Journal of Air Law and Commerce

Volume 69 | Issue 1 Article 7

2004

Search and Seizure at Airport Customs Checkpoints - Third Circuit Holds That a Search Involving Inappropriate Contact with a Woman Was Routine and Did Not Need to Be Justified By Reasonable Suspicion: *Bradley v. United States*

Elizabeth M. Bedell

SEARCH AND SEIZURE AT AIRPORT CUSTOMS CHECKPOINTS — THIRD CIRCUIT HOLDS THAT A SEARCH INVOLVING INAPPROPRIATE CONTACT WITH A WOMAN WAS ROUTINE AND DID NOT NEED TO BE JUSTIFIED BY REASONABLE SUSPICION: *BRADLEY V. UNITED STATES*

ELIZABETH M. BEDELL*

IN *UNITED STATES v. Montoya De Hernandez*, the most recent United States Supreme Court case to address border searches, the Supreme Court noted that because all searches and seizures must be "reasonable" under the Fourth Amendment, courts must balance a search's intrusion on an individual's Fourth Amendment rights against the interests the government is seeking to promote by conducting the search to determine whether the search is permissible.[1] Although the Supreme Court has held that "routine searches" conducted at this country's borders are presumed to be reasonable under the Fourth Amendment,[2] the Court has also found that any search beyond the scope of "routine" must be justified by the customs officer.[3] In the recent case of *Bradley v. United States*, the Third Circuit addressed the permissibility of a customs officer's search of a female passenger during which the officer had what the court considered "disagreeable" contact with the woman.[4] After noting that the Supreme Court has never articulated which border searches are

* Southern Methodist University Dedman School of Law, candidate for J.D., 2004; B.B.A., Business Management, University of Texas, highest honors, 2001.

[1] United States v. Montoya De Hernandez, 473 U.S. 531, 538 (1985).

[2] *Id.* at 537; United States v. Ramsey, 431 U.S. 606, 616 (1977); Carroll v. United States, 267 U.S. 132, 153-54 (1925). This presumption has been justified by the need for national protection against persons carrying unauthorized belongings into the country. Furthermore, Congress has given the Executive plenary power to perform routine border searches without probable cause or a warrant to collect duties and prevent the smuggling of contraband into the country.

[3] *Montoya de Hernandez*, 473 U.S. at 541.

[4] Bradley v. United States, 299 F.3d 197, 205 (3d Cir. 2002).

classified as "routine," the Third Circuit held that this particular search was a "routine patdown" and, therefore, did not require any justification by the customs officer.[5]

The Third Circuit's decision to hold the defendants not liable for the invasive search was correct, but the court erred in the manner in which it reached this conclusion. The court acknowledged, yet failed to follow the case law precedent introduced by the plaintiff, which would have necessitated a finding that the search at issue was invasive and non-routine and, therefore, would have required the officer to justify the search.[6] Although the Third Circuit stressed the need to revisit the state of the law governing border searches in light of the September 11 tragedy,[7] the Supreme Court's failure to apply a consistent test to determine when a search is "routine" leaves courts and customs officers unsure of what falls within the bounds of the law.

On April 5, 1999, Yvette Bradley, an African-American woman, was subjected to a search of her belongings and a "patdown" body search when she arrived in Newark International Airport on a non-stop international flight from Jamaica.[8] Because the specific flight on which Bradley arrived is considered "high risk" for bringing narcotics into the country, customs inspectors regularly search its passengers.[9] When Bradley disembarked from the plane, two female customs officers noticed she was wearing heavy clothes, despite the fact that she was returning from a warm climate, and a hat similar to those in which contraband had been previously found.[10] The inspectors escorted Bradley into a separate room where they asked her to remove her shoes, which did not reveal any contraband.[11] The inspectors then asked her to remove her jacket and stand against the wall with her legs apart.[12] Next, one of the female inspectors began to "rub her hands" all over Bradley's body and used her "fingers to inappropriately push" through Bradley's "sheer slip dress" into Bradley's "breasts and inner and outer

---

5 *Id.* at 203-05.

