Blue to Gold
LAW ENFORCEMENT TRAINING

CASE LAW

SRO's and the Fourth Amendments

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125 S.Ct. 834
Supreme Court of the United States

ILLINOIS, Petitioner,
v.
Roy I. CABALLES.

No. 03–923.
|
Argued Nov. 10, 2004.
|
Decided Jan. 24, 2005.

Synopsis

Background: Defendant was convicted, following bench trial in the Circuit Court, La Salle County, H. Chris Ryan, Jr., J., of cannabis trafficking, and he appealed from denial of motion to suppress evidence discovered during traffic stop of vehicle he was driving. The Illinois Appellate Court affirmed. Granting petition for leave to appeal, the Illinois Supreme Court, Kilbride, J., 207 Ill.2d 504, 280 Ill.Dec. 277, 802 N.E.2d 202, reversed. Certiorari was granted.

The United States Supreme Court, Justice Stevens, held that, where lawful traffic stop was not extended beyond time necessary to issue warning ticket and to conduct ordinary inquiries incident to such a stop, another officer's arrival at scene while stop was in progress and use of narcotics-detection dog to sniff around exterior of motorist's vehicle did not rise to level of cognizable infringement on motorist's Fourth Amendment rights, such as would have to be supported by some reasonable, articulable suspicion.

Vacated and remanded.

Justice Souter dissented and filed opinion.

Justice Ginsburg dissented and filed opinion, in which Justice Souter joined.

Chief Justice Rehnquist took no part in the decision of the case.

****835 *405** *Syllabus*[*]

After an Illinois state trooper stopped respondent for speeding and radioed in, a second trooper, overhearing the transmission, drove to the scene with his narcotics-detection dog and walked the dog around ****836** respondent's car while the first trooper wrote respondent a warning ticket. When the dog alerted at respondent's trunk, the officers searched the trunk, found marijuana, and arrested respondent. At respondent's drug trial, the court denied his motion to suppress the seized evidence, holding, *inter alia,* that the dog's alerting provided sufficient probable cause to conduct the search. Respondent was convicted, but the Illinois Supreme Court reversed, finding that because there were no specific and articulable facts to suggest drug activity, use of the dog unjustifiably enlarged a routine traffic stop into a drug investigation.

Held: A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment. Pp. 837–838.

207 Ill.2d 504, 280 Ill.Dec. 277, 802 N.E.2d 202, vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, THOMAS, and BREYER, JJ., joined. SOUTER, J., filed a dissenting opinion, *post,* p. 838. GINSBURG, J., filed a dissenting opinion, in which SOUTER, J., joined, *post,* p. 843. REHNQUIST, C. J., took no part in the decision of the case.

Attorneys and Law Firms

Christopher A. Wray, for the United States as amicus curiae, by special leave of the Court, supporting the petitioner.

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Opinion

Justice STEVENS delivered the opinion of the Court.

***406** Illinois State Trooper Daniel Gillette stopped respondent for speeding on an interstate highway. When Gillette radioed the police dispatcher to report the stop, a second trooper, Craig Graham, a member of the Illinois State Police Drug Interdiction Team, overheard the transmission and immediately headed for the scene with his narcotics-detection dog. When they arrived, respondent's car was on the shoulder of the road and respondent was in Gillette's vehicle. While Gillette was in the process of writing a warning ticket, Graham walked his dog around respondent's car. The dog alerted at the trunk. Based on that alert, the officers searched the trunk, found marijuana, and arrested respondent. The entire incident lasted less than 10 minutes.

***407** Respondent was convicted of a narcotics offense and sentenced to 12 years' imprisonment and a $256,136 fine. The trial judge denied his motion to suppress the seized evidence and to quash his arrest. He held that the officers had not unnecessarily prolonged the stop and that the dog alert was sufficiently reliable to provide probable cause to conduct the search. Although the Appellate Court affirmed, the Illinois Supreme Court reversed, concluding that because the canine sniff was performed without any " 'specific and articulable facts' " to suggest drug activity, the use of the dog "unjustifiably ****837** enlarg[ed] the scope of a routine traffic stop into a drug investigation." 207 Ill.2d 504, 510, 280 Ill.Dec. 277, 802 N.E.2d 202, 205 (2003).

The question on which we granted certiorari, 541 U.S. 972, 124 S.Ct. 1875, 158 L.Ed.2d 466 (2004), is narrow: "Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop." Pet. for Cert. i. Thus, we proceed on the assumption that the officer conducting the dog sniff had no information about respondent except that he had been stopped for speeding; accordingly, we have omitted any reference to facts about respondent that might have triggered a modicum of suspicion.

Here, the initial seizure of respondent when he was stopped on the highway was based on probable cause and was concededly lawful. It is nevertheless clear that a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution. *United States v. Jacobsen,* 466 U.S. 109, 124, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission. In an earlier case involving a dog sniff that occurred during an unreasonably prolonged traffic stop, the Illinois Supreme Court held that use of the dog and the subsequent discovery ***408** of contraband were the product of an unconstitutional seizure. *People v. Cox,* 202 Ill.2d 462, 270 Ill.Dec. 81, 782 N.E.2d 275 (2002). We may assume that a similar result would be warranted in this case if the dog sniff had been conducted while respondent was being unlawfully detained.

In the state-court proceedings, however, the judges carefully reviewed the details of Officer Gillette's conversations with respondent and the precise timing of his radio transmissions to the dispatcher to determine whether he had improperly extended the duration of the stop to enable the dog sniff to occur. We have not recounted those details because we accept the state court's conclusion that the duration of the stop in this case was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop.

Despite this conclusion, the Illinois Supreme Court held that the initially lawful traffic stop became an unlawful seizure solely as a result of the canine sniff that occurred outside respondent's stopped car. That is, the court characterized the dog sniff as the cause rather than the consequence of a constitutional violation. In its view, the use of the dog converted the citizen-police encounter from a lawful traffic stop into a drug investigation, and because the shift in purpose was not supported by any reasonable suspicion that respondent possessed narcotics, it was unlawful. In our view, conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy. Our cases hold that it did not.

