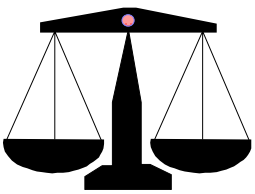
Virginia YMCA
Model Judiciary Program

2008 Appeals Round Handbook
Arida v. Jameson

Trinity Episcopal School
Youth and Government Club



The Young Lawyers Division of the Virginia Bar Association

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Model Judiciary Program

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Appeal Arguments

Appropriate Dress:

- Coat and tie for young men (preferably a suit).
- Professional dress for young women (preferably a suit).

Be Respectful of the Court:

- To begin argument address the court, "May it please the Court, my name is _____, and I will be arguing on behalf of the appellant/appellee..."
- Appellants must indicate at the beginning of their argument whether they wish to reserve time for rebuttal and how much time.
- When an Appeals Judge or Supreme Court Justice interrupts your argument to ask a question, stop speaking immediately, listen to the question carefully, and respond to the best of your knowledge.
- Address the court respectfully, "Yes, Mr. Chief Justice (to Chief Justice Hassell...Yes/No, your honor (to other Justices or Appeals Judges)."

Preparation:

- Organization is everything. With the time limitations and the likelihood that some of your time will be spent fielding questions, a well-organized argument is essential. Establish your main points early and in a logical progression.
- Do not use notes! Commit your argument and the facts of the case to memory. If you are relying on notes or reading a prepared speech, you are not prepared! Notes can be a distraction for you and the judges. They also restrict good eye contact, which is vital.
- Speak distinctly, neither murmur nor shout, in an even voice.
- Use only limited hand gestures, too many are distracting.

MODEL JUDICIARY PROGRAM 2008

APPELLATE SCHEDULE

February 28, 2008 (1:00) – Court of Appeals of Virginia

Commonwealth v. Diamond

Maggie Walker (Commonwealth) v. Patrick Henry (Diamond)

Patrick Henry (Commonwealth) v. Maggie Walker (Diamond)

Atlee (Commonwealth) v. Prince George (Diamond)

Prince George (Commonwealth) v. Atlee (Diamond)

Brubaker v. McCoy

St. Catherine's School (Brubaker) v. Benedictine (McCoy)

Midlothian (Brubaker) v. St. Gertrude (McCoy)

Benedictine (Brubaker) [no opposition]

Arida v. Jameson

Douglas Freeman (Arida) v. Collegiate (Jameson)

Trinity (Arida) v. Douglas Freeman (Jameson)

Trinity (Jameson) [no opposition]

ARIDA v. JAMESON

APPELLATE ISSUES

Assume for purposes of this appeal that the Defendant moved to suppress the evidence of the search and the motion was granted by the trial judge and the case was dismissed. The State has appealed the following issues:

A. Officer Shannon Shackelford was acting as a school official. Therefore the search was reasonable and Defendant waived the warrant requirement.

New Jersey v. T.L.O., 469 U.S. 325, 109 S. Ct. 733 (1985)
Cason v. Cook, 810 F.2d 188 (8th Cir. 1987)
Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984) cert. denied, 470 U.S. 1051, 105 S.Ct. 1749, 84 L.Ed.2d 814 (1985)
Martens v. District No. 220, 620 F.Supp 29 (N.D. Ill. 1985)

B. Even if the search was unreasonable and the Defendant had not waived the warrant requirement, the search was still proper, because a student locker is outside the zone of privacy.

Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 84 L.Ed.2d 393 (1984)
Zamora v. Pomeroy, 639 F.2d. 662 (10th Cir. 1981)
United States v. Bunkers, 521 F.2d. 1217 (9th Cir. 1975)

Bench Memorandum

Arida v. Jameson

On January 24, 1998, Terry Jackson , a student at Andrew Johnson High School, was arrested for possession of methamphetamine. He was arrested at the high school by Shannon Shackelford, an officer of Roanoak Police Department who is assigned as the school officer.

Officer Shackelford was in the teacher's lounge where she was accosted by Billy Barrow and Kelly Smith, a hall monitor. Billy informed Officer Shackelford that he had observed a quantity of methamphetamine in Jameson's locker. Together, they went to look for Ms. Turner, the school principal who could not be found. They then went to Terry Jameson's locker which they found ajar. Officer Shackelford opened the locker and found a bag of tablets that later were found to contain methamphetamine. When Terry Jameson returned to his locker, he was arrested by Officer Shackelford.

The lockers at the school are assigned to individual students, but padlocks are prohibited. Further, the students were advised not to bring any valuables to school, and if they do, the items are locked up in the principal’s office.

At trial, the defendant moved to suppress the evidence of the search, claiming the search was in violation of her Fourth Amendment rights. The State of Arida appealed and claimed error as follows:

1. Officer Shackelford, at the time of the arrest, was acting as a school officer. Therefore the search was reasonable and Defendant waived the warrant requirement.

The cases relating to this issue are:

New Jersey v. T.L.O., 469 U.S. 325, 109 S.Ct. 733 (1985)
Cason v. Cook, 810 F.2d 188 (5th Cir. 1987)
Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984), cert. denied, 470 U.S. 1051, 105 S.Ct. 1749 84 L.Ed.2d 814 (1985)
Martens v. District No. 220, 620 F.Supp. 29 (N.D. Ill. 1985)

2. Even if the search was unreasonable and the Defendant had not waived the requirement, the search was still proper, because a student locker is outside the zone of privacy.

The cases relating to this issue are:

Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194 84 L.Ed.2d 393 (1984)
Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981)
United States v. Burkers, 521 F.2d 1217 (9th Cir. 1975)

ARGUMENT

A. Officer Shackelford was acting as a school official.

In 1985, the U.S. Supreme Court, in New Jersey v. T.L.O, 469 U.S. 325, found that because of the educational environment in high schools, school officials would be permitted to conduct searches of students and their possessions. However, the Court held that the search was subject to reasonableness standard. The Court also found that there would be no warrant requirement for school officials. The Court did not decide whether that would still be the requirement if there was police involvement.

Several courts have permitted the T.L.O. requirements to stand where there has been limited police involvement. Cason v. Cook, 810 F.2d 188 (8th Cir. 1987); Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984), cert. denied, 470 U.S. 1051, 105 S.Ct. 1749, 84 L.Ed.2d 814 (1985); and Mortens v. District No. 220, 620 F.Supp. 29 (N.D. Ill. 1985).

It is expected that the State will argue the following:

1. Officer Shackelford was a school official as she is a school officer who works at the direction of school officials.

2. That the cases have allowed police involvement and as long as it is in conjunction with school officials there is no problem. Officer Shackelford was acting in conjunction with school officials. Her duties as school officer are to wipe out drugs so schools can continue teaching.

Terry Jameson will argue that this goes far beyond the previous cases. Officer Shackelford was acting as a police officer, nothing more and nothing less, when she engaged in the search and the arrest. It does not matter where she is assigned, she is still an officer with the Roanoak Police Department.

B. The Locker was Outside the Zone of Privacy

State will argue that lockers have been permitted to be searched in previous occasions. Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981) (dog sniffers); and United States v. Burkers, 521 F.2d 1217 (9th Cir. 1975) (postal employees' lockers). The attorneys will argue that the Jameson case is similar to those.

Jameson will argue there is a big difference between postal employees' lockers and school lockers. School lockers are in a different environment than a job location. New Jersey v. T.L.O. Moreover, in the Zamora case, the school officials had informed students earlier that a search was taking place with use of dogs. In the case at bar, the search was specific to one individual. The use of dogs in a general search is not dissimilar to airport searches of baggage. More protection is afforded an individual and a greater expectation of privacy exists.

ADDENDUM:

APPLICABLE SUBSTANTIVE LAW

for

STATE OF ARIDA VS. TERRY E. JAMESON

I. PROBABLE CAUSE FOR A WARRANTLESS SEARCH

The fourth amendment to the U.S. Constitution, applicable to the states through the fourteenth amendment, prohibits unreasonable searches by state officials. Elkins v. United States, 364 U.S. 206, 213, 80 S.Ct. 1437, 1442, 4L.Ed2d 1669 (1960). It does not apply to a search, even an unreasonable one, by a private individual who is not acting as an agent of the government or with the participation or knowledge of any government official. United States v. Jacobson, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed. 2d 85 (1984). The fourth amendment protects only expectations of privacy that are reasonable or that society is prepared to recognize as legitimate, Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed. 2d 393 (1984); Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed. 2d 633 (1980), and the fourth amendment may protect containers of contraband that are not shown to be readily apparent as contraband. Robbins v. California, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed 2d 744 (1981). There is no legitimate expectation of privacy, however, in readily apparent contraband and a "field test" of suspected contraband compromises no legitimate privacy interest. Jacobson, 466 U.S. at 121-23, 104 S.Ct. at 1661-62. There is, however, a reasonable expectation of privacy in a rented storage locker. United States v. Karo, 468 U.S. 705, 720 n.6, 104 S.Ct. 3296, 3306 n.6, 82 L.Ed. 2d 530 (1984).

All searches by government officials without a valid warrant are presumptively unreasonable unless shown to fall within one of the exceptions to the rule that a search must rest upon a valid warrant and the burden is on the person seeking to uphold the search to show that it comes within an exception. Coolidge v. New Hampshire, 403 U.S. 443, 455, 91 S.Ct. 20022, 2032, 29 L.Ed 2d 564 (1971); Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.ed 2d 856 (1964).

Probable cause is flexible, common sense standard. It exists where the facts and circumstances within the police officer's knowledge and of which they have reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that an offense has been, or is being committed. Ker v. California, 374 U.S. 23, 35, 83 S.Ct. 1623, 1630 (1962). The existence of probable cause is to be determined only from what the officers had reason to believe at the time of entry. Id. at n.12 A practical, nontechnical probability that incriminating evidence is involved is all that is required to establish probable cause. Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed 2d 1879 (1949).

Probable cause to search, plus exigent circumstances, may justify a warrantless search. Note that probable cause alone is insufficient; it must be coupled with exigent circumstances before a warrantless search is justified. Vale v. Louisiana, 357 U.S. 30, 90 S.Ct. 1969, 26 L.Ed. 2d 409 (1970). (What constitutes exigent circumstances is discussed below).

NOTE: In New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed 2 720 (1985), the Supreme Court held that a student had a legitimate expectation of privacy in the contents of her purse and held that searches by school officials are protected by the fourth amendment, although less than probable cause may justify a search. The court left open the question of whether a student's expectation of privacy extends to his locker, n.5, and further left open the question of

whether a school search conducted by law enforcement agents may be justified when supported by something less than probable cause. Note 7.

II. DUE DILIGENCE IN PROCESSING A WARRANT

The cases are not clear concerning when, and for how long, the police may delay in seeking a search warrant. In United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed 2d 538 (1977), the Supreme Court held that a person had a reasonable expectation of privacy in the contents of his footlocker and, once the police gained exclusive possession of the footlocker, a warrantless search conducted one hour later was unreasonable and not justified by exigent circumstances. Similarly, in Arkansas v. Sanders, 442 U.S. 753, 766, 99 S.Ct. 2586, 2594, 61 L.Ed. 2d 235 (1979), the Supreme Court held that once the police, without risking the loss of evidence, had detained a suspect and secured his suitcase, the police should have delayed the search of the suitcase until they obtained a search warrant. In United States v. v. Johns, 469 U.S. 478, 105 S.Ct. 881, 83 L.Ed. 2d 890 (1985), however, the Supreme Court held that because the police could have conducted a warrantless search of packages seized from a truck immediately, a three day delay in searching the packages was reasonable, even though no search warrant was obtained. The deciding factor appears to be whether or not the police have the right to conduct a search immediately when they gain exclusive possession of the object to be searched. If the police, because probable cause plus exigent circumstances, are entitled to search the object as soon as they gain exclusive possession of it, they need not delay the search and seek a warrant. If, however, exigent circumstances do not exist at the time the police gain exclusive possession of the object, the police cannot immediately conduct a search. Instead, they must obtain a warrant.

III. EXIGENT CIRCUMSTANCES JUSTIFYING A WARRANTLESS SEARCH

Exigent circumstances, when coupled with probable cause, may excuse the requirement that a warrant be obtained before a search is conducted but, even when applying this principle, the Supreme Court has emphasized that a warrant should be obtained where practicable. See United States v. United States District Court, E.D. of Michigan, Southern Div., 407 U.S. 297, 318, 92 S.Ct. 2125, 2137, 32 L.Ed. 2d 752 (1972). The seriousness of the offense alone does not create an exigent circumstance that would justify a warrantless search. Mincey v. Arizona, 437 U.S. 385, 394, 98 S.Ct. 2408, 2414, 57 L.Ed. 2d 290 (1978).

One exigent circumstance the Supreme Court has recognized is that when there is a danger that evidence will be lost or destroyed while a warrant is sought, a warrantless search may be reasonable, Arkansas v. Sanders, 442 U.S. at 759, 99 S.Ct. at 2590-91, because subjects have no constitutional right to destroy or dispose of evidence. Ker, 374 U.S. at 39, 83 S.Ct. at 1633. Narcotics specifically have been held to be uniquely "quickly and easily destroyed." Id.

The test for determining whether exigent circumstances exist so as to excuse the failure to obtain a warrant is whether the officer reasonably believed that he was confronted with an emergency in which the delay necessary to obtain the warrant, under the circumstances, threatened the destruction of evidence. Schmerber v. California, 384 U.S. 757, 770, 86 S.Ct. at 1826, 1835 (1966). In applying such a test, the answer is not to be determined by hindsight;

instead, the state of mind of the police at the time the search was made is the relevant factor. Cf. Ker, 374 U.S. at 40, N.12, 83 S.Ct. at 1633, n.12.

IV. PLAIN VIEW

The plain view doctrine authorizes the seizure of illegal or evidentiary items visible to a police officer whose access to the object has some prior fourth amendment justification and who has probable cause to suspect that the item is connected with criminal activity. Texas v. Brown, 460 U.S. at 738 and n.4, 741-42, 103 S.Ct. at 1540 and n.4, 1542-43. The plain view doctrine is grounded on the proposition that once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost; the owner may retain incidents of title and possession but not privacy. Illinois v. Andreas, 463 U.S. 765, 771, 103 S.Ct. 3319, 3324, 77 L.Ed. 2d 1003 (1983).

Where the initial intrusion that brings the police within plain view of the object is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, seizure of the object is permitted, Coolidge, 403 U.S. at 465, 91 S.Ct. at 2037; however, plain view alone is insufficient to justify warrantless seizure of evidence. Exigent circumstances must also exist, Coolidge, 403 U.S. at 468, 91 S.Ct. at 2039, and the search or seizure of objects in plain view must be supported by probable cause. Arizona v. Hicks, 107 S.Ct. 1154 (1987) (moving a stereo to see serial numbers was a search which could only be supported by probable cause). In addition, the discovery of items in plain view may have to be inadvertent; where the police know in advance the location of evidence and intend to seize it, a warrant is required absent exigent circumstances. Coolidge, 403 U.S. at 469, 91 S.Ct. at 2040 (plurality opinion never adopted by a majority of the court, see Arizona v. Hicks, 107 S.Ct. 1149, 1155 (White, J., concurring).

