Supreme Court of Ohio Clerk of Court - Filed July 26, 2016 - Case No. 2016-0271

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	
	:	Case No. 2016-0271
Appellant,	:	
	:	
v.	:	On appeal from the Franklin County
	:	Court of Appeals, Tenth Appellate District
Joshua D. Polk,	:	
	:	
Appellee.	:	Court of Appeals Case No. 14AP-787
	:	

MERIT BRIEF OF AMICI CURIAE, OHIO SCHOOL BOARDS ASSOCIATION, BUCKEYE ASSOCIATION OF SCHOOL ADMINISTRATORS, OHIO ASSOCIATION OF SCHOOL BUSINESS OFFICIALS, OHIO ASSOCIATION OF SECONDARY SCHOOL ADMINISTRATORS, OHIO FEDERATION OF TEACHERS AND OHIO EDUCATION ASSOCIATION, IN SUPPORT OF APPELLANT

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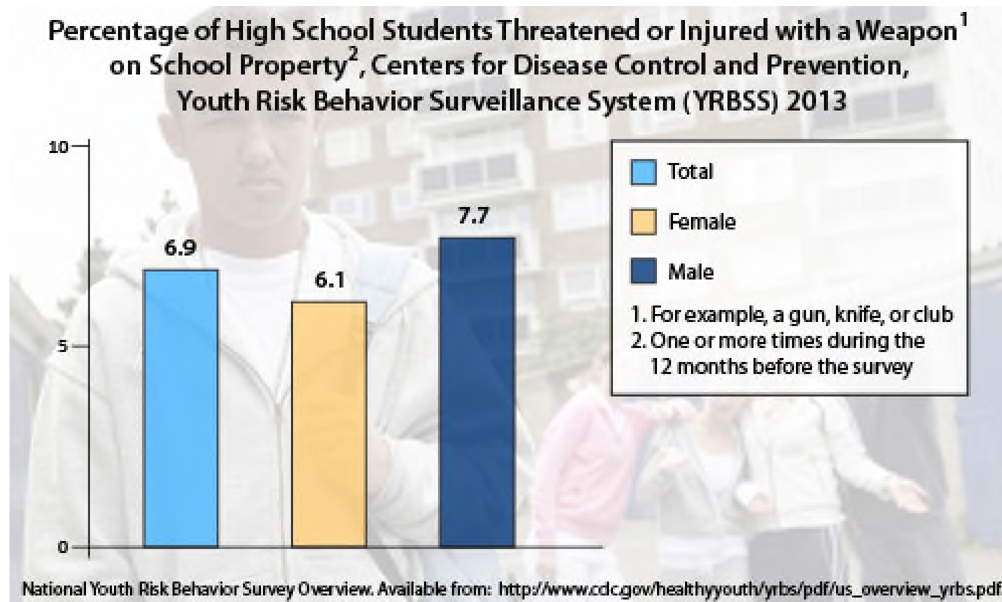
INTRODUCTION

According to the Centers for Disease Control and Prevention (CDC), school violence is a subset of youth violence, which is a public health problem.[1] In a 2013 survey, nearly 18% of high school students reported taking a weapon to school.[2] In this same survey, 6.9% of high school students reported being threatened or injured with a weapon on school property one or more times in the previous 12-month period:[3]



According to the CDC:

> While U.S. schools remain relatively safe, any amount of violence is unacceptable. Parents, teachers, and administrators expect schools to be safe havens of learning. Acts of violence can disrupt the learning process and have a negative effect on students, the school itself, and the broader community.[4]

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[1] CDC, *Injury Prevention & Control: Div. of Violence Prevention, About School Violence* http://www.cdc.gov/violenceprevention/youthviolence/schoolviolence/ (accessed July 20, 2016).
[2] CDC Natl. Ctr. for Injury Prev. and Control, Div. of Violence Protection, *Understanding Youth Violence Fact Sheet* (2015), https://www.cdc.gov/violenceprevention/pdf/yv-factsheet-a.pdf
[3] Table at webpage referenced in footnote 1; *see, also,* CDC Natl. Ctr. for Injury Prev. and Control, Div. of Violence Protection, *Understanding School Violence Fact Sheet* (2015), http://www.cdc.gov/violenceprevention/pdf/school_violence_fact_sheet-a.pdf
[4] *See* webpage referenced in footnote 1 (accessed July 20, 2016).