Official conduct that does not "compromise any legitimate interest in privacy" is not a search subject to the Fourth Amendment. *Jacobsen,* 466 U.S., at 123, 104 S.Ct. 1652. We have held that any interest in possessing contraband cannot be deemed "legitimate," and thus, governmental conduct that *only* reveals the possession of contraband "compromises no legitimate privacy interest." *Ibid.* This is because the expectation ***409** "that certain facts will not come to the attention of the authorities" is not the same as an interest

****838** in "privacy that society is prepared to consider reasonable." *Id.,* at 122, 104 S.Ct. 1652 (punctuation omitted). In *United States v. Place,* 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), we treated a canine sniff by a well-trained narcotics-detection dog as "*sui generis* " because it "discloses only the presence or absence of narcotics, a contraband item." *Id.,* at 707, 103 S.Ct. 2637; see also *Indianapolis v. Edmond,* 531 U.S. 32, 40, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). Respondent likewise concedes that "drug sniffs are designed, and if properly conducted are generally likely, to reveal only the presence of contraband." Brief for Respondent 17. Although respondent argues that the error rates, particularly the existence of false positives, call into question the premise that drug-detection dogs alert only to contraband, the record contains no evidence or findings that support his argument. Moreover, respondent does not suggest that an erroneous alert, in and of itself, reveals any legitimate private information, and, in this case, the trial judge found that the dog sniff was sufficiently reliable to establish probable cause to conduct a full-blown search of the trunk.

Accordingly, the use of a well-trained narcotics-detection dog—one that "does not expose noncontraband items that otherwise would remain hidden from public view," *Place,* 462 U.S., at 707, 103 S.Ct. 2637—during a lawful traffic stop, generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement.

This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. *Kyllo v. United States,* 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). Critical to that decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a ***410** home, such as "at what hour each night the lady of the house takes her daily sauna and bath." *Id.,* at 38, 121 S.Ct. 2038. The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

The judgment of the Illinois Supreme Court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE took no part in the decision of this case.

Justice SOUTER, dissenting.

I would hold that using the dog for the purposes of determining the presence of marijuana in the car's trunk was a search unauthorized as an incident of the speeding stop and unjustified on any other ground. I would accordingly affirm the judgment of the Supreme Court of Illinois, and I respectfully dissent.

In *United States v. Place,* 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), we categorized the sniff of the narcotics-seeking dog as *"sui generis"* under the Fourth Amendment and held it was not a search. *Id.,* at 707, 103 S.Ct. 2637. The classification rests not only upon the limited nature ****839** of the intrusion, but on a further premise that experience has shown to be untenable, the assumption that trained sniffing dogs do not err. What we have learned about the fallibility of dogs in the years since *Place* was decided would itself be reason to call for reconsidering *Place's* decision against treating the intentional use of a trained dog as a search. The portent of this very case, however, adds insistence ***411** to the call, for an uncritical adherence to *Place* would render the Fourth Amendment indifferent to suspicionless and indiscriminate sweeps of cars in parking garages and pedestrians on sidewalks; if a sniff is not preceded by a seizure subject to Fourth Amendment notice, it escapes Fourth Amendment review entirely unless it is treated as a search. We should not wait for these developments to occur before rethinking *Place's* analysis, which invites such untoward consequences.[1]

At the heart both of *Place* and the Court's opinion today is the proposition that sniffs by a trained dog are *sui generis* because a reaction by the dog in going alert is a response to nothing but the presence of contraband.[2] See *ibid.* ("[T]he sniff discloses only the presence or absence of narcotics, a contraband item"); *ante,* at 838 (assuming that "a canine sniff by a well-trained narcotics-detection dog" will only reveal " 'the presence or absence of narcotics, a contraband item'

" (quoting *Place, supra,* at 707, 103 S.Ct. 2637)). Hence, the argument goes, because the sniff can only reveal the presence of items devoid of any legal use, the sniff "does not implicate legitimate privacy interests" and is not to be treated as a search. *Ante,* at 838.

The infallible dog, however, is a creature of legal fiction. Although the Supreme Court of Illinois did not get into the sniffing averages of drug dogs, their supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether ***412** owing to errors by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine. See, *e.g., United States v. Kennedy,* 131 F.3d 1371, 1378 (C.A.10 1997) (describing a dog that had a 71% accuracy rate); *United States v. Scarborough,* 128 F.3d 1373, 1378, n. 3 (C.A.10 1997) (describing a dog that erroneously alerted 4 times out of 19 while working for the postal service and 8% of the time over its entire career); *United States v. Limares,* 269 F.3d 794, 797 (C.A.7 2001) (accepting as reliable a dog that gave false positives between 7% and 38% of the time); *Laime v. State,* 347 Ark. 142, 159, 60 S.W.3d 464, 476 (2001) (speaking of a dog that made between 10 and 50 errors); *United States v. $242,484.00,* 351 F.3d 499, 511 (C.A.11 2003) (noting that because as much as 80% of all currency in circulation contains drug residue, a dog alert "is of little value"), vacated on other grounds by rehearing en banc, 357 F.3d 1225 (C.A.11 2004); *United States v. Carr,* 25 F.3d 1194, 1214–1217 (C.A.3 1994) (Becker, J., concurring in part and dissenting in part) ("[A] ****840** substantial portion of United States currency ... is tainted with sufficient traces of controlled substances to cause a trained canine to alert to their presence"). Indeed, a study cited by Illinois in this case for the proposition that dog sniffs are "generally reliable" shows that dogs in artificial testing situations return false positives anywhere from 12.5% to 60% of the time, depending on the length of the search. See Reply Brief for Petitioner 13; Federal Aviation Admin., K. Garner et al., Duty Cycle of the Detector Dog: A Baseline Study 12 (Apr.2001) (prepared by Auburn U. Inst. for Biological Detection Systems). In practical terms, the evidence is clear that the dog that alerts hundreds of times will be wrong dozens of times.

