6-15-1978

Chavez v. District Court In and For Second Judicial Dist.

No. 28214

IN THE SUPREME COURT OF THE STATE OF COLORADO

EDNA CHAVEZ,

Petitioner

vs.

THE DISTRICT COURT IN AND FOR THE SECOND JUDICIAL DISTRICT AND STATE OF COLORADO, AND THE HONORABLE SUSAN GRAHAM BARNES, ONE OF THE JUDGES THEREOF, DAN CRONIN, Manager of Safety and Excise, and Ex-Officio Sherrif of Denver, and LARRY STONE, Bailiff, Division 10 of the Denver District Court,

Respondents.

ORIGINAL PROCEEDING PURSUANT TO RULE 21, COLORADO APPELLATE RULES

BRIEF OF PETITIONER

JOHN A. PURVIS
Colorado State Public Defender

MADELINE S. CAUGHEY
Deputy State Public Defender

ATTORNEY FOR PETITIONER
331 Fourteenth Street
Denver, Colorado 80202
893-8939

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TABLE OF CASES CITED

No.

IN THE SUPREME COURT OF THE STATE OF COLORADO

EDNA CHAVEZ, Petitioner vs. THE DISTRICT COURT IN AND FOR THE SECOND JUDICIAL DISTRICT AND STATE OF COLORADO, AND THE HONORABLE SUSAN GRAHAM BARNES, ONE OF THE JUDGES THEREOF, DAN CRONIN, Manager of Safety and Excise, and Ex-Officio Sherrif of Denver, and LARRY STONE, Bailiff, Division 10 of the Denver District Court, Respondents.	]	Original Proceeding Pursuant to Rule 21, Colorado Appellate Rules

BRIEF OF PETITIONER

Petitioner is a defendant in the trial court and will be referred to by name or as Petitioner. Respondents will be referred to as the People or the State.

STATEMENT OF THE ISSUES PRESENTED

Whether the search and detention to which petitioner is being subjected upon the occasion of each court appearance is in violation of petitioner's right to be free from illegal searches and seizures, to the presumption of innocence, and to the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Edna Chavez, is charged with Second Degree Burlgary and Theft in Division 10 of the Denver

District Court. On March 14, 1978 petitioner was granted a personal recognizance bond in the sum of $2,500 by Judge Edward Simons and has remained at liberty on said bond to date.

On the occasion of petitioner's last three appearances in court, May 2, 1978, May 18, 1978, and June 15, 1978, the bailiff instructed petitioner that her entry into the courtroom was conditioned on her first proceeding to the sheriff's office in the City and County Building, there being searched and by a deputy sheriff escorted to the courtroom and placed in the jury box. Submitting to such a procedure was never made a condition of her bond by either the terms of her bond or by any order of court having jurisdiction.

STATEMENT OF THE FACTS

The basis of the search and detention of petitioner at the time of her last three court appearances is a Chief Judge Directive of May 2, 1978 concerning "Security Regarding Persons on Bond," issued on that date by the Honorable Joseph N. Lilly (App. A; App. B). That directive remains in effect to date and the procedure outlined therein is being followed by the Sheriff's Department of the City and County of Denver (App. B).

SUMMARY OF THE ARGUMENT

THE SEARCH AND DETENTION TO WHICH PETITIONER IS SUBJECTED UPON THE OCCASION OF EACH COURT APPEARANCE IS IN VIOLATION OF PETITIONER'S RIGHT TO BE FREE FROM ILLEGAL SEARCHES AND SEIZURES, TO THE PRESUMPTION OF INNOCENCE, AND TO THE EQUAL PROTECTION OF THE LAWS.

ARGUMENT

THE SEARCH AND DETENTION TO WHICH PETITIONER IS SUBJECTED UPON THE OCCASION OF EACH COURT APPEARANCE IS IN VIOLATION OF PETITIONER'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES, TO THE PRESUMPTION OF INNOCENCE, AND TO THE EQUAL PROTECTION OF THE LAWS.

It will be useful to examine the constitutionality of the systematic searches and detentions of persons charged with a criminal offense who are at liberty on bond within the context of the caselaw concerning the constitutionality of the systematic airport preboarding searches of would-be air travelers. Each relies for its justification not on probable cause to stop or search a particular individual, bur rather on reasonableness as determined by a balancing of competing interests.