Over thirty years ago, the United States Supreme Court recognized "the substantial interest of teachers and administrators in maintaining discipline [and order] in the classroom and on school grounds" and that this task had been made more difficult with the increase in drug use and violent crime in the schools. *See New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985). Indeed, public school administrators, teachers and employees are tasked with not only educating our youth, but with creating and maintaining an environment that fosters the educational process. Part and parcel of this responsibility is the authority to conduct searches of students and their belongings, under appropriate circumstances. Against this backdrop, the Supreme Court noted that maintaining such security and order "requires a certain degree of flexibility in school disciplinary procedures[.]" *Id.* at 340. The Court went on to set forth the now well-established standard that governs school searches.

Since *T.L.O.*, public schools have developed and implemented protocols for conducting a wide variety of searches of students and their belongings—from suspicionless drug testing of student athletes to school locker searches and many more in between. The overriding principle in school search protocols is reasonableness, based on all of the circumstances. *Id.* at 341. The more intrusive the search (strip searches, for example), the more serious the reason or circumstances must be to justify the search. The search conducted here can be described as one of the least intrusive types of searches conducted in the school setting—the search of a book bag left on a school bus. It is common protocol in Ohio public schools that student book bags, left unattended, are thoroughly searched for identification and safety purposes, as was the protocol with Columbus City Schools here.

Both the trial court and court of appeals agreed that the protocol of emptying an unattended book bag is reasonable and justified and that had the school employee emptied the

contents of bag in the first instance, there would not have been a Fourth Amendment violation. (Trial Court Decision at 4; Court of Appeals Decision at ¶ 16.) But, despite the unintrusive nature of the search in light of the justification for the search (safety and identification)—and the conclusion that the general protocol was reasonable—the lower courts nonetheless found the search was unconstitutional because, as found by the trial court, the full search of the bag was based solely on a rumor that the bag's owner was in a gang.

In focusing on the school employee's knowledge of the student's reputation while he conducted the search, the lower courts lost their way and misapplied the general *T.L.O.* standard of reasonableness under all the circumstances. The lower courts' analysis failed to recognize the circumstances under which the search occurred in the first place and assumes the emptying of the bag was conducted in order to turn up evidence that the student was violating the law or school rules. It was a safety search of an unattended bag—plain and simple; end of story.

The lower courts' decisions ignore the unique nature of the school setting, applying standards that are intended for law enforcement officials in the criminal context—not for school employees in the context of advancing school safety. It is essential that an objective standard apply to these types of searches, so that school districts are able to understand and properly fulfill their duties within the constraints of the law. The Tenth District has interfered with that ability, creating unnecessary confusion as to the protocol to be followed when searching unattended bags. It is likely that school employees will have general information or specific knowledge about particular students, just as the school employee did here. Under the lower court's analysis, a search might be deemed unreasonable simply because the employee knows certain information about the student.

The confusion grows exponentially given the lower courts' conclusion that the protocol of emptying unattended bags, in and of itself, is reasonable. What if, for example, the unattended bag had the student's name on the outside. Will the employee's method of searching the interior of the bag for safety purposes be scrutinized simply because the employee has knowledge of the student's reputation? To dissect and evaluate an otherwise objectively reasonable search, based on the employee's thought process or subjective knowledge, is not only unworkable as a practical matter—it is not demanded by established legal principles. If a school district's protocol for addressing unattended bags is reasonable—and that very protocol is followed by the employee—the inquiry into the constitutionality of the search ends.

In addition, the Tenth District's extension of the exclusionary rule to searches conducted by school employees is wrong. The Tenth District has analogized public school employees to law enforcement officials, erroneously relying on *Elkins v. United States*, 364 U.S. 206 (1960). But *Elkins* involved *only* law enforcement officers. In support, the court of appeals made the bold assertion that school employees "would have little incentive to respect student's rights" when conducting searches and that "law enforcement would have an incentive to use school employees as Fourth Amendment immune agents to conduct illegal student searches in schools." (Decision, ¶ 21.) This commentary is speculative and has no legal or practical support.

Ohio public schools are well aware they must conduct searches in accordance with the Fourth Amendment—regardless of whether the search results may implicate criminal activity or the involvement of law enforcement. Searches conducted by school employees are done for school purposes only—not for law enforcement purposes, as the court of appeals suggested. Whether a particular search will result in subsequent criminal prosecution is immaterial to a school district's protocol when conducting a search. School employees have their own

responsibilities and concerns in mind when conducting searches. *See generally Wolf v. Commissioner*, 13 F.3d 189, 193-194 (6th Cir. 1993), citing *Tirado v. C.I.R.*, 689 F.2d 307, 312 (2nd Cir.1982). School employees are educators and personnel who support the educational process. They are not in the business of law enforcement. Public school employees, including those in school safety and security positions, are not police officers.