Once the dog's fallibility is recognized, however, that ends the justification claimed in *Place* for treating the sniff as *sui generis* under the Fourth Amendment: the sniff alert does not necessarily signal hidden contraband, and opening the container or enclosed space whose emanations the dog has ***413** sensed will not necessarily reveal contraband or any other evidence of crime. This is not, of course, to deny that a dog's reaction may provide reasonable suspicion, or probable cause, to search the container or enclosure; the Fourth Amendment does not demand certainty of success to justify a search for evidence or contraband. The point is simply that the sniff and alert cannot claim the certainty that *Place* assumed, both in treating the deliberate use of sniffing dogs as *sui generis* and then taking that characterization as a reason to say they are not searches subject to Fourth Amendment scrutiny. And when that aura of uniqueness disappears, there is no basis in *Place's* reasoning, and no good reason otherwise, to ignore the actual function that dog sniffs perform. They are conducted to obtain information about the contents of private spaces beyond anything that human senses could perceive, even when conventionally enhanced. The information is not provided by independent third parties beyond the reach of constitutional limitations, but gathered by the government's own officers in order to justify searches of the traditional sort, which may or may not reveal evidence of crime but will disclose anything meant to be kept private in the area searched. Thus in practice the government's use of a trained narcotics dog functions as a limited search to reveal undisclosed facts about private enclosures, to be used to justify a further and complete search of the enclosed area. And given the fallibility of the dog, the sniff is the first step in a process that may disclose "intimate details" without revealing contraband, just as a thermal-imaging device might do, as described in *Kyllo v. United States,* 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001).[3]

****841** ***414** It makes sense, then, to treat a sniff as the search that it amounts to in practice, and to rely on the body of our Fourth Amendment cases, including *Kyllo,* in deciding whether such a search is reasonable. As a general proposition, using a dog to sniff for drugs is subject to the rule that the object of enforcing criminal laws does not, without more, justify suspicionless Fourth Amendment intrusions. See *Indianapolis v. Edmond,* 531 U.S. 32, 41–42, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). Since the police claim to have had no particular suspicion that Caballes was violating any drug law,[4] this sniff search must stand or fall on its being ancillary to the traffic stop that led up to it. It is true that the police had probable cause to stop the car for an offense committed in the officer's presence, which Caballes concedes could have justified his arrest. See Brief for Respondent 31. There is no occasion to consider authority incident to arrest, however, see *Knowles v. Iowa,* 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998), for the police did nothing more than

detain Caballes long enough to check his record and write a ticket. As a consequence, the reasonableness of the search must be assessed in relation to the actual delay the police chose to impose, and as Justice GINSBURG points out in her opinion, *post,* at 844, the Fourth Amendment consequences of stopping for a traffic citation are settled law.

***415** In *Berkemer v. McCarty,* 468 U.S. 420, 439–440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), followed in *Knowles, supra,* at 117, 119 S.Ct. 484, we held that the analogue of the common traffic stop was the limited detention for investigation authorized by *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). While *Terry* authorized a restricted incidental search for weapons when reasonable suspicion warrants such a safety measure, *id.,* at 25–26, 88 S.Ct. 1868, the Court took care to keep a *Terry* stop from automatically becoming a foot in the door for all investigatory purposes; the permissible intrusion was bounded by the justification for the detention, *id.,* at 29–30, 88 S.Ct. 1868.[5] Although facts disclosed by enquiry within this limit might give grounds to go further, the government could not otherwise take advantage of a suspect's immobility to search for evidence unrelated to the reason for the detention. That has to be the rule unless *Terry* is going to become an open sesame for general searches, and that rule requires holding that the police do not have reasonable grounds to conduct sniff searches for drugs simply because they have stopped someone to receive a ticket for a highway offense. Since the police had no indication of illegal activity beyond the speed of the car in this case, the sniff search should be held unreasonable under the Fourth Amendment and its fruits should be suppressed.

Nothing in the case relied upon by the Court, *United States v. Jacobsen,* 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984), unsettled the limit of reasonable enquiry adopted in *Terry.* In *Jacobsen,* the Court found that no Fourth Amendment search occurred when federal agents analyzed ****842** powder they had already lawfully obtained. The Court noted that because the test could only reveal whether the powder was cocaine, the owner had no legitimate privacy interest at stake. 466 U.S., at 123, 104 S.Ct. 1652. ***416** As already explained, however, the use of a sniffing dog in cases like this is significantly different and properly treated as a search that does indeed implicate Fourth Amendment protection.

In *Jacobsen,* once the powder was analyzed, that was effectively the end of the matter: either the powder was cocaine, a fact the owner had no legitimate interest in concealing, or it was not cocaine, in which case the test revealed nothing about the powder or anything else that was not already legitimately obvious to the police. But in the case of the dog sniff, the dog does not smell the disclosed contraband; it smells a closed container. An affirmative reaction therefore does not identify a substance the police already legitimately possess, but informs the police instead merely of a reasonable chance of finding contraband they have yet to put their hands on. The police will then open the container and discover whatever lies within, be it marijuana or the owner's private papers. Thus, while *Jacobsen* could rely on the assumption that the enquiry in question would either show with certainty that a known substance was contraband or would reveal nothing more, both the certainty and the limit on disclosure that may follow are missing when the dog sniffs the car.[6]

***417** The Court today does not go so far as to say explicitly that sniff searches by dogs trained to sense contraband always get a free pass under the Fourth Amendment, since it reserves judgment on the constitutional significance of sniffs assumed to be more intrusive than a dog's walk around a stopped car, *ante,* at 838. For this reason, I do not take the Court's reliance on *Jacobsen* as actually signaling recognition of a broad authority to conduct suspicionless sniffs for drugs in any parked car, about which Justice GINSBURG is rightly concerned, *post,* at 845–846, or on the person of any pedestrian minding his own business on a sidewalk. But the Court's stated reasoning provides no apparent stopping point short of such excesses. For the sake of providing a workable framework to analyze cases on facts like these, which are certain to come along, I would treat the dog sniff as the familiar search it is in fact, ****843** subject to scrutiny under the Fourth Amendment.[7]

Justice GINSBURG, with whom Justice SOUTER joins, dissenting.

