IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2016-0271
Plaintiff-Appellant,	:	
	:	On Appeal from the Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
JOSHUA D. POLK,	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case No. 14AP-787

MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLEE JOSHUA D. POLK

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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

CASES:

CONSTITUTIONAL PROVISION:

STATEMENT OF THE CASE AND FACTS

Amicus curiae hereby adopts the statement of the case and facts set forth in Appellee Joshua D. Polk's merit brief.

STATEMENT OF INTEREST OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender (OPD) is a state agency designed to represent indigent criminal defendants and to coordinate criminal defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio statutory law and procedural rules. The primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect and defend the rights of indigent persons by providing and supporting superior representation in the criminal and juvenile justice systems.

As amicus curiae, the OPD offers this Court the perspective of experienced practitioners who routinely handle significant criminal cases in the Ohio appellate courts. The OPD has an interest in the present case insofar as this Court will determine whether the Fourth Amendment protects students from unjustified searches while they are in school and whether the exclusionary rule applies to state actors who are not characterized as "law enforcement."

Despite the safety concerns put forth by the State and amici, students do not "shed their constitutional rights * * * at the schoolhouse gates." *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). They rely upon courts to ensure that anxiety does not eviscerate constitutional rights.

In considering whether Joshua D. Polk's Fourth Amendment rights were violated, both the trial court and appellate court stated that Safety and Security Officer Robert Lindsey would have been permitted to empty Polk's book bag in order to determine to whom the bag belonged,

and whether its contents posed any immediate danger. The State and its amici have seized upon this language to argue that Lindsey's subjective motivations are irrelevant because he would have been allowed to empty the bag anyway, in accordance with the school's search policies.

As amicus curiae, OPD posits that the vaguely described "reasonable search protocol" of Whetstone High School cannot circumvent Fourth Amendment protections or precedent. Any search of any student must still be a reasonable one and must be no more intrusive than necessary to achieve the specific objectives that justified the search. A blanket policy that allows school officers to sidestep the Ohio or U.S. Constitution has no place within our schools.

ARGUMENT

STATE'S 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.**

I. A school-based search is constitutional if it is reasonable. The alleged policies and protocols of the school are irrelevant.

A. Whetstone High School's official search policy was never adequately established.

To be clear, no official school policy detailing search protocols was ever made a part of the record. No handbook, manual, or memorandum was ever offered as an exhibit or referenced by a witness. In actuality, the "reasonable search protocol" that the State and its amici repeatedly point to and rely upon consists solely of the piecemeal and conflicting statements offered by Safety and Security Officer Robert Lindsey as he was testifying at the motion-to-suppress hearing in Polk's case. The "reasonable search protocol" relied upon by the State, as described by Lindsey, is as follows:

- Look in bag to see who it belongs to; look for name on a piece of paper (Tr. 6-7, 56);

- Dump bag to be "precautious" (Tr. 6);
- Put bag in "lost and found" if it does not have a name on it (Tr. 6);
- While looking in bag to identify ownership, "just do a search" (Tr. 8);
- Look through empty, unattended bags (Tr. 9, 45);
- Search anything left on the bus unattended (Tr. 15);
- Look in it, dump it, "do the process" (Tr. 18);
- If a student smells like marijuana, search the student, search the backpack, search the locker (Tr. 19);
- Continue searching bag after procuring identification (Tr. 20);
- Search through an unattended bag, even if there is no question of identity and no suspicion that bag is involved in a crime (Tr. 23-24, 43);
- Unattended bags may or may not be given to Safety and Security Resource Coordinator (Tr. 42);
- Ask to search the bags of random students who have aroused no suspicion (Tr. 44);
- If students refuse to consent to random searches of their bags, take the refusing student to the office; call a parent (Tr. 44-45); and
- If a student steps away from their bag, search it (Tr. 49).

Despite these references to an alleged "policy," the trial court found that Lindsey's dumping of the bag—the search that actually produced the bullets—was not done pursuant to a search protocol, but instead resulted from Lindsey's belief that Polk was in a gang. Sept. 29, 2014 Decision and Entry at 4; *State v. Polk*, 10th Dist. Franklin No. 14AP-787, 2016-Ohio-28, ¶ 16. This was well within the trial court's factfinding role and was a reasonable conclusion given that no corroborating evidence was presented to show that Lindsey's more intrusive search of Polk's book bag actually complied with a formalized search protocol. As such, the State's

proposition of law, to the extent this Court adopts it, does not warrant a reversal of the Tenth District's decision.