NEW JERSEY v. T. L. O.

No. 83-712

SUPREME COURT OF THE UNITED STATES

469 U.S. 325; 105 S. Ct. 733; 1985 U.S. LEXIS 41; 83 L. Ed. 2d 720; 53 U.S.L.W. 4083

March 28, 1984, Argued
January 15, 1985, Decided

SUBSEQUENT HISTORY:
[***1]

Reargued October 2, 1984.

PRIOR HISTORY:
CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

DISPOSITION:
94 N. J. 331, 463 A. 2d 934, reversed.

REF-LINKS:
View References Turn Off Lawyers' Edition Display

DECISION:

Reasonableness standard held to be proper standard for determining legality of searches conducted by public school officials.

SUMMARY:

At a New Jersey high school a teacher discovered a 14-year-old freshman smoking in a lavatory in violation of a school rule and brought her to the principal's office. When questioned by an assistant vice principal, the student denied that she had been smoking and claimed that she did not smoke at all, and the assistant vice principal then demanded to see her purse, opened the purse, found a pack of cigarettes, and, upon removing the cigarettes, noticed a pack of cigarette rolling papers, which is closely associated with the use of marijuana. The assistant vice principal proceeded to search the purse thoroughly and found a small amount of marijuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card containing a list of those students who owed the student money, and two letters that implicated the student in marijuana dealing. A New Jersey juvenile court admitted the evidence so discovered in delinquency proceedings against the student, holding that a school official may properly conduct a search of a student's person if the official has a reasonable suspicion that a crime has been or is in the process of being committed, or reasonable cause to believe that the search is necessary to maintain school discipline or enforce

school policy, and that the search in this case was a reasonable one under this standard. The court found the student to be a delinquent and sentenced her to a year's probation (428 A2d 1327). The Appellate Division affirmed the trial court's finding that there had been no Fourth Amendment violation, but vacated the adjudication of delinquency and remanded for a determination whether the student had willingly and voluntarily waived her Fifth Amendment Rights before confessing (448 A2d 493). On appeal of the Fourth Amendment ruling by the student, the Supreme Court of New Jersey reversed the judgment of the Appellate Division and ordered the suppression of the evidence found in the purse, holding that the search of the purse was not reasonable (463 A2d 934).

On certiorari, the United States Supreme Court reversed. In an opinion by White, J., in which Burger, Ch. J., and Powell, Rehnquist, and O'Connor, JJ., joined, and in which Brennan, Marshall, and Stevens, JJ., joined as to point one below, the court held: (1) that the Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials; (2) that school officials need not obtain a warrant before searching a student who is under their authority; (3) that school officials need not strictly adhere to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law, and that the legality of their search of a student should depend simply on the reasonableness, under all the circumstances, of the search, and (4) that the search in this case was not unreasonable under the Fourth Amendment.

Powell, J., joined by O'Connor, J., concurred in the opinion and the holding, expressing the view that greater emphasis should be placed on the special characteristics of elementary and secondary schools that make it unnecessary to afford students the same constitutional protections granted adults and juveniles in a nonschool setting.

Blackmun, J., concurred in the judgment, expressing the view that the special need for an immediate response to behavior that threatens either the safety of school children and teachers or the educational process itself justifies the court in excepting school searches from the warrant and probable cause requirements, and in applying a standard determined by balancing the relevant interests.

Brennan, J., joined by Marshall, J., concurred in part and dissented in part, expressing the view that teachers, like all other government officials, must conform their conduct to the Fourth Amendment's protections of personal privacy and personal security, that the Fourth Amendment's language compels that school searches like that conducted in this case are valid only if supported by probable cause, and that applying the constitutional probable cause standard to the facts of this case, the search in question violated the student's Fourth Amendment rights.

Stevens, J., joined by Marshall, J., and joined also by Brennan, J., as to point one below, concurred in part and dissented in part, expressing the view that (1) the court has misapplied the standard of reasonableness embodied in the Fourth Amendment; (2) that a standard better attuned to the concern for violence and unlawful behavior in the schools would permit teachers and school administrators to search a student when they have

reason to believe that the search will uncover evidence that the student is violating the law or engaging in conduct that is seriously disruptive of school order, or the educational process; and (3) that the search in this case failed to meet this standard.

Held:

1. The Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials and is not limited to searches carried out by law enforcement officers. Nor are school officials exempt from the Amendment's dictates by virtue of the special nature of their authority over schoolchildren. In carrying out searches and other functions pursuant to disciplinary policies mandated by state statutes, school officials act as representatives of the State, not merely as surrogates for the parents of students, and they cannot claim the parents' immunity from [***3] the Fourth Amendment's strictures. Pp. 333-337.

2. Schoolchildren have legitimate expectations of privacy. They may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items by bringing them onto school grounds. But striking the balance between schoolchildren's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place requires some easing of the restrictions to which searches by public authorities are ordinarily subject. Thus, school officials need not obtain a warrant before searching a student who is under their authority. Moreover, school officials need not be held subject to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a determination of whether the search was justified at its inception and [***4] whether, as conducted, it was reasonably related in scope to the circumstances that justified the interference in the first place. Under ordinary circumstances the search of a student by a school official will be justified at its inception where there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. And such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the student's age and sex and the nature of the infraction. Pp. 337-343.

3. Under the above standard, the search in this case was not unreasonable for Fourth Amendment purposes. First, the initial search for cigarettes was reasonable. The report to the Assistant Vice Principal that respondent had been smoking warranted a reasonable suspicion that she had cigarettes in her purse, and thus the search was justified despite the fact that the cigarettes, if found, would constitute "mere evidence" of a violation of the no-smoking rule. Second, the discovery of the rolling papers then gave rise to a reasonable [***5] suspicion that respondent was carrying marihuana as well as cigarettes in her purse, and this suspicion justified the further exploration that turned up more evidence of drug-related activities. Pp. 343-347.

COUNSEL:

Allan J. Nodes, Deputy Attorney General of New Jersey, reargued the cause for petitioner. With him on the brief on reargument were Irwin J. Kimmelman, Attorney General, and Victoria Curtis Bramson, Linda L. Yoder, and Gilbert G. Miller, Deputy Attorneys General. With him on the briefs on the original argument were Mr. Kimmelman and Ms. Bramson.

Lois De Julio reargued the cause for respondent. With her on the briefs were Joseph H. Rodriguez and Andrew Dillmann. *

* Briefs of amici curiae urging reversal were filed for the United States by Solicitor General Lee, Deputy Solicitor General Frey, and Kathryn A. Oberly; for the National Association of Secondary School Principals et al. by Ivan B. Gluckman; for the National School Boards Association by Gwendolyn H. Gregory, August W. Steinhilber, and Thomas A. Shannon; for the Washington Legal Foundation by Daniel J. Popeo and Paul D. Kamenar; and for the New Jersey School Boards Association by Paula A. Mullaly and Thomas F. Scully.

Briefs of amici curiae urging affirmance were filed for the American Civil Liberties Union et al. by Mary L. Heen, Burt Neuborne, E. Richard Larson, Barry S. Goodman, and Charles S. Sims; and for the Legal Aid Society of the City of New York et al. by Janet Fink and Henry Weintraub.

Julia Penny Clark and Robert Chanin filed a brief for the National Education Association as amicus curiae.

Shy Cason, Appellant, v. Connie Cook, In her official capacity as Vice Principal of North High School; Wanda Jones, In her official capacity as a detective of the Des Moines Police Department; William A. Anderson, In his official capacity as Superintendent of Schools; The Des Moines Independent School District; and the Des Moines Police Department, Appellees

No. 85-2393

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

810 F.2d 188; 1987 U.S. App. LEXIS 1385

October 14, 1986, Submitted

January 28, 1987, Filed

PRIOR HISTORY:
[**1] Appeal from the United States District Court for the Southern District of Iowa.

COUNSEL:
Thomas Mann, Jr. for Appellant.

Elizabeth Gregg Kennedy, J. M. Sullivan, for Appellee.

JUDGES:
McMillian, Circuit Judge, Henley, Senior Circuit Judge, and Nichol, * Senior District Judge.

* The Honorable Fred J. Nichol, Senior United States District Judge, District of South Dakota, sitting by designation.

OPINIONBY:
NICHOL

OPINION:

[*189] NICHOL, Senior District Judge.

Shy Cason appeals from the district court's n1 grant of a directed verdict in favor of the appellees. Shy brought this action pursuant to 42 U.S.C. section 1983 alleging that her constitutional rights to due process and to be free from unreasonable search and seizure were violated when she was removed from her high school classroom, questioned, and both her person and possessions were searched by the appellees Cook and Jones. Shy also alleged constitutional violations on the part of appellees Anderson,

the Des Moines Independent School District and the Des Moines Police Department, claiming that their failure to promulgate rules and their failure to properly train and supervise violated her right to due process. In addition, the appellant raised several pendent [**2] state law claims. The district court directed a verdict at the close of all the evidence after determining that there was no constitutional violation of the appellant's rights. We affirm.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 The Honorable William C. Hanson, Senior United States District Judge, Southern District of Iowa.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

I. BACKGROUND

When addressing the propriety of a directed verdict, the evidence, together with all of the reasonable inferences to be drawn therefrom, is to be viewed in the light most favorable to the nonmoving party. Schlothauer v. Robinson, 757 F.2d 196 (8th Cir. 1985) (per curiam); Dobson v. Bacon Transport Co., 607 F.2d 805, 806 (8th Cir. 1979); Hauser v. Equifax, Inc., 602 F.2d 811, 814 (8th Cir. 1979). The motion for directed verdict should be granted only when the nonmoving party has presented insufficient evidence to support a jury's verdict in his favor. Hauser at 814.

Viewing the evidence in the light most favorable to Shy, the stipulated facts and the record evidence show that on May 17, 1983, Shy was a student at North High School in Des Moines, Iowa. At approximately 12:20 p.m. on that date, a student approached the appellee Connie Cook, the vice-principal of North [**3] High School, and told her that her locker had been broken into and that she was missing a pair of sweatpants and a duffle bag. She also reported that a friend was missing a pair of [*190] sweatpants. At approximately 12:40 p.m., another student approached Ms. Cook and reported that her wallet and coin purse had been taken from her gym locker. The student reported that the wallet contained $65 along with several credit cards. Ms. Cook recorded a detailed description of the missing items.

Standing with Ms. Cook when these reports were made was the appellee Wanda Jones, a police officer who had been assigned to North High School as a liaison officer pursuant to an established police liaison program between the Des Moines Police Department and the school district. The liaison program is funded jointly by the police department and the school district. The officer does not wear a police uniform and drives an unmarked automobile. The liaison officer is instructed to cooperate with the school officials.

After receiving the reports of stolen items, Ms. Cook decided to investigate the alleged thefts and asked Ms. Jones if she would accompany her to the locker room. Ms. Cook interviewed several students [**4] in the locker room and was supplied with the

names of four students who had been seen in the locker area around the time of the thefts: Shy Cason, Jerrie Harvey, Monica Harvey and Tabatha Prather. These four students did not have permission to be in the locker area at this time nor were they assigned to the gym class of the prior period. Ms. Cook also recalled having seen Shy, Jerrie and Monica together in the lobby just prior to receiving the reports of the thefts.

Ms. Cook and Ms. Jones then proceeded to the office where Ms. Cook checked the schedules of the four students. Ms. Cook again asked Ms. Jones to accompany her as she interviewed each of the students. Jerrie was removed from her classroom by Ms. Cook and was taken into an empty classroom where she was questioned. Ms. Jones did not participate in this questioning and in fact, remained in the hallway during this time period. Shy and Monica were then removed from their classroom and taken into an empty restroom. Shy testified that Monica remained outside and that she was taken into the restroom and that Ms. Cook locked the door. Ms. Jones was also inside the locked restroom but again did not participate in any questioning [**5] of Shy.

Ms. Cook informed Shy why she was being questioned and allowed Shy an opportunity to respond. After Shy admitted being in the locker room but denied having any of the missing items, Ms. Cook told Shy that she was going to search her purse. Ms. Cook then took Shy's purse and dumped the contents onto a shelf in the restroom. In Shy's purse was a coin purse that matched exactly the description of the missing coin purse. After this purse was found, Shy testified that Ms. Jones conducted a pat-down search of Shy from her shoulders to her toes while Shy was made to stand against the wall with her hands up and legs spread.

Monica and Shy were then taken to the office area and on the way, Shy was asked by Ms. Cook to open her locker and a search of the locker was conducted by Ms. Cook. At the office, Monica and Shy were placed in separate rooms with Ms. Jones remaining with Monica while Ms. Cook continued to question Shy. Ms. Jones did not participate in the questioning of either Shy or Monica at this point. It was learned that Shy and Jerrie were in fact involved with the thefts and Jerrie was summoned to come to the office. Ms. Jones did participate in a joint interview with Shy [**6] and Jerrie and when the two girls could not agree on the events that had transpired in the locker room, Ms. Jones presented each girl with a juvenile appearance card. Juvenile appearance cards are utilized by the police liaison program whenever possible in lieu of an arrest. The card required each of the girls and their parents to report to Ms. Jones' office at the police station on May 19, 1983.

Shy's mother was not made aware of the events of this day until she arrived to pick up Shy after school. No attempt was made to contact Shy's mother prior to any questioning or the search of Shy and her possessions. [*191] While at school, Shy was not informed of a right to remain silent or of a right to counsel. Both Shy and her mother signed a waiver and consent form before they visited with Ms. Jones at her office on the 19th. Each of the girls was suspended from school and after meeting with Ms. Jones no further action was taken.

II. DISCUSSION

In May of 1983, it had been firmly established that schoolchildren do not shed their constitutional rights at the schoolhouse gates. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969) (First Amendment); Goss v. [**7] Lopez, 419 U.S. 565, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975) (Due Process); Ingraham v. Wright, 430 U.S. 651, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977) (Eighth Amendment). In 1985, the Supreme Court addressed the Fourth Amendment and its application in the school setting. Consistent with the above opinions, the Court held that the Fourth Amendment right to be free from unreasonable search and seizure applies to a search by a school official. New Jersey v. T.L.O., 469 U.S. 325, 333, 83 L. Ed. 2d 720, 105 S. Ct. 733 (1985) (T.L.O.).

After the Court determined that the Fourth Amendment applied in the school setting, it further discussed the extent of the protection afforded the schoolchildren. Balancing the interests of the children's privacy and the need to maintain discipline in the school setting, the Court held that the warrant requirement was unsuited to the school environment: "requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." Id. at 340. In addition to eliminating the warrant requirement, the Court also reduced the level of suspicion of illicit activity that is needed [**8] to justify a search. Id. "The legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." Id. at 341.

