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STATE OF ILLINOIS
SPRINGFIELD

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FILE NO. S-1497

CRIMINAL LAW:
Strip Searches

Honorable Richard M. Baner
State's Attorney
Woodford County
Court House
Eureka, Illinois 61530

Dear Mr. Baner:

I have your letter in which you inquire as to the applicability of section 103-1 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1979, ch. 38, par. 103-1) to certain booking-in procedures for persons who are arrested for traffic, regulatory or misdemeanor offenses not involving weapons or a controlled substance, and are incarcerated in the Woodford County jail prior to the issuance of a court order. You have also asked whether the provisions of section 103-1 in any way diminish the rights of a police officer, as established by existing law, to conduct a protective weapons search of an arrested person.

With regard to your first question, it is my opinion that the provisions of section 103-1 apply to the booking-in procedures which you describe. You have informed me that the booking-in procedures followed by the Woodford County sheriff's department include a pat-down of the arrested person while he is clothed, the use of a metal detector to locate concealed weapons, and the removal of all clothing in order that a "medical information sheet" can be completed by the booking officer. Once the sheet is completed, the arrested person is given coveralls and other personal necessities and is placed in the proper jail area.

Section 103-1 provides in pertinent part:

"

* * *

> (c) No person arrested for a traffic, regulatory or misdemeanor offense, except in cases involving weapons or a controlled substance, shall be strip searched unless there is reasonable belief that the individual is concealing a weapon or controlled substance.
>
> (d) 'Strip search' means having an arrested person remove or arrange some or all of his or her clothing so as to permit a visual inspection of the genitals, buttocks, anus, female breasts or undergarments of such person.
>
> (e) All strip searches conducted under this Section shall be performed by persons of the same sex as the arrested person and on premises where the search cannot be observed by persons not physically conducting the search.

> (f) Every peace officer or employee of a police department conducting a strip search shall:
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> (1) Obtain the written permission of the police commander or an agent thereof designated for the purposes of authorizing a strip search in accordance with this Section.
>
> (2) Prepare a report of the strip search. The report shall include the written authorization required by subsection (e)(1); the name of the person subjected to the search; (2) the names of the persons conducting the search; and (3) the time, date and place of the search. A copy of the report shall be provided to the person subject to the search.
>
> * * *
>
> (j) The provisions of subsections (c) through (h) of this Section shall not apply when the person is taken into custody by or remanded to the sheriff or correctional institution pursuant to a court order."

The medical information sheet used by the Woodford County sheriff's department consists of a health questionnaire and a diagram, depicting front, back and side views of the body, on which the booking officer is to mark the location of cuts and bruises, scars, tattoos, etc. Subsection 103-1(d) above defines "strip search" to include the removal of all clothing "so as to permit a visual inspection of the genitals, buttocks, anus, female breasts * * * ". It is evident that in order to complete the medical diagram, the booking officer must fully inspect the arrested person's body, including at least some of the body parts listed in subsection 103-1(d).

Obtaining the data for the diagram on the medical information sheet would require a strip search within the plain meaning of subsection 103-1(d). Therefore, any search or inspection of the arrested person's body in order to obtain the data called for by the diagram is plainly prohibited by subsection 103-1(c) except where (a) the arrest involves weapons or a controlled substance; or (b) there is a reasonable belief that the person is concealing a weapon or a controlled substance.

As applied to arrests made for traffic, regulatory and misdemeanor offenses, the strip search provisions of section 103-1 must also be read together with two recent cases involving strip searches: People v. Seymour (1979), 80 Ill. App. 3d 221, and Tinetti v. Wittke (E.D. Wis. 1979), 479 F. Supp. 486, aff'd per curiam (7th Cir. 1980) _____ F. 2d _____.

People v. Seymour, which was decided before the passage of the strip search provisions of section 103-1, is the sole Illinois case involving a strip search of a person arrested for a misdemeanor offense. The defendant, arrested for unlawful use of a weapon, was searched upon arrest and then taken to the police station, where he was required to remove all his clothing and further searched. In invalidating

the second search, the court first held that police officers are required to inform persons arrested of their right to post immediate bail, as set by rule of the Supreme Court (see, e.g., Ill. Rev. Stat. 1979, ch. 110A, pars. 526, 528, 530), and be released. The court stated that where an arrested person has in his possession the necessary sum to post bond (as did the defendant here), he may be detained for a reasonable time to allow the police to complete their investigation and reports, but he may not be incarcerated during this time. The court also held that a strip search of an individual who is able to post bond, constitutes a violation of his right to privacy guaranteed by section 6 of article I of the Illinois Constitution of 1970.

