

Department of Legislative Services
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FISCAL AND POLICY NOTE

House Bill 1189
Judiciary

(Delegate Glass)

Public Safety - Inappropriate Search of Minor by Public Servant - Penalties

This bill prohibits a “public servant” from conducting an “inappropriate search” of a minor without (1) probable cause that the minor is concealing contraband or a weapon or (2) the consent of the parent or guardian of the minor. Violators are guilty of a misdemeanor and subject to imprisonment for up to one year and/or a maximum fine of \$4,000.

A “public servant” is (1) an officer, employee, or agent of the United States, the State, a branch/department/agency of the State or the United States; (2) another person acting under contract with a branch, department, or an agency of the State or the United States for the purpose of providing a security or law enforcement service; or (3) another person acting under color of federal or State law. An “inappropriate search” means intentionally, knowingly, or recklessly touching or viewing bodily areas, including sexual organs, anus, buttocks, and chest.

Fiscal Summary

State Effect: Potential minimal increase in general fund revenues from fines imposed in the District Court. Potential minimal increase in general fund expenditures as a result of the bill’s incarceration penalty.

Local Effect: Potential minimal increase in local revenues from fines imposed in circuit court cases. Potential minimal increase in local expenditures due to the bill’s incarceration penalty.

Small Business Effect: None.

Analysis

Current Law:

Searches and Seizures

The Fourth Amendment of the U.S. Constitution, as applied to the states through the Fourteenth Amendment, protects individuals from unreasonable searches and seizures. The U.S. Supreme Court has held that a police officer may stop and frisk an individual if the officer has reasonable suspicion (a lower threshold than probable cause for an arrest) that the individual has committed or is in the process of committing a crime. The permitted “frisk” involves a pat down of the individual to ensure that the individual is not armed and to preserve evidence.

In 2007, the Court of Appeals in the case of *Paulino v. State*, 399 Md. 341 articulated the perimeters of what constitutes a strip search, a body cavity search, and when the police may conduct such activity incident to an arrest. In *Paulino*, the Court of Appeals held (with three dissenting judges) on Fourth Amendment grounds that, “. . . the Court must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. The police officers’ search of an arrestee is unreasonable when the officers conduct a highly intrusive search in the parking lot of a public business in the presence of others and there were no exigent circumstances requiring an immediate search.”

Paulino also cited definitions of terms from a U.S. Court of Appeals for the First Circuit case. In *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985), n. 3, the court said:

A “strip search,” though an umbrella term, generally refers to an inspection of a naked individual, without any scrutiny of the subject’s body cavities. A “visual body cavity search” extends to a visual inspection of the anal and genital areas. A “manual body cavity search” includes some degree of touching or probing of body cavities.

Federal Preemption

Under the supremacy clause of the U.S. Constitution, federal law overrides (preempts) state law. Preemption can be express (*i.e.*, the federal law states that it preempts state law) or implied, such as when there is an actual conflict between the two laws, when the state law presents an obstacle to the enforcement or intent of the federal law, or when the state law involves a subject matter that is so pervasively regulated by the federal government that the federal government is thought to “occupy the field” of that area of law.

Under the Federal Aviation Act (FAA), the Under Secretary of Transportation for Security is required to provide for the screening of all passengers and luggage that will be carried aboard passenger aircraft in the United States. The federal government has required the mandatory search of all passengers and carry-on luggage since 1973. Federal courts have ruled on several occasions that the screening of airport passengers is not subject to the warrant and probable cause requirements of the Fourth Amendment. However, the legal reasoning used to reach these conclusions has varied among the cases.

Sexual Offenses

The crime of fourth degree sexual offense prohibits a person from (1) engaging in sexual contact with another without the consent of the other or (2) engaging in a sexual act or vaginal intercourse with a victim who is age 14 or 15 and the defendant is at least four years older than the victim. Fourth degree sexual offense is a misdemeanor and carries maximum penalties of imprisonment for one year and/or a fine of \$1,000. There is a three-year statute of limitations for prosecution of a fourth degree sexual offense involving a person in a position of authority or sexual contact with a minor without the consent of the minor.

Under the State's prohibition against third degree sexual offense, a person may not:

- (1) engage in sexual contact with another without the consent of the other and (2) employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon; suffocate, strangle, disfigure, or inflict serious physical injury on the victim or another in the course of committing the crime; threaten, or place the victim in fear, that the victim, or an individual known to the victim, imminently will be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; or commit the crime while aided and abetted by another;
- engage in sexual contact with another if the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know of the victim's condition;
- engage in sexual contact with another if the victim is younger than age 14, and the person performing the sexual contact is at least four years older than the victim;
- engage in a sexual act with another if the victim is age 14 or 15, and the person performing the sexual act is at least age 21; or
- engage in vaginal intercourse with another if the victim is age 14 or 15, and the person performing the act is at least age 21.

A violator is guilty of the felony of third degree sexual offense and subject to imprisonment for a maximum of 10 years.

Background:

Airport Security

The U.S. Transportation Security Administration (TSA) is a division of the U.S. Department of Homeland Security and has jurisdiction over national aviation security. TSA oversees the airport security program, which requires airport operators to implement measures to ensure the safety and security of persons and properties in the air and airport areas. Among other things, TSA screens more than 1.7 million passengers per day at more than 450 airports nationwide; screens checked bags for explosives; conducts air cargo screening on domestic and international-outbound passenger aircraft; and implements daily background checks on over 15 million transportation-related employees. In accordance with federal law, TSA is responsible for screening all commercial airline passengers and baggage.