Illinois State Police Trooper Daniel Gillette stopped Roy Caballes for driving 71 miles per hour in a zone with a posted ***418** speed limit of 65 miles per hour. Trooper Craig Graham of the Drug Interdiction Team heard on the radio that Trooper Gillette was making a traffic stop. Although Gillette requested no aid, Graham decided to come to the scene to conduct a dog sniff. Gillette informed Caballes that he was speeding and asked for the usual documents—driver's license, car registration, and proof of insurance. Caballes promptly provided the requested documents but refused to consent to a search of his vehicle. After calling his dispatcher to check on

the validity of Caballes' license and for outstanding warrants, Gillette returned to his vehicle to write Caballes a warning ticket. Interrupted by a radio call on an unrelated matter, Gillette was still writing the ticket when Trooper Graham arrived with his drug-detection dog. Graham walked the dog around the car, the dog alerted at Caballes' trunk, and, after opening the trunk, the troopers found marijuana. 207 Ill.2d 504, 506–507, 280 Ill.Dec. 277, 278, 802 N.E.2d 202, 203 (2003).

The Supreme Court of Illinois held that the drug evidence should have been suppressed. *Id.,* at 506, 280 Ill.Dec., at 278, 802 N.E.2d, at 202. Adhering to its decision in *People v. Cox,* 202 Ill.2d 462, 270 Ill.Dec. 81, 782 N.E.2d 275 (2002), the court employed a two-part test taken from *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), to determine the overall reasonableness of the stop. 207 Ill.2d, at 508, 280 Ill.Dec., at 278, 802 N.E.2d, at 204. The court asked first "whether the officer's action was justified at its inception," and second "whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Ibid.* (quoting *People v. Brownlee,* 186 Ill.2d 501, 518–519, 239 Ill.Dec. 25, 34, 713 N.E.2d 556, 565 (1999) (in turn quoting *Terry,* 392 U.S., at 19–20, 88 S.Ct. 1868)). "[I]t is undisputed," the court observed, "that the traffic stop was properly initiated"; thus, the dispositive inquiry trained on the "second part of the *Terry* test," in which "[t]he State bears the burden of establishing that the conduct remained within the scope of the stop." 207 Ill.2d, at 509, 280 Ill.Dec., at 279, 802 N.E.2d, at 204.

***419** The court concluded that the State failed to offer sufficient justification for the canine sniff: "The police did not detect the odor of marijuana in the car or note any other evidence suggesting the presence of illegal drugs." *Ibid.* Lacking "specific and articulable facts" supporting the canine sniff, *ibid.* (quoting *Cox,* 202 Ill.2d, at 470–471, 270 Ill.Dec. 81, 782 N.E.2d, at 281), the court ruled, "the police impermissibly broadened the scope of the traffic stop in this case into a drug investigation." 207 Ill.2d, at 509, 280 Ill.Dec., at 279, 802 N.E.2d, at 204.[1] I would affirm the Illinois ****844** Supreme Court's judgment and hold that the drug sniff violated the Fourth Amendment.

In *Terry v. Ohio,* the Court upheld the stop and subsequent frisk of an individual based on an officer's observation of suspicious behavior and his reasonable belief that the suspect was armed. See 392 U.S., at 27–28, 88 S.Ct. 1868. In a *Terry*-type investigatory stop, "the officer's action [must be] justified at its inception, and ... reasonably related in scope to the circumstances which justified the interference in the first place." *Id.,* at 20, 88 S.Ct. 1868. In applying *Terry,* the Court has several times indicated that the limitation on "scope" is not confined to the duration of the seizure; it also encompasses the manner in which the seizure is conducted. See, *e.g., Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.,* 542 U.S. 177, 188, 124 S.Ct. 2451, 2459, 159 L.Ed.2d 292 (2004) (an officer's request that an individual identify himself "has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop"); *United States v. Hensley,* 469 U.S. 221, 235, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) (examining, under *Terry,* ***420** both "the length and intrusiveness of the stop and detention"); *Florida v. Royer,* 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion) ("[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop [and] the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion ....").

"A routine traffic stop," the Court has observed, "is a relatively brief encounter and 'is more analogous to a so-called *Terry* stop ... than to a formal arrest.' " *Knowles v. Iowa,* 525 U.S. 113, 117, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998) (quoting *Berkemer v. McCarty,* 468 U.S. 420, 439, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984)); see also *ante,* at 841 (SOUTER, J., dissenting) (The government may not "take advantage of a suspect's immobility to search for evidence unrelated to the reason for the detention.").[2] I would apply *Terry's* reasonable-relation test, as the Illinois Supreme Court did, to determine whether the canine sniff impermissibly expanded the scope of the initially valid seizure of Caballes.

It is hardly dispositive that the dog sniff in this case may not have lengthened the duration of the stop. Cf. *ante,* at 837 ("A seizure ... can become unlawful if it is prolonged beyond the time reasonably required to complete [the initial] mission."). *Terry,* it merits repetition, instructs that ****845** any investigation must be "reasonably related in *scope* to the circumstances which justified the interference in the first place." 392 U.S., at 20, 88 S.Ct. 1868 (emphasis added). The unwarranted ***421** and nonconsensual expansion of the seizure here from a routine traffic stop to a drug investigation broadened the scope of the investigation in a manner that, in my judgment, runs afoul of the Fourth Amendment.[3]

The Court rejects the Illinois Supreme Court's judgment and, implicitly, the application of *Terry* to a traffic stop converted, by calling in a dog, to a drug search. The Court so rules, holding that a dog sniff does not render a seizure that is reasonable in time unreasonable in scope. *Ante,* at 837. Dog sniffs that detect only the possession of contraband may be employed without offense to the Fourth Amendment, the Court reasons, because they reveal no lawful activity and hence disturb no legitimate expectation of privacy. *Ante,* at 837–838.