Finally, the majority opinion is based on the mistaken belief that the United States Supreme Court has decided the question of whether the exclusionary rule applies to searches conducted by school employees. The Tenth District cites to an extended passage from *T.L.O*. that speaks only to the application of the Fourth Amendment generally to school employees, and does nothing to bolster the argument that the exclusionary rule applies in the school setting. As correctly noted by Judge Dorrian in her dissent, the question of whether the exclusionary rule applies is a question yet to be determined by the United States Supreme Court or the Ohio Supreme Court. (Decision, ¶ 37.)

As aptly noted by the Ohio Attorney General in his amicus brief in support of jurisdiction, the exclusionary rule is not a personal constitutional right; it is not a remedy for an injury caused by an unconstitutional search. (Attorney General Jurisdictional Brief, p. 14.) The sole purpose of the exclusionary rule is to deter *police* misconduct. *Davis v. United States*, 564 U.S. 229, 246 (2011) (noting the Court has repeatedly rejected efforts to expand the focus of the rule beyond deterrence of culpable police conduct) (citations omitted). In concluding the exclusionary rule applies to student searches by public school employees, the court of appeals turns public school employees into law enforcement officials and all school searches into criminal matters. That conclusion is not supported by the case law, and it ignores the purposes for which school employees conduct searches of students (for discipline and safety reasons).

It is vitally important to Ohio's public schools that the lower courts' faulty conclusions are corrected.

STATEMENT OF AMICI INTEREST

The impact of the court of appeals' decision goes beyond the parties in this case and will have an impact on all Ohio public schools. School boards, administrators and employees need predictability in our courts' application of established legal principles. They expect courts will apply the law in a way that recognizes the realities public schools face. When courts stray from established law or apply established rules incorrectly, it creates uncertainty for school boards and their employees. The Tenth District's decision does just that in the important area of school searches conducted by public school employees. It ignores the practical realities and day-to-day operations of public schools. This is not good for Ohio schools, and it is not good for public school children. For this reason, the following six Ohio public school management and employee associations have joined forces to urge reversal of the lower court decisions.

The Ohio School Boards Association (OSBA) is a nonprofit 501(c)(4) corporation dedicated to assisting its members to more effectively serve the needs of students and the larger society they are preparing to enter. Nearly 100% of the 714 district boards in all of the city, local, exempted village, career technical school districts and educational service center governing boards throughout the state of Ohio are members of the OSBA, whose activities include extensive informational support, advocacy and consulting activities, such as board development and training, legal information, labor relations representation, and policy service and analysis.

The Buckeye Association of School Administrators (BASA) is a statewide organization representing over 95% of school district superintendents in Ohio. BASA is a nonprofit 501(c)(6) corporation dedicated to assisting its members to more effectively serve the needs of school

administrators and their districts. BASA provides extensive informational support, advocacy, and professional development in an effort to support their professional practice.

The Ohio Association of School Business Officials (OASBO) is a statewide organization representing over 1,200 school business officials. OASBO is a nonprofit 501(c)(6) corporation dedicated to assisting its members to more effectively serve the needs of their boards of education and school administration, including providing extensive informational support, advocacy, professional development, business services and search services.

The Ohio Association of Secondary School Administrators (OASSA) represents educators employed on an administrative contract in a middle level, secondary school or central office. This includes principals, assistant principals, athletic directors, directors, supervisors, coordinators and assistant superintendents, among others. OASSA is a nonprofit 501 (c)(6) corporation representing over 2200 members throughout Ohio. Our mission is to provide high standards of leadership through professional development, political astuteness, legislative influence, positive public relations, consultation, and collaboration with related organizations.

The Ohio Federation of Teachers (OFT) is a union of professionals that envisions an Ohio where all citizens have access to the high quality public education and public services they need to develop to their full potential. The OFT champions the social and economic well-being of our members, Ohio's children, families, working people and communities. It is committed to advancing these principles through community engagement, organizing, collective bargaining and political activism, and especially through the work of its members.

The Ohio Education Association (OEA) is a statewide organization and exclusive representative of approximately 121,000 educators and education support professionals in more than 750 local affiliates throughout the state of Ohio. OEA's mission is to lead the way for the

continuous improvement of public education while advocating for our members and the learners they serve, in order to provide a quality public education for every Ohio student. OEA assists local affiliates and members in the areas of professional issues and practices, political and legislative advocacy, collective bargaining, organizing and community engagement. OEA advocates for the safety and security of all of its members in the scope of their employment activities. Safety issues for employees and students would be adversely impacted if school employees are restricted in their ability to follow reasonable policies regarding searches and/or if current standards related to school searches conducted by school personnel on school property are inappropriately modified.