6 Anderson v. Cornejo, 199 F.R.D. 228, 259 (N.D. Ill. 2000) (finding that at some point, even "above-clothes, aggressive patting" may require reasonable suspicion).

7 *Bradley*, 299 F.3d at 200.

8 *Id.*

9 *Id.* at 201.

10 Bradley v. United States, 164 F. Supp. 2d 437, 442-43 (D.N.J. 2001).

11 *Id.*

12 *Id.*

labia."[13] Bradley complained that the inspectors conducted the search with blatant disregard to the fact that it was readily "apparent there was no underwear or contraband" under her dress.[14]

Bradley filed suit against the United States, the United States Customs Service, and several of its employees.[15] She alleged that the patdown violated her Fourth Amendment right to protection against unreasonable searches and seizures, and that she was selected for the search because of her race and gender in violation of her Fifth and Fourteenth Amendment rights to equal protection of the law.[16] The District Court of New Jersey granted the defendants' motion for summary judgment on both claims,[17] and on appeal, the Third Circuit affirmed.[18]

Both courts explained that Bradley's Fourth Amendment claim must be viewed in light of the "largely undisputed" and "well-settled law" governing border searches.[19] In *Montoya de Hernandez*, the Supreme Court determined that "routine" searches of persons at border checkpoints do not require justification.[20] In contrast, the Court further explained that any search that is "non-routine" is justifiable *only if* the customs officer had a "reasonable suspicion"[21] that the passenger was smuggling contraband in the area subject to the search.[22] The Court emphasized the need for a consistent standard for determining whether a search was routine or intrusive, yet justified. The Court also cautioned that the development of "subtle verbal gradations," like those being used by lower courts to determine the validity of border searches, will obscure rather than enlighten courts and customs officers as to the meaning of a "routine search."[23]

---

[13] *Bradley*, 299 F.3d at 201 (noting that the inner and outer labia are part of a woman's "external genitalia").

[14] *Id.* (noting that the intrusiveness of the search was aggravated by the fact that Bradley was not wearing underwear at the time of the search and, therefore, did not have the additional layer of cloth to reduce the intrusion of the search).

[15] *Id.* at 200.

[16] *Id.*

[17] *Bradley*, 164 F. Supp. 2d at 455.

[18] *Bradley*, 299 F.3d at 200.

[19] *Id.* at 201; *Bradley*, 164 F. Supp. 2d at 477.

[20] *Montoya de Hernandez*, 473 U.S. at 541.

[21] *Id.* (stating that the "reasonable suspicion" standard requires officers to have a "particularized and objective basis for suspecting the particular person" of violating a federal law).

[22] *Id.*

[23] *Id.*

Despite these few well-established general principles reiterated by the Third Circuit, the law remains unsettled because the Supreme Court has never articulated precisely what qualifies as a "routine" border search. Several courts of appeal, however, have articulated that a "routine" search is one that "does not pose a serious invasion of privacy and that does not embarrass or offend the average traveler."[24] Notably, the Supreme Court has never expressly classified a patdown search as routine.[25] Although all of the circuits that have addressed this issue since the *Montoya de Hernandez* decision have noted that "a *standard* patdown at the border"[26] is considered a routine border search, these courts' statement of this rule is dictum because the searches at issue were deemed lawful on the grounds that the customs officers had reasonable suspicion to conduct the searches.[27] In the recent case of *Anderson v. Cornejo*, the court attempted to clarify what is outside the scope of a routine search or a standard patdown by explaining that, in addition to the search at issue,[28] there are two categories of conduct that would make a search so intrusive such that reasonable suspicion would be necessary to justify the search: (1) where an inspector "reaches under the traveler's clothes" and (2) where an inspector "fondl[es] a traveler's genital area, breasts, or buttocks area."[29] The court noted, however, that in some cases even an

---

[24] United States v. Johnson, 991 F.2d 1287, 1291 (7th Cir. 1993); United States v. Braks, 842 F.2d 509, 511-12 (1st Cir. 1988); United States v. Dorsey, 641 F.2d 1213, 1215 (7th Cir. 1980).