B. The policy at issue is the dumping of Joshua D. Polk's bag after his identity had been discovered and general safety concerns were addressed.

The State asserts that "Lindsey's emptying of the book bag found on the school bus was reasonable because it was done pursuant to the school's established policy to search all unattended bags for safety and security purposes." State's Brief at 5. But this statement misrepresents the facts of this case and the evidence that was presented.

First, there is a difference between saying that Whetstone High School has a policy to search all unattended bags for safety and security purposes, and asserting, without sufficient evidence, that Whetstone High School directs employees to dump out unattended book bags even after identity and safety concerns have been resolved. The State's argument that Lindsey was merely acting pursuant to the school's "reasonable search policies" is simply not supported by the record and was not found credible by the trial court.

Second, neither the trial court nor the court of appeals stated that Lindsey's initial search of Polk's bag was unreasonable or unconstitutional. Indeed, a school policy that advises employees to conduct cursory searches of unattended bags for safety and identification purposes would be a reasonable one. But, Lindsey's second, more intrusive search was not done for safety and identification purposes. It was done because Lindsey had heard rumors that Polk was in a gang. Thus, the State cannot argue the second search was done pursuant to a reasonable search policy. Reasonable search policies are only activated when special needs justify them. The special needs had already been met. Lindsey lost authority to continue searching Polk's book bag. As such, the search was unconstitutional.

To the extent the State argues that the school's policy is to continue engaging in intrusive and unnecessary searches after safety and identification concerns have been met, that policy is unreasonable. Lindsey's search cannot be deemed reasonable if it was conducted pursuant to a public school's *unreasonable* search policy. State's Brief at 5.

C. An unreasonably intrusive search protocol is unconstitutional.

The State assumes without justification that the unspecified "policy" that Lindsey followed in his search of Polk's book bag was reasonable. But, a policy that directs school employees to unreasonably search students or students' belongings does not turn an unconstitutional search into a constitutional one.

Despite the hypothetical posed by both the trial court and court of appeals, Lindsey would not necessarily have been within constitutional bounds had he initially dumped out Polk's book bag. "[T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." *New Jersey v. T.L.O.*, 469 U.S. 325, 341, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). A search pursuant to any policy must be "justified at its inception" and conducted in a way that is "reasonably related to the circumstances that justified the interference in the first place." *Id.*; *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 370, 129 S.Ct. 2633, 2639, 174 L.Ed.2d 354 (2009).

Two justifications were offered for the search of unattended book bags: safety and identification. Thus, any search of any bag must be conducted in a way that is reasonably related to accomplishing those objectives. If opening a book bag and looking through it can meet those objectives, then Lindsey is not permitted to engage in a more intrusive search in order to find contraband or to substantiate rumors that he has heard. *Arizona v. Hicks*, 480 U.S. 321, 323-325,

107 S.Ct. 1149, 94 L.Ed.2d 347 (1987). Student book bags do not become treasure troves to be ransacked for information when they are lost, forgotten, or unattended.

Indeed, Lindsey repeatedly described his general search practice as "looking through" or "looking in" bags rather than dumping them out. *See* Tr. 6-9, 23-24, 45, 56, 58. That approach is appropriate given that a cursory look through a bag will often (as it did in this case) provide the answers to questions of ownership and risk. And to be clear, risk in this context means the risk posed by the unattended book bag or its contents. *Polk*, 10th Dist. Franklin No. 14AP-787, 2016-Ohio-28, at ¶ 14. That justification does not extend to searching the bag for evidence that its owner is dangerous or may pose a risk. That wholly unsupported objective was not and cannot be the justification for the more intrusive search in this case. *See T.LO.*, 469 U.S. at 346, 105 S.Ct. 733, 83 L.Ed.2d 720 ("inchoate or unparticularized suspicion or hunch" is not reasonable suspicion); *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). If it were, school employees and safety officers could search any student's book bag for "safety reasons" to determine whether the student posed a risk. Under the State and amici's reasoning, that general, unspecific interest would support blanket searches of students' private possessions.

The trial court found Lindsey's enhanced and more intrusive search was motivated by rumors rather than reasonable suspicion, legitimate justifications, or official school protocols. The search was conducted in a way to produce evidence of wrongdoing, not simply to meet its special, legitimate needs of the search: identification and risk. It was unreasonable and unconstitutional.

