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STUDENT SEARCH AND SEIZURE 2008: VIDEO CAMERA SURVEILLANCE

Overview

In the aftermath of a recent spate of school shooting tragedies, and because of near riot situations in a growing number of public high school buildings and at interscholastic high school athletic events, the safety and security of staff and students are top priorities for local school boards. A review of recent case law from around the country reveals that in these tumultuous times courts in several jurisdictions have been busy deciding constitutional issues involving the tenuous balance that exists between the prerogatives of public school officials to maintain safe, secure, and disruption-free school environments and the scope of student rights and protections under the Fourth Amendment. One issue area that recently has emerged involves an increase in the use video cameras to provide surveillance of school buildings and grounds, school buses, and extra-curricular events.

Surveillance Cameras at School. Simply stated *surveillance* means to keep watch, or watch over in an effort to see or keep track of what happens in a particular place. BLACK'S tells us that the term means to closely observe or listen in hope of gathering evidence. (Seventh Edition, 1999) In recent years public school systems have integrated the use of video cameras on school buses and in school owned buildings to increase safety and security. Video cameras have proved helpful in the early identification of trespassers and in monitoring student behavior. At the same time, however, the use of cameras inside school buildings (especially in monitoring classrooms and locker rooms) has raised a number of privacy oriented questions. For purposes of assessing constitutional protections against unreasonable searches and seizures, video surveillance of students is considered a search within the meaning of the Fourth Amendment.

Student Privacy 2008. It is an established tenet of education law that students possess a “reasonable expectation of privacy” while at school and in attendance at school sanctioned activities. Watkins v. Millennium School (S.D. Ohio 2003) The general rule is that the Fourth Amendment protects an individual in the places where he/she can demonstrate a reasonable expectation of privacy. However, because public school officials have a legitimate interest in maintaining safety and discipline in schools, the privacy expectations of students are limited. Doe ex rel. Doe v. Little Rock School District (8th Cir. 2004)

In recent months it seems that more courts are expanding the prerogatives of public school officials to conduct searches of students and their belongings and take a variety of other more intrusive steps in school buildings and at school sponsored events to maintain a safe environment. Thus, a major question has been raised but at this point in time remains unanswered. *How far can public school officials go in the name of increasing school security before they run afoul of the Fourth Amendment?*

The purpose of this commentary is three fold. First, a brief restatement of basic principles of public school search and seizure law will be discussed. Second, a brief review of a recent court decision involving the use of surveillance video cameras in a public school will be presented as an excellent primer regarding Fourth Amendment law. Finally, implications for local school board policy will be suggested.

Restatement of the Law

As the Appellate Court of Connecticut recently stated, the Fourth Amendment does not proscribe all state-initiated searches and seizures, it merely proscribes those which are unreasonable. State v. State (Conn. App. 2008) More than two decades ago the United States Supreme Court clearly established in New Jersey v. T.L.O. (1985), that the Fourth Amendment's "unreasonable searches and seizures" provision is applicable to public school officials and personnel when dealing with students. However, it must be remembered that "the unique need to maintain a safe learning environment requires a lessening of the restrictions normally imposed for public officials to conduct searches." Bosher, Kaminski, and Vacca (2004)

The ultimate measure of the constitutionality of a school search is one of *reasonableness*, and what is or is not reasonable depends on the context within which the search takes place. Shuman ex rel. Shertzer v. Penn Manor School District (3rd Cir. 2005) Thus, a determination of the reasonableness of a school search must be adjudged according to the circumstances existing at the time of the search. Des Roches by Des Roches v. Caprio (4th Cir. 1998) In addition, the Fourth Amendment's reasonableness inquiry must take into account the overall purpose that school officials are trying to achieve in conducting the search, Bravo ex rel. Ramirez v. Hsu (C.D. Cal. 2005), and the school's "custodial and tutelary responsibilities over students entrusted in their care." Shade v. City of Farmington (8th Cir. 2002) and Johnson v. City of Lincoln Park (E.D. Mich. 2006) Also, school searches must not be "excessively intrusive in light of the age and sex of the student and the nature of the infraction." Carlson ex rel. Stucznski v. Bremen High School District (N.D. Ill. 2006)