STATEMENT OF FACTS

The Amici Curiae adopt the Statement of Facts set forth in the State's Merit Brief.

ARGUMENT

First Proposition of Law: A search is constitutional if it complies with a public school's reasonable search protocol. The subjective motive of the public school employee performing the search is irrelevant.

In the public school setting, a search is permissible if it is reasonable under all the circumstances. *See T.L.O.*, 469 U.S. at 341. A search is reasonable if it was (1) justified at its inception; and (2) reasonably related in scope to the circumstances which justified the search in the first place. *Id.* A search is justified at its inception if there are reasonable grounds for suspecting the search will turn up evidence that the student violated or is violating the law or school rules. *Id.* at 341-342. A search is permissible in scope when the measures are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction. *Id.* at 342.

The search here was of an unattended bag left on a school bus. The established protocol is for school employees to search all unattended bags for identification and safety purposes. The

grounds for such searches are obvious, and neither the trial court nor the court of appeals took issue with the search being justified at its inception. Pursuant to the established protocol, the school employee made an initial "cursory examination" immediately followed by a more thorough inspection by emptying the contents of the bag. The court of appeals concluded that the practice of emptying the entire unattended bag is "an acceptable way to meet the two initial justifications for the search: safety and identification." (Decision, ¶16.). In other words, the court of appeals concluded that emptying out an unattended student bag is reasonable in scope because such measure is related to both the safety and identification objectives. Yet, the court of appeals still determined the search here was unreasonable and violative of the Fourth Amendment.

This is because the trial court found that the school employee emptied the bag *only* after recalling rumors that the student was involved in gang activity. In so finding, the lower courts mistakenly viewed the search as two separate searches. The court of appeals concluded that the employee's "cursory examination" of the bag's contents was sufficient to determine the bag did not pose a hazard to the school community, and thus the decision to empty the bag after learning of the student's identity was unreasonable. Here is where the lower courts lost their way.

While the bag did not contain a bomb, it could have contained a number of other dangerous items not readily apparent during a "cursory examination." As such, a cursory examination did not fulfill one of the original, reasonable justifications for the search (safety). The employee's thought process during the safety search does not, and should not, turn this into two completely separate searches—one for safety purposes and the other for disciplinary purposes. Only after conducting a thorough examination of the bag, which entailed emptying the contents of the bag, was the *single* safety search completed. Contrary to the court of appeals' theory, there was only one search here.

The lower courts make much of the fact that the employee emptied the bag only after learning the student's identity. But the test of reasonableness under the Fourth Amendment is an objective one, and subjective motive should not be considered. *See L.A. County v. Rettele*, 550 U.S. 609, 614 (2007). The Tenth District ignored this standard, and its reliance on an Alabama case is unfounded The facts in *G.M. v. State*, 142 So.3d 823 (2013) are easily distinguished. In G*.M.*, a student was called to the principal's office and searched simply because he had been seen talking to a student who was caught with cocaine earlier in the school day. Here, it was not Defendant's "mere association with a gang" that resulted in the search of his bag. It was because he left the bag on a bus. School protocol called for the search of such bags, including emptying such bags—a protocol the court of appeals found entirely reasonable. If Defendant's bag had not been left unattended, it would not have been searched.

The Fourth Amendment requires that a search conducted by a school employee be reasonable under the circumstances. If a school employee complies with an objectively reasonable search protocol, such as the one governing unattended bags, the search is reasonable and, therefore, does not violate the Fourth Amendment.

<u>Second Proposition of Law</u>: The sole purpose of the federal exclusionary rule is to deter police misconduct. As a result, the exclusionary rule does not apply to searches by public school employees.

Amici Curiae adopt the arguments set forth in the State's Merit Brief as to why the exclusionary rule does not apply to searches conducted by public school employees.

<u>Third Proposition of Law</u>: Suppression is proper only if the deterrence benefits of suppression outweigh its substantial social costs.

Amici Curiae adopt the arguments set forth in the State's Merit Brief in relation to the Third Proposition of Law.

CONCLUSION

For the reasons set forth above, Amici Curiae respectfully urge this Court to reverse the judgment of Tenth District Court of Appeals.

Respectfully submitted,

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I hereby certify that a true copy of the foregoing Merit Brief of Amici Curiae was served on the following by electronic mail, this 26th day of July, 2016:

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