BWI Marshall Airport and Martin State Airport (MTN) are the two airports currently owned by the State. Security at BWI Marshall Airport is currently provided by TSA, Maryland Transportation Authority (MDTA) police, and Akal Security, a private contractor; TSA conducts security screening of passengers and luggage in accordance with federal law, MDTA provides law enforcement services, and Akal Security provides unarmed security services.

TSA has sole authority for all aspects of passenger and luggage screening at BWI Marshall Airport. Any potential contract, lease, or agreement to perform security screening at BWI Marshall Airport must be implemented by TSA. The same TSA security protocols and standards that are implemented at all commercial airports nationwide must be implemented at BWI Marshall Airport.

MDTA police provide law enforcement services for the airport roadways, terminals, and airfields at BWI Marshall Airport in accordance with a Memorandum of Agreement (MOA) with the Maryland Aviation Administration (MAA). This MOA is reviewed annually.

Passenger and luggage screening does not currently take place at MTN. Security services at the airport and the surrounding area are provided by the National Guard, private security firms, and Baltimore County police. TSA does not have a passenger screening program at MTN because there is no regularly scheduled commercial air service; however, MAA meets quarterly with TSA on safety and security requirements for MTN.

TSA Searches

Controversy arose in 2010 and 2011 when the TSA implemented new search procedures at airports. Under the new procedures, passengers could be subject to more extensive pat-down searches or full body scans using more advanced imaging scanners. According to some news reports and posted online videos, some infants and children were subjected to pat down searches and elderly passengers were subject to strip searches.

State Revenues: General fund revenues may increase minimally as a result of the bill's monetary penalty provision from cases heard in the District Court. It is assumed that the prosecution of cases under the bill is limited to actions that are beyond the scope of duties of affected State personnel and are not covered by existing criminal statutes.

State Expenditures: General fund expenditures may increase minimally as a result of the bill's incarceration penalty due to more people being committed to State correctional facilities for convictions in Baltimore City. The number of people convicted of this proposed crime is expected to be minimal. It is assumed that the prosecution of cases under the bill is limited to actions that are beyond the scope of duties of affected State personnel and are not covered by existing criminal statutes.

Generally, persons serving a sentence of one year or less in a jurisdiction other than Baltimore City are sentenced to a local detention facility. The Baltimore City Detention Center, a State-operated facility, is used primarily for pretrial detentions.

Under the Maryland Tort Claims Act (MTCA), State personnel are immune from liability for acts or omissions performed in the course of their official duties, so long as the acts or omissions are made without malice or gross negligence. Under MTCA, the State essentially waives its own common law immunity. However, MTCA limits State liability to \$200,000 to a single claimant for injuries arising from a single incident. MTCA covers a multitude of personnel, including some local officials and nonprofit organizations. In actions involving malice or gross negligence or actions outside of the scope of the public duties of the State employee, the State employee is not shielded by the State's color of authority or sovereign immunity and may be held personally liable.

In fiscal 2012, the State Insurance Trust Fund (SITF) paid \$9.7 million for tort claims under MTCA. The Governor's proposed fiscal 2015 State budget includes a \$7.36 million appropriation for tort claims (including motor vehicle torts) under MTCA. The funds are to be transferred to SITF. While the bill may result in additional payments for civil tort claims, it is not expected to materially affect payments of tort claims under MTCA.

The Department of Juvenile Services (DJS) advises that while the department does not anticipate a fiscal impact from the bill, the bill may prohibit DJS staff from conducting appropriate searches to maintain the security of youth, staff, and the community.

Local Revenues: Revenues may increase minimally as a result of the bill's monetary penalty provision from cases heard in the circuit courts.

Local Expenditures: Local expenditures may increase minimally due to the bill's incarceration penalty. Though the bill's provisions may result in an increase in the number of civil lawsuits filed against local employees for actions deemed criminal under the bill, it is assumed that any increase in civil litigation as a result of the bill does not materially affect local finances.

The Local Government Tort Claims Act (LGTC) defines local government to include counties, municipal corporations, Baltimore City, and various agencies and authorities of local governments such as community colleges, county public libraries, special taxing districts, nonprofit community service corporations, sanitary districts, housing authorities, and commercial district management authorities.

LGTC limits the liability of a local government to \$200,000 per individual claim and \$500,000 per total claims that arise from the same occurrence for damages from tortious acts or omissions (including intentional and constitutional torts). It further establishes that the local government is liable for tortious acts or omissions of its employees acting within the scope of employment, so long as the employee did not act with ill will or improper motivation ("actual malice"). Thus, LGTC prevents local governments from asserting a common law claim of governmental immunity from liability for such acts or omissions of its employees.

Additional Comments: This analysis assumes the bill does not impact the passenger and luggage screeners and operations at BWI Marshall Airport, as these services are under the exclusive jurisdiction of the federal government. Screening of passengers and luggage must be conducted by TSA in accordance with federally determined procedures and protocols.

Additional Information

Prior Introductions: HB 1010 of 2013 and HB 1106 of 2012 received unfavorable reports from the House Judiciary Committee.

Cross File: None.

Information Source(s): Baltimore, Charles, Frederick, and Montgomery counties; Department of Natural Resources; Department of General Services; Judiciary (Administrative Office of the Courts); Department of Juvenile Services; Office of the Public Defender; Department of Public Safety and Correctional Services; State's Attorneys' Association; Maryland Department of Transportation; University System of Maryland; American Jurisprudence 2d; *Fordham Law Review*; TIME.com; denverpost.com; Department of Legislative Services

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