Review of Recent Juvenile Cases (2009)

by
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

Thirteen year old student's search of bra and underpants by school officials violated Fourth Amendment rights.[Safford v. Redding](09-3-7)

On June 25, 2009, the Supreme Court of the United States held that because there were no reasons to suspect that the drugs in question (ibuprofen and over-the-counter naproxen) presented a severe enough danger or were concealed in her underwear, the search of a thirteen year old did violate the Constitution, but the official who ordered the unconstitutional search was entitled to qualified immunity from liability.

¶ 09-3-7. **Safford Unified School District v. Redding,** 557 U.S. ____, No. 08-479, U.S. Sup.Ct., 6/25/09 (from Ninth Circuit).

Facts: After escorting 13-year-old Savana Redding from her middle school classroom to his office, Assistant Principal Wilson showed her a day planner containing knives and other contraband. She admitted owning the planner, but said that she had lent it to her friend Marissaand that the contraband was not hers. He then produced four prescription-strength, and one over-the-counter, pain relief pills, all of which are banned under school rules without advance permission. She denied knowledge of them, but Wilson said that he had a report that she was giving pills to fellow students. She denied it and agreed to let him search her belongings. He and Helen Romero, an administrative assistant, searched Savana's backpack, finding nothing. Wilson then had Romero take Savana to the school nurse's office to search her clothes for pills. After Romero and the nurse, Peggy Schwallier, had Savana remove her outer clothing, they told her to pull her bra out and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree. No pills were found. Savana's mother filed suit against petitioner school district (Safford), Wilson, Romero, and Schwallier, alleging that the strip search violated Savana's Fourth Amendment rights. Claiming qualified immunity, the individuals (hereinafter petitioners) moved for summary judgment.

The District Court granted the motion, finding that there was no Fourth Amendment violation, and the en banc Ninth Circuit reversed. Following the protocol for evaluating qualified immunity claims, see *Saucier* v. *Katz*, 533 U. S. 194, 200, the court held that the strip search was unjustified under the Fourth Amendment test for searches of children by school officials set out in *New Jersey* v. *T. L. O.*, 469 U. S. 325. It then applied the test 2 for qualified immunity. Finding that Savana's right was clearly established at the time of the search, it reversed the summary judgment as to Wilson, but affirmed as to Schwallier and Romero because they were not independent decision makers.

Issue: Whether a 13-year-old student's Fourth Amendment right was violated when she was subjected to a search of her bra and underpants by school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school.

Held: Search did violate the Constitution, but the school official was entitled to qualified immunity from liability.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS,

C. J., and SCALIA, KENNEDY, BREYER, and ALITO, JJ., joined, and in which STEVENS and GINSBURG, JJ., joined as to Parts I-III. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which GINSBURG, J., joined. GINSBURG, J., filed an opinion concurring in part and dissenting in part. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part.

JUSTICE SOUTER: Romero and Schwallier directed Savana to remove her clothes down to her underwear, and then "pull out" her bra and the elastic band on her underpants. Savana's subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating. The reasonableness of her expectation (required by the Fourth Amendment standard) is indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure. The common reaction of these adolescents simply registers the obviously different meaning of a search exposing the body from the experience of nakedness or near undress in other school circumstances. Changing for gym is getting ready for play; exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as so degrading that a number of communities have decided that strip searches in schools are never reasonable and have banned them no matter what the facts maybe.

The indignity of the search does not, of course, outlaw it, but it does implicate the rule of reasonableness as stated in *T. L. O.*, that "the search as actually conducted [be] reasonably related in scope to the circumstances which justified the interference in the first place." The scope will be permissible, that is, when it is "not excessively intrusive in light of the age and sex of the student and the nature of the infraction." Here, the content of the suspicion failed to match the degree of intrusion. Wilson knew beforehand that the pills were prescription-strength ibuprofen and over-the-counter naproxen, common pain relievers equivalent to two Advil, or one Aleve. He must have been aware of the nature and limited threat of the specific drugs he was searching for, and while just about anything can be taken in quantities that will do real harm, Wilson had no reason to suspect