In my view, the Court diminishes the Fourth Amendment's force by abandoning the second *Terry* inquiry (was the police action "reasonably related in scope to the circumstances [justifiying] the [initial] interference"). 392 U.S., at 20, 88 S.Ct. 1868. A drug-detection dog is an intimidating animal. Cf. *United States v. Williams,* 356 F.3d 1268, 1276 (C.A.10 2004) (McKay, J., dissenting) ("drug dogs are not lap dogs"). Injecting such an animal into a routine traffic stop changes the character of the encounter between the police and the motorist. The stop becomes broader, more adversarial, and (in at least some cases) longer. Caballes—who, as far as Troopers Gillette and Graham knew, was guilty solely of driving six miles per hour over the speed limit—was exposed to the embarrassment and intimidation of being investigated, on a public thoroughfare, for drugs. Even if the drug sniff is not characterized as a Fourth Amendment "search," cf. *Indianapolis* ***422** *v. Edmond,* 531 U.S. 32, 40, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000); *United States v. Place,* 462 U.S. 696, 707, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), the sniff surely broadened the scope of the traffic-violation-related seizure.

The Court has never removed police action from Fourth Amendment control on the ground that the action is well calculated to apprehend the guilty. See, *e.g., United States v. Karo,* 468 U.S. 705, 717, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984) (Fourth Amendment warrant requirement applies to police monitoring of a beeper in a house even if "the facts [justify] believing that a crime is being or will be committed and that monitoring the beeper wherever it goes is likely to produce evidence of criminal activity."); see also *Minnesota v. Carter,* 525 U.S. 83, 110, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) (GINSBURG, J., dissenting) ("Fourth Amendment protection, reserved for the innocent only, would have little force in regulating police behavior toward either the innocent or the guilty."). Under today's decision, every traffic stop could become an occasion to call in the dogs, to the distress and embarrassment of the law-abiding population.

The Illinois Supreme Court, it seems to me, correctly apprehended the danger in allowing the police to search for contraband despite the absence of cause to suspect its presence. Today's decision, in contrast, clears the way for suspicionless, ****846** dog-accompanied drug sweeps of parked cars along sidewalks and in parking lots. Compare, *e.g., United States v. Ludwig,* 10 F.3d 1523, 1526–1527 (C.A.10 1993) (upholding a search based on a canine drug sniff of a parked car in a motel parking lot conducted without particular suspicion), with *United States v. Quinn,* 815 F.2d 153, 159 (C.A.1 1987) (officers must have reasonable suspicion that a car contains narcotics at the moment a dog sniff is performed), and *Place,* 462 U.S., at 706–707, 103 S.Ct. 2637 (Fourth Amendment not violated by a dog sniff of a piece of luggage that was seized, pre-sniff, based on suspicion of drugs). Nor would motorists have constitutional grounds for complaint should police with dogs, stationed at long traffic lights, circle cars waiting for the red signal to turn green.

***423** Today's decision also undermines this Court's situation-sensitive balancing of Fourth Amendment interests in other contexts. For example, in *Bond v. United States,* 529 U.S. 334, 338–339, 120 S.Ct. 1462, 146 L.Ed.2d 365 (2000), the Court held that a bus passenger had an expectation of privacy in a bag placed in an overhead bin and that a police officer's physical manipulation of the bag constituted an illegal search. If canine drug sniffs are entirely exempt from Fourth Amendment inspection, a sniff could substitute for an officer's request to a bus passenger for permission to search his bag, with this significant difference: The passenger would not have the option to say "No."

The dog sniff in this case, it bears emphasis, was for drug detection only. A dog sniff for explosives, involving security interests not presented here, would be an entirely different matter. Detector dogs are ordinarily trained not as all-purpose sniffers, but for discrete purposes. For example, they may be trained for narcotics detection or for explosives detection or for agricultural products detection. See, *e.g.,* U.S. Customs & Border Protection, Canine Enforcement Training Center Training Program Course Descriptions, http://www.cbp.gov/xp/cgov/border_security/canines/training_program.xml (all Internet materials as visited Dec. 16, 2004, and available in Clerk of Court's case file) (describing Customs training courses in narcotics detection); Transportation Security Administration, Canine and Explosives Program, http:// www.tsa.gov/public/display?theme=32 (describing Transportation Security

Administration's explosives detection canine program); U.S. Dept. of Agriculture, Animal and Plant Health Inspection Service, USDA's Detector Dogs: Protecting American Agriculture (Oct.2001), available at http://www.aphis.usda.gov/oa/pubs/detdogs.pdf (describing USDA Beagle Brigade detector dogs trained to detect prohibited fruits, plants, and meat); see also Jennings, Origins and History of Security and Detector Dogs, in Canine Sports Medicine and Surgery 16, 18–19 (M. Bloomberg, J. Dee, & R. Taylor eds.1998) (describing narcotics-detector ***424** dogs used by Border Patrol and Customs, and bomb detector dogs used by the Federal Aviation Administration and the Secret Service, but noting the possibility in some circumstances of cross training dogs for multiple tasks); S. Chapman, Police Dogs in North America 64, 70–79 (1990) (describing narcotics- and explosives-detection dogs and noting the possibility of cross training). There is no indication in this case that the dog accompanying Trooper Graham was trained for anything other than drug detection. See 207 Ill.2d, at 507, 280 Ill.Dec., at 278, 802 N.E.2d, at 203 ("Trooper Graham arrived with his drug-detection dog ...."); Brief for Petitioner 3 ("Trooper Graham arrived with a drug-detection dog ....").

****847** This Court has distinguished between the general interest in crime control and more immediate threats to public safety. In *Michigan Dept. of State Police v. Sitz,* 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), this Court upheld the use of a sobriety traffic checkpoint. Balancing the State's interest in preventing drunk driving, the extent to which that could be accomplished through the checkpoint program, and the degree of intrusion the stops involved, the Court determined that the State's checkpoint program was consistent with the Fourth Amendment. *Id.,* at 455, 110 S.Ct. 2481. Ten years after *Sitz,* in *Indianapolis v. Edmond,* 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333, this Court held that a drug interdiction checkpoint violated the Fourth Amendment. Despite the illegal narcotics traffic that the Nation is struggling to stem, the Court explained, a "general interest in crime control" did not justify the stops. *Id.,* at 43–44, 121 S.Ct. 447 (internal quotation marks omitted). The Court distinguished the sobriety checkpoints in *Sitz* on the ground that those checkpoints were designed to eliminate an "immediate, vehicle-bound threat to life and limb." 531 U.S., at 43, 121 S.Ct. 447.