In determining whether a given search is reasonable, the Court provided further guidance: The inquiry into the reasonableness of a search is twofold: First, the action must be justified at its inception and second, the scope of the search must be reasonably related to the circumstances which justified the interference in the first place. Id. (citing Terry v. Ohio, 392 U.S. 1, 20, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968)). A search satisfies the first inquiry when there are reasonable grounds for suspecting that the search will uncover evidence of a rule or criminal violation. The second inquiry is satisfied when "the measures adopted 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 (footnote omitted).

The Court did note, however, that it was not addressing the question of what standard would apply when a search is conducted by school officials in conjunction with or at the behest of law enforcement [**9] agencies and expressed no opinion on that subject. Id. at 341 n. 7 (emphasis added). This is the precise question that is presented to this court by the case at bar: Whether the reasonableness standard should apply when a school official acts in conjunction with a police liaison officer. The district court found that the reasonableness standard was the correct standard and that the appellee Cook had met this standard and thus there was no violation of the appellant's constitutional rights. We agree.

There is no evidence to support the proposition that the activities were at the behest of a law enforcement agency. The uncontradicted evidence showed that Ms. Cook, the school official, conducted the investigation of the thefts that had been reported to her. Ms. Jones' involvement was limited to a pat-down search conducted after a coin purse matching the description of the one stolen was found and to briefly interviewing [*192] Shy and Jerrie and presenting juvenile appearance cards to the girls. At most, then, this case represents a police officer working in conjunction with school officials.

In Martens v. District No. 220, 620 F. Supp. 29 (N.D. Ill. 1985), the district court [**10] addressed a very similar question. The school official had received an anonymous phone call implicating the plaintiff in drug-related activities. The plaintiff was called into the office but refused to consent to a search until his parents were contacted. Id. at 30. While waiting in the office, a deputy sheriff came in (the deputy had come to the school on another matter). The deputy told the plaintiff that based on his experience it would be best to cooperate. The deputy then asked the plaintiff to empty his pockets and the plaintiff complied. Id. at 30-31.

The court recognized that the involvement of the police officer distinguished this case from T.L.O.; however, the court held that, "The interest that prompted the T.L.O. Court to waive the warrant requirement and to adopt a reasonableness standard -- preserving swift and informal disciplinary procedures -- would not be served by imposing warrant and probable cause requirements here" in light of the limited role of the deputy. Id. at 32. The district court noted that the deputy had not helped to develop the facts that prompted the search of the plaintiff nor had he directed that the plaintiff be detained and [**11] searched. There was no indication that but for the deputy's involvement, the plaintiff would not have been searched. Id. Finding that the school official's actions were based on reasonable suspicion and reasonable in scope, the court held that there was no constitutional violation. Id.

In Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984), cert. denied, 470 U.S. 1051, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985), n2 the plaintiff raised the question of the appropriate standard to apply when a school official acts in conjunction with law enforcement. The school officials here were investigating possible drug usage and sales on school property. Id. at 979. After the school officials had confronted several students, the police were summoned and several students were removed. Id. at 979, 983. The plaintiff was questioned further by the school officials and when he refused to remove his pants for a search, the police were again summoned. Id. at 979-80. The plaintiff argued that due to this police involvement, the correct standard to apply was that of probable cause and a warrant. Id. at 983.

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n2 Although Tartar v. Raybuck predated T.L.O., the Sixth Circuit applied the same reasonable cause standard when it addressed the question of a search by a school official.

Tartar is cited with approval by the Court in T.L.O.. T.L.O., 469 U.S. at 332 n. 2, 341 n. 6.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[**12]

The court found that the police involvement with respect to the plaintiff was marginal. Further, since this was an action brought pursuant to 42 U.S.C. section 1983 for damages, the Sixth Circuit declined to draw any distinction between school officials acting alone and those incidents where the officials act in conjunction with law enforcement. Id. at 984.

We find the reasoning of the district court in Martens to be persuasive. The imposition of a probable cause warrant requirement based on the limited involvement of Ms. Jones would not serve the interest of preserving swift and informal disciplinary procedures in schools. Ms. Jones did not conduct any of the initial interviews of the students and participated in a pat-down search only after evidence was discovered. Ms. Cook, on the other hand, made the initial determination to investigate the reported thefts and conducted the investigation. This school official procured the names of four students who had been seen in the locker room area at an unscheduled time and without permission. Ms. Cook also recalled having personally observed these same students together in the hall just prior to receiving the reports of the thefts. [**13] The students were removed from their classrooms by Ms. Cook and each was [*193] provided with an explanation as to the reason for their removal and was provided with an opportunity to respond prior to any search.

It was Ms. Cook who conducted the search of Shy's purse which led to the discovery of the coin purse. It was only after this discovery that Ms. Jones conducted a limited pat-down search of Shy. The only other involvement of the police liaison officer occurred when the students were unable to agree on the events that had transpired in the locker room. This involvement was limited to some questioning and the issuance of juvenile appearance cards.

It is clear that the correct standard to apply under the circumstances presented in this case is the standard enunciated by the Court in T.L.O.: Whether the search was reasonable under all of the circumstances. Based on the foregoing discussion of the facts, the initial search of the appellant's purse was based on a reasonable suspicion that Shy Cason had been involved in a violation of school rules and of the criminal law. The subsequent pat-down search was made when this suspicion was increased due to the finding of physical evidence [**14] in the appellant's possession. In addition, the scope of the search was reasonable. The theft victim had reported $65 as missing along with her wallet. Due to the nature of this missing item, patting down the appellant was not "excessively intrusive in light of the age and sex of the student and the nature of the infraction." T.L.O., 469 U.S. at 342.

We find that based on the stipulated facts and record evidence, and viewing the evidence in a light most favorable to the appellant, the appellant presented insufficient evidence to support a jury's verdict in her favor. We do not hold that a search of a student by a school official working in conjunction with law enforcement personnel could never rise to a constitutional violation, but only that under the record as presented to the court, no such violation occurred here. The district court did not err in granting a directed verdict at the close of all the evidence.

Since we have found no constitutional violation, the remaining allegations against the Des Moines Police Department, the appellee Anderson and the Des Moines Independent School District need not be addressed.

The appellant also raised several pendent claims based on her [**15] allegation that Ms. Jones failed to abide by the requisite sections of the Iowa Code relating to juveniles, specifically Iowa Code sections 232.11 and 232.19. These claims are based on Shy's assertion that she was taken into custody by Ms Cook and Ms. Jones when she was taken both into the restroom and into the school office. There is simply no support for this proposition. See, Boynton v. Casey, 543 F. Supp. 995, 998 (D. Me. 1982) (plaintiff questioned by school official for over one hour on the school grounds not custodial interrogation); In Interest of J.A.N., 346 N.W.2d 495, 499 (Iowa 1984) (Custodial interrogation is questioning initiated by law enforcement officers). Thus, the fact that Shy was not informed of a right to remain silent and a right to counsel is not relevant. When Shy and her mother did in fact meet with Ms. Jones, each signed a consent and waiver of these very rights before the interview began. Because Shy was not in custody, her accusation that the failure to notify her mother prior to any questioning or the search violated her rights also fails. See, Pollnow v. Glennon, 594 F. Supp. 220, 224 (S.D. N.Y. 1984), aff'd, 757 F.2d 496 (2nd [**16] Cir. 1985); Boynton v. Casey, 543 F.Supp. at 998.

Accordingly, the order of the district court is affirmed.

DAVID TARTER, et al., Plaintiffs-Appellants, v. WILLIAM RAYBUCK, et al., Defendants-Appellees

No. 83-3174

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

742 F.2d 977; 1984 U.S. App. LEXIS 19004

March 6, 1984, Argued

August 31, 1984, Decided

PRIOR HISTORY:
[**1]

ON APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

COUNSEL:
George B. Vasko, Akron, Ohio, for Appellant.

Dennis M. Whalen, Cuyahoga Falls, Ohio, for Appellee.

JUDGES:
Merritt and Krupansky, Circuit Judges; and Phillips, Senior Circuit Judge.

OPINIONBY:
PHILLIPS

OPINION:

[*978] PHILLIPS, Senior Circuit Judge.

This action was brought under 42 U.S.C. @ 1983 by David Tarter, and his parents, Judy and Dennis Tarter. The defendants were five administrators of the Cuyahoga Falls City School District, William Raybuck, David E. Rump, William Spargur, Marianne Rovnyak, and Dr. Harold E. Wilson, [*979] and the Cuyahoga Falls Board of Education. The complaint alleged that David, while a student at Cuyahoga Falls High School, had been subjected to an unlawful search by the defendant school administrators, and that David, Judy and Dennis Tarter had been falsely imprisoned by the school administrators. The complaint also sought an order compelling the defendant school board to reinstate David as a student at the Cuyahoga Falls High School. Defendants counterclaimed seeking costs and attorneys fees.

This suit was tried in the district [**2] court on January 3, 1983. At the close of plaintiffs' case, the district court granted a directed verdict in favor of defendants Rovnyak, Wilson and the Board of Education, and the trial continued. The district court issued its findings of fact and conclusions of law reported in Tarter v. Raybuck, 556 F. Supp. 625 (N.D. Ohio 1983), and rendered judgment in favor of defendants. In addition, the court found the plaintiff's cause of action was frivolous, unreasonable or without foundation, and awarded defendants attorneys fees pursuant to 42 U.S.C. @ 1988. n1 On appeal, plaintiffs make two contentions: (1) that the district court erred in holding that the search of David Tarter was not unconstitutional; and (2) that the district court erred in awarding attorneys fees against the plaintiffs.

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n1 On June 10, 1983 the district court issued an order granting defendants $9,668.00 in attorneys fees and $1,179.90 in costs.

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I.

On March 3, 1981 David Tarter was a junior at Cuyahoga Falls High School. Upon his [**3] arrival at school that morning he went to a designated smoking area in a parking lot adjacent to the high school building. That day three defendants, David Rump, the Administrative Principal, and unit principals William Raybuck and William Spargur had undertaken surveillance of the smoking area, as a result of reports previously received regarding alleged drug use and vandalism by students while in the smoking area.

The administrators observed students smoking cigarettes or marijuana, and the exchange of money and plastic bags which they believed contained marijuana, including an exchange between David Tarter and Michael Cosner. Thus, the school officials converged upon the smoking area and directed a number of students, including David Tarter, to the faculty lounge. Some students were released immediately; however, the school officials undertook questioning those students they suspected involved in illegal activity. In the meantime the local police were called to the scene. In addition, a number of students, including Tarter, were given forms to sign indicating notice of intent to suspend.

The school officials requested several students, including Tarter, to empty their coat [**4] pockets; all did so. No incriminating evidence was found on Tarter. However, Raybuck testified he detected an odor of marijuana on Tarter's breath. Thereafter, Unit Principal Raybuck informed Tarter and three others that they were going to be suspended. He then left to attempt to call the parents or guardian of each student.

During the course of these events, the police arrived, conducted a search of several students, and took several away. Mr. Raybuck then took David Tarter to the

office, and after a conversation with William Spargur, advised Tarter of what he had seen, and indicated the belief that Tarter had sold marijuana to Michael Cosner. Mr. Raybuck informed David Tarter that he wished to conduct a further search. He then took Tarter to the "clinic", a small room near the office, to conduct the search. Defendant Spargur was also present while Ms. Rovnyak stood outside the door of the "clinic". Pursuant to defendant's request, David Tarter emptied his pockets, removed his jacket, boots and shirt. No incriminating evidence was found. Raybuck and Spargur then asked Tarter to remove his [*980] pants; Tarter refused, the search ceased, and the police were summoned. [**5] n2

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n2 The defendants' request to have plaintiff remove his pants was apparently based upon events which transpired earlier in the day. The district court noted:

> In an earlier confrontation on the morning of March 3, 1981, the defendant William Spargur was handed a plastic bag of marijuana cigarettes concealed under the trousers of student Dave Richardson who had been seen engaging in an exchange of what appeared to be marijuana cigarettes with a student in a transaction separate from the Tarter-Cosner exchange.
>
> Prior to the Spargur-Raybuck-Tarter confrontation in the clinic, William Raybuck was present when an officer of the Cuyahoga Falls Police Department began a search of Greg Kmet, another student observed smoking marijuana in the pit on March 3, 1981. The police officer asked Kmet to unbutton his pants. After Kmet complied, with some hesitation, and lowered his pants, the police officer and Raybuck observed a big bulge in his underwear which was patted by the police officer with ensuing crinkling-like paper sound. At that point Kmet stated, "You're not searching me any more," and bolted from the school with the police officer in pursuit.

556 F. Supp. at 627.

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[**6]

A few minutes later, David's parents arrived and entered the clinic. Defendants Ms. Rovnyak and Mr. Rump also entered the clinic at this time. During discussions concerning the morning's events, the Tarter parents were advised that the police had been summoned. Mr. Tarter advised his son to put on his clothes, and stated that they were going home. The school officials requested they wait until the police arrived; the Tarters refused. According to the district court's findings, the plaintiffs "left the premises without interference from any of the defendants." 556 F. Supp. at 628.

On March 3, 1981, the day of the incident in question, David Tarter was suspended from school for a period of ten days for possession and/or use of marijuana based upon the observations of defendants Raybuck, Spargur and Rump.

David Tarter was subsequently expelled for the balance of the semester by the Superintendent of Schools. The Cuyahoga Falls School Board conducted a hearing on David Tarter's appeal of the expulsion, and affirmed the decision of the Superintendent. The Tarters were represented by counsel at the hearing.

II.

Plaintiffs challenge the constitutionality of the school officials' [**7] search of David Tarter. Thus, we are presented with the question of the role of the fourth amendment in the context of the public school system. More precisely, we consider whether defendants Raybuck and Spargur violated David Tarter's constitutional rights when they searched his person on the premises of Cuyahoga Falls High School on March 3, 1981.

The district court concluded David Tarter "consented to the search conducted by and at the request of defendants Raybuck and Spargur . . . [and] the ensuing search did not violate a constitutionally protected right of the plaintiff David Tarter." 556 F. Supp. at 628. Alternatively, it addressed the question of the reasonableness of the search in the context of the fourth amendment constraints "assuming arguendo that the plaintiff David Tarter was intimidated by the presence of his high school principals to consent involuntarily to the search. . . ." Id. at 629. The court concluded the search was reasonable under the circumstances, and even assuming the absence of consent David Tarter's fourth amendment rights were not violated. Id. at 630.

We are not as convinced as the district court that David Tarter knowingly and intelligently [**8] waived his constitutional rights when he "consented" to be searched, and we are not inclined to resolve this case on the basis of consent. The burden would be upon defendants to demonstrate such a voluntary relinquishment of constitutional rights by plaintiff. There is a presumption against the waiver of constitutional rights. That he may have acquiesced in the initial search does not necessarily demonstrate the relinquishment of his rights to challenge his initial search. In fact, David [*981] Tarter's testimony indicates he only submitted to the search because he was afraid. Furthermore, there is no indication he even was aware that he might have had a constitutional right to object to a search. His eventual refusal to be strip-searched fully is not necessarily an indication of a waiver of his rights, rather it is equally likely that personal modesty or embarrassment resulted in his ultimate refusal to permit the search to continue.