Nor could Wilson have suspected that Savana was hiding common painkillers in her underwear. Petitioners suggest, as a truth universally acknowledged, that "students . . . hid[e] contraband in or under their clothing," Reply Brief for Petitioners 8, and cite a smattering of cases of students with contraband in their underwear. But when the categorically extreme intrusiveness of a search down to the body of an adolescent requires some justification in suspected facts, general background possibilities fall short; a reasonable search that extensive calls for suspicion that it will pay off. But nondangerous school contraband does not raise the specter of stashes in intimate places, and there is no evidence in the record of any general practice among Safford Middle School students of hiding that sort of thing in underwear; neither Jordan nor Marissa suggested to Wilson that Savana was doing that, and the preceding search of Marissa that Wilson ordered yielded nothing. Wilson never even determined when Marissa had received the pills from Savana; if it had been a few days before, that would weigh heavily against any reasonable conclusion that Savana presently had the pills on her person, much less in her underwear. In sum, what was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear. We think that the combination of these deficiencies was fatal to finding the search reasonable. In so holding, we mean to cast no ill reflection on the assistant principal, for the record raises no doubt that his motive throughout was to eliminate drugs from his school and protect students from what Jordan Romero had gone through. Parents are known to overreact to protect their children from danger, and a school official with responsibility for safety may tend to do the same. The

difference is that the Fourth Amendment places limits on the official, even with the high degree of deference that courts must pay to the educator's professional judgment.

We do mean, though, to make it clear that the *T. L. O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.

Conclusion: Here, the content of the suspicion failed to match the degree of intrusion. Because Wilson knew that the pills were common pain relievers, he must have known of their nature and limited threat and had no reason to suspect that large amounts were being passed around or that individual students had great quantities. Nor could he have suspected that Savana was hiding common painkillers in her underwear. When suspected facts must support the categorically extreme intrusiveness of a search down to an adolescent's body, petitioners' general belief that students hide contraband in their clothing falls short; a reasonable search that extensive calls for suspicion that it will succeed. Nondangerous school contraband does not conjure up the specter of stashes in intimate places, and there is no evidence of such behavior at the school; neither Jordan nor Marissa suggested that Savana was doing that, and the search of Marissa yielded nothing. Wilson also never determined when Marissa had received the pills from Savana; had it been a few days before, that would weigh heavily against any reasonable conclusion that Savana presently had the pills on her person, much less in her underwear.

Although the strip search violated Savana's Fourth Amendment rights, petitioners Wilson, Romero, and Schwallier are protected from liability by qualified immunity because "clearly established law [did]not show that the search violated the Fourth Amendment," The intrusiveness of the strip search here cannot, under *T. L. O.,* be seen as justifiably related to the circumstances, but lower court cases viewing school strip searches differently are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt about the clarity with which the right was previously stated.

JUSTICE GINSBURG, concurring in part and dissenting in part.

I agree with the Court that Assistant Principal Wilson's subjection of 13-year-old Savana Redding to a humiliating strip down search violated the Fourth Amendment. But I also agree with JUSTICE STEVENS, that our opinion in *New Jersey* v. *T. L. O.*, 469 U. S. 325 (1985),"clearly established" the law governing this case.

Fellow student Marissa Glines, caught with pills in her pocket, accused Redding of supplying them. App. 13a.Asked where the blue pill among several white pills in Glines's pocket came from, Glines answered: "I guess it slipped in when *she* gave me the IBU 400s." Asked next "who is *she*?", Glines responded: "Savana Redding." *Ibid.* As the Court observes no follow-up questions were asked. Wilson did not test Glines's accusation for veracity by asking Glines when did Redding give her the pills, where, for what purpose. Any reasonable search for the pills would have ended when inspection of Redding's backpack and jacket pockets yielded nothing. Wilson had no cause to suspect, based on prior experience at the school or clues in this case, that Redding had hidden pills€”containing the equivalent of two Advils or one Aleve€”in her underwear or body. To make matters worse, Wilson did not release Redding, to return to class or to go home, after the search. Instead, he made her sit on a chair outside his office for over two hours. At no point did he attempt to call her parent. Abuse of authority of that order should not be shielded by official immunity.

In contrast to *T. L. O.*, where a teacher discovered a student smoking in the lavatory, and where the search was confined to the student's purse, the search of Redding involved her body and rested on the bare accusation of another student whose reliability the Assistant Principal had no reason to trust. The Court's opinion in *T. L. O.*

plainly stated the controlling Fourth Amendment law: A search ordered by a school official, even if "justified at its inception," crosses the constitutional boundary if it becomes "excessively intrusive in light of the age and sex of the student and the nature of the infraction."

Here, "the nature of the [supposed] infraction," the slim basis for suspecting Savana Redding, and her "age and sex," establish beyond doubt that Assistant Principal Wilson's order cannot be reconciled with this Court's opinion in *T. L. O.* Wilson's treatment of Redding was abusive and it was not reasonable for him to believe that the law permitted it. I join JUSTICE STEVENS in dissenting from the Court's acceptance of Wilson's qualified immunity plea, and would affirm the Court of Appeals' judgment in all respects.