The use of bomb-detection dogs to check vehicles for explosives without doubt has a closer kinship to the sobriety checkpoints in *Sitz* than to the drug checkpoints in *Edmond.* As the Court observed in *Edmond:* "[T]he Fourth Amendment would almost certainly permit an appropriately tailored ***425** roadblock set up to thwart an imminent terrorist attack ...." 531 U.S., at 44, 121 S.Ct. 447. Even if the Court were to change course and characterize a dog sniff as an independent Fourth Amendment search, see *ante,* p. 838 (SOUTER, J., dissenting), the immediate, present danger of explosives would likely justify a bomb sniff under the special needs doctrine. See, *e.g., ante,* at 843, n. 7 (SOUTER, J., dissenting); *Griffin v. Wisconsin,* 483 U.S. 868, 873, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987) (permitting exceptions to the warrant and probable-cause requirements for a search when "special needs, beyond the normal need for law enforcement," make those requirements impracticable (quoting *New Jersey v. T.L. O.,* 469 U.S. 325, 351, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) (Blackmun, J., concurring in judgment))).

* * *

For the reasons stated, I would hold that the police violated Caballes' Fourth Amendment rights when, without cause to suspect wrongdoing, they conducted a dog sniff of his vehicle. I would therefore affirm the judgment of the Illinois Supreme Court.

All Citations

543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842, 73 USLW 4111, 05 Cal. Daily Op. Serv. 648, 2005 Daily Journal D.A.R. 849, 18 Fla. L. Weekly Fed. S 100

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 I also join Justice GINSBURG's dissent, *post,* p. 843. Without directly reexamining the soundness of the Court's analysis of government dog sniffs in *Place,* she demonstrates that investigation into a matter beyond the subject of the traffic stop here offends the rule in *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the analysis I, too, adopt.

2 Another proffered justification for *sui generis* status is that a dog sniff is a particularly nonintrusive procedure. *United States v. Place,* 462 U.S. 696, 707, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). I agree with Justice GINSBURG that the introduction of a dog to a traffic stop (let alone an encounter with someone walking down the street) can in fact be quite intrusive. *Post,* at 845.

3 *Kyllo* was concerned with whether a search occurred when the police used a thermal-imaging device on a house to detect heat emanations associated with high-powered marijuana-growing lamps. In concluding that using the device was a search, the Court stressed that the "Government [may not] us[e] a device ... to explore details of the home that would previously have been unknowable without physical intrusion." 533 U.S., at 40, 121 S.Ct. 2038. Any difference between the dwelling in *Kyllo* and the trunk of the car here may go to the issue of the reasonableness of the respective searches, but it has no bearing on the question of search or no search. Nor is it significant that *Kyllo's* imaging device would disclose personal details immediately, whereas they would be revealed only in the further step of opening the enclosed space following the dog's alert reaction; in practical terms the same values protected by the Fourth Amendment are at stake in each case. The justifications required by the Fourth Amendment may or may not differ as between the two practices, but if constitutional scrutiny is in order for the imager, it is in order for the dog.

4 Despite the remarkable fact that the police pulled over a car for going 71 miles an hour on I–80, the State maintains that excessive speed was the only reason for the stop, and the case comes to us on that assumption.

5 Thus, in *Place* itself, the Government officials had independent grounds to suspect that the luggage in question contained contraband before they employed the dog sniff. 462 U.S., at 698, 103 S.Ct. 2637 (describing how Place had acted suspiciously in line at the airport and had labeled his luggage with inconsistent and fictional addresses).

6 It would also be error to claim that some variant of the plain-view doctrine excuses the lack of justification for the dog sniff in this case. When an officer observes an object left by its owner in plain view, no search occurs because the owner has exhibited "no intention to keep [the object] to himself." *Katz v. United States,* 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring). In contrast, when an individual conceals his possessions from the world, he has grounds to expect some degree of privacy. While plain view may be enhanced somewhat by technology, see, *e.g., Dow Chemical Co. v. United States,* 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986) (allowing for aerial surveillance of an industrial complex), there are limits. As *Kyllo v. United States,* 533 U.S. 27, 33, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), explained in treating the thermal-imaging device as outside the plain-view doctrine, "[w]e have previously reserved judgment as to how much technological enhancement of ordinary perception" turns mere observation into a Fourth Amendment search. While *Kyllo* laid special emphasis on the heightened privacy expectations that surround the home, closed car trunks are accorded some level of privacy protection. See, *e.g., New York v. Belton,* 453 U.S. 454, 460, n. 4, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) (holding that even a search incident to arrest in a vehicle does not itself permit a search of the trunk). As a result, if Fourth Amendment protections are to have meaning in the face of superhuman, yet fallible, techniques like the use of trained dogs, those techniques must be justified on the basis of their reasonableness, lest everything be deemed in plain view.

7 I should take care myself to reserve judgment about a possible case significantly unlike this one. All of us are concerned not to prejudge a claim of authority to detect explosives and dangerous chemical or biological weapons that might be carried by a terrorist who prompts no individualized suspicion. Suffice it to say here that what is a reasonable search depends in part on demonstrated risk. Unreasonable sniff searches for marijuana are not necessarily unreasonable sniff searches for destructive or deadly material if suicide bombs are a societal risk.

1 The Illinois Supreme Court held insufficient to support a canine sniff Gillette's observations that (1) Caballes said he was moving to Chicago, but his only visible belongings were two sport coats in the backseat; (2) the car smelled of air freshener; (3) Caballes was dressed for business, but was unemployed; and (4) Caballes seemed nervous. Even viewed together, the court said, these observations gave rise to "nothing more than a vague hunch" of "possible wrongdoing." 207

Ill.2d 504, 509–510, 280 Ill.Dec., at 279–280, 802 N.E.2d 202, 204–205 (2003). This Court proceeds on "the assumption that the officer conducting the dog sniff had no information about [Caballes]." *Ante,* at 837.