The *reasonableness* standard created by the United States Supreme Court in New Jersey v. T.L.O. (1985) remains in place. Courts in every jurisdiction consistently apply the following two-pronged standard of analysis in determining whether or not a school initiated student search passes constitutional muster:

1. *Was the school search reasonable at its inception?* More specifically, did school officials launch the search based on reason to believe (i.e., have *reasonable suspicion*) that present in the situation at hand is something illegal and/or a violation of school system policies?
2. *Did the search as it moved forward remain reasonable in scope* (i.e., remain within the purpose and scope of the initial reasonable suspicion for launching the search)?

Contemporary courts consistently apply both the *procedural safeguards and precautions* set forth in Vernonia School District v. Acton (1995), involving random drug testing (urine analysis) of athletes, and the *special needs exception* articulated by the United States Supreme Court in Board of Education v. Earls (2002), involving random drug testing of students as a precondition of involvement in extra curricular activities. In Earls, Justice Thomas declared that the privacy interests of students are limited in the public school

environment where school officials are responsible for maintaining discipline, health, and safety. In essence, the Court established that because of the “special needs” of the public school environment school officials do not need to wait for a serious problem (in *Earls* it was drugs in schools) to exist before they take action to keep it from happening. The Court does stress, however, the need to protect student anonymity (confidentiality) and also to control the intrusive nature of the search. On a related point of law, courts have consistently held that while “individualized suspicion” is helpful to have prior to conducting a search, it is not an indispensable element in establishing reasonable suspicion. *Beckham* (2005)

A third established point of law that remains in place deals with the courts consistently separating *school searches* (i.e., searches initiated by and remaining under the control of public school officials where the standard is “reasonable suspicion”), from *police searches* (i.e., searches initiated by and remaining under the control of police officers, where the standard to apply is “probable cause”). However, some recent courts have held that the search of a student on school grounds by a school resource officer (SRO) at the request of school officials should be deemed a school search and thus is subject to a reasonableness standard and not a probable cause standard. *Wilson ex rel. Adams v. Cahokia School District No. 187* (S.D. Ill. 2007)

It should be noted that the mere presence of a law enforcement officer during a school administrator’s questioning of a student does not make the situation a police matter. The rule is that a public school student involved in a school controlled search is not automatically entitled to a *Miranda*-type warning prior to being questioned by a school principal. *J.D. v. Commonwealth* (Va. App. 2004) On a related point of law, courts have consistently held that confrontation and cross-examination of witnesses against a student, and a student being represented by legal counsel are, as a general rule, not mandatory. *Horner and Vacca* (2005)

Recent Case Law Example

A court decision from the United States Court of Appeals for the Sixth Circuit is very instructive regarding video camera surveillance and student privacy interests under the Fourth Amendment. The case also demonstrates the tenuous balance that must be created and maintained between the reasonable privacy expectations of students and the critical need for today’s public school officials to increase and maintain school security.

The Facts: *Brannum v. Overton County School Board* (6th Cir. 2008), does not involve searching students or their belongings; rather, the case involved issues stemming from the use of video surveillance equipment in a public middle school building. The equipment was installed by school officials to improve school security.

To improve security video cameras were installed throughout the school building in areas facing exterior doors, in hallways leading to exterior doors, and in the boy’s and girl’s locker rooms. Images captured by the cameras were transmitted to an assistant principal’s office where they were displayed and stored. Subsequently it was discovered that cameras were videotaping locker room areas in which students routinely dressed for athletic activities. The assistant principal notified the principal of this situation but the camera location were not changed.

In addition to the images being sent to the assistant principal’s office they also were accessible via remote internet connection. Any person with access to the software username, password, and Internet Protocol (IP) address could access the stored images. Neither the assistant principal nor anyone else had changed the system password or user name from its default setting. Between July 12, 2002, and January 10, 2003, the system was accessed ninety-eight different times.

From July 2002 to January 2003, a number of Overton County Schools and schools from surrounding counties used the locker rooms for athletic events. During a girl's basketball game on January 8, 2003, visiting team members noticed the cameras and told their coach. The coach questioned the school principal who assured the coach that the cameras were not activated. This was not accurate and the images of team members in their undergarments had been recorded. Subsequently the video tape was reviewed by school officials who concluded that the images of the 10 to 14 year old girls contained "nothing more than images of a few bras and panties." Later that day the cameras were removed.

