[J-157-96]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

IN THE INTEREST OF: F.B.	:	No. 64 E.D. Appeal Docket 1996
	:	Appeal from the Judgment of Superior Court opinion filed on May 31, 1995 at No. 251 Phila. 1994, affirming the January 11, 1994 Adjudication of Delinquency and
APPEAL OF F.B.	:	Commitment entered by the Court of Common Pleas of Philadelphia County, Family Court Division, Juvenile Branch
	:	658 A.2d 1378 (Pa.Super. 1995)
	:	ARGUED: October 15, 1996

DISSENTING OPINION

MR. JUSTICE ZAPPALA **DECIDED: March 2, 1999**

Members of the Philadelphia Police Department went to University High School and required students to empty their pockets while their backpacks, coats, and other personal items were searched. The majority concludes that such conduct was not police action. I must respectfully disagree. I find it inconceivable to deny that these facts clearly constituted police action. The police lacked any individualized suspicion justifying the search of Appellant, F.B., and the students were compelled to submit to such a search because of the compulsory education laws. I conclude that such police conduct offended both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution.

The majority reasons that if a search in a school environment passes constitutional muster under our state constitution, then "that search will also satisfy the reasonableness

test of the Fourth Amendment set forth in Acton." Majority Op. at 6, citing, Veronia School District 47J v. Acton, 515 U.S. 646 (1995). At the outset, I do not believe that Acton controls the analysis of the search here for purposes of the Fourth Amendment. Indeed, the majority fails to recognize that the United States Supreme Court has never handed down a decision involving the validity of a search conducted by police on school grounds.[1]

Acton involved urine samples taken by school officials and parents for purposes of determining whether students would be eligible to participate in voluntary, interscholastic athletic events. In reaching its conclusion permitting the urine tests, which are deemed searches under the Fourth Amendment, the Acton Court specifically relied upon the fact that the test results were "disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function." Acton, at 658 (emphasis added). In contrast, the case before this Court today involves compulsory searches conducted by police officers, the fruits of which are used in criminal proceedings against students. In this case, the fruits of the searches did not need to be turned over to law enforcement authorities because the law enforcement authorities themselves conducted the searches. It could hardly be clearer that Acton does not govern these facts.

It is also significant that, under the facts of Acton, only six of the nine justices were willing to allow school officials to search students where there was an absence of

---

[1] The U.S. Supreme Court explicitly recognized this in New Jersey v. T.L.O., 469 U.S. 325, 340 n.7 (1985), the only other case from that Court addressing searches of students on school grounds, when it stated "[w]e here consider only searches carried out by school authorities acting alone and on their own authority. This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question." The Court then cited Picha v. Wielgos, 410 F.Supp. 1214, 1219-1221 (N.D. Ill. 1976) (holding that probable cause standard is applicable to search of school involving the police), for purposes of comparison.

individualized suspicion. Moreover, Justice Ginsburg wrote a concurring opinion explicitly stating, "I comprehend the Court's opinion as reserving the question whether the District, on no more than the showing here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school." Acton, at 2397 (Ginsburg, J., concurring). Justice Ginsburg went on to cite language used by Judge Friendly in United States v. Edwards, 498 F.2d 496 (2nd Cir. 1974), which contrasted airport searches of passengers and luggage, which are easily avoidable "by choosing not to travel by air," with unavoidable, unannounced school searches. The concerns expressed by Justice Ginsburg are precisely implicated by the facts of our case today. The students at University High were unaware of when the search would take place and, even more obviously, the students had absolutely no ability to avoid the search because their attendance at school is required by law.

In her dissenting opinion, Justice O'Connor recognized that while students in a school setting may not enjoy the level of protection from unreasonable searches provided by the traditional probable cause standard, those students should not be stripped of the Fourth Amendment's "most basic, categorical protection: its strong preference for an individualized suspicion requirement, with its accompanying antipathy toward personally intrusive, blanket searches of mostly innocent people." Acton, at 666 (O'Connor, J., dissenting, joined by Justices Stevens and Souter). It is exactly that type of suspicionless search that occurred in this case. Thus, a consideration of the concurring and dissenting opinions in Acton, in conjunction with the Acton majority's explicit distinction between searches conducted by school officials and searches conducted by law enforcement officials, leads me to conclude that this search violated the federal constitution.

Supporting my belief that the search at issue violated the federal constitution is my finding that the lesser degree of constitutional protection afforded students in what has come to be called the "sui generis school setting" does not operate under facts where the

police enter upon school grounds to conduct searches.[2] New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (establishing reasonableness, rather than probable cause, as the standard for assessing the validity of searches conducted by school officials in a school setting). Once the police enter school grounds, the bases for the U.S. Supreme Court's decision to lower the level of suspicion necessary for a search no longer exist. Thus, the lower standard of "reasonableness" should no longer be applied. See Cass, 709 A.2d at 370-371 (Zappala, J., dissenting).