The systematic search of persons charged with a criminal offense who are at liberty on bond prior to allowing them access to the courtroom can not be justifed under the less-than-probable cause standard of Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 889 (1968), although several courts have invoked this rationale to uphold airport preboarding magnetometer searches. See, e.g., United States v. Moreno, 475 F.2d 44 (5th Cir.), cert denied, 414 U.S. 840, 94 S. Ct. 94, 38 L. Ed. 76 (1973); United States v. Riggs, 474 F.2d 699 (2d Cir.), cert denied, 414 U.S. 820, 94 S. Ct. 115 L. Ed. 53 (1973); United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972), United States v. Bell, 464 F.2d 667 (2d Cir.) cert denied, 409 U.S. 991, 93 S. Ct. 335 34 L. Ed. 258 (1973); United States v. Epperson, 454 F.2d 769 (4th Cir.), cert denied, 406 U.S. 947, 92 S. Ct. 2050,32 L. Ed. 33 (1972).

Terry is inapplicable because it dealt with a street confrontation between a citizen and a policeman, and held that in a situation in which a policeman justifiably stops an individual and possesses "specific articulable facts" which lead him to believe that the person with whom he is dealing is armed and dangerous, he may conduct a limited pat-down search for weapons in order to protect himself while conducting the stop. United States v. Davis, 482 F.2d 893, 906-07 (9th Cir. 1973). The officer's right to conduct such a search turns on his possession of specific facts covering that one individual, and the scope (pat-down) is limited by the purpose (detection of weapons).

In neither the airport preboarding magnetometer searches nor in the search here of persons on bond, does the officer wait to search until he has in his possession specific articulable facts which lead him to believe the individual is armed and dangerous. Therefore, the justification, if it exists, must be provided by a source other than the actions of the individual searched.

Some courts, recognizing the inapplicability of Terry to an airport preboarding search, have turned to the principles of Colonnade Catering Corp. v. United States, 397 U.S. 72, 76, 90 S. Ct. 774, 25 L. Ed. 2d 60 (1970), which were developed and applied in the United States v. Biswell, 406 U.S. 311, 314-17, 92 S. Ct. 1593, 32 L. Ed. 2d 87 (1972). With these cases and their progeny began a new exception to the Fourth Amendment warrant requirement--administrative searches.

In Biswell the Court upheld regulatory inspections of business premises where specifically authorized by statute,

if such searches further an urgent federal interest, and the possibilities of abuse and the threat to privacy are not great. The Court rejected the contention that the owner's decision to step aside and allow the inspection was tantamount to consent; rather the Court held that this was mere acquiescence to lawful authority, but that the search should be upheld nevertheless because there was a valid statute authorizing the search, and limiting it in time, place and scope. Cf. United States v. Schafer, 461 F.2d 856, 858 (9th Cir.) cert. denied, 409 U.S. 881, 93 S. Ct. 211, 34 L. Ed. 136 (1972).

The reason for turning to the administrative search line of cases to find a rationale for upholding airport preboarding magnetometer searches was no doubt the similarity between the searches in that neither relied for its justification on considerations which related to the particular individual searched, but rather on grounds of general reasonableness as determined by a balancing of the competing interests involved. Camara v. Municipal Court, 387 U.S. 523, 536-37, 87 S. Ct. 1727, 1735, 18 L. Ed. 2d 930 (1967). When the courts applied such a balancing process to the analysis of the competing interests involved in airport searches, they almost uniformly came to the conclusion that the governmental interest in curbing the alarming and growing number of hijackings outweighed the minimal invasion of privacy caused by a magnetometer search. United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974); United States v. Albarado, 495 F.2d 44, 49-52 (5th Cir. 1973); United States v. Dalpiaz, 494 F.2d 374, 377 (6th Cir. 1974).

The fact that a magnetometer search involves no detention as well as the fact that individuals were not selectively subjected to such searches, also led to the courts'

finding of reasonableness. United States v. Albarado, supra at 806; United States v. Dalpiaz, supra at 376; United States v. Davis, supra at 909-11.

However, the factor which the courts relied on most heavily in upholding airport searches was the option available to the individual to avoid the search altogether by not boarding the flight. This option led some courts to go so far as to apply a consent rationale, at least where there was widespread publicity about hijacking security measures in effect, so that the individual can be said to have knowingly consented to the search by proceeding to the boarding area. United States v. Freeland, 562 F.2d 383, 385-86 (6th Cir. 1976); United States v. Dalpiaz, supra at 376; United States v. Canada, 527 F.2d 1374-78 (9th Cir. 1975); United States v. Doran, 482 F.2d 929, 932, (9th Cir. 1973).