It is beyond peradventure that school children do not shed their constitutional rights at the school house gate. Tinker v. Des Moines Independent Comm. School Dist., 393 U.S. 503, 506, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969). It is well [**9] recognized that school officials are subject to constitutional restraints as state officials. See, e.g.,

Goss v. Lopez, 419 U.S. 565, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975) (due process hearing rights for school suspensions); Tinker, supra. (First Amendment rights available to students subject to application in light of special circumstances of the school environment). School officials, employed and paid by the state and supervising children, are agents of the government and are constrained by the Fourth Amendment. Horton v. Goose Creek Indep. School District, 690 F.2d 470 (5th Cir. 1982) cert. denied, 463 U.S. 1207, 103 S. Ct. 3536, 77 L. Ed. 2d 1387 (1983) (per curiam) (challenge to the use of canine contraband detection program); State in Interest of T.L.O., 94 N.J. 331, 463 A.2d 934, 943 (1983) cert. granted; sub nom. State of New Jersey v. T.L.O., 464 U.S. 991, 104 S. Ct. 480, 78 L. Ed. 2d 678 (1983) scheduled for reargument 52 U.S.L.W. 3935 (1984). n3 Accord. Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977); State v. Young, 234 Ga. 488, 216 S.E.2d 586, cert. denied, 423 U.S. 1039, 46 L. Ed. 2d 413, 96 S. Ct. 576 (1975); People v. [**10] Scott, 34 N.Y.2d 483, 358 N.Y.S.2d 403, 315 N.E.2d 466 (1974). n4

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n3 Unlike this case the New Jersey case initially presented the question of whether the exclusionary rule barred the use in a criminal proceeding of evidence obtained in a search of the student by a school official. In scheduling the case for reargument, the Court asked the parties to brief and argue the following question: "Did the assistant principal violate the Fourth Amendment in opening respondent's [student's] purse in the facts and circumstances of this case?" Although not in the context of an action pursuant to 42 U.S.C. @ 1983, the Supreme Court next term will consider virtually the same question presented to this Court in the case at bar.

n4 Some courts have avoided the application of fourth amendment principles to school teachers and administrators under the doctrine of in loco parentis. See Mercer v. State, 450 S.W.2d 715 (Tex. Civ. App. 1970). Under this theory the school official does not act as an agent of the state, rather he stands "in the shoes of the parent," and thus is not constrained by the fourth amendment. See generally Trosch, Williams & DeVore, "Public School Searches and the Fourth Amendment," 11 J. Law & Educ. 41, 44-45 (1982). This reasoning is unsound and we reject it as have courts and commentators. See cases cited in text immediately preceding this note. See also 3 LaFave, Search and Seizure, @ 10, 11 (1978); Buss "The Fourth Amendment and Searches of Students in Public Schools," 59 Iowa L.Rev. 739, 767 (1974). As the court in Horton, supra, noted: "We think it beyond question that the school official . . . is an agent of the government and is constrained by the fourth amendment." 690 F.2d at 480.

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[**11]

The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue but upon probable cause. . . ." "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions

by government officials." Camara v. Municipal Court, 387 U.S. 523, 528, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) (warrantless administrative search of private residence).

However, the basic concern of the fourth amendment is reasonableness, see Terry v. Ohio, 392 U.S. 1, 19, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968), and reasonableness depends upon the particular circumstances. Although incursions on the fourth amendment should be guarded jealously, not infrequently the ordinary requirements of the fourth amendment are [*982] modified to deal with special circumstances. See, e.g., Marshall v. Barlow's Inc., 436 U.S. 307, 56 L. Ed. 2d 305, 98 S. Ct. 1816 (1978) (administrative search); Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968) [**12] ("stop and frisk" search upon reasonable suspicion); Camara, supra.

Thus, as other courts have done, we balance the fourth amendment rights of individual students with the interest of the state and the school officials in the maintenance of a proper educational environment to educate today's youth. See, e.g., Horton, supra, 690 F.2d at 480; State in the Interest of T.L.O., supra. For an interesting discussion of the balancing approach concept see Trosch, Williams and DeVore, "Public School Searches and the Fourth Amendment," 11 J. Law & Educ. 41, 50 (1982). Indeed, as the Supreme Court has emphasized "education is perhaps the most important function of state and local governments." Brown v. Board of Education, 347 U.S. 483, 493, 98 L. Ed. 873, 74 S. Ct. 686 (1954).

The Fifth Circuit has noted:

> The public school presents special circumstances that demand similar accommodations of the usual fourth amendment requirements. When society requires large groups of students, too young to be considered capable of mature restraint in their use of illegal substances or dangerous instrumentalities, it assumes a duty to protect them from dangers posed by anti-social activities [**13] -- their own and those of other students -- and to provide them with an environment in which education is possible. To fulfill that duty, teachers and school administrators must have broad supervisory and disciplinary powers.

Horton, supra, 690 F.2d at 480 (footnote omitted). See also People v. Overton, 20 N.Y.2d 360, 283 N.Y.S.2d 22, 229 N.E.2d 596 (1967). ("School authorities have an obligation to maintain discipline over the students. . . . Parents, who surrender their children to this type of environment, in order that they may continue development both intellectually and socially, have a right to except certain safeguards. . . . Thus, it is the affirmative obligation of the school authorities to investigate any charge that a student is using or possessing narcotics and to take appropriate steps if the charge is substantiated.")

Thus, we balance the fourth amendment interests of David Tarter with the legitimate concerns of public school officials in maintaining an orderly school conducive to the educational advancement of its students and determine when a school official may search a student in the absence of a warrant.

The prevailing view is that school [**14] officials may constitutionally conduct a search directed at a student under their supervision upon a quantum of evidence short of that which is needed for the usual police search. Horton, supra, 690 F.2d at 481. See 3 LaFave, Search and Seizure, @ 10.11, at 456 (1978). Typically the quantum of evidence is characterized as "reasonable cause" or "reasonable suspicion." See Horton, supra, at 481; LaFave, supra, @ 10.11 at 456 and cases cited therein.

We hold that a school official or teacher's reasonable search of a student's person does not violate the student's fourth amendment rights, if the school official has reasonable cause to believe the search is necessary in the furtherance of maintaining school discipline and order, or his duty to maintain a safe environment conducive to education. Cf. Horton v. Goose Creek, supra, 690 F.2d at 480; State in the Interest of T.L.O., supra, 463 A.2d at 941; State v. McKinnon, 88 Wash. 2d 75, 81, 558 P.2d 781, 784 (1977) (search reasonable if school official has reasonable grounds to believe search is necessary in the aid of maintaining school discipline and order). We note that not only must there be a reasonable [**15] ground to institute the search, the search itself must be reasonable. Thus, for example, the authority of the school official would not justify a degrading body cavity search of a youth in order to determine whether a student was in possession of contraband in violation of school rules. There the fourth amendment and privacy [*983] interests of the youth would clearly outweigh any interest in school discipline or order which might be served by such a search. In Doe v. Renfrow, 631 F.2d 91, 92-93 (7th Cir. 1980) cert. denied, 451 U.S. 1022, 69 L. Ed. 2d 395, 101 S. Ct. 3015 (1981) the court noted: "it does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency." n5 "We suggest as strongly as possible that the conduct herein described exceeded the 'bounds of reason ' by two and a half country miles." 631 F.2d at 93. n6

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n5 In Doe v. Renfrow the district court had determined that defendants had no reasonable cause to believe plaintiff possessed contraband. 631 F.2d at 92. [**16]

n6 The Seventh Circuit in Doe considered and rejected the district court's position in that case that defendants were entitled to "good faith" immunity from damages under the doctrine of Wood v. Strickland, 420 U.S. 308, 43 L. Ed. 2d 214, 95 S. Ct. 992 (1975) reh'g denied 421 U.S. 921, 43 L. Ed. 2d 790, 95 S. Ct. 1589 (1975) which held that in the context of school discipline a school board member will only be liable for a damage award in a @ 1983 action if he acted with an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot be reasonably characterized as being in good faith.

The district court in the case at bar did not address the immunity issue, nor do we. See infra, note 7.

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The determination of whether a school official's search is reasonable and based upon reasonable cause must be determined upon the facts and circumstances of each particular case. However, we caution to note that federal courts should not become entwined in the day to day decision making of teachers and school administrators. [**17] Wood v. Strickland, supra, 420 U.S. at 326. The responsible school official must be afforded the necessary discretion to carry out his duties.

The defendants in this case, Raybuck and Spargur, themselves had observed activity they reasonably believed to indicate the use and sale of marijuana, activity which plainly constituted a violation of a well established policy. Thus, they had personally observed the incident, and had particularized suspicion of specific individuals including David Tarter. Furthermore, they were not making a general search of a large group of students. Cf. Horton, supra; Renfrow, supra. The information they had -- their personal observations -- was obviously reliable. In addition to their personal observations, another student, Michael Cosner, claimed he had purchased a marijuana cigarette from a student he identified in the school yearbook as David Tarter. 556 F. Supp. at 627.

Accordingly, we hold that under the particular circumstances of this case the school officials had reasonable cause to search the plaintiff. Furthermore, the search actually conducted in this case itself was reasonable under the circumstances.

Plaintiffs contend the [**18] district court's reliance on the Horton standard is misplaced because the Fifth Circuit in Horton specifically limited its decision stating:

> We intimate no opinion as to the standards to be applied when a school official acts at the request of police, calls in the police before searching, or turns over the fruits of his search to the police. In that situation, when there is some component of law enforcement activity in the school official's action, the considerations may be critically different.

Horton, 690 F.2d at 481, n. 19.

In this case, the Tarters correctly point out, the police had been summoned to the scene and had taken away two other students. In addition, the defendants had again called the police to the scene with respect to David Tarter. It should be noted, however, that the school officials were not acting on direction of the police, nor was anything from Tarter's person turned over to police. Plaintiffs argue, however, that the reasonable cause standard is not applicable and the probable cause warrant requirement should have applied because the school officials clearly intended to turn over any incriminating evidence to the police, [**19] [*984] and thus were themselves effectively acting as law enforcement officers.

Plaintiffs express a legitimate concern. The presence of the police officers does take this case purely out of the context of school officials seeking to maintain an

environment conducive to the educational process as in Horton. Here, as is often the case, the school rules overlapped the criminal law. However, in the context of this case we decline to pass directly on the question of what fourth amendment standards would be applicable where the fruits of a search are turned over to law enforcement officials and used in proceedings against the student searched. Cf. State in the Interest of T.L.O., supra (adopting "reasonable cause" standard for search where fruits of search were used in proceedings against student). This case simply does not present such a question. This is not a criminal proceeding; no evidence is sought to be excluded; indeed, no incriminating evidence was ever discovered on David Tarter's person. For a discussion of these issues see Annotation "Admissibility, in Criminal Case, of Evidence Obtained By Search Conducted By School Official or Teacher," 49 A.L.R. 3d 978 [**20] (1973), and LaFave, supra.

Although the police had been called with regard to David Tarter, it was because the school officials discontinued their search when David said he would not continue his "cooperation." The involvement of the police with respect to plaintiff was marginal. Their presence does not suggest that a standard other than reasonable cause ought to be adopted. For purposes of a @ 1983 action for damages, we decline to draw the distinctions from Horton urged by appellants. The propriety of such a search in the context of excluding evidence obtained therefrom in a subsequent criminal proceeding against the student is currently a question before the Supreme Court in New Jersey v. T.L.O., supra, and is not before this Court in this @ 1983 action.

We hold that Raybuck and Spargur had reasonable cause to search David Tarter under the circumstances set forth above and that the search was reasonable. Accordingly, we affirm the decision of the district court in this respect, although on grounds different from those relied on by the district court. n7

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n7 Because we conclude that defendants had reasonable cause to conduct the search and the search itself was reasonable, we need not address the question of whether under Wood v. Strickland, 420 U.S. 308, 43 L. Ed. 2d 214, 95 S. Ct. 992 (1975) the defendants would have been entitled to good faith immunity from an award of damages. The issue was not presented to the district court, nor was it presented to this court. Cf. Doe v. Renfrow, 631 F.2d 91, 92-93 (7th Cir. 1980), cert. denied, 451 U.S. 1022, 69 L. Ed. 2d 395, 101 S. Ct. 3015 (1981) wherein the Seventh Circuit reversed a ruling by the district court that defendants were immune from monetary damages under Strickland where the court found no reasonable cause to conduct a search of plaintiffs.

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[**21]

III.

Appellants also assert the district court erred in awarding attorneys fees to the prevailing defendants pursuant to 42 U.S.C. @ 1988. This statute provides the court with

discretion to allow the prevailing party reasonable attorneys fees. n8 Although the language of the statute does not distinguish between a prevailing plaintiff and a prevailing defendant, the legislative history and relevant case law demonstrate the standards are distinct.

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n8 42 U.S.C. @ 1988 provides in pertinent part:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The legislative history reflects the primary purpose of the provision is to provide an opportunity for private citizens to vindicate important constitutional rights. The provision [**22] passed in the Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559, 90 Stat. 2641 was enacted in response to the Supreme Court decision of Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 44 L. Ed. 2d 141, 95 S. Ct. 1612 [*985] (1975) applying the "American Rule" (that each party bears his own legal expenses) for attorneys fees where private parties seek to vindicate federal rights, absent a specific congressional provision granting the authority to award such fees. See Sen. Rep. No. 94-1011, 2-5 (1976) reprinted in 1976 U.S. Code Cong. & Ad. News, 5908, 5910-12. The Senate Report stated further:

> It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by S.2278, if successful, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, 19 L. Ed. 2d 1263, 88 S. Ct. 964 (1968).
>
> * * *
>
> Such "private attorneys general" should not be deterred from bringing good faith [**23] actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose.
>
> * * *

This bill thus deters frivolous suits by authorizing an award of attorneys' fees against a party shown to have litigated in "bad faith" under the guise of attempting to enforce the Federal rights created by the statutes listed in S.2278. Id. at 5912 (footnote omitted).

In Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 54 L. Ed. 2d 648, 98 S. Ct. 694 (1978), the Supreme Court articulated what has become the standard basis for awarding attorneys fees to prevailing defendants in civil rights cases. The Court stated:

"[A] district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." 434 U.S. at 421. In other language the Court stated: "a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after [**24] it clearly became so." Id. at 422.

While the Supreme Court in Christiansburg was addressing the question of the standard applicable to the attorneys fee provision of section 706(k) of Title VII of the Civil Rights Act of 1964, 78 Stat. 261, 42 U.S.C. @ 2000e-5(k), the provision are virtually identical to those of @ 1988 at issue in this case.

In Hughes v. Rowe, 449 U.S. 5, 14-15, 66 L. Ed. 2d 163, 101 S. Ct. 173 (1980) (per curiam) the Court applied the Christiansburg test in actions brought pursuant to @ 1983, although the plaintiff in Hughes was an uncounselled prisoner, the Court's language is clear:

In Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 54 L. Ed. 2d 648, 98 S. Ct. 694 (1978), we held that the defendant in an action brought under Title VII of the Civil Rights Act of 1964 may recover attorney's fees from the plaintiff only if the District Court finds " that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Id., at 421. Although arguably a different standard might be applied in a civil rights action under 42 U.S.C. @ 1983, we can perceive no reason for [**25] applying a less stringent standard. The plaintiff's action must be meritless in the sense that it is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees.