In its decision justifying a lesser degree of suspicion, the U.S. Supreme Court balanced the child's privacy interest against "the substantial interest of the teachers and administrators in maintaining discipline in the classroom and on the school grounds." Id. at 340. The Court also relied upon school officials' need to foster a "proper educational environment" and a suggestion that it would be inappropriate to require a school official to obtain a warrant or have probable cause before being able to conduct a search of a

---

[2] It is disconcerting that this is the second decision from this Court in approximately one year characterizing the school setting as unique and upholding searches on school grounds. In Commonwealth v. Cass, 709 A.2d 350 (Pa. 1998), a majority of this Court decided that the use of drug sniffing dogs, the search of students' lockers, and the search of the belongings within those lockers, was not unconstitutional notwithstanding the absence of any individual suspicion. Today, the majority extends that aberration from normal constitutional protections by asserting that "[g]iven that the same personal items were subject to search if found in a locker, it would be illogical to find a greater privacy interest at stake in searching those personal items outside a locker." Majority Op. at 8. While the majority's language has superficial appeal, it conveniently overlooks the fact that "outside the locker" in this case refers to "on the persons themselves." Here the purses and pockets that are searched are taken from the individuals themselves rather than from their lockers. Not only does common understanding dictate that an individual has the greatest expectation of privacy in items that are on his or her person, but so does precedent. Commonwealth v. Martin, 626 A.2d 588, 560 (Pa. 1993) (explaining that a search of a person always involves a greater degree of intrusion upon the person's privacy interest than the search of a thing). Justice Brennan expressed similar reasoning in distinguishing the sniffing of inanimate objects by drug dogs from the sniffing of human beings for purposes of what constitutes a search under the Fourth Amendment. See Doe v. Renfrow, 451 U.S. 1022, 1026 n.4 (1981) (Brennan, J., dissenting from the denial of certiorari).

student's belongings, given the "value of preserving the informality of the student teacher relationship." Id. The Court also reasoned that allowing school officials to conduct searches based upon mere reasonable suspicion "will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause." T.L.O., at 343. Accordingly, a reasonableness standard, rather than a probable cause standard, was applied to searches in a school setting.

Once the police enter upon school grounds, however, the balance changes. School officials no longer have a problem maintaining an environment free of disruption, and the informal student-teacher relationship that the Court valued so much in T.L.O. clearly does not exist any longer. The police are waiting at the doors of the school to conduct a point-of-entry search when the children arrive. Moreover, it may be assumed that the police are already schooled in the niceties of probable cause. Thus, under the facts of this case, the bases upon which the U.S. Supreme Court lowered the amount of suspicion needed to justify a search in a public school do not exist. The entrance of the police onto school grounds to conduct searches destroys the sui generis "school setting" that has been characterized as unique for purposes of Fourth Amendment jurisprudence.

Justice Stevens, in his dissenting opinion in T.L.O., which was joined by Justice Marshall, and, in pertinent part, Justice Brennan, discussed the destructive effect that allowing children to be treated in a manner that would be unconstitutional in any other environment than a school building would have on our students. In doing so, Justice Stevens quoted language used by Justice Brandeis in Olmstead v. United States, 277 U.S. 438, 485 (Brandeis, J., dissenting):

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Justice Stevens went on to explain that "[s]chools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry. If the Nation's students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have been dealt with unfairly." T.L.O., at 373-374 (Stevens, J., dissenting, joined by Justices Marshall and Brennan) (footnotes omitted). It is clear to me that in the facts of this case these concerns are more relevant than ever before. The government has now taken a significant step in teaching University High students contempt for the law by subjecting them to arbitrary police conduct. See Acton, at 666 (Ginsburg, J. concurring)(O'Connor, J. dissenting, joined by Justices Stevens and Souter).

Finally, Justice Stevens appropriately noted Justice Brennan's dissent from the denial of certiorari in another case, Doe v. Renfrow, 451 U.S. 1022 (1981). In Renfrow, school officials and police detained every junior and senior high school student in a town and then used drug-sniffing dogs to conduct a student-by-student inspection to see if there was contraband present. One of the dogs repeatedly pushed its nose and muzzle into a thirteen year old student's legs. After she emptied her pockets, which revealed nothing illegal, the dog continued to alert. The young lady was escorted to the school nurse's office and ordered to strip. She did so, and again nothing was found. As it turned out, the highly trained police dog had apparently alerted because the young girl had been playing with her own dog, which was in heat, on the morning of the raid. Id. at 1024 n.1. The girl sought injunctive relief and declaratory relief as well as compensatory and punitive damages, under 42 U.S.C. §§1983 and 1985(3), claiming a violation of her Fourth, Ninth, and Fourteenth Amendment rights provided by the federal constitution. Other than with respect to a grant of good-faith immunity regarding the strip search, the Seventh Circuit affirmed the district court's rejection of the girl's claims. In his dissent to the denial of certiorari, Justice Brennan made the following observation:

> We do not know what class petitioner was attending when the police and dogs burst in, but the lesson the school authorities taught her that day will undoubtedly make a greater impression than the one her teacher had hoped to convey. I would grant certiorari to teach petitioner another lesson: that the Fourth Amendment protects 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures'....Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms.

Id. at 1027-1028. Justice Brennan concluded that "[o]nce school authorities enlist the aid of police officers....they step outside the bounds of any quasi-parental relationship, and their conduct must be judged according to the traditional probable-cause standard." Id.