Other courts, however, have held that there is official coercion inherent in a situation in which an individual must choose between surrendering his Fourth Amendment rights and his constitutional right to travel interstate, and have refused to hold that such consent-in-fact almounts to the freely and voluntarily given consent necessary to waive a fundamental constitutional right. Schneckloff v. Bustamonte, 412 U.S. 218, 222, 93 S.Ct. 2041, 2045, 36 L.Ed.2d 854 (1973); United States v. Ruiz-Estrella, 481 F.2d 723, 727 (2d Cir. 1973). However, although the consent is not of a kind which would validate an otherwise illegal search, the fair warning to the passenger that he can avoid the search by proceeding no further is one factor which may bring the search within the test of reasonableness. United States v. Edwards, supra at 501.

When petitioner's search is measured against the above constitutional principles developed in the context of airport preboarding magnetometer searches, it fails to overcome the presumptive illegality of searches without a warrant. People v. Mathis, 542 P.2d 1296 (Colo. 1975); People v. Neyra, 540 P.2d 1077 (Colo. 1975). Even were there a valid statute in effect authorizing such a search of persons on bond, the search would not be upheld absent legislative promulgation of standards specifically regulating the procedures and scope of the inspection power. Colonnade Catering Corp. v. United States, supra; cf. Wyman v. James, 400 U.S. 309, 318, 324-25 91 S.Ct. 381, 27 L.Ed.2d 408 (1971); People v. Alexander, 561 P.2d 1263, 1265 (Erickson, J., concurring). Recognizing the invasion of privacy inherent in a frisk, courts have taken great care in validating airport preboarding searches to authorize only a magnetometer search rather than a frisk in the first instance. United States v. Albarado, supra at 805-06 However, the search authorized by the Chief Trial Judge is not limited to the minimal invasion of privacy which a magnetometer search entails but rather contains no limitations whatsoever on scope of the search. (App. A).

There is another respect in which the procedure now in effect in the Denver District Court is illegal and unconstitutional. The fact that no detention is involved in an airport magnetometer search was another factor leading courts to conclude that such searches were reasonable. Albarado, supra at 806. Here, there is ample reason for petitioner to believe she is "not free to leave." People v. Parada, 533 P.2d 1121 (1975). The "Fourth Amendment is invoked when a seizure occurs regardless of the means by which the officer chooses to execute it." Stone v. People, 174 Colo. 504, 485 P.2d 495 (1971). What

is signifigant is that "the [individual] is deprived of his freedom to move." People v. Stevens, 517 P.2d 1336, 1339 (1973).

Unlike airport magnetometer searches, which are applied to all who wish to pass a certain point, the courthouse searches here involved are not applied to all who wish to gain entry into the courtroom. (App. B). Exempted by the terms of Chief Trial Judge's Directive are spectators, witnesses, victims, and friends and relatives of an accused, all of whom are individuals who may be displeased with a ruling of the court and who may therefore present a potential security risk. Subjecting only those individuals with pending criminal matters to such a search not only is in gross violation of petitioner's right to the presumption of innocence, but, because of the arbitrary and irrational basis for the classification, works a deprivation of petitioner's right to equal protection of the laws.

If the courts were reluctant to uphold airport preboarding searches on the basis of free and voluntary consent, how much more reluctant should this court be to uphold the search before it on that basis. While the would-be air traveler is confronted with the choice of submitting to a search or not flying, defendants on bond are confronted with the choice of making their scheduled court appearances or forfeiting their bond and their liberty awhile awaiting trial. It is hard to see how under any possible analysis the people could sustain its burden of proving this is any more than acquiescence to a claim of lawful authority. Schneckloff supra at 233, 93 S. Ct. at 2041; Bumper v. North Carolina 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968).

Finally, not only are there lacking many of the above factors which led to the conclusion airport magnetometer searches were, under all the circumstances reasonable, but an analysis of the competing interests involved only further demonstrates the unreasonableness of searches of persons on bond.

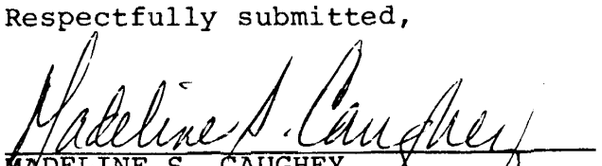
While there can be no doubt that there exists a legitimate governmental interest in securing the safety of a society's judges, nowhere is there evidence of any threat to their safety, let alone a threat anywhere near commensurate with that to the public caused by airline hijackers and noted by the courts in the period when the exception to the Fourth Amendment warrant requirement was first created for airport magnetometer searches. Between 1961 and 1968, hijackings of United States aircraft averaged about one per year, but in 1968 rose to 18, and in 1969 to 40 hijackings, of which 33 were succesful United States v. Davis, 482 F.2d 893, 897-904 (1973); United States v. Albarado, 495 F.2d 798, 803. Without some sort of demonstrated threat to the safety of the judiciary, the government interest in assuring their safety by a selective application of a search policy to persons on bond is outweighed by the intrusion into the privacy and the violation of the constitutional rights of those persons on bond who are subjected to the search.