Id. 449 U.S. at 14.

The application of the Christiansburg standard for the award of attorneys fees to defendants under @ 1988 has been adopted by numerous courts. See e.g. Campbell v. Cook, 706 F.2d 1084, 1086 (10th Cir. 1983); Doe v. Busbee, 684 F.2d 1375, 1378-80 (11th Cir. 1982); Werch v. City of Berlin, [*986] 673 F.2d 192 (7th Cir. 1982); Reichenberger v. Pritchard, 660 F.2d 280 (7th Cir. 1981); Bowers v. Kraft Foods Corp., 606 F.2d 816 (8th Cir. 1979); Lopez v. Aransas County Indep. School Dist., 570 F.2d 541 (5th Cir. 1978).

The Supreme Court's test in Christiansburg, supra, however, must be read in context with other language in the Court's opinion stressing that the underlying purposes of @ 1983 and @ 1988 not be undermined in awarding fees to prevailing defendants too freely. The Supreme Court cautioned:
In applying these criteria, it is important [**26] that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a

plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

434 U.S. at 421-422.

The decision to award attorney's fees is committed to the discretion of the trial judge. 42 U.S.C. @ 1988; Christiansburg Garment, 434 U.S. at 421; Harrington v. DeVito, 656 F.2d 264, 266 (7th Cir. 1981); Obin v. District 9 of Internat. Ass'n, Etc., 651 F.2d 574 (8th Cir. 1981); Muscare v. Quinn, 614 F.2d 577, 579-80 [**27] (7th Cir. 1980); Konczak v. Tyrrell, 603 F.2d 13, 19 (7th Cir. 1979), cert. denied, 444 U.S. 1016, 62 L. Ed. 2d 646, 100 S. Ct. 668 (1980) as is the amount of the fee award. Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 1941, 76 L. Ed. 2d 40 (1983). The standard of appellate review of a district court's award of attorney's fees to a prevailing party under @ 1988 is whether the trial court abused its discretion in making or denying the award. Reichenberger v. Pritchard, 660 F.2d 280, 288 (7th Cir. 1981) (award to prevailing defendants); Olitsky v. O'Malley, 597 F.2d 303, 305 (1st Cir. 1979). See Christiansburg Garment, supra, 434 U.S. at 421, 424; Tonti v. Petropoulous, 656 F.2d 212, 217 (6th Cir. 1981); Obin v. District 9 of Internat. Ass'n, Etc., 651 F.2d 574, 586 (8th Cir. 1981).

The Seventh Circuit has articulated several factors an appellate court may consider when determining whether the trial court properly exercised its discretion in applying the Christiansburg standards:

In seeking to determine whether a suit is frivolous, unreasonable or groundless, courts have focused on several factors. Among those considered are whether [**28] the issue is one of first impression requiring judicial resolution, Christiansburg, 434 U.S. at 423-24, 98 S. Ct. at 701; whether the controversy is sufficiently based upon a real threat of injury to the plaintiff, Olitsky, 597 F.2d at 305; whether the trial court has made a finding that the suit was frivolous under the Christiansburg guidelines, and whether the record would support such a finding, see, e.g., Vorbeck v. Whaley, 620 F.2d 191, 193 (8th Cir. 1980).

Reichenberger v. Pritchard, 660 F.2d 280, 288 (7th Cir. 1981).

We examine the district court's award of attorneys fees, cognizant of the Supreme Court's heed of caution regarding the award of fees to a prevailing defendant articulated in Christiansburg; mindful of the legislative history of 42 U.S.C. @ 1988 in the context of the overall purpose behind the civil rights provisions; aware of the factors articulated

by the Seventh Circuit in Reichenberger, and with due recognition of the limited scope of our review.

The district court recognized that the Christiansburg standard was the appropriate standard for determining whether defendants [*987] were entitled to attorneys fees [**29] under @ 1988. Tarter v. Raybuck, 556 F. Supp. 625, 631 (N.D. Ohio 1983). The district court then examined plaintiff's complaint in light of this standard. With respect to the expulsion of David Tarter and plaintiffs' prayer for an order compelling defendants to readmit David to school, the district court wrote:

> Pursuant to R.C. 3313.66 et seq., the plaintiff parents appealed the expulsion to the Board of Education of Cuyahoga Falls. Considerable testimony was taken with respect to that appeal. See Exhibit H. A study of the record of the expulsion hearing before the Board of Education fails to reveal any factual basis to warrant the filing of a complaint alleging conduct on the part of the defendants actionable under 42 U.S.C. @ 1983.
>
> The plaintiffs' complaint prayed for relief including an order from this Court compelling the defendant school board and defendant school administrators to permit the plaintiff David Tarter to reenter Cuyahoga Falls High School. The complaint was filed in September of 1981 after David Tarter, as a matter of law, was eligible to return to school because his expulsion was for only the semester, consistent with the provisions of Ohio Revised [**30] Code @ 3313.66. The fact that the expulsion was for only the period of a semester was clearly indicated by a letter mailed to the plaintiffs following the expulsion. See Exhibit 5. Nonetheless, the student David Tarter made no attempt to reenter Cuyahoga Falls High School. His parents failed to make any inquiry on behalf of David Tarter calculated to bring about his reentry into Cuyahoga Falls High School. The defendants took no action which in any way could have been construed as an attempt to prohibit David Tarter from returning to Cuyahoga Falls High School.

556 F. Supp. at 631-32.

It was readily apparent from the letter to plaintiffs from the Superintendent of Schools that the expulsion was for the balance of the spring 1981 semester. Thus the complaint, not filed until September 1981, was meritless to the extent it sought an order to compel defendants to permit David Tarter to reenter Cuyahoga Falls High School. Nothing was ever alleged or shown which might have conceivably been characterized by defendants to deny David Tarter reentry.

Furthermore, we entirely agree with the district court that the "claim that David Tarter and his parents were wrongfully [**31] detained in the high school clinic is patently without merit." 556 F. Supp. at 632.

We turn then to the district court's discussion of the merits of plaintiffs' fourth amendment claim. The district court's only consideration of awarding attorneys fees to defendant with respect to the search issue was as follows:

It is without dispute that the search of David Tarter on the morning of March 3, 1981, ceased immediately upon his revocation of the consent that he had earlier given to a search of his person.

556 F. Supp. at 632.

As previously stated we are not inclined to resolve this case on the finding that David Tarter freely consented to the search. In examining this claim in light of standards enunciated in Christiansburg, we hold the district court abused its discretion in awarding attorneys fees to defendants in this case. First, we cannot conclude that this action was wholly meritless or without foundation. See Christiansburg, supra. We specifically note that the issue of a student's fourth amendment rights in the context of a search by a school official is not a well settled area of the law in the country or in this circuit. This factor mitigates [**32] against an award to defendants. See Reichenberger, supra. Indeed, the United States Supreme Court has scheduled for reargument next term a case which may address directly a factual situation not unlike the case at bar. The question the Court has directed to be considered in ordering reargument is essentially whether an assistant principal violated a student's fourth amendment rights when he searched her purse based upon information [*988] from a teacher that the student had been smoking in the girl's bathroom in contravention of school rules. See New Jersey v. T.L.O., 468 U.S. 1214, 104 S. Ct. 3583, 82 L. Ed. 2d 881 (June 26, 1984) scheduling the case for reargument. n9 Finally, as suggested in Reichenberger, supra, the district court did make a finding that the suit was frivolous under the Christiansburg guidelines. However, we cannot conclude the record adequately supports such a finding. The district court's analysis of the award with respect to the fourth amendment claim was limited only to his determination that because consent was freely given, plaintiff's claim was groundless. 556 F. Supp. at 632. As we have previously discussed, plaintiffs' case was [**33] not so easily resolved. Although plaintiffs' claim ultimately proved unsuccessful, it was not so meritless or without foundation, that defendant was properly awarded attorney's fees as the prevailing party in this case in light of the legislative history behind section 1988, the Civil Rights statutes, and the Christiansburg standards enunciated by the Supreme Court.

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n9 As noted, supra at Note 3, the issue was not initially before the Court. Rather the issue initially presented was only whether the exclusionary rule applied where the state sought to introduce that evidence in a subsequent criminal proceeding.

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Christiansburg warns that judges not engage in post hoc reasoning to justify such an award. 434 U.S. at 422. "Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." Id. "Decisive facts may not emerge until discovery or trial." Id.

We conclude this lawsuit is the type of case contemplated [**34] by the Supreme Court in enunciating the words of caution just quoted. The issue of consent was reasonably in dispute given the context of the purported waiver of important constitutional rights. The exact nature and extent of a student's fourth amendment rights are not well settled. Furthermore, there is no definitive standard established on when school officials may undertake incursions on traditional fourth amendment protections, in order to maintain school order and discipline. Also, the presence of the police at the high school surrounding the time of the incident in question raised a legitimate question of whether the standard of conduct of the school officials was the same as for police officials. That the district court or this court ultimately declined to adopt the positions urged by plaintiffs on these questions is not tantamount to concluding defendants are entitled to an attorneys fees award under section 1988.

We hold therefore, that the district court abused its discretion in awarding defendants judgment on their counterclaim for attorneys fees pursuant to 42 U.S.C. @ 1988.

IV.

We conclude that there was reasonable cause for the defendants to conduct a search [**35] of David Tarter under the circumstances of this case, and the extent of the search actually undertaken was reasonable. Thus, we affirm the district court in rendering judgment in favor of defendants with respect to the claims of plaintiffs. However, we conclude the district court abused its discretion rendering judgment in favor of defendants on their counter-claim for attorneys fees pursuant to 42 U.S.C. @ 1988. The judgment of the district court is affirmed in part and reversed in part. Both sides will bear their own costs on this appeal.

MICHAEL MARTENS, By and Through his father and next friend, PHILIP MARTENS, Plaintiff, v. DISTRICT NO. 220, BOARD OF EDUCATION, et al., Defendant

No. 82 C 3414

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

620 F. Supp. 29; 1985 U.S. Dist. LEXIS 15796

September 19, 1985

JUDGES:
[**1]

Moran, Judge.

OPINIONBY:
MORAN

OPINION:

[*30] MEMORANDUM AND ORDER

MORAN, Judge

This case stems from the warrantless search of the student plaintiff on school property. It raises several interesting questions under the Fourth Amendment of the Constitution, which reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

I.

At about 10:30 a.m. on April 29, 1982, Joan Baukus, dean of students at Reavis High School, received an anonymous phone call. The caller identified herself as living in the Sahs area of Stickney, Illinois. The caller said that she had discovered her daughter with marijuana cigarettes purchased from James Lafollette, a student at Reavis. The caller said Lafollette kept marijuana in a Marlboro box in his school locker, and that the box was in the locker that day. Baukus tried unsuccessfully to persuade the caller to reveal her name or leave a phone number. Baukus then [**2] had Lafollette open his locker. There, as promised, was a Marlboro box containing marijuana cigarettes.

At about 12:30 p.m. the same day, Baukus received another phone call from a woman Baukus believed to have been the earlier anonymous tipster, although she was not sure. This second caller identified herself as living in the Sahs area. She said she had discovered her daughter in possession of marijuana cigarettes. The caller indicated that her daughter had purchased the marijuana from James Lafollette and the plaintiff, Michael Martens. The caller said Martens kept drug paraphernalia in the lining of his coat and that he might have paraphernalia in his possession that day. Baukus was again unsuccessful in persuading the caller to reveal her name or phone number.

At about 1:15 p.m. Baukus brought Martens to her office and confronted him with the substance of the phone call. Martens denied he had a controlled substance in his possession and refused to consent to a search until his parents were contacted. Baukus was unable to reach either of Martens' parents over the next 45 minutes.

[*31] At this point Officer Hentig, a Cook County Sheriff's deputy, came into Baukus' office [**3] and spoke to Martin. Hentig was at the school on another matter. There is no indication that he supplied any evidence implicating Martens or directed school officials to detain Martens for questioning. He told Martens that based on his experience it would be better to cooperate with school officials. Hentig then asked Martens to empty his pockets and Martens complied. A pipe in Martens possession was later found to have contained marijuana residue.

Martens was suspended from school on May 10, 1982, pending a hearing before the Board of Education on May 18, 1982. At that hearing Martens was represented by counsel, presented witnesses and cross examined adverse witnesses. The transcript of the hearing covers 23 single-spaced pages. At the conclusion of the hearing the Board decided to expel Martens for the remainder of the school year. This order was not entered on Martens' permanent record and was not revealed to colleges or prospective employers. Martens faced no criminal charges as a result of the search. At the time of the expulsion Martens was at the end of his junior year. Martens claims, tardily, that the expulsion kept him from graduating a semester early, as he had planned. [**4]

Martens' complaint for a temporary restraining order has long since become an action for damages. Martens claims, first, that the search violated his Fourth Amendment rights and, second, that the illegally seized evidence was improperly admitted at the expulsion hearing before the school board. This court delayed ruling on defendant's motion for summary judgment until after the Supreme Court handed down its decision in New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).

II.

Young people are not stripped of their constitutional rights upon entering the schoolhouse. The Supreme Court has recognized that students are protected by the proscriptions of the First, Eighth and Fourteenth Amendments. See Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733

(1969) (First Amendment), Ingraham v. Wright, 430 U.S. 651, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977) (Eighth Amendment), Goss v. Lopez, 419 U.S. 565, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975) (Fourteenth Amendment). In T.L.O. the Supreme Court rejected the argument that school administrators act in loco parentis and are not subject to [**5] the dictates of the Fourth Amendment. The Court held that the Fourth Amendment does apply to searches by school officials. 105 S. Ct. at 740-41.

While honoring the notion that students have Fourth Amendment rights, the T.L.O. Court limited those rights in order to accommodate the school's need to preserve order and a proper educational environment. First, the Court held that school officials need not obtain a warrant before searching a student. 105 S. Ct. at 743. According to the Court, the warrant requirement is unsuited to the school environment because it "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." Id.

As a second concession to school officialdom, the T.L.O., Court rejected "probable cause" as the touchstone for determining the legality of school searches. It held that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." 105 S. Ct. at 743-44. In determining the reasonableness of a search, a court must consider, first, whether the search was justified at its inception and, second, whether the scope of the search was reasonably [**6] related to the circumstances that prompted the search. Id. at 744. The difference in the quantum of information required under the probable cause and reasonableness standards is quite unclear, although the Court seems to indicate that the courts should look to the reasonableness standards of Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 [*32] (1968), and its progeny for guidance.

