

State v. Battle

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Peek-a-boo Searches Revisited

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We start off today's legal update with some bad news. You may recall that the legal office sponsored a contest last summer¹ to find a new term for certain types of "strip searches" that aren't really strip searches. In these types of searches, suspects are not completely unclothed, but a search is done of the inside of the undergarments to look for hidden contraband or weapons. After millions of entries² were sorted through, the legal office settled on calling these types of searches "peek-a-boo searches."³

We were confident after making this important declaration that the term would spread like wildfire and become a widely accepted part of American jurisprudence. It seemed a certainty that peek-a-boo searches would be the subject of learned legal treatises, hotly debated in courtrooms around the country, and taught in reputable law schools everywhere leading to fame and fortune for your very own legal adviser. I was preparing for talk show appearances, celebrity "Legal Question of the Week" signings, and a phone call from the President asking if I would do him the privilege of serving as the 10th United States Supreme Court Justice.⁴

Unfortunately, the phrase hasn't caught on yet. Check out the following paragraph from the N.C. Court of Appeals in their recent decision in State v. Battle:⁵

"We first note that neither the United States Supreme Court nor the appellate courts of this state have clearly defined the term 'strip search.' However, the United States Supreme Court has stated:⁶ 'The exact label for this [type of search] is not important,⁷ though 'strip search' is a fair way to speak of it. . .' We further note that the attorneys for both the State and Defendant referred to the search of Defendant as a 'strip search' at the suppression hearing, and we will refer to the contested search as a 'strip search.'"⁸

¹ See 2 LQOW 16 ("School Strip Searches," 07/16/09) and 2 LQOW 17 ("Brouhaha Law," 07/31/09) for details. While I'm talking about old legal updates, some questions arose this week about DWI vehicle seizures. Do YOU know when a vehicle should be seized? If not, go back and read 1 LQOW 4, ("Drunks Drive the Best Cars," 07/18/08.) If you don't know where to find old legal updates, contact me and I will show you.

² Give or take a million or two.

³ The idea behind this terminology was to make this type of search sound less intrusive in hopes that more of them would be upheld in our appellate courts.

⁴ I would have turned him down, of course. Why would I want to leave the High Point Police Department?

⁵ COA 09-201 (February 16, 2010).

⁶ In Safford v. Redding, 557 U.S. ___ (2009), the case that was the subject of my legal update last summer.

⁷ What?! Not important?!

⁸ Noooooo!

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So obviously we've got some more work to do on the legal terminology front. Tell your friends, call your congresspersons, mention "peek-a-boo" searches in as many casual conversations as possible. No one said changing the world was going to be easy – get to it!

But enough about my personal dreams and ambition, let's look at this most recent court opinion about peek-a-boo searches, State v. Battle. Here are the facts according to the North Carolina Court of Appeals: A confidential, reliable informant told Granville County Sheriff's Detectives that Glen Murfree,⁹ Antonio Evans, and our defendant Kim Battle would be going to Durham to buy an ounce to an ounce and a half of cocaine and returning at a certain time by a certain route in a certain car. The detectives had probable cause to arrest Murfree, who happened to be the driver, on a prior drug offense so they stopped the vehicle and arrested him.

The officers noticed many small Ziploc bags in the driver's side door. They searched Murfree and the male passenger and found nothing else. A female officer then asked Battle to stand between the opened front and rear passenger doors of the officers' SUV between the body of the SUV and the officer. A pat-down of Battle turned up nothing so the officer asked Battle to pull her bra away from her body and shake it,¹⁰ and then the officer opened the front of Battle's pants and pulled her underwear away from her body. Inside Battle's underwear was a crack pipe and a folded five-dollar bill which contained a small amount of heroin.

The trial court denied Battle's motion to suppress, finding that the officers had probable cause to search her and that the search was conducted reasonably. After her motion was denied, Battle pled guilty while reserving her right to appeal. Upon her appeal, the Court of Appeals...well, they....umm, here is where it gets a little confusing, so we need some background.

The North Carolina Court of Appeals is made up of 15 judges that sit in rotating panels of three to hear each appeal. Therefore, each case is generally decided by three judges who look at the record, hear oral arguments when necessary, and then "vote" to determine the outcome. If all three vote the same way, there is no appeal to the N.C. Supreme Court unless the Supreme Court decides to hear the case ("grants certiorari") for some reason. However, if there is one dissenter, the loser can appeal to the N.C. Supremes. Usually, there will be one written opinion that spells out the decision of the majority as well as the rationale behind their decision.

In the Battle case, however, a strange thing happened. All three judges agreed that the evidence should have been suppressed, but none of the three agreed on why that was the proper result. Judge McGee wrote a massive 41-page opinion, citing all kinds of legal authority and setting out her reasons for finding the search unconstitutional. Judge Steelman, on the other hand, wrote an opinion consisting of two sentences and Judge Jackson agreed with the result only, but wrote no opinion at all!

Legally speaking, the fact that there is no "majority opinion" of the court means that the Battle case has little precedential authority. In other words, the specific result stands in Battle's fact situation, but the case sheds no real authority on how the court would rule on facts that differ slightly from the ones in this case. However, in looking at Judge McGee's analysis of the case law in this area, we can draw some general conclusions about the constitutionality of peek-a-boo searches.

⁹ I always thought this was spelled with a "ph" instead of an "f."

