 349-50, 568 A.2d at 41. States declining to follow this view contend that this form of remedy is entirely compensatory in nature, and not a valid means of computing punitive damages. They also contend that it improperly impinges upon the jury's discretionary power to fix the amount of punitive damages. *Id.* at 350, 568 A.2d at 41.

In response, the court of appeals stated:

> It is true that an award of attorney's fees reimburses a plaintiff for his out-of-pocket legal expenses. When viewed solely in this light such fees may seem to be wholly compensatory in function. Yet, when viewed in the context of the long-standing prohibition against awarding attorney's fees, and the fact that