This case differs from T.L.O. in one important respect. T.L.O. involved the search of a student on school grounds by a school official. In this case the disgorgement was in the presence of and at the urging of a police officer. Apparently happening into Baukus' office, Officer Hentig told Martens that cooperation was indicated. At this point Martens broke a 45-minute stalemate and emptied his pockets. Yet, the record also indicates that Hentig had nothing to do with developing the facts that prompted Baukus to detain Martens in her office. Nor did Hentig direct school officials to detain and search Martens. In short, Hentig's urging was the immediate cause of Marten's emptying his pockets, but there is no indication that a criminal investigation was contemplated, that this [**7] was a cooperative effort with law enforcement, or that but for his intervention Martens would not have been searched eventually. See T.L.O., 105 S. Ct. at 744 n.7. The interest that prompted the T.L.O. Court to waive the warrant requirement and to adopt a reasonableness standard -- preserving swift and informal disciplinary procedures -- would not be served by imposing warrant and probable cause requirements here in light of Hentig's relatively limited role. There is, here, no basis for thinking that school official action was a subterfuge to avoid warrant and probable cause requirements.

The school officials certainly had reasonable suspicions and, indeed, probably probable cause to search Martens. Under the totality-of-circumstances test of Illinois v. Gates, 462

U.S. 213, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983), the anonymous tip was adequate to satisfy even the higher standard. First, the high school was facing a substantial drug problem that had resulted in the expulsion of many students before Martens. A tip that a Reavis student had drug paraphernalia was thus not inherently implausible. Second, coming from a member of the public rather than the typical police [**8] informer from the criminal milieu, the tip was presumptively somewhat more credible. Third, there was substantial evidence indicating the tip was accurate. Baukus believed that the Martens tip came from the same caller who had accurately indicated that another student possessed marijuana. There is some other evidence suggesting that the tipster was indeed the same person. Both were female, lived in the same area, had discovered their daughter in possession of marijuana, and refused to disclose their identity or phone number. Finally, the Martens tip was not a blanket allegation but rather outlined Martens' role as a drug distributor, described where he kept his drug paraphernalia and indicated that Martens had the paraphernalia in his possession that day. The detailed nature of the tip weighs in favor of its accuracy. Finally, even if there were not probable cause, the reasonable suspicion led to measures reasonably related to the objectives of the search and not excessively intrusive. A high school junior was asked, in a school office during school hours and in light of specific information relating to marijuana, to empty his pockets, and he reluctantly complied.

Conclusion [**9]

Defendant's motion for summary judgment is granted.

IT IS ORDERED AND ADJUDGED That defendant's motion for summary judgment is granted. (See Memorandum and Order date 9-19-85).

HUDSON v. PALMER

No. 82-1630

SUPREME COURT OF THE UNITED STATES

468 U.S. 517; 104 S. Ct. 3194; 1984 U.S. LEXIS 143; 82 L. Ed. 2d 393; 52 U.S.L.W. 5052

December 7, 1983, Argued

July 3, 1984, Decided *
* Together with No. 82-6695, Palmer v. Hudson, also on certiorari to the same court.

PRIOR HISTORY:
[***1]

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

DISPOSITION:
697 F.2d 1220, affirmed in part and reversed in part.

REF-LINKS:
View References Turn Off Lawyers' Edition Display

DECISION:
Prison inmates held not entitled to Fourth Amendment protection against unreasonable searches and seizures in their individual cells.

SUMMARY:
A prison inmate brought an action under 42 USCS 1983 against a prison officer, alleging that the officer had conducted a shakedown search of his prison cell and had brought a false charge against him solely to harass him. The prisoner also alleged that the officer intentionally destroyed some of his personal property during the search in violation of the Fourteenth Amendment. The United States District Court for the Western District of Virginia granted summary judgment in favor of the officer. The United States Court of Appeals for the Fourth Circuit affirmed in part, reversed in part, and remanded, holding that the prisoner was not deprived of his property without due process but that the prisoner had a limited privacy right in his cell entitling him to protection against searches conducted solely to harass or to humiliate (697 F2d 1220).

On certiorari, the United States Supreme Court affirmed in part and reversed in part. In an opinion by Burger, Ch. J., joined by White, Powell, Rehnquist, and O'Connor, JJ., it was held that a prison inmate does not have a reasonable expectation of privacy in his

prison cell entitling him to the protection of the Fourth Amendment against unreasonable searches and seizures. The court also held that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the due process clause of the Fourteenth Amendment if, as in the present case, a meaningful postdeprivation remedy for the loss is available.

O'Connor, J., concurred, expressing the view that the prisoner's complaint did not state a ripe constitutional claim since the prisoner had not availed himself of state remedies or proved that the remedies were inadequate.

Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ., concurring in part and dissenting in part, expressed the view that the destruction of the prisoner's property was a seizure for purposes of the Fourth Amendment and that the seizure was unreasonable.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:

PRISONS AND CONVICTS @1

SEARCH AND SEIZURE @6
Fourth Amendment -- expectation of privacy --

Headnote: [1A] [1B] [1C] [1D]
A prison inmate does not have a reasonable expectation of privacy in his prison cell entitling him to the protection of the Fourth Amendment against unreasonable searches and seizures. (Stevens, Brennan, Marshall, and Blackmun, JJ., dissented from this holding.)

CONSTITUTIONAL LAW @564
deprivation of property -- postdeprivation remedy --

Headnote: [2A] [2B]
An unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the due process clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available.

CONSTITUTIONAL LAW @942

PRISONS AND CONVICTS @1
prisoners' right to petition government --

Headnote: [3]
Prisoners have the constitutional right to petition the government for redress of their grievances, which includes a reasonable right of access to the courts.

CONSTITUTIONAL LAW @969

PRISONS AND CONVICTS @1
First Amendment -- religious freedom --

Headnote: [4]
Prisoners must be provided reasonable opportunities to exercise their religious freedom guaranteed under the First Amendment.

CONSTITUTIONAL LAW @942

PRISONS AND CONVICTS @1
First Amendment -- rights of speech --

Headnote: [5]
Prisoners retain those First Amendment rights of speech not inconsistent with their status as prisoners or with the legitimate penological objectives of the corrections system.

CONSTITUTIONAL LAW @521

PRISONS AND CONVICTS @1
due process protection --

Headnote: [6]
Prisoners enjoy the protection of due process.

CRIMINAL LAW @76

PRISONS AND CONVICTS @1
Eighth Amendment -- cruel and unusual punishment --

Headnote: [7]
The Eighth Amendment applies to prisoners and ensures that they will not be subject to cruel and unusual punishment.

CONSTITUTIONAL LAW @778.5
destruction of property -- adequate postdeprivation remedy --

Headnote: [8A] [8B] [8C]
A state provides an adequate postdeprivation remedy to a prisoner for the alleged destruction of his property by a state employee during a shakedown search where there

are several common-law remedies available to the prisoner that would provide adequate compensation for his property loss and where employees of the state do not enjoy sovereign immunity for their intentional torts; the intentional destruction of the prisoner's personal property therefore does not violate the due process clause of the Fourteenth Amendment.

OFFICERS @61
liability -- intentional torts --

Headnote: [9]
Under Virginia law, a state employee may be held liable for his intentional torts.

SYLLABUS:

Respondent, an inmate at a Virginia penal institution, filed an action in Federal District Court under 42 U. S. C. @ 1983 against petitioner, an officer at the institution, alleging that petitioner had conducted an unreasonable "shakedown" search of respondent's prison locker and cell and had brought a false charge, under prison disciplinary procedures, of destroying state property against respondent solely to harass him; and that, in violation of respondent's Fourteenth Amendment right not to be deprived of property without due process of law, petitioner had intentionally destroyed certain of respondent's noncontraband personal property during the search. The District Court granted summary judgment for petitioner, and the Court of Appeals affirmed with regard to the District Court's holding that respondent was not deprived of his property without due process. The Court of Appeals concluded that the decision in Parratt v. Taylor, 451 U.S. 527 -- holding that a negligent deprivation of a prison inmate's property [***2] by state officials does not violate the Due Process Clause of the Fourteenth Amendment if an adequate post-deprivation state remedy exists -- should extend also to intentional deprivations of property. However, the Court of Appeals reversed and remanded with regard to respondent's claim that the "shakedown" search was unreasonable. The court held that a prisoner has a "limited privacy right" in his cell entitling him to protection against searches conducted solely to harass or to humiliate, and that a remand was necessary to determine the purpose of the search here.

Held:

1. A prisoner has no reasonable expectation of privacy in his prison cell entitling him to the protection of the Fourth Amendment against unreasonable searches. While prisoners enjoy many protections of the Constitution that are not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration, imprisonment carries with it the circumscription or loss of many rights as being necessary to accommodate the institutional needs and objectives of prison facilities, particularly internal security and safety. It would be impossible to accomplish the prison objectives of [***3] preventing the introduction of weapons, drugs, and other contraband into the premises if inmates retained a right of privacy in their cells. The unpredictability that

attends random searches of cells renders such searches perhaps the most effective weapon of the prison administrator in the fight against the proliferation of weapons, drugs, and other contraband. A requirement that random searches be conducted pursuant to an established plan would seriously undermine the effectiveness of this weapon. Pp. 522-530.

2. There is no merit to respondent's contention that the destruction of his personal property constituted an unreasonable seizure of that property violative of the Fourth Amendment. Assuming that the Fourth Amendment protects against the destruction of property, in addition to its mere seizure, the same reasons that lead to the conclusion that the Amendment's proscription against unreasonable searches is inapplicable in a prison cell, apply with controlling force to seizures. Prison officials must be free to seize from cells any articles which, in their view, disserve legitimate institutional interests. P. 528, n. 8.

3. Even if petitioner intentionally destroyed [***4] respondent's personal property during the challenged "shakedown" search, the destruction did not violate the Due Process Clause of the Fourteenth Amendment since respondent had adequate postdeprivation remedies under Virginia law for any loss suffered. The decision in Parratt v. Taylor, supra, as to negligent deprivation by a state employee of a prisoner's property -- as well as its rationale that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are "impracticable" since the state cannot know when such deprivations will occur -- also applies to intentional deprivations of property. Both the District Court and, at least implicitly, the Court of Appeals held that several common-law remedies were available to respondent under Virginia law and would provide adequate compensation for his property loss, and there is no reason to question that determination. The fact that respondent might not be able to recover under state-law remedies the full amount which he might receive in a @ 1983 action is not determinative of the adequacy of the state remedies. As to respondent's contention [***5] that relief under state law was uncertain because a state employee might be entitled to sovereign immunity, the courts below held that respondent's claim would not be barred by sovereign immunity, since under Virginia law a state employee may be held liable for his intentional torts. Pp. 530-536.

COUNSEL:

William G. Broaddus, Chief Deputy Attorney General of Virginia, argued the cause for petitioner in No. 82-1630 and respondent in No. 82-6695. With him on the briefs were Gerald L. Baliles, Attorney General, Donald C. J. Gehring, Deputy Attorney General, and Peter H. Rudy, Assistant Attorney General.

Deborah C. Wyatt argued the cause for respondent in No. 82-1630 and petitioner in No. 82-6695. With her on the briefs was Leon Friedman.

GRACE ZAMORA, as Parent and Natural Guardian on behalf of
VIDAL SHAWN (LOLLY) ZAMORA, a minor child, Appellant v. H.
FRED POMEROY; TRUETT WORLEY; ELGIN MALLORY; H. C. PRICHARD;
DR. MORTON DANN; DR. ROBERT SMITH; STUART D. SHANOR and JANE H. BALDOCK, individually and in their official capacity,
Appellees

No. 79-1611

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

639 F.2d 662; 1981 U.S. App. LEXIS 20726

November 19, 1980, Argued

January 26, 1981, Decided

PRIOR HISTORY:
[**1]

Appeal from the United States District Court For the District of New Mexico (D.C. 78-317-B)

COUNSEL:
Ramon I. Garcia and Antonio V. Silva, Southern New Mexico Legal Services, Roswell, N. M., for appellant.

John W. Bassett, Jr., of Atwood, Malone, Mann & Cooter, P. A., Roswell, N. M., for appellees.

JUDGES:
Before BARRETT, DOYLE, McKAY, Circuit Judges.

OPINIONBY:
DOYLE

OPINION:

[*663]

This civil action was brought by the mother of an allegedly aggrieved high school student who maintains that his civil rights were violated contrary to 42 U.S.C. @ 1983, Civil Rights Act of 1871. The son is a minor and hence the suit was brought on his behalf. The source of the claim is the conducting of a warrantless search of his school

locker. That search revealed the presence of marijuana and the alternate contentions are that it was unlawful to use "sniffer" dogs to discover the drug, and that after discovery of it a warrant was essential to the opening of the locker and the removal of the marijuana.

The search referred to did not originate as an investigation of the minor son of the plaintiff. It was a general investigation. The Assistant District Attorney of the county in question contacted [**2] Mr. Worley, then Assistant Principal of the Roswell High School about conducting a search of the school lockers, using so-called "sniffer" dogs, which dogs would be available to them some time in the future. At that time no specific persons were suspected of possessing marijuana at Roswell High.

Permission for use of the dogs at Roswell High was not granted by Worley, because he had to clear it with the Principal, one Elgin Mallory. Mallory could not authorize the use of the dogs and the entry by the police officers into the school until he was granted permission by the defendant Pomeroy, the Roswell Independent School District Superintendent. After clearance was obtained from all these people, and permission was granted to conduct the program, the proposed search was started.

The Facts from the Standpoint of Appellants

The Assistant District Attorney contacted a Special Investigation Unit in Albuquerque, New Mexico, and at that time he requested the Albuquerque Police Department to send "sniffer" dogs to conduct a search of school lockers. On or about December 15, 1977, Sergeant Ken Keller, Officers Grady Tauty and Florentino Duran brought such dogs to the Roswell High School for [**3] the avowed purpose of carrying on this search of school lockers. The Albuquerque Police Officers, with Assistant District Attorney Jay Rosenthall, proceeded to Roswell High, where they met the defendants Worley and Mallory. They entered the school building, and Sergeant Keller, Officers Grady and Duran walked their dogs from locker to locker, searching for narcotics. When the dogs demonstrated that they had discovered narcotics, the locker was opened so as to seize any contraband found there. There were two lockers which were opened.

[*664] Before the first locker was opened, Sergeant Keller inquired as to whether a search warrant should be obtained. One of the school authorities replied that a search warrant was not necessary because a consent to search had been signed by the students. n1 In any event, no search warrant was ever obtained by the police officers or by the defendants.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1. A notice that the lockers were subject to being opened was given to each student at the beginning of the year. However, another version of what was said in response to the inquiry as to the necessity of a warrant was that "there was no need for a warrant, because we had no intentions of taking criminal action."
Deposition of Elgin Mallory, p. 25.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -
[**4]

On December 16, 1977, the identical procedure was used to search the lockers at Goodard High School, the second high school in Roswell. Again, no search warrant was ever obtained by the police officers or by the defendants.

