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SEARCH AND SEIZURE 2014: LEGAL AND POLICY ISSUES

Overview

As the Fourth Amendment to the United States Constitution states in relevant part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....” In recent years public school officials have spent countless hours dealing with legal and policy issues growing out of situations involving student search and seizure and the Fourth Amendment.

Beginning in the mid-1970s and moving through the mid-1980s public school administrators across this country were being called upon “to search students and their property, principally for harboring or dealing in drugs.” (Vacca and Boshier, 2012) Because a growing number of these searches raised a question regarding the applicability of the Fourth Amendment to the United States Constitution they found their way into court where, as a general rule, final decisions were inconsistent. A uniform judicial standard was needed to specifically address public school administrator- not police- initiated searches. This was accomplished when the United States Supreme Court handed down New Jersey v. T.L.O. (1985)—its first public school student-related search decision.

The T.L.O Standard. Emphasizing that students do not forfeit their Fourth Amendment protections or waive their privacy interests and expectations simply because they enter school property, Justice White also made it clear that student privacy interests and expectations must be balanced against the fact that school officials (as government agents) possess a “legitimate need to maintain an environment in which learning can take place.” In his view, while “[m]aintaining order in the classroom has never been easy.... in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in schools have become major problems....” Because school officials are different from the police they need “a certain degree of flexibility in school disciplinary procedures....” To enable this the standard created by the Court to apply in school administrator-initiated searches poses the following questions: (1) At its inception do school

administrators have *reasonable suspicion* (different from and lesser than the police standard of *probable cause*) to suspect that a violation of school policy, or school rules, or the law is present?
(2) Is the search, as conducted (*i.e.*, its scope), *reasonably related* to the purpose for the search?

Post-T.L.O. In the post-T.L.O. (1985) era constitutional and legal issues continued to spring up as local public school officials incorporated a variety of procedures (many of which were highly intrusive in nature and not addressed in T.L.O.) to keep students safe and secure while at school and in attendance at school sponsored activities. Over the past several years public school systems across this country have resorted to student strip searches, metal detector searches, pat down searches, random urinalysis drug testing, breathalyzers, random searches of student book bags and other personal items, school locker and desk searches, searches of cars and other vehicles parked on school property, and police assisted canine searches of students and their belongings all in an effort to maintain order, discipline, safety and security. As the Supreme Court opined in a student drug testing case, “[a] student’s privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety.” The school environment is different. Board of Education v. Earls (2002) The Supreme Court itself has characterized the public school environment as a *special needs* environment. Vernonia v. Acton (1995)

While contemporary courts consistently apply T.L.O.’s “reasonable suspicion” standard, legal experts nonetheless caution that “[s]ome searches (such as random, suspicionless searches for drugs or weapons) have different standards..., and searches involving police officers or school resource officers (‘SROs’) may be subject to the probable cause standard.” (Johnson and Redfield, 2012) As my colleague Professor Boshier and I have summarized, when school officials engage in searches that go to court they have been challenged most often on four questions. One involves the circumstances under which the search was initiated; another focuses on the procedures used to carry out the search; another asks whether the police (including School Resource Officers) and/or school system employed security personnel were involved; and a fourth involves the admissibility of evidence seized during the search. (Vacca and Boshier, 2012) The reader is reminded that *reasonable* is dependent on the facts of each situation, and *searching* and *seizing* (taking possession of or the confiscation of property that “may interfere with a person’s reasonable expectation of privacy”) are separate acts. Black’s Law Dictionary (1999)

In 2004 the United States Court of Appeals for the Eighth Circuit held, in a Little Rock, Arkansas case, that random suspicionless searches of students and their personal items (including book bags) by school officials violated student Fourth Amendment rights. The searches, said the Court, “unreasonably invade their legitimate expectations of privacy.” Doe v. Little Rock School District (8th Cir. 2004) Recently I came across another Eighth Circuit student search decision involving the Fourth Amendment and student personal belongings. This time, however, the facts contained an interesting twist.

