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RECENT DEVELOPMENT

PAULINO V. STATE: AN OTHERWISE LAWFUL SEARCH OF AN ARRESTEE'S PERSON IS UNREASONABLE UNDER THE FOURTH AMENDMENT WHEN CONDUCTED IN A PUBLIC PLACE AND IN A MANNER HIGHLY INVASIVE OF THE ARRESTEE'S PRIVACY INTEREST.

By: Craig Bannon

The Court of Appeals of Maryland held that an otherwise lawful search of an arrestee's person is unreasonable under the Fourth Amendment when performed in public and in a fashion that is highly invasive of the arrestee's privacy interest. *Paulino v. State*, 399 Md. 341, 924 A.2d 308 (2007). Specifically, the Court found that physically manipulating the buttocks to inspect the anal cavity constituted a visual body cavity search even though the arrestee's clothes were not removed. *Id.* at 341, 924 A.2d at 308.

On September 29, 2000, police received an informant tip that John August Paulino ("Paulino") would be at a particular location later that evening and in possession of a controlled dangerous substance ("CDS"). The informant also advised police that Paulino usually hid CDS in the area of his buttocks. Late that evening, police observed a vehicle with Paulino and other passengers parked in a well-lit, but secluded, public car wash. Police removed Paulino from the vehicle and searched him. Paulino's pants were below his buttocks at the time of the search; however, it was unclear whether this was part of a "fashion" or whether police pulled his pants down. Officers could not determine whether Paulino had any contraband in his buttocks merely by looking at him, so they lifted up his underwear and physically spread his cheeks, which revealed a quantity of cocaine.

Paulino was charged with possession with intent to distribute cocaine and possession of cocaine. The Circuit Court for Baltimore County held a hearing on Paulino's motion to suppress the cocaine, but denied the motion and subsequently found Paulino guilty at trial. A post-conviction court granted Paulino the right to file a belated appeal, and, after the appeal was granted, the Court of Special Appeals of Maryland affirmed the lower court's finding that the search was

reasonable. Paulino petitioned the Court of Appeals of Maryland for a writ of certiorari, which the Court granted.

Paulino did not contest the validity of the arrest; rather, only the scope of the search was at issue. *Paulino*, 399 Md. at 350, 924 A.2d at 313. The Court recognized that police do not need a warrant, under the Fourth Amendment, to conduct a full search of an arrestee's person to remove weapons or to prevent the concealment or destruction of evidence. *Id.* at 350, 924 A.2d at 313 (citing *Chimel v. California*, 395 U.S. 752, 763 (1969)). The Fourth Amendment, however, protects an arrestee's privacy interest in his or her person by prohibiting unjustified bodily intrusions and improperly performed intrusions. *Paulino*, 399 Md. at 351, 924 A.2d at 314 (citing *Schmerber v. California*, 384 U.S. 757, 768 (1966)). However, the United States Supreme Court has not ruled on whether a strip search incident to a lawful arrest will pass constitutional muster. *Paulino*, 399 Md. at 351, 924 A.2d at 314.

The Court explained that a strip search is inherently "more invasive" than a routine custodial search. *Id.* at 351, 924 A.2d at 314. A strip search generally refers to inspecting the skin surfaces of a naked individual without inspection of the genitals, breasts, or buttocks. *Id.* at 352-53, 924 A.2d at 315 (citing *State v. Nieves*, 383 Md. 573, 586, 861 A.2d 62, 70 (2004)). A visual body cavity search is even more invasive because it involves visually inspecting the anal or genital body cavities. *Paulino*, 399 Md. at 352-53, 924 A.2d at 315 (citing *Nieves*, 383 Md. at 586, 861 A.2d at 70). When a search rises to the level of a strip search, its constitutionality depends on the exigency of the circumstances and reasonableness. *Id.* at 351, 924 A.2d at 314. Exigent circumstances are emergency circumstances "so imminent that they present an urgent and compelling need for police action." *Id.* at 351-52, 924 A.2d at 314 (quoting *Stackhouse v. State*, 298 Md. 203, 219-20, 468 A.2d 333, 342 (1983)).