No detentions should be more closely scruntinized that those which occur in a nation's courthouses, and which rest for their justification not on a presumption of innocence, but on a presumption of dangerousness, and on no more than the directive of a member of the judiciary before whom the person detained and searched has never appeared.

CONCLUSION

The search and detention to which petitioner must submit before being allowed entry to the courtroom for the purpose of appearances which are required by the terms of her bond are in violation of petitioner's right to be free from illegal searches and seizures, to the presumption of innocence, and to the equal protection of the laws.

Respectfully submitted,



MADELINE S. CAUGHEY
Deputy State Public Defender
Attorney for the Petitioner
331 Fourteenth Street
Denver, Colorado 80202
893-8939

CHAMBERS
District Court
CITY AND COUNTY BUILDING
DENVER, COLO.
JOSEPH N. LILLY, CHIEF JUDGE

APPENDIX A

CHIEF JUDGE DIRECTIVE

May 2, 1978.

TO:
1. All District Court Judges, Criminal Courtroom Clerks and Bailiffs
2. District Attorney
3. Public Defender
4. Probation Department
5. Denver Sheriff/Division Chief, c/o Room 404
6. Court Administrator/Clerk of the Court
7. Deputy Clerk, Norma Butero
8. Hon. George A. Manerbino, Presiding Judge, Denver County Court

FROM: JOSEPH N. LILLY, Chief Judge JNL

RE: SECURITY REGARDING PERSONS ON BOND

Commencing immediately, the following procedure will be used regarding persons on bond, namely:

1. The Deputy in charge of each courtroom (Criminal Division--District Court only) will assign one of his men to the said courtroom at 8:15 a.m. each morning. The officer so assigned will report to the court and remain there to receive persons on bond who are escorted to the courtroom. The officer will place the person on bond in the jury box with instructions to remain there until the case is called and disposed of. Should the person on bond have to leave the courtroom for any reason, such as the restroom, he must receive permission from the Deputy and then be searched again when he returns to the courtroom. There is to be no deviation from this procedure, except by order of the Court, or by order of a Sheriff Department command officer.

2. Each morning the Desk Sergeant will assign Deputies to the duty of searching persons on bond, who report to this office, and escorting them to the courtroom. All such persons are to be escorted to the courtroom and turned over to the Deputy assigned to that courtroom. The officers assigned to searching and escorting duties will not escort anyone to a courtroom before 8:15 a.m. each morning.

3. After a person on bond has been searched and escorted to a courtroom, he will not be left unattended until the case is disposed of without permission of the Court. A defendant may be allowed to confer with his attorney prior to the opening of court, but, absent permission of Court, the defendant must remain in the jury box. There will be no visiting in the courtrooms, except by Court order, or as indicated in this paragraph.

A P P E N D I X B

A F F I D A V I T

I, Captain Galyean, Division Chief hereby depose and state as follows:

That I am complying with the attached directive of the Chief Judge concerning the procedures to be followed regarding persons on bond.

Access to the courtroom for spectators, bondsmen, witnesses, alleged victims, or for friends and family of an accused, is not conditional on their submitting to a search nor being escorted to the courtroom. I make no attempt to search or escort to the courtroom anyone other than persons who are on bond pursuant to a pending criminal action, or those who are already in custody.

Floyd H. Galyean

Date: 6-14-78

STATE OF COLORADO]
] SS.
CITY AND COUNTY OF DENVER]

Subscribed and sworn to before me this 14th day of June, 1978.

My commission expires: 2-10-81

NOTARY PUBLIC

CHAMBERS
District Court
DENVER, COLO.
JOSEPH N. LILLY, CHIEF JUDGE

CHIEF JUDGE DIRECTIVE

May 2, 1978.

TO:
1. All District Court Judges, Criminal Courtroom Clerks and Bailiffs
2. District Attorney
3. Public Defender
4. Probation Department
5. Denver Sheriff/Division Chief c/o Room 404
6. Court Administrator/Clerk of the Court
7. Deputy Clerk, Norma Butero
8. Hon. George A. Manerbino, Presiding Judge, Denver County Court

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the attached Brief of the Petitioner was duly served upon the respondents, by interdepartmental mail, this 15th day of June, 1978.