In the course of searching the lockers in the Roswell High School, a so-called "hit" was made by one of the dogs. It was the locker of plaintiff-appellant Zamora. The locker was opened and a substance which proved to be marijuana was found therein. Besides the substance and a leather strap, nothing else was found; neither books, clothes nor school supplies were in the locker. The marijuana was taken from the locker and given to Worley. He tested the substance and concluded that it was marijuana. Some little time after the test Vidal Zamora was taken from his classes and was questioned about the substance that had been found in his locker. Worley accused Vidal, based upon his own investigation, of having had marijuana in his possession. Zamora denied any wrong-doing and denied that the marijuana was in his possession. He said that he was not using that locker, but was using one in what was called the Vo-Core Building. Vidal was called out of class a second time. [**5] He contends that he was pressured by the defendant to confess that the alleged marijuana was his. On one occasion during the questioning, Vidal discovered that Worley was using an electronic recording device, although permission had not been asked to record his statement. It is also pointed out that he was not warned about self-incrimination. The relevance of this failure is questionable, because this procedure is not criminal in nature.

During the time Vidal was being questioned by Worley, he was given the impression, so it is maintained by counsel for Zamora, that it was his obligation to prove his innocence; and he was not told that he could confer with counsel.

Soon after these happenings, the appellant Vidal was transferred from Roswell High School to the District's Educational Services Center, another high school within the city which did not have the academic standing of Roswell High. An objection is made to the fact that Mrs. Zamora, the mother of the boy in question, did not receive notice through the mails as to what was happening. She did not, for example, receive notice, for whatever value it may have here, that charges were filed against the boy in school. Worley said [**6] that he could not get hold of her on the telephone because she did not have a telephone, and he did not mail a notice to her because he did not have an address for her.

On December 23rd the semester ended and school let out for Christmas. Mrs. Zamora sought to contact Worley during the Christmas vacation and was unable to do so. She finally contacted one Dan Gomez, an Assistant Principal, and asked about Vidal's problem. Gomez informed her that Worley was out of town and would not be back until the end of the Christmas vacation. On January 4th, Mrs. Zamora finally spoke to the defendant Worley, and she then asked why her son had been "expelled" from school, and

inquired as to what was needed to get her son back into school. At that time a meeting was arranged with the defendants Worley and Mallory at Worley's office.

On January 9, 1978, Mrs. Zamora went to the offices of the Southern New Mexico Legal Services, and obtained counsel. Also on January 9th they were given an appointment with the principal. The lawyer, so it [*665] is said in the appellants' statement of the case, had no prior notice of the fact and was unable to make any preparation. At the meeting the Zamoras were [**7] informed by the defendants, so it is charged, that he had to prove his innocence in order to avoid being expelled from school; that a substance alleged to be marijuana was found in his locker and that the search of the lockers was legal. The point was made that there was no opportunity for cross-examination, etc., and the meeting was ended in a short time. The plaintiffs argue that Vidal was expelled from the high school. The order transferred him to the Educational Services Center.

On January 9, 1978, counsel for the Zamoras talked to the defendant H. Fred Pomeroy, who said he would think about giving Vidal a further hearing. On January 13, 1978, the lawyer for Zamora received a letter from the school's attorney, informing him that although they were not entitled to a hearing, one would be provided. Counsel for the Zamoras were not informed in the letter of the charges against Vidal, or any of the facts, so they say, on which the decision to "expel" Vidal was made.

A hearing was held on January 18, 1978, before a school hearing authority which consisted of three Roswell Independent School District employees. It is maintained by the Zamoras that the hearing was not fair. Then on [**8] February 20, 1978, a hearing was held before the school board; about the same evidence, the Zamoras say, was presented on that occasion, and no opportunity was given for cross-examination. Mr. Worley did state that he had had no reason to believe that there was contraband in any of the lockers, but the school board affirmed the decision of the hearing authority.

The Version of the School Authorities

The defendants' side of the case brings out the fact that Zamora was enrolled in a special program for students who were potential drop-outs; that the courses given to him were easier ones than were offered average students. Even though Vidal was residing with his mother, he gave a different address, namely 1416 Hendricks in Roswell, as his address, and he knew that the notices from school would be sent to the latter place. It was brought out that during his high school career, Vidal's attendance was poor, and that he had a history of disruptive conduct and insubordination.

During the 1977-1978 school year the State Board of Education Regulation 77-3 was in effect. It prohibited the sale, possession, transportation or use of marijuana on school premises, and had a provision with regard [**9] to search of lockers, which said general searches of school property, including lockers and school buses, may be conducted at any time with or without the presence of students. This policy, so it is said, was adopted by the District Board of Education. Section 5130 was in effect at all times material to the

action. It was contained in a publication entitled "Rights, Responsibilities and Limitations of Students" which Vidal read at the beginning of the 1977-1978 school year. The administration policy on lockers was published in the student handbook, a copy of which was given to each student. It was stated that lockers remain under the jurisdiction of the school, notwithstanding the fact that they were assigned to individual students; that the school reserved the right to inspect all lockers at any time; that the students were to assume the full responsibility for security of the lockers, were to make certain that they were locked after being opened, and that the combination should not be given to a friend. It was in accordance with these locker policies that the instant search was made. (So the appellees argue.)

Although the search of the lockers and the use of the dogs was brought [**10] about through the District Attorney, the District Attorney assured the school officials that he was not doing it in any official capacity; that no charges or arrests would be made as a result of the demonstration; and that if marijuana was found the decision as to action against the offender would be left to the school authorities. The search (so it is [*666] argued) was performed under the sole control and direction of Mallory, and not the Assistant District Attorneys, who were there just as observers.

The dogs arrived with their trainers after classes were over on a particular day. Those witnessing the demonstration included the teachers, some students, the two Assistant District Attorneys and security officers of the Roswell High School, together with defendants Mallory and Worley. Each dog was accompanied by a Principal or Assistant Principal, who walked with them down the halls of the school where there were some 2,000 lockers. When a dog would "key" in on a locker, that locker would be marked, and if the dog keyed three times on any one locker, Worley or Mallory, who had master keys to all lockers, would open it to inspect it. Only school officials opened the lockers. [**11]

During the demonstration, one of the trained dogs keyed in on Locker 875, that of Vidal. (Defendant's Exhibit B). Worley opened the locker and took possession of the substance and secured it. Two tests were made, one of which was by the police. Both tests revealed that the substance was marijuana. The next morning Worley met with Vidal in his office. Vidal was told that marijuana was found in the locker assigned to him, and that he was responsible for its contents; that the matter would be investigated and they would like to have any evidence or information that would be helpful to Vidal. Vidal represented to Worley that he had no locker, but later admitted that Locker 875 had been assigned to him, and that he was responsible for its contents. Vidal was requested to provide supporting evidence or witnesses, but he was unable to do so. The school officials made no disposition of the matter at that time.

The evening after the inquiry Vidal advised his mother that he had been called into the office and charged by school officials with having marijuana in his locker, and that it could lead to his being suspended. He discussed with her what had occurred, but was unable to explain how [**12] the marijuana got into his locker. Worley and another Assistant Principal, Mr. Gomez, conferred with Vidal on Monday, December 19th. Vidal

was advised that the matter was still being investigated, and that no evidence had come to light to support his innocence; and that Vidal would be held responsible unless he produced further evidence. Vidal was specifically asked to come up with further evidence and witnesses to support his innocence; he failed to provide it. He was advised that if he was suspended he would have a right to appeal the matter, and would have a hearing, and it was explained how an appeal would be carried out. No decision was made at this time.

On December 21, 1977, Worley invited Vidal to his office, but Vidal was unable to produce further evidence or witnesses. Worley then made the decision to refer Vidal to the Educational Services Center effective January 9th, so Vidal could complete the second semester, and receive credit for his first semester courses. Worley advised him that he did not have Vidal's address, and asked Vidal for his parents' address and telephone number. At that time Vidal replied that he had no parents. He did not give Worley his mother's telephone [**13] number or address. Vidal was given a form referring him to the ESC with the request that he return the form after taking it to his teachers for completion. This form was never returned to the school officials. The same day Worley instructed his secretary to send a letter to Vidal's home, notifying Vidal's parents of the referral and mailing them a copy of the completed referral form. Worley was unaware of the fact that Vidal did not return the form, and consequently, no notice was mailed to his parents of record. Worley made no further attempt to contact Vidal's parents, as he assumed the form had been mailed. The same day Vidal completed his last class for the semester and was out for the holidays. The first day after the holidays and the first day of the second semester was January 9, 1978.

On December 22nd, Mrs. Zamora telephoned Worley at Roswell High School and [*667] told him she had received word that Vidal had been "suspended". He advised her of the charge and the nature of the evidence against him, and of the proposed referral of Vidal to the ESC, which is another school to which he was assigned. Also, she was told how plaintiff could appeal from the decision of the [**14] principal and could obtain a hearing. A few days later Vidal again discussed the matter with plaintiff and advised her he was being referred to the ESC.

Prior to January 9, 1978, plaintiff (the mother) had a conversation with Mallory about the incident. In that conversation she requested that an informal hearing before Mallory be set for the morning of January 9th. At this time a final decision to refer Vidal to ESC had not been made. Plaintiff, Vidal, her attorney and the attorney's assistant, Worley and Mallory attended that hearing on January 9th. Plaintiff and Vidal were again afforded the opportunity to produce evidence helpful to Vidal, but none was produced. Plaintiff's attorney was afforded the opportunity to examine both Worley and Mallory, and was shown the marijuana found in Vidal's locker. After the hearing the decision was made to refer Vidal to the ESC.

The next occurrence was a hearing before a three-teacher hearing authority on January 18, 1978. This was a review of the administrative decision and resulted in an approval of it. n2

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n2. Neither plaintiff nor her son found the hearings unfair or unjust.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -
[**15]

On February 28, 1978, a special meeting was held by the Board of Education, and that body approved what had been done. Vidal attended ESC during the spring semester, continuing the same academic courses that he had taken at RHS the previous semester, including counseling and guidance. Upon arriving there he was tested in order to ascertain his level of achievement and competence, and was thereafter instructed accordingly. He was given full credit for all courses taken in the past. Vidal became a senior at RHS the next fall and has since graduated from RHS. He was never prosecuted nor was other action taken of a legal nature.

Points Advanced on this Appeal

The issues presented on behalf of the appellant are as follows:

I. That the court erred in granting summary judgment, inasmuch as there were issues of material fact. Under this heading also it is maintained that the plaintiffs had standing to raise constitutional claims, and secondly, that genuine issues did exist as to whether there were violations.

II. That the district court improperly granted summary judgment because there were disputed facts which do not entitle the appellees to summary judgment as a matter of law.

I. [**16]

The initial question is whether in the light of the facts, the case before us is one of constitutional magnitude. True, Vidal's locker was opened and examined without his permission and without a warrant. But the relationship is not one of defendant pitted against the state. A school discipline question is somewhat different, as we have suggested above. It poses an important public interest problem, especially where a drug is found. The school authorities cannot, of course, tolerate the storing of marijuana in a school locker by a student. It tends to be a per se type of infraction, and, indeed, a specific regulation issued by the school prohibits this very activity. Also to be considered is the fact that there was not an expulsion in this case; there was a transfer to another school which the plaintiff contends was not as good an educational institution as Roswell High School. No doubt it was part of the sanction to transfer him to this school rather than to expel him or allow him to continue on in Roswell High.

A further argument is the fact that the plaintiff has never conceded that he had possession of the marijuana. He claimed for a long time that he was using a locker in another [**17] part of the building, and was not [*668] using this one. He did eventually concede that the locker was his. He failed to offer anything in the way of

explanation or mitigation of this offense. These several factors differentiate this case from that before the Supreme Court in Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725.

Goss, supra, settled several issues which are dealt with in a case like the instant one. One of these was that students who face temporary suspension from public school have interests which qualify for protection under the due process clause of the Fourteenth Amendment. Further, Ohio granted an absolute right to an education to persons under the age of twenty-one and it was not allowed to withdraw the right on the grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct had occurred. The state was required to recognize that the student's legitimate entitlement to a public education, as a property interest, is protected by the due process clause, and is not to be taken away for misconduct without observing minimum procedural safeguards required by that clause.

Misconduct charges which are sustained and [**18] recorded can damage the student's reputation as well as interfere with later educational and employment opportunities. The state's right to determine unilaterally and without process whether that misconduct has occurred immediately collides with the prohibitions of the constitution against arbitrary deprivation of liberty. The Court also held that a ten-day suspension from school is not de minimis and may not be imposed without regard to the giving of notice and hearing. Furthermore, the Court ruled that due process in connection with a suspension of ten days or less requires that the student be given oral or written notice of the charges, and if denied, he is entitled to an explanation of the evidence of the authorities, and to have an opportunity to present his version. The Court went on to say that generally notice and hearings should precede the student's removal from school, since the hearing may almost immediately follow the misconduct. But if prior notice and hearing are not feasible, as where the student's presence endangers persons or property, or threatens destruction of the academic process, immediate removal from the school may be justified, but that notice and hearing [**19] should follow as soon as practicable.

Our view is that there was no lack of due process in the case at bar. Numerous hearings were held, first before the principal and other officers of the high school, and finally, a special hearing was given by the school board. The fact that Vidal Zamora received a number of opportunities to be heard, including an opportunity to appear before the school board, does distinguish this case from Goss, supra, in which procedural due process was ignored. The student was suspended without being given a chance to present his side of the case. Here, Vidal Zamora was given many such opportunities. On at least five occasions he appeared before either the principal or other persons who were in authority, and at no time did he take advantage of the chance to explain his side and his denial of the charge or to mitigate it. The result was that the inferences which arose from the fact that the marijuana was discovered in his locker were not dispelled or overcome.

The decision here depends on the validity of the seizure rather than procedural sufficiency.

A subsequent decision of the Supreme Court frequently cited is Board of Curators, University of Missouri [**20] v. Horowitz, 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978). This case distinguished Goss, supra, on the ground that the Board of Curators had given fair hearings. The action taken here was dismissal from medical school! Clinical deficiencies was the reason. The Court upheld it. The reason was that repeated chances had been given. The Court there recognized the student's entitlement to due process, but held that she had been given adequate due process. Despite the successive warnings the subject failed to show improvement.

The factors here which entitle the plaintiff to careful hearing and scrutiny are the fact that he was suspended for a short time, [*669] and transferred to another school, one which seemingly had less standing as an educational institution. He contends that the transfer constituted imposition of an excessive sanction. The other element is that the appellant was in violation of the law.

In Sill v. Pennsylvania State University, 462 F.2d 463 (3rd Cir. 1972), a distinction was made between a suspension from school for disciplinary reasons and the granting of probation for two years, including the denial of school privileges. In the latter type of sanction, [**21] the trial court held that the students had not been aggrieved in the constitutional sense by such punishment because they had no standing to challenge the school regulations involved or the punishment imposed. The Court of Appeals for the Third Circuit agreed that the punishment had not created aggrievement analogous to that suffered by those students who were deprived of continued attendance at the university. It was specifically ruled that the plaintiff lacked standing to maintain the action.