Paulino argued that the police conducted a visual body cavity search because they physically spread the cheeks of his buttocks, or, at the very least, the search was a strip search. *Paulino*, 399 Md. at 352, 924 A.2d 314-15. The State asserted that the search was not a strip search because Paulino remained clothed at all times and they merely "lifted up" his shorts. *Id.* at 352, 924 A.2d at 315. The Court explained that, even though Paulino's clothes remained on, the police lifted up Paulino's exposed underwear in a fashion that enabled them to view and spread the cheeks of his buttocks to find the cocaine. *Id.* at 353-54, 924 A.2d at 315-16. Therefore, the Court concluded the

search was both a strip search and a visual body cavity search. *Id.* at 353-54, 924 A.2d at 315-16. The dissent, however, argued the search was not a strip search and found it was only a “reasonable reach-in” search in which the suspect’s genitals are not displayed. *Id.* at 370-71, 924 A.2d at 326 (Battaglia, J., dissenting).

The Court stated that the reasonableness of a search incident to an arrest is determined by balancing “the need for a particular search against the invasion of personal rights that the search entails.” *Id.* at 355, 924 A.2d at 317 (majority opinion) (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). Specifically, a court must consider four factors: (1) the scope of the search, (2) the justification for initiating it, (3) the place in which it is conducted, and (4) the manner in which it is conducted. *Paulino*, 399 Md. at 355, 924 A.2d at 316 (citing *Nieves*, 383 Md. at 588, 861 A.2d at 71). In weighing these factors, the relative strength of each must be evaluated. *Paulino*, 399 Md. at 355, 924 A.2d at 316-17.

Analyzing the scope of the search, the Court rejected the notion that the scope was reasonable because of its brevity. *Id.* at 356, 924 A.2d at 317. The Court noted that, under the circumstances, there was no exigency; therefore, even a brief search of the type conducted on *Paulino* could not be reasonable in scope. *Id.* at 356, 924 A.2d at 317. The Court described the type of search that *Paulino* was subjected to as “dehumanizing” and “demeaning.” *Id.* at 356, 924 A.2d at 317.

The Court then considered the justification for initiating the search. *Id.* at 356, 924 A.2d at 317. The Court explained that the police were justified in initiating a search to check for weapons and preserve evidence. *Id.* at 357, 924 A.2d at 317. However, the Court concluded that although a search was justified there was simply no exigency to justify such an invasive search in the car wash where the arrest occurred. *Id.* at 357, 924 A.2d at 318.

Finally, in evaluating the place and manner of the search, the Court held that the search of *Paulino* was unreasonable. *Id.* at 357-58, 924 A.2d at 318. The Court analyzed cases from other jurisdictions in which police refrained from conducting similarly invasive searches until relocating to a secluded area where the public could not see officers conduct the search. *Id.* at 358-59, 924 A.2d at 318-19. By contrast, the police in this case did not make an effort to protect *Paulino*’s privacy interest when they searched him at the scene of the arrest. *Id.* at 358, 924 A.2d 318.

Specifically, the Court found the place and manner of the search were unreasonable because the car wash was a public place and the

invasive search into Paulino's buttocks was performed in the presence of the other people who accompanied Paulino. *Id.* at 360, 924 A.2d at 319. The dissent, however, argued the search was reasonable because there was no evidence anyone saw Paulino's genitalia or buttocks. *Id.* at 361 n.7, 924 A.2d at 320 n.7. The Court rejected this argument, finding it was conceivable the search was visible to anyone present. *Id.* at 361 n.7, 924 A.2d at 320 n.7. The Court, again, noted lack of exigency and held that the invasion of Paulino's privacy interest outweighed the need for the search, thus making the search unreasonable. *Id.* at 361, 924 A.2d at 319-20.

By holding that the search of Paulino was unreasonable under the Fourth Amendment, the Court of Appeals of Maryland instructs police officers that a search incident to a lawful arrest is not without limits, particularly when the search involves a more substantial bodily intrusion than a mere frisk. For now, the Court strengthens the Fourth Amendment's protective power, but the four-to-three decision leaves open the possibility that a bodily intrusion of a fully clothed person may not be held unreasonable under similar circumstances in the future. Police are well-advised to act cautiously in conducting similar searches to ensure their hard work is not performed in vain.