Burlison v. Springfield Public Schools (8th Circuit, 2013)

Facts. A director of the school services department later testified that he contacted the County Sheriff’s Department in October 2009 to request that drug detection dogs visit each of the high

schools during the 2009 to 2010 school year. A captain was assigned by the sheriff to coordinate the use of drug dogs.

C.M. was a high school freshman during the 2009 to 2010 school year. In April 2010 two deputies from the County Sheriff's Department canine unit arrived at the school to conduct a brief survey of randomly selected areas of the school building. The survey was conducted in accordance with school police services standard operating procedures. This operating procedure allows drug dogs to be used at the district's secondary buildings "to protect the safety and health of the district's faculty, staff, and students." The school district's policy and procedures for drug detection surveys were created in order to address a known drug problem in the school district and to "balance each student's right to privacy" with "the need to maintain an appropriate learning environment." The school police service's standard operating procedure "permits student property to 'be screened in conjunction with law enforcement by using animals trained to locate and/or detect weapons and prohibited drugs.'" Dogs were allowed to sniff student lockers, desks, backpacks, and similar items when they are not in possession of students. The procedure also states that once a dog has completed sniffing an area, the handler and dog "will retire from the area." The school director of school police services certified that a student's possessions will only be searched if a drug dog has twice alerted on the same property.

C.M. was informed that his science classroom had been selected to be sniffed by a drug dog. The dog was held by a deputy sheriff thirty to fifty feet from C.M.'s classroom while a school police officer instructed the students and teacher to leave the room. All back packs, purses, and other personal belongings were to be left behind. C.M. left his back pack and books in the room and went into the hallway where he could no longer see his belongings.

Subsequently, a deputy sheriff took a drug dog into C.M.'s classroom where they stayed for approximately five minutes. During that time the dog did not alert to anything. Although school personnel and the deputy sheriff later testified that no student possessions left in that classroom were searched during that time, C.M. stated that after he went back inside he "felt like the pockets [of his book bag] had been unzipped and stuff." He alleged that his book bag was zipped when he left the science classroom.

Federal Court Action. Parents filed suit in federal district court under 42 U.S.C. 1983 and the Missouri Constitution against the school district and school officials on behalf of their son. The superintendent of schools, school principal, and sheriff were also named as defendants. The plaintiffs sought a declaration that their son's "constitutional rights had been violated by the search and seizure of his property." They also sought "a permanent injunction, actual and nominal damages, attorney fees, and other appropriate relief." On cross motions for summary judgment the district court granted it to the school district and officials. The trial court concluded "that the 'written policies and procedures...appear to be reasonable and not in any way a deprivation of federal right.'" Burlison v. Springfield Public Schools (W.D. Mo. 2012) The parents appealed claiming that the district court erred in granting summary judgment.

Eighth Circuit Rationale. At the outset the appeals court made it clear that to succeed under 42 U.S.C 1983 "the Burlison's must prove that the district acted under color of state law in a manner that deprived C.M. of a constitutionally protected federal right." Regarding their claim under the

Missouri Constitution, this claim, said the Court, “is parallel to and coextensive with the Fourth Amendment.”

Citing and often quoting from New Jersey v. T.L.O. (1985), Board of Education v. Earls (2002), Vernonia v. Acton (1995), and Doe v. Little Rock (8th Cir. 2004), the Eighth Circuit Court emphasizes the following points: Fourth Amendment guarantees (1) are extended to searches and seizures by state officials—including school officials, (2) students retain their rights while at school, (3) school officials have a legitimate need to maintain an “environment where learning can take place,” (4) what is “reasonable” depends on the context, (5) a search and seizure occurs when there is “some meaningful interference with an individual’s possessory interest in that property,” (6) not every government interference constitutes search and seizure of that property, (7) the reasonableness inquiry must consider schools “custodial and tutelary responsibility for children,” and (8) a “fact specific balancing” must occur between the intrusion on a student’s rights and school system’s promotion of legitimate government interests.