[25] *Bradley*, 299 F.3d at 203.

[26] *Id.* (emphasis added).

[27] United States v. Beras, 183 F.3d 22, 26 (1st Cir. 1999) (holding that a patdown over a woman's socks, which were found to contain several bundles of cash, was warranted by reasonable suspicion because the bundles were in plain view); United States v. Gonzalez-Rincon, 36 F.3d 859, 863 (9th Cir. 1994) (finding that the patdown and partial strip search of a passenger arriving from Columbia was justified by reasonable suspicion because the woman was wearing a bulky overcoat and did not have a consistent story to explain her short trip to the U.S.); United States v. Carreon, 872 F.2d 1436, 1442 (10th Cir. 1989) (holding that the search of a person's vehicle, including the inspection of a secret compartment inside the camper by use of an electric drill was reasonable because the person was visibly nervous and the camper wall was very thick and secured by shiny, new bolts).

[28] *Anderson*, 199 F.R.D. at 259-61 (holding that one of the plaintiffs was subjected to an intrusive and, therefore, non-routine patdown when the customs officer, while over the plaintiff's clothes, "pushed her hand into [the plaintiff's] vagina six times").

[29] *Id.* at 258-59 (defining fondling as touching in a "sexual or sexually suggestive manner").

"above-clothes, aggressive" patdown will require reasonable suspicion.[30]

Considering this legal background, the district court examined Bradley's first allegation—that the patdown conducted by the customs inspector was intrusive and unjustified—and noted what it considered an "important distinction" in the language Bradley used to describe the patdown in her complaint, as opposed to her response to the defendants' motion to dismiss.[31] The court acknowledged that the kind of search Bradley described in her complaint would "embarrass" and "disgust" any woman, but found that it was not sufficiently intrusive to warrant liability against federal personnel.[32] Furthermore, the court determined that even if the search were deemed to be intrusive, the defendants "articulated objective reasons" for selecting Bradley for the search, which amounted to reasonable suspicion.[33] The district court also dismissed Bradley's equal protection claim on the grounds that the defendants provided several "legitimate, nondiscriminatory reasons" for selecting Bradley for the search.[34]

Bradley appealed the district court's decision on the grounds that the court "failed to construe the facts in the light most favorable to her," as the court was required to do since she was the non-moving party.[35] Writing for the Third Circuit, Judge Barry noted that on review, the court must apply the "same standard the lower court should have used."[36] Therefore, under the current legal scheme, the court needed to first determine whether the patdown was routine or invasive, and second, if the

---

[30] *Id.* at 259.

[31] *Bradley*, 164 F. Supp. 2d at 450. The plaintiff's brief opposing summary judgment stated that the inspector "inserted her fingers" into Bradley's vaginal area. Bradley's amended complaint asserted that the inspector "slowly rubbed her hands" and "pushed" over Bradley's vaginal area.

[32] *Id.* at 454-55.

[33] *Id.* at 450 (noting that "[u]nusual conduct. . .[and] clothing of the type where contraband had previously been found" were sufficient to establish reasonable suspicion).

[34] *Id.* at 446-47. Defendants set forth several reasons for selecting Bradley for the search: (1) she arrived on a plane that originated in Jamaica, which is a source country for narcotics; (2) the inspectors were told that another passenger on Bradley's flight was carrying narcotics; (3) she wore a hat under which drugs have been smuggled in the past; and (4) she was wearing bulky, cool weather attire, which was perceived as unusual because she was arriving from Jamaica.

[35] *Bradley*, 299 F.3d at 204.