Ultimately, thirty-four middle school students filed a 42 U.S.C. section 1983 suit in federal district court. In their law suit they alleged that school officials violated their privacy by installing the video cameras in the locker rooms and by viewing and retaining the tapes. School officials moved for summary judgment claiming qualified immunity, but their motion was denied. On appeal school officials conceded to the students' version of the facts, but only raised the issue of the students' right to privacy from videotaping under the Fourth Amendment.

The Decision: In reaching its decision the Sixth Circuit made it clear that the right to privacy claimed by the students "is one protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, and that in this case, the defendants violated the students' rights under the amendment." Citing Vernonia School District v. Acton (1995) and New Jersey v. T.L.O. (1985) the Court reiterated the Supreme Court's holding that "the Fourth Amendment applies in the public school context to protect students from unconstitutional searches conducted by school officials." However, said the Court, because Fourth Amendment rights are different in public schools "the ultimate measure of constitutionality of such searches is one of 'reasonableness.'"

Applying the 2-pronged T.L.O. standard to the facts in this case the Sixth Circuit concluded that the videotaping of students was justified at its inception (*i.e.*, reasonable grounds to believe that the search, to increase school security, would garner evidence of violations of law or school rules). However, the scope and manner in which the video surveillance was conducted was the problem. The Sixth Circuit compared the secret surveillance in this case, where children were observed in their undergarments, as being like a strip search situation. Because students were unaware that they were being taped, the locker room taping was very intrusive and significantly invaded the students' reasonable expectations of privacy. In remanding the case, the appellate court concluded that the students in this case had a reasonable expectation of privacy and the invasion of the students' privacy was not justified by the school's need to assure security." Thus, the locker room videotaping was unreasonable in scope and violated the students' Fourth Amendment.

The Sixth Circuit Court ruled that the district court had correctly denied summary judgment to school officials. However, it is important to point out that individual school board members and the Director of Schools were granted qualified immunity. In the Court's view, there was no indication that they either authorized or were aware of the locker room videotaping. Their role and involvement was limited to the general decision to improve school security by installing video equipment.

Policy Implications

As indicated above in Brannum (2008), the intent of placing video cameras in a middle school building was to increase security. Some readers might have been surprised by the fact that this case involved the surveillance of such young students. Recent (2006-2007) statistics show that while there has been an overall reduction in reports of serious violent crimes committed in public schools at all levels across this country, middle schools were nonetheless cited as the "most violent." (Indicators of School Crime and Safety: 2007)

As more communities are insisting that local boards of education do all that is necessary to make school buildings, classrooms, playgrounds, parking areas, school buses, bus stops, and interscholastic activities safer and more secure, the use of surveillance equipment will undoubtedly become more popular; especially as the technology improves and the price is made more reasonable. It therefore follows that policies will need to be formulated and implemented to accommodate the use of newly installed surveillance technology. What follow are some suggestions to consider as the policy formulation process moves forward. School system policies must make it clear that:

- The Board recognizes and accepts its legal duties, responsibilities, and prerogatives to do all that is necessary to protect the safety, security, and general welfare of all students.
- The Board and school administration will proactively work to (a) provide a safe and secure environment for all students, and (b) keep the educational environment disruption free and conducive to teaching and learning.
- The Board recognizes, respects, and will work to protect the Fourth Amendment rights and privacy expectations of all students.
- The Board will seek to fully inform all students and their parents of security programs and procedures prior to their implementation.
- Students at all grade levels in the school system, as well as all school personnel and visitors to school buildings and school sponsored events, can expect to be subject to security programs and procedures when entering school buildings and grounds, or while in attendance at school sponsored functions and interscholastic athletic events.
- The installation, placement, location and use of video cameras as security measures, and the collection, storage, and viewing of all video tapes, will be accomplished by authorized school officials through reasonable, least intrusive, confidential, and secure means.

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Note: The views expressed in this commentary are those of the author.