¹⁰ The bra, not the body. The defendant apparently testified in the motion to suppress that rolling papers fell out of her bra, but none of the officers mentioned this. That's the least of the weirdness connected with this case, however, as you'll soon find out.

Let's summarize some of the major cases in this area of law:

The U.S. Supreme Court held last summer in Safford v. Redding, that a peek-a-boo search of a 13-year old female student in the school nurse's office for prescription strength ibuprofen was unconstitutional. The Court pointed out that the ibuprofen was not an especially dangerous form of contraband and there was no particularized suspicion¹¹ that the contraband would specifically be found in the student's undergarments.

Closer to home, the N.C. Supreme Court upheld a roadside peek-a-boo search of a drug suspect in State v. Smith.¹² In Smith, an officer received a tip from a confidential and reliable informant that Smith was carrying a large amount of currency and was on his way to buy cocaine. The informant gave additional information about where the defendant would go to package the cocaine for sale and "that he would have the cocaine concealed in his crotch, or under his crotch."

Based on that information, officers stopped the defendant's vehicle and conducted a search of the defendant on the roadside at approximately 1:30 a.m. which involved shining a flashlight on the defendant's private parts, and "reaching underneath the defendant's scrotum to retrieve what was later confirmed to be cocaine."¹³ The Court upheld this search as reasonable.¹⁴

There have also been two recent cases in the N.C. Court of Appeals concerning peek-a-boo searches based on consent. In State v. Stone,¹⁵ officers asked for consent to search a suspect in the parking lot of an apartment complex at approximately 3:30 a.m. The defendant gave consent but when the officer pulled the front of the defendant's waistband out and shined his flashlight down his pants, the defendant objected. The Court ruled that the officer had exceeded the scope of the defendant's consent because a reasonable person would not have believed he was giving consent for a search that intrusive.¹⁶

Finally, in State v. Neal,¹⁷ a peek-a-boo search was upheld as constitutional based on consent when the officer asked the defendant to consent to a "more thorough" search. The defendant was taken into a restaurant restroom and was asked to lift her shirt, then unzip her pants and lower them. She was then asked to lower her underwear and when she did so a bag of cocaine fell out. The Court upheld this search, pointing out that a reasonable person would have understood that the police intended to conduct a "strip search." The Court also based its opinion on the fact that the defendant was very cooperative during the search and had never expressed any misgivings about the scope of the search.¹⁸

¹¹ Remember that reasonable suspicion is all that is required for school related searches because of New Jersey v. T.L.O., 469 U.S. 325 (1985). As a result, in a school setting, reasonable suspicion that "dangerous" contraband would be found in the undergarments would probably suffice, while probable cause would be needed outside the schools.

¹² 118 N.C. App. 106 (1995), *rev'd for reasons stated in the dissenting opinion*, 342 N.C. 407 (1995).

¹³ Ah, the glamorous life of a law enforcement officer.

¹⁴ Judge McGee stated in her Battle opinion that the Smith ruling did not apply to the search in Battle because the officer in Smith had very specific information about the defendant's actions and specific information that the defendant would be carrying contraband in his crotch. The officer in Battle had no specific information about Battle's actions or any information about Battle carrying contraband in her undergarments.

¹⁵ 179 N.C. App. 297 (2006).

¹⁶ Judge McGee wrote the majority opinion in Stone. Judge Steelman wrote a dissenting opinion stating that he would have upheld the consent search in Stone. Judge Steelman's two sentence opinion in Battle stated that if the less-intrusive search in Stone conducted with "at least questionable consent" were unconstitutional, then the more intrusive search done in Battle with no consent could not be constitutional.

¹⁷ 660 S.E.2d 586 (2008).

¹⁸ For those of you keeping score at home, Judge McGee and Judge Steelman were not on the panel that heard the Neal case.

Based on these four cases, you can see that this is still a somewhat amorphous area of the law. However, as your legal advisor, I hereby give you the following advice when you want to conduct a peek-a-boo search:

1. Try to get consent for the search. Make sure the suspect understands what the scope of the search is going to be. Try to conduct the search in a reasonable manner and do it in a reasonable place so as to protect the dignity of the suspect. If the suspect resists, it is no longer a consent search.
2. If you are conducting a search based on probable cause, a peek-a-boo search conducted on the roadside is probably only going to be upheld where you have probable cause that contraband will be found in the undergarments specifically OR you have some exigent circumstances that justify not waiting until the search could be conducted in a more discreet location. Possible exigent circumstances would include evidence that the person will attempt to destroy the evidence or that the manner in which the evidence is concealed will endanger the health of the suspect. If no exigent circumstances are present and there is no specific evidence of contraband in the undergarments, you should only conduct a peek-a-boo search in a private, discreet location.
3. Peek-a-boo searches conducted incident to arrest should only be done in a private location absent some overriding exigent circumstance like those mentioned above.

So there you have it – a clear synopsis of when peek-a-boo searches can be conducted. Now if I can only figure out how to post this legal update without setting off the filtering program on my computer or winding up on a pornography search engine since I've used the words strip, scrotum, and peek-a-boo in the same article, not to mention crack.

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ABOUT THE AUTHOR: Brian Beasley is the Legal Advisor for the High Point Police Department. This legal update is provided free of charge to the SR&S Webpage in the hopes that officers across the state would be able to benefit from it. Brian is not an attorney with Smith, Rodgers, & Strickland, PLLC but he thinks they're pretty cool guys.



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