[36] *Id.* at 200; Chisolm v. McManimon, 275 F.3d 315, 321 (3d Cir. 2001).

patdown was invasive and non-routine, whether the inspectors had reasonable suspicion to subject Bradley to the search.[37]

According to the Third Circuit, Bradley's search was *not* invasive.[38] Despite the court's acknowledgement that a "patdown gone awry" could be considered so intrusive that the reasonable suspicion standard would apply, the court reasoned that Bradley's patdown was not an intrusive search because it is "standard procedure" for inspectors to "feel over clothing for bulges" in areas known to be common places for hiding contraband.[39] The court also emphasized that, while a search resulting in penetration would require reasonable suspicion, pushing and rubbing a woman in the way Bradley described does not rise to the same level of intrusiveness.[40] Because the court found that Bradley's search fell within the class of routine searches, it stated that there was "no need" to decide whether the inspectors had a reasonable suspicion that Bradley was carrying contraband.[41]

The Third Circuit was correct in concluding that the defendants should not be held liable for the patdown conducted of passenger Bradley, but the court erred in finding the search to be routine. The district court acknowledged that Bradley's "embarrassment and even disgust" with the customs officers is "entirely understandable," and the Third Circuit conceded that this search would "no doubt [be] a disagreeable experience" for a woman.[42] Despite these negative characterizations of Bradley's patdown, the Third Circuit failed to apply the rulings of other courts of appeal, which have held that a patdown search is non-routine if it would "embarrass or offend the average traveler."[43] Furthermore, the Third Circuit failed to apply the *Anderson* court's findings that, at some point, even an "above-clothes, aggressive patdown" must be supported by the officer's reasonable suspicion that the passenger was carrying contraband.[44] Instead of holding that this embarrassing and disagreeable search was routine, the court should have held, as the district court noted,

---

[37] *Bradley*, 229 F.3d at 201-02.

[38] *Id.* at 204.

[39] *Id.* at 205.

[40] *Id.*; *cf. Anderson*, 199 F.R.D. at 260.

[41] *Bradley*, 229 F.3d at 205.

[42] *Id.*; *Bradley*, 164 F. Supp. 2d at 454-55.

[43] *See supra* note 26.

[44] *Anderson*, 199 F.R.D. at 259.

that the officers had reasonable suspicion to conduct a search to find the contraband they believed Bradley was carrying.[45]

The Third Circuit explained that customs officers must be sensitive not to abuse or misuse their power to conduct border searches.[46] Despite the court's awareness of the potential for abuse of this power, the court failed to bring Bradley's invasive search into the realm of a non-routine search that must be supported by reasonable suspicion. Instead, the Third Circuit opened the door for officers to conduct this kind of search on any woman entering the United States on an international flight for no reason whatsoever. The court stated that it did not intend for its ruling to stand for the proposition that customs officers "have free license to exceed what is reasonable and proper."[47] Yet, the court must have understood that its finding that the search was reasonable and routine, in effect, allows officers to use their fingers to inappropriately and offensively push and rub on a woman's most sensitive areas, even if they have no reason to believe the woman is attempting to smuggle contraband.

The Third Circuit was presented with ample case law[48] that would have supported a conclusion that Bradley's patdown was outside the scope of a "routine" border search but still constitutional because it was justifiable. The court's ruling in *Bradley* is an example of the highly discretionary process that courts may undertake in determining whether a challenged border search is unconstitutional. Instead of allowing lower courts to adopt their own standard of what constitutes a routine search on a case-by-case, the Supreme Court should provide a workable and understandable test. By adopting a uniform standard for classifying border searches, courts will be able to consistently and fairly determine whether a search is routine or invasive, and more importantly, customs officers will be able to appropriately evaluate what type of search they should conduct based on their level of suspicion of the passenger being considered for the search.

---

[45] *Bradley*, 164 F. Supp. 2d at 450.

[46] *Bradley*, 299 F.3d at 205.

[47] *Id.*

[48] *See supra* note 26; *see also Anderson*, 199 F.R.D. at 259.


SOUTHERN METHODIST UNIVERSITY
DALLAS, TEXAS