In Tinetti v. Wittke, the Seventh Circuit Court of Appeals struck down a police department policy of routinely strip searching every person who was being detained as violative of the due process clauses of the fifth and fourteenth amendments to the Federal Constitution, and of the fourth amendment protections against unreasonable searches. The court held that a person arrested for a minor traffic violation who is being incarcerated due to his inability to post bond may not be strip searched unless there is a justifiable basis to believe he is concealing contraband or a weapon.

You have also asked whether the provisions of section 103-1 in any way diminish the right of a police officer, as established by existing law, to conduct a protective search of an arrested person. In order to answer your question, it is useful to review the existing law relating to protective searches incident to an arrest.

The rights of a police officer to conduct a search of a person arrested without a warrant, are set forth in section 108-1 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1979, ch. 38, par. 108-1), which states:

> "When a lawful arrest is effected a peace officer may reasonably search the person arrested and the area within such person's immediate presence for the purpose of:
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> (a) Protecting the officer from attack; or
>
> (b) Preventing the person from escaping; or
>
> (c) Discovering the fruits of the crime; or
>
> (d) Discovering any instruments, articles, or things which may have been used in the commission of, or which may constitute evidence of, an offense."

The scope of a valid search incident to a lawful arrest was stated by the United States Supreme Court in Chimel v. California (1969), 395 U.S. 752, 762, 89 S.Ct. 2034, 23 L. Ed. 2d 685, as follows:

> "When an arrest is made, it is reasonable for the arresting officer to search the person

> arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. * * * "

Under the terms of section 108-1, where a lawful arrest has been effected, a police officer may "reasonably" search the arrested person. The general rule is that an officer may make a full search of the individual's person, including a pat-down and a search of the pockets and clothing. United States v. Robinson (1973), 414 U.S. 218, 235, 94 S.Ct. 467, 38 L. Ed. 2d 247; People v. Jones (1977), 56 Ill. App. 3d 414, 417; People v. White (1977), 51 Ill. App. 3d 155.

It is my opinion that the provisions of section 103-1 do not limit the rights of a police officer under case law, to conduct a protective weapons search which includes a pat-down and a search of the pockets and outer clothing of the arrested person. Furthermore, where the officer discovers a weapon, or an object which he suspects is a weapon, the statute does not affect his right to reach into the person's clothing to retrieve it. Terry v. Ohio (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L. Ed. 2d 889.

The statute does, in my opinion, place restrictions on searches which go beyond these bounds. Notably, an in-

spection of an arrested person's undergarments is a strip search within the meaning of subsection 103-1(d), and therefore may not be conducted unless the procedural requirements of subsections 103-1(e) and 103-1(f) are complied with. In this regard, insofar as subsection 103-1(f) states that written permission must be obtained before a strip search may be conducted, it effectively precludes a police officer from examining the arrested person's underclothing as part of a protective search carried out in the field.

Further, where an arrest has been effected for a traffic, regulatory or misdemeanor offense not involving weapons or a controlled substance, in order for a strip search to be carried out there must exist, in addition to probable cause to make the arrest, a reasonable belief that the arrested person is concealing weapons or a controlled substance. (Ill. Rev. Stat. 1979, ch. 38, par. 103-1(c).) The requirement of additional justification to conduct a strip search in these circumstances is a departure from the doctrine of United States v. Robinson (1973), 414 U.S. 218, 94 S.Ct. 467, 38 L. Ed. 2d 247, and Gustafson v. Florida (1973), 414 U.S. 260, 94 S.Ct. 488, 38 L. Ed. 2d 456, where the United States Supreme Court held that where an arrest is based on probable cause, a search incident to the arrest

requires no additional justification. It is, however, consistent with Tinetti v. Wittke (E.D. Wis. 1979), 479 F. Supp. 486, aff'd per curiam (7th Cir. 1980) _____ F. 2d _____, where the court stated that in the case of arrests for minor traffic offenses, a strip search cannot be conducted as a search incident to arrest unless there is a justifiable basis to believe the person is concealing weapons or contraband.

Very truly yours,

ATTORNEY GENERAL