2 The *Berkemer* Court cautioned that by analogizing a traffic stop to a *Terry* stop, it did "not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop." 468 U.S., at 439, n. 29, 104 S.Ct. 3138. This Court, however, looked to *Terry* earlier in deciding that an officer acted reasonably when he ordered a motorist stopped for driving with expired license tags to exit his car, *Pennsylvania v. Mimms,* 434 U.S. 106, 109–110, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) *(per curiam),* and later reaffirmed the *Terry* analogy when evaluating a police officer's authority to search a vehicle during a routine traffic stop, *Knowles,* 525 U.S., at 117, 119 S.Ct. 484.

3 The question whether a police officer inquiring about drugs without reasonable suspicion unconstitutionally broadens a traffic investigation is not before the Court. Cf. *Florida v. Bostick,* 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991) (police questioning of a bus passenger, who might have just said "No," did not constitute a seizure).

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MEMORANDUM OPINION
Court of Appeals of Texas,
Austin.

In the Matter of O.E.

No. 03–02–00516–CV.
|
Nov. 13, 2003.

Synopsis
Student pled true in the District Court, Travis County, 98th Judicial District, W. Jeanne Meurer, J., to possession of marihuana in a drug-free zone and was adjudicated delinquent. He appealed. The Court of Appeals, David Puryear, J., held that: search of student as he was entering alternative learning center was a permissible administrative search.

Affirmed.

From the District Court of Travis County, 98th Judicial District, No. J–22,173; W. Jeanne Meurer, Judge Presiding.

Attorneys and Law Firms

Ruben V. Castaneda, Juvenile Public Defender, Austin, for appellant.

M. Scott Taliaferro, Asst. Dist. Atty., Austin, for appellee.

Before Chief Justice LAW, Justices B.A. SMITH and PURYEAR.

MEMORANDUM OPINION

DAVID PURYEAR, Justice.

***1** O.E. was adjudicated delinquent based on his possession of marihuana in a drug-free zone. *See* Tex. Health & Safety Code Ann. § 481.121 (West 2003). After the trial court denied appellant's motion to suppress evidence, appellant waived trial by jury, pled true to the allegations in the petition, was adjudicated delinquent by the trial court, and placed on probation for a six-month period. In one issue on appeal, appellant contends that the trial court erred in denying his motion to suppress. We will affirm the trial court's judgment.

Factual and Procedural Background

Val Barnes, a seven-year veteran of the Austin Independent School District Police Department, was the only witness at the hearing on the motion to suppress.[1] Barnes worked at the Alternative Learning Center (the "Center"). Students from throughout the district are placed in the Center for various disciplinary violations, including drug-related offenses and gang-related issues; only students with such violations attend the Center. The Center has a uniform security policy: every day, all students entering the Center must pass through a metal detector, be patted down, empty their pockets onto a tray, remove their shoes, and place those shoes on a table for inspection. If no contraband is found, the student is allowed to retrieve the belongings and go to class. Before attending the Center, every student and parent is required to attend an orientation session outlining the Center's rules and regulations, including the search policy. The policy had been in place during the entire seven years that Barnes worked at the Center.

On the morning of May 2, 2002, appellant emptied his pockets, went through the metal detector, removed his shoes, and placed them on the table. Officer Barnes saw a white tissue inside the right shoe, removed the tissue, and found a marihuana cigarette. This juvenile proceeding ensued.

Discussion

Standard of Review
We review the ruling on a motion to suppress in a juvenile case using an abuse of discretion standard of review. *See In re R.J. H .,* 79 S.W.3d 1, 6 (Tex.2002) (adopting standard).[2] An appellate court reviewing such a ruling defers to the trial court's findings of historical fact but determines *de novo* the court's application of the law to those facts. *Id.; see State v. Ross,* 32 S.W.3d 853, 856 (Tex.Crim.App.2000); *Guzman v. State,* 955 S.W.2d 85, 88–89 (Tex.Crim.App.1997). The reviewing court may not disturb supported findings absent an

abuse of discretion. *See Etheridge v. State,* 903 S.W.2d 1, 15 (Tex.Crim.App.1994).

Although the court in this case made detailed findings, to the extent that the juvenile court's findings might not sufficiently address all factual issues, the appellate court examines the record in the light most favorable to the trial court's ruling. *See State v. Ballard,* 987 S.W.2d 889, 891 (Tex.Crim.App.1999). Viewing the evidence in that light, the reviewing court may infer all findings necessary to support the juvenile court's ruling. The court must defer to those findings and must sustain that lower court's ruling if the record reasonably supports the ruling and the ruling is correct on any theory of law applicable to the case. *See Ross,* 32 S.W.2d at 855–56.

Administrative Searches

***2** The uncontradicted evidence in this case shows this search was not targeted at a particular person based on a tip, suspicious behavior, or any other form of individual suspicion.[3] Rather, appellant was searched as part of a daily routine during which all students entering the Center were searched. Thus, this search falls within the general category of "administrative searches." *See, e.g., Camara v. Municipal Court,* 387 U.S. 523, 537, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).

An administrative search is conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of a crime. *See Gibson v. State,* 921 S.W.2d 747, 757–62 (Tex.App.-El Paso 1996, pet. denied) (metal detector at courthouse entrance). As such, it is may be permissible under the Fourth Amendment although not supported by a demonstration of probable cause directed to a particular place or person to be searched. *Gibson,* 747 S.W.2d at 758 (citing *United States v. Davis,* 482 F.2d 893, 908 (9th cir.1973)). "Designed to prevent the occurrence of a dangerous event, an administrative search is aimed at a group or class of people rather than a particular person." *Id.* (quoting *People v. Dukes,* 151 Misc.2d 295, 580 N.Y.S.2d 850, 851–52 (City Crim. Ct.1992)). An administrative search will be upheld as reasonable when the intrusion involved is no greater than necessary to satisfy the governmental interest underlying the need for the search. *See Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646, 664–65, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) (random drug testing of athletes); *Michigan Dep't of State Police v. Sitz,* 496 U.S. 444, 455, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990) (random sobriety checkpoints); *Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602, 633, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (post-accident drug testing of railroad employees); *United States v. Martinez–Fuerte,* 428 U.S. 543, 545, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (vehicle stops at fixed checkpoints to search for illegal aliens); *Camara v. Municipal Court,* 387 U.S. 523, 537, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) (searches of residences by housing code inspectors); *Gibson,* 921 S.W.2d at 765 (magnetometer search at courthouse entrance).