Specifically addressing the seizure issue and relying on T.L.O. (1985), Acton (1995), and Horton v. Goose Creek I.S.D. (5th Cir. 1982) the appellate court offered the following four observations. First, “[a]ssuming that C.M.’s belongings were seized in this case when the school police officer directed that they be left in the classroom for approximately five minutes while the drug dog survey occurred, we conclude that the seizure was a part of a reasonable procedure to maintain safety and security of students at the school.” Second, “[s]ince C.M. is a high school student, he has ‘a lesser expectation of privacy’ than the general public.” Third, “[h]e was separated from his belongings for a short period of time while the deputy sheriff safely and efficiently completed the drug dog walkabout.” Finally, the “reasonable procedure used avoids potential embarrassment to students, ensures that students are not targeted by dogs, and decreases the possibility of dangerous interactions between dogs and children.”

The Eighth Circuit Court also states that the school district and its officials in this case “have shown an immediate need for the drug dog procedure because there is substantial evidence showing there was a drug problem in district buildings.” Citing Earls (2002) the Court stresses that the United States Supreme Court has repeatedly emphasized “the strong government interest in preventing drug use by students....” In this case (where drug incidents had increased between 2000 and 2011) the “procedures used by district personnel and the deputy sheriff at C.M.’s school in April 2010 reasonably addressed concerns over drug use in school in a manner that was minimally intrusive to students and their belongings.” The Court makes it clear that the Fourth Amendment’s *search clause* is “wholly distinct” from its *seizure clause*—*i.e.*, they provide different protections.

The Court specifically addressed the parents’ argument that the seizure of C.M.’s belongings was “plainly illegal” because “it was not undertaken pursuant to judicial authority and was not supported by individualized suspicion.” Relying on T.L.O. (1985), Acton (1995), and Earls (2002), the Court emphasized that (1) the need to first obtain a warrant is not appropriate in a school setting, (2) reasonableness of school searches and seizures depends on the circumstances, and (3) not all school searches or seizures must be supported by individualized suspicion. As such, “the brief separation of C.M. and his belongings was reasonable and did not deprive him of a constitutionally protected right.” The Eighth Circuit Court also held that the district court properly

granted summary judgment to the school district and to the superintendent and principal, and that the district court was correct in concluding that the sheriff was not liable under 42 U.S.C. Section 1983.

Eighth Circuit Decision. For the reasons cited above the judgment of the district court is affirmed.

Policy Implications

While Burlison v. Springfield Public Schools (8th Cir. 2013) is but one case involving one public school district in one jurisdiction, it is nonetheless instructive. Because the Court's rationale reads like a restatement of the law on student search and seizure post-T.L.O. (1985), the policy implications for local school districts in other jurisdictions are important and are worth reiterating.

Local school board policies must make it clear that:

- The intent of all policies and procedures regarding student discipline and control is to provide and maintain a safe, secure, healthy, and disruption-free learning environment in each school conducive to teaching and learning.
- While the Board recognizes the rights of students, any student behavior that results in an actual disruption of, or poses a threat of harm to other students, or to faculty, or support staff, or the school learning environment will be subject to immediate disciplinary action and procedures as outlined in the *Student Code of Conduct*.
- School principals are granted the discretion to carry out and enforce all Board policies, provisions and procedural guidelines for student discipline as outlined in the *Student Code of Conduct*.
- The Board shall, through formal agreement (including an agreed upon plan and standard procedures) cooperate with local law enforcement agencies to establish and maintain a school environment that is violence, weapon, contraband, and drug-free.
- Students who are found to be involved in behavior that is in violation of the law, school system policies, or school rules are subject to school system disciplinary actions and, where appropriate, possible legal action.

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