BY: Laura Garrett

28214

IN THE DISTRICT COURT IN AND FOR THE

CITY AND COUNTY OF DENVER AND

STATE OF COLORADO

Criminal Action No. CR 10284

COURTROOM TEN

FILED IN THE SUPREME COURT OF THE STATE OF COLORADO

JUN 21 1978

David W. Brezina

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

vs.

EARNEST G. MEDINA and EDNA CHAVEZ,

Defendants.

EXCERPT OF PROCEEDINGS

June 15, 1978

THIS MATTER came on regularly for hearing before the HONORABLE SUSAN G. BARNES, Judge of the District Court of the City and County of Denver and State of Colorado, in Denver, Colorado, commencing at the hour of approximately 9:00 a.m., on Thursday, the 15th day of June, A.D., 1978.

A P P E A R A N C E S

MS. BETH McCANN, District Attorney, Second Judicial District, State of Colorado, appearing on behalf of the People.

MS. MADELINE CAUGHEY, State Public Defender, appearing on behalf of Edna Chavez, who was also present in person.

MR. ROY MARTINEZ, Court-appointed counsel, appearing on behalf of Earnest G. Medina, who was also present in person.

(WHEREUPON, the following proceedings were had, to-wit:)

EXCERPT OF PROCEEDINGS

9:00 a.m.

(All proceedings were had and reported, but not herein transcribed by direction of ordering counsel.)

PROCEEDINGS

THE CLERK: CR 10254, People v. Ernest G. Medina and Edna Chavez.

MS. CAUGHEY: Madeline Caughey appearing on behalf of Ms. Chavez.

MR. MARTINEZ: Roy Martinez appearing with Mr. Medina.

MS. CAUGHEY: I have a preliminary matter I would like to take up. I would like a directive that Edna Chavez is free to come and go from the courtroom at will without being subjected to a search before entering.

THE COURT: Well, I'm not going to give you that directive. I modified it as much as I could do. If you want to step outside the courtroom to confer with her, I'll give you that authority as long as she is with you. I'm not going to disobey the Chief Judge's directive as much as I'm in sympathy with your client. I have to obey the security provisions set forth by district court directive. I'm required to follow them regardless of whether I personally disagree with them.

I've been looking at the directive and I think I have leeway to order that if you want to--once she's gone through the search initially in accordance with the procedures that are set up by directive--that if you need to step outside the courtroom in order to confer with her, that you may certainly do that with her. But in terms of simply letting her come into the courtroom without any

kind of search, at any time, that would be in violation of the Chief Judge's directive.

Without some showing of special need in this case, I don't feel that I ought to disobey that directive.

MS. CAUGHEY: And if she steps out into the hall with counsel, she will have to report back to the sheriff's office to go through another search?

THE COURT: No--no, she will not.

MS. CAUGHEY: She must be accompanied by counsel to leave the courtroom?

THE COURT: Well, yes. If she leaves the courtroom with counsel, then there is no search when she comes back.

MS. CAUGHEY: Thank you.

(Additional proceedings were then had and reported, but not herein transcribed by direction of ordering counsel.)

THE COURT: Ms. Caughey, with respect to Ms. Chavez and your inquiry about the regulation regarding security, let me make clear that Ms. Chavez is free to leave the courtroom. It is the regulation that she will have to go back to security if she leaves for any other purpose other than conferring with you.

MS. CAUGHEY: If she leaves with someone other than her attorney.

THE COURT: She's not required to stay in the courtroom, it's just that if she leaves other than to confer with her lawyer, then she has to start around the horn again and go through the security procedure again.

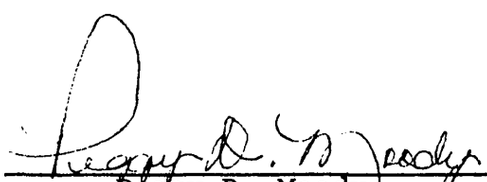
MS. CAUGHEY: Yes.

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

I, PEGGY D. MOODY, Official Reporter for the District Court, Second Judicial District, do hereby certify that the foregoing is a true transcript of the proceedings had on the date above mentioned and that the same was taken in machine shorthand by me at the time and place aforesaid and was reduced to typewriting under my supervision.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 15th day of June, 1978.

My commission expires: 6-24-78.



Peggy D. Moody
Shorthand Reporter