II. Student property is not abandoned when it is lost or forgotten on school grounds.

Amicus Ohio Attorney General argues that the Fourth Amendment offers no protection to Polk because he "abandoned" his book bag and thus lost any reasonable expectation of privacy in it. This is a tenuous characterization of lost student property.

The cases the Attorney General relies upon instead demonstrate that Polk did not abandon his book bag. *State v. Freeman* explicitly states that in determining whether an item has been abandoned, one asks whether the person has "*voluntarily* discarded, left behind, or otherwise relinquished his interest in the property." (Emphasis added.) 64 Ohio St.2d 291, 296, 414 N.E.2d 1044 (1980); *see also State v. Gould*, 131 Ohio St.3d 179, 2012-Ohio-71, 963 N.E.2d 136, ¶ 30. "Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts." *Freeman* at 297.

Polk did not discard his book bag. He did not throw it away. He did not give it to someone else. He forgot it on the bus. Students forget things. Forgetting or losing a belonging at the school is not a voluntary act. And when students forget items while in school, they still retain a reasonable expectation of privacy in them. Further, a student reasonably expects that the belonging will be respected and returned, more so than if he or she had forgotten it in a park, at the mall, or another open space.

A student's forgetfulness does not result in a carte blanche for school administrators to "ransack" belongings. *Contra* Tr. 20. If a student leaves behind a phone at his or her desk, a teacher is not authorized to review the entirety of its contents simply because the student forgot it. If a purse is forgotten in the lunchroom, the custodian does not become authorized to rifle through it for no other reason than curiosity.

Lindsey testified that Whetstone High School does conduct these kinds of searches. *See* Tr. 20, 23-24, 44-45. He testified that even if he knows to whom the book bag belongs, once the student steps away from it, he can search it. Tr. 49. He does not need a reason to search it; he believes he is authorized to do so because he works in a school and because "what is going on in America" justifies it. *Id.*

The Attorney General's position on abandonment would significantly undermine the Fourth Amendment rights of public school students and is in conflict with other holdings from this Court. It should not be relied upon in deciding this case.

STATE'S SECOND PROPOSITION OF LAW

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.

Amicus curie supports the argument set forth in appellee's merit brief.

STATE'S THIRD PROPOSITION OF LAW

Suppression is proper only if the deterrence benefits of suppression outweigh its substantial social costs.

Amicus curie supports the argument set forth in appellee's merit brief.

CONCLUSION

The Office of the Ohio Public Defender urges this Court to affirm the judgment of the Tenth District Court of Appeals. Officer Lindsey conducted the second search of Joshua D. Polk's bag because of unsubstantiated rumors, not for safety and identification purposes. The search was unconstitutional under *New Jersey v. T.L.O.*, 469 U.S. 325, 341, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985).

Further, the only reasonable search policy a school can adopt is one that mirrors the Fourth Amendment precedent courts have already established. Schools cannot make otherwise

unconstitutional actions legal by formally adopting such actions as a "search protocol." If the Fourth Amendment has any power within the walls of America's public schools, then this search—even if it was done pursuant to Whetstone High School's search policies—should be deemed unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Merit Brief of Amicus Curiae Office of the Ohio Public Defender** was sent by regular U.S. mail, postage prepaid, to Ron O'Brien and Seth L. Gilbert, Franklin County Prosecutor's Office, 373 S. High Street – 13th Floor, Columbus, Ohio 43215; Yeura R. Venters and Timothy E. Pierce, Franklin County Public Defender's Office, 373 S. High Street – 12th Floor, Columbus, Ohio 43215; Michael DeWine, Eric E. Murphy, Michael J. Hendershot, Samuel L. Peterson, and Katherine J. Bockbader, Ohio Attorney General's Office, 30 E. Broad Street – 17th Floor, Columbus, Ohio 43215; Jennifer M. Flint, Bricker & Eckler LLP, 100 S. Third Street, Columbus, Ohio 43215; Marsha L. Levick, Juvenile Law Center, 1315 Walnut Street – Suite 400, Philadelphia, Pennsylvania 19107; Kimberly Jordan, Justice for Children Clinic, 55 W. 12th Avenue, Columbus, Ohio 43210; Russ Bensing, 1350 Standard Building, 1370 Ontario Street, Cleveland, Ohio 44113; and Sherri Bevan Walsh and Heather DiMartino, 53 University Avenue, Akron, Ohio 44308, on this 14th day of September 2016.

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