In the case of Yench v. Stockmar, 483 F.2d 820 (1973), this court held that the right to maintain a civil rights action such as that which was brought here grew out of the expulsion of the student from the educational process. Yench was a student at Colorado School of Mines who sued the board of trustees and others, alleging violation of his civil rights. He was first placed on disciplinary probation without a hearing for publishing objectional language in a newspaper which he edited, one which was distributed to the students. A year later, while he was still on probation, Yench was found guilty of various acts of misconduct at commencement ceremonies. At the commencement ceremonies he wore [**22] a Mickey Mouse hat rather than a mortar board. At the time he was one of several students who was to complete the requirements for a degree at summer school following commencement. He was given a limited hearing before an ad hoc committee composed of faculty and students, and after a finding of violating probation he was expelled. His assertion was that the initial proceedings which placed him on probation were invalid; that the school officials had failed to follow their own prescribed procedures, and thereby deprived him of due process. This court's opinion by Chief Judge Seth held that there was no recognizable constitutional right involved in the initial disciplinary proceeding. This court also held that the initial action against the student which placed him on probation did not constitute a deprivation of the magnitude required, and the court said such actions, meaning the sanctions, of severity less than expulsion, do not constitute aggrievements under the constitution, nor do they invoke the jurisdiction of

the federal court regardless of the nature of the incident or the reasons for the disciplinary action. Thus, it did not constitute a deprivation of rights requiring judicial [**23] review.

In the present case the school authorities fashioned a remedy which was in harmony with the constitution. The student was not deprived of education. They went to some length to impose a sanction which would guarantee that he would continue his school work so that he could graduate. Also, after that year he was readmitted to Roswell High School, from which he did graduate. Zamora was not separated from the educational process; he completed it. Not until the first day of the spring semester, which was the first day of school after the Christmas holidays, was he transferred to and enrolled in the other school for continuation of his education for the spring semester. The hearing on January 9, 1978 had preceded this. At the ESC school he took about the same courses that he would have taken had he continued his education at Roswell High School. n3 In testifying on deposition in this case, Vidal admitted that as a result of attending the ESC, that is, the other school, the only benefit which he lost was his eligibility to play baseball. (He had not participated in that the previous year because of [*670] misconduct.) Also, his job as a custodian, obtained through the "Vo-Core" [**24] program, for which he was paid, apparently interfered with his playing baseball. But even though he was deprived of the opportunity to participate in sports during the period immediately after the incident, this would not constitute a violation of his constitutional rights. His job as custodian was an extra-curricular activity in connection with his regular school courses or activities. He was not allowed to continue the work activities during the semester following the incident, but members of the faculty had requested that he be removed from the Vo-Core program, and in view of that the likelihood is that he would not have been allowed to participate in work activities during the spring semester, according to the affidavit of Mr. Worley.

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n3. It is noted that Vidal received poor grades at the ESC. Nevertheless, he was promoted to the senior class at Roswell High School the following semester.

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In summary, although the facts suggest a possible violation of his due process rights, examination of the evidence [**25] in the light of the authorities negatives this. Inasmuch as the sanctions imposed were far less severe than expulsion, and in view of the fact that his offense was serious, it cannot be said that they evidence an injury within the framework of the constitution, one which is capable of supporting jurisdiction of this court. The Zamoras' allegations that the ESC was so inferior to amount to an expulsion from the educational system are not borne out by the record, and in the absence of a clear showing that the ESC assignment was substantially prejudicial, the Zamoras lack the requisite standing to attack the appellees' actions on that ground. Sill v. Pennsylvania State University, supra.

II.

Inasmuch as the school had assumed joint control of the locker it cannot be successfully maintained that the school did not have a right to inspect it. Therefore, the search was legal once the probability existed that there was contraband inside of the locker. We fail to see that there was any violation of Vidal Zamora's rights under the Fourth Amendment. As a result of this, it cannot be seriously challenged that the school had reasonable cause to search the locker. Whether the fruits of such a [**26] search could be used in a criminal action we need not decide. An annotation in 49 A.L.R. 3rd 978, 989, summarizes this question on locker searching, as follows:

A few cases involving searches of lockers assigned to high school students have been decided not on the distinction between the school officials searching the lockers as a private individual or as a government agent..., but rather on the view that the student's possession of the locker was exclusive only as against fellow students and not as against school officials, who because of their quasi-parental relationship to the students had the right and perhaps eventhe duty to inspect such lockers. Under this view, school officials may inspect student lockers themselves or consent to such an inspection by law enforcement officers.

The particular relationship between Vidal and the school authorities serves to distinguish this case from the search and seizure cases which are relied on by the plaintiff-appellant.

The basic theory is that although a student has rights under the Fourth Amendment, these rights must yield to the extent that they interfere with the school administration's fundamental duty to operate the school [**27] as an educational institution and that a reasonable right to inspect is necessary in the performance of its duties, even though it may infringe, to some degree, on a student's Fourth Amendment rights. The courts which have considered this question have noted that the doctrine in loco parentis expands the authority to school officials, even to the extent that it may conflict with the rules set forth in the Fourth Amendment. Some cases have gone so far as to say that the school authorities have an affirmative duty to search the lockers.

The logical explanation for all of this is that the school authorities have, on behalf of the public, an interest in these lockers and a duty to police the school, particularly where possible serious violations of the criminal laws exist. There is no merit in [*671] the contention that a school locker is the property of the student who occupies it pro tem.

In this case the appellant has acknowledged that the locker in question was assigned to him. He necessarily knew that it was a violation of school policy to have drugs on the premises. The school retained control and access to all lockers, and maintained a confidential file of all lockers and [**28] the combinations thereto. Both Worley and Mallory retained master keys to all lockers. The evidence shows that Vidal was given a handbook containing the regulations bearing on lockers, and that he was aware of the rules. Finally, the authorities hold that a school official need only have reasonable cause or reasonable suspicion in order to search a student or his locker.

The other point which is argued by the appellant is that the rights of Zamora were violated as a result of removing him from Roswell High School and transferring him to the ESC school. We have already considered this in connection with appellant's first point; to go over it again would be redundant and there is more than enough redundancy in the opinion now.

We affirm.

CONCURBY:
McKAY

CONCUR:

McKAY, Circuit Judge, concurring:

I agree completely with the court's analysis of the sufficiency of the hearing process afforded the appellant in this case which involves the management of school discipline short of expulsion and in the result. Even when appellant's allegations are treated as being true for summary judgment purposes, the process satisfied the requirements of Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. [**29] 2d 725 (1975). Thus it is unnecessary to reach the other issues treated by the court. I express no opinion on the other issues treated.

UNITED STATES OF AMERICA, Plaintiff/Appellee, v. JENNIEVE ROSE BUNKERS, Defendant/Appellant

No. 74-2944

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

521 F.2d 1217; 1975 U.S. App. LEXIS 13298

August 5, 1975

SUBSEQUENT HISTORY:
[**1]

Cert. denied, 423 U.S. 989, 96 S. Ct. 400, 46 L. Ed. 2d 307, 1975.

PRIOR HISTORY:
Appeal from the United States District Court for the Eastern District of California.

DISPOSITION:
AFFIRMED.

JUDGES:
Chambers and Choy, Circuit Judges, and William G. East, * Senior District Judge.

* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

OPINIONBY:
EAST

OPINION:

[*1218] EAST, Senior District Judge:

THE APPEAL

The defendant-appellant Jennieve Rose Bunkers (hereinafter Bunkers) appeals from a judgment of her conviction and sentence for a postal employee's theft of United States mailing matters in violation of 18 U.S.C. @ 1709.

There is presented a single issue on appeal: Did the District Court err in denying Bunkers' motion for the suppression as evidence of the fruits of the crime searched for and seized from her locker at the post office and her following made incriminating statement?

We conclude that the District Court did not so err and affirm.

THE FACTS

During the pertinent times subsequent to on or about January 1, 1974, Bunkers was a postal employee at the Colonial Post Office in Sacramento, California. Experienced postal inspectors [**2] were cognizant of a recurring disappearance of C.O.D. parcels at the post office and charted the time of C.O.D. package losses for a correlation thereof to the work schedules of the several employees at the post office. Through such charting, the inspectors determined that Bunkers' work schedule coincided or correlated with the dates and times of the C.O.D. package losses. The postal inspectors, based upon that information, suspected Bunkers and made the investigatory decision to conduct from the secreted observation galleries an undetected surveillance of Bunkers during her working hours. The postal inspectors saw her take a parcel from her assigned work area to the women's locker room and within one minute return from the locker room without the parcel.

[*1219] Thereupon the postal inspectors requested the post office manager to request the office's female supervisor to search the locker and she observed several post office packages therein. During the day, the locker was searched for a second time by the manager of the post office who also observed the postal packages and for a third time by the manager and one of the postal inspectors following Bunkers' leaving for the night. [**3] At this last search, two locks were placed on the locker door and the manager and the postal inspector each retained the key to one lock. The following morning Bunkers was met by the postal inspectors and the locker was opened in her presence. Nine items of postal matter so found were seized from the locker. Bunkers subsequently signed the incriminating statement.

The locker in question was government property within the post office building and was furnished Bunkers as an incident of her employment ". . . to be used for [her] convenience and . . . subject to search by supervisors and postal inspectors." Part 643 of the Postal Manual.

The regulatory leave for governmental search of the employees' lockers is emphasized by the alleviation or protection from indiscriminate governmental searches by Article 37, Section 5, of the Union Agreement with the postal service carriers which provides that:

"Except in matters where there is reasonable cause to suspect criminal activity, a steward or an employee shall be given the opportunity to be present in any inspection of employees' lockers." (Italics supplied.)

Bunkers had been supplied with a copy of this agreement at [**4] the commencement of her employment and the evidence is undisputed on these two factors:

(a) Bunkers had no authority or permission to take parcels or packages out of her work area of the post office, and no postal employee was permitted or held authority to take mailing matter entrusted to him to the locker areas; and
(b) Bunkers was fully advised of the regulatory term and conditions of her use of the locker and the government's continuing leave to search it.

BUNKERS' CONTENTION

Bunkers contends that the search of her locker without a search warrant violated her Fourth Amendment immunities. We disagree and conclude the contention to be untenable.

DISCUSSION

The Supreme Court's decision in Katz v. United States, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967), makes it clear that the claim of: "The protection of the [Fourth] Amendment [against unreasonable searches and seizures] depends not upon a property right in the invaded [locker] but upon whether the [locker] was [an area] in which there was a reasonable expectation of freedom from governmental intrusion. See 389 U.S. at 352. The crucial issue, therefore, is whether, in light of [**5] all the circumstances, [Bunkers' locker] was such a place." Mancusi v. DeForte, 392 U.S. 364, 368, 20 L. Ed. 2d 154, 88 S. Ct. 2120 (1968).

United States v. Hitchcock, 467 F.2d 1107, 1108 (9th Cir. 1972), defines the Mancusi statement of "a reasonable expectation of freedom from governmental intrusion" thus:

"The protection of the Fourth Amendment no longer depends upon 'constitutionally protected' places. Instead, we must consider 'first that a person have exhibited an actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognize as "reasonable."'"

The public interest in the protection of the safety of the mail and the need for the prevention and discovery of theft and desecration of the mails are of great governmental postal service urgency. [*1220] On the other side, Bunkers' private interest in the locker is at most a very restricted and regulated employment related use thereof.

The active role and mission of the postal authorities in protecting the security and safety of the mails from theft and desecration and the detection of postal crimes is famous, if not notorious, through the [**6] open public news media exploitation thereof. The postal inspectors' regular use of hidden-from-view catwalks and galleries in postal service buildings for the unobserved surveillance of postal employees at work is of common knowledge. In short, and we paraphrase Hitchcock at 1108, in postal service buildings official surveillance has traditionally been the order of the day.

Manifestly Bunkers "exhibited an actual (subjective) expectation of privacy" by placing the C.O.D. parcels in the locker. However, we are satisfied that it would be incredulous

for any postal employee to hold a reasonable expectation of privacy from the here involved postal inspectors' search of his work connected locker for the fruits of suspected criminal activity. We decline to believe that society is prepared to recognize Bunkers' use of the government supplied employment connected locker to hold in privacy the C.O.D. parcels as "reasonable." n1

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n1 We are dealing here only with the seizure of the fruits of a postal crime connected with Bunkers' performance of her employment at the post office. We express no view or opinion upon the reasonableness of a search of a postal employee's employment connected locker for the fruits of a crime not work connected.

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[**7]

Bunkers obliquely contends that the postal inspectors' observation of her with-parcel-entry-to and quick-without-parcel-exit-from the locker room area was sufficient to raise probable belief and cause to seek the issuance of a search warrant, without which the search of her locker was unreasonable. We disagree. The inspectors held the continuing regulatory leave and unrestricted right to inspect and search the locker at any time "where there is reasonable cause to suspect criminal activity." The observation of the work-area-to-locker-room-with package-trip of Bunkers at the very least gave the experienced postal inspectors a well-founded suspicion that criminal activity was afoot. Each of the three searches pursuant to that reasonably grounded suspicion of criminal activity was lawful and armed the inspectors with ample probable cause to arrest Bunkers for the commission of a crime in their presence. The securing of the situation by the two locks on the locker was a freezing of the status quo of the locker and its contents after Bunkers had left for the evening and until her lawful arrest on the following morning. The seizure of the stolen postal parcels from the locker in the presence [**8] of Bunkers was a lawful incident of her arrest.

Accordingly the warrantless search for and the ultimate seizure of the postal packages from Bunkers' locker was not unreasonable and unlawful. United States v. Donato, 269 F. Supp. 921 at 923-24 (E.D. Pa.), aff'd, 379 F.2d 288 (3d Cir. 1967). n2 Bunkers' reliance upon the rationale of United States v. Blok, 88 U.S. App. D.C. 326, 188 F.2d 1019 (1951), is misplaced. The existence of Part 643 of the Postal Manual distinguishes this case from Blok. See Donato at 924 n. 4.

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n2 Donato is pre-Katz; nevertheless the force of its rationale of regulatory leave on the part of postal authorities to search the mint employee's work connected locker is not restricted nor eroded by the reasonable expectancy of privacy test under Katz. In fact, we believe the thrust of the Donato rationale to be enhanced by Katz. See United States v.

Magana, 512 F.2d 1169 (9th Cir.1975), for a lack of reasonable expectancy of privacy in a residential driveway.

The government relies on the work related element of the crime rationale of United States v. Collins, 349 F.2d 863 (2d Cir. 1965), cert. denied, 383 U.S. 960, 16 L. Ed. 2d 303, 86 S. Ct. 1228 (1966). Collins is also pre-Katz. We believe the search of the closed locker area involved in this case is distinguishable from the open space area involved in Collins.

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[**9]

[*1221] Furthermore, we believe that Bunkers' voluntary entrance into postal service employment and her acceptance and use of the locker subject to the regulatory leave of inspection and search and the labor union's contractual rights of search upon reasonable suspicion of criminal activity amount to an effective relinquishment of Bunkers' Fourth Amendment immunity in her work connected use of the locker. See Knopf, Inc. v. Colby, 509 F.2d 1362 at 1370 (4th Cir.), review denied, 421 U.S. 992, 95 S. Ct. 1999, 44 L. Ed. 2d 482 (1975), for an effective relinquishment of First Amendment rights in work connected information.

The judgment of conviction and sentence is affirmed.

AFFIRMED.