School Searches

The Fourth Amendment applies to searches of students by school authorities. *See New Jersey v. T.L.O.,* 469 U.S. 325, 333, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). However, "[a] student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety.... Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults." *Board of Education v. Earls,* 536 U.S. 822, 830–31, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002); *Marble Falls Indep. Sch. Dist. v. Shell,* No. 03–02–00652–CV, 2003 Tex.App. LEXIS 2845, at *16 (Tex.App.-Austin April 3, 2003, no pet.) (memorandum opinion) (citing *Earls,* 536 U.S. at 830–31). The legality of a search of a student depends on the reasonableness, under all the circumstances, of the search. *T.L.O.,* 469 U.S. at 341.

***3** Administrative searches at schools have been upheld in various circumstances. Random drug testing of athletes without any individualized suspicion was upheld in *Vernonia,* 515 U.S. at 664–65. Although the court recognized that the drug testing at issue was inherently intrusive, it concluded that the privacy invasion was justified by the important government interest in reducing drug abuse by student athletes. *Earls,* essentially following *Vernonia,* approved random drug testing for all students participating in extracurricular activities. *Earls,* 536 U.S. at 838.

In *In re F.B.,* 442 Pa.Super. 216, 658 A.2d 1378 (Pa.Super.Ct.1995), students entering a public high school were routinely required to empty their pockets, and surrender their jackets and any bags. While the belongings were searched, the students were scanned with a metal detector. If no drugs or weapons were found, the student was allowed to retrieve his belongings. Signs were posted notifying students of this procedure. *Id.* at 1380. The defendant was found to have engaged in delinquent conduct by possessing a weapon on school property, a knife found when he emptied his pockets. In upholding the search, the court held that the

search of the student during a student-wide search by school officials was reasonable even though the school officials had no individualized suspicion that the student was armed. *Id.* at 1379–80. The court concluded that the search was justified at its inception because of the high rate of violence in the Philadelphia public schools. Further, "it was reasonable to search all students prior to entering the school because there is no way to know which students are carrying weapons." *Id.* at 1382. A similar search procedure was upheld in *In re S.S.,* 452 Pa.Super. 15, 680 A.2d 1172 (Pa.Super.Ct.1996). An important factor in the court's analysis was that a uniform procedure was followed when each student was searched. "This uniformity served as a safeguard, assuring that a student's expectation of privacy was not subjected to officials' discretion." *Id.* at 1176.

Analysis of this Search

In analyzing an administrative search, we weigh the intrusion involved against the governmental interest underlying the need for the search to determine its reasonableness.[4] *See, e.g., Vernonia,* 515 U.S. at 664–65. In that weighing process, we keep in mind the diminished expectation of a student's privacy in a school setting and the State's compelling interest in maintaining a safe and disciplined environment. *See* Tex. Educ.Code Ann. § 4.001 (West 1996) (one of objectives of public education is that "[s]chool campuses will maintain a safe and disciplined environment conducive to student learning."). In this case, Barnes' testimony made it clear that the search had as its main objective the security of the school. During the seven years Barnes worked at the Center, contraband items such as knives, razor blades, marihuana, and cocaine were regularly found. More than one court has noted the increasing violence in public schools. *See T.L.O.,* 469 U.S. at 339 (drug use and violent crime in the schools have become major social problems); *People v. Pruitt,* 278 Ill.App.3d 194, 214 Ill.Dec. 974, 662 N.E.2d 540, 546 (Ill.App.Ct.1996) ("violence and the threat of violence are present in the public schools[;][s]choolchildren are harming each other with regularity"). All of the students attending the Center had been removed from other campuses for disciplinary problems, increasing the difficulty of the State's task to maintain order and provide a safe environment conducive to learning. *Cf. In re F. B.,* 658 A.2d at 1378 (all students entering school searched; no indication campus was disciplinary school facility). The search procedure was justified at its inception as a method of furthering the State's interest in maintaining a safe and disciplined learning environment in a setting at high risk for drugs and violence.

***4** We also must evaluate the level of intrusion on the individual's privacy. In general, although students in public schools have an expectation of privacy in their persons and belongings, because of the state's custodial and tutorial authority over the students, public school students are subject to a greater degree of control and administrative supervision than adults. *Earls,* 536 U.S. at 830–31.

In this case, appellant and his parents were notified in advance of the school's daily screening process. Such a notice has been held to reduce the expectation of privacy. *See Shoemaker v. State,* 971 S.W.2d 178, 182 (Tex.App.-Beaumont 1998, no pet.) (student had no reasonable expectation of privacy in locker when school authorities had keys to all lockers and student handbook warned that lockers could be searched at any time there was "reasonable cause" to do so).

Emptying pockets and searching backpacks previously has been upheld in other school searches; the level of intrusion into any given individual's privacy is less than that approved in the cases allowing random drug testing. Removing one's shoes for inspection has been deemed "minimally intrusive" in at least one case. *See Thompson v. Carthage Sch. Dist.,* 87 F.3d 979, 981–83 (8th Cir.1996) (suspicion that weapons brought to school, all male students asked to take off shoes and socks and empty pockets; "generalized but minimally intrusive search for dangerous weapons was constitutionally reasonable").

The school district has developed a uniform procedure to search students. Such uniformity serves as a safeguard against an abuse of discretion on the part of school officials in making a determination of which persons will be searched. *See In re S.S.,* 680 A.2d at 1176. It