Because the police officers had absolutely no basis for suspecting that F.B. possessed even a three-inch Swiss army knife, and thus lacked probable cause to believe that he was armed, it is clear to me that F.B.'s Fourth Amendment rights were violated at the hands of law enforcement officials. See Slip. Op. (Flaherty, C.J., concurring) (expressing concern over the characterization of a three-inch Swiss army knife as a weapon); see also T.L.O., 382-383 (Stevens, J, dissenting, joined by Justice Marsall) (focusing on the character of the rule infraction that is to be the object of the search).

Although my conclusion that the federal constitution was violated makes it unnecessary for me to address the majority's analysis pursuant to the Pennsylvania Constitution, I feel compelled to note my disagreement with the majority's analysis under our state constitution.

The majority identifies the following four factors as relevant to an analysis of a school search's validity under the Pennsylvania Constitution: 1) a consideration of the students' privacy interest, 2) the nature of the intrusion created by the search, 3) notice, and 4) the overall purpose to be achieved by the search and immediate reasons prompting the decision to conduct the search. Majority Op. at 6. In its discussion of both the privacy

interest of the students and the nature of the intrusion created by the search, the majority makes the following statements: "Although the search at issue is described as a search of the person, that would be a literal description of the search, not a common sense depiction of the actual process. The students do not suffer physical intrusion during the search. A hand-held metal scanner is passed over the students' outer clothing." Majority Op. at 8.

The majority's "common sense" depiction of the search that F.B. and his schoolmates were subjected to consists of nothing more than overlooking the fact that the students' pockets, bags, purses, and other personal items were taken from them and also searched. The majority disregards a literal description of the search in favor of a glossy mischaracterization of the police conduct. Likewise, the majority's assertion that "[t]he students do not suffer physical intrusion during the search" is simply untrue. Forcing school children to empty their pockets, hand over their bags, and be scanned, is clearly a physical intrusion similar to any other type of intrusion from which our constitution provides protection.

The majority also relies upon the use of electronic weapon scanners in other contexts in support of its conclusion that the intrusion at issue here is minimal. Majority Op. at 8-9. However, the use of such equipment in airports is distinguishable in that individuals can easily avoid those scanners by simply choosing to travel another way. In contrast, students are required by law to attend school, see 24 P.S. § 13-1327, and as a consequence the children of University High are compelled to submit to such scanning. Therefore, the analysis of the two issues is entirely distinct.

By placing undue weight on the degree of physical intrusion that occurs when an individual is subjected to a metal scanner, the majority downplays the individual's privacy interest, which is the touchstone of Article I, Section 8's protection. The majority blurs the two considerations by stating, "[a] determination of whether the increased privacy interest involved in a search of a student himself bars the type of search at issue here, necessitates

a consideration of the second factor identified in our analytical framework: the nature of the intrusion created by the search. We note that this court has identified the framework for our analysis as involving four distinct factors, but the analytical process requires consideration of these factors in concert, not in isolation." Majority Opinion at 8. In considering these two factors "in concert" the majority focuses on the physically less intrusive nature of a scanner (again overlooking the search of the students' pockets, purses, and other personal items) rather than the object of the search which is being conducted. It is the students' privacy interest in their bodies that is placed at issue when they are scanned.

I also find the majority's application of the notice factor for assessing the search's validity to be somewhat disingenuous. The compulsory education law makes notice of the search almost meaningless for purposes of assessing the search's constitutional validity. Furthermore, as the majority recognizes, there is absolutely nothing in the record with respect to what notice of the searches the students at University High are given.

The final factor that the majority considers under its analysis of the state constitution is the "overall purpose to be achieved by the search and the immediate reasons prompting the decision to conduct the actual search." Majority Op. at 10. As the majority recognizes, the record is silent as to any immediate reasons that University High School decided to have the police conduct this point of entry weapons search on October 14, 1993. Id. at 11. Nonetheless, the majority claims that the overall purpose of the search was to keep weapons out of schools, and that such an interest is so obvious that the need to develop a record on that point is superfluous. Id. at 12.

While I share the majority's view on the importance of keeping weapons out of our schools, the absence in the record of any justification for the search on the day in question precludes me from finding that the overall purpose of the search outweighs the substantial intrusion upon the high expectation of privacy that the search implicates. Otherwise,

suspicionless searches could be justified in almost any context by citing an interest in protecting public safety.

Thus, in addition to my finding that the federal constitution was violated, I likewise find that this Commonwealth's constitution was violated by the Philadelphia Police Department's search of F.B.[3]

For the above stated reasons, I respectfully dissent.

[3] In the last paragraph of its opinion, the majority relies upon the fact that the search at issue was directed at all students as support for its finding that no constitutional violation occurred. However, as Justice O'Connor discussed in detail in her dissent in Acton, "[t]he view that mass, suspicionless searches, however evenhanded, are generally unreasonable remains inviolate in the criminal law enforcement context." Acton, at 671-672 (O'Connor, J., dissenting), citing, Ybarra v. Illinois, 100 S.Ct. 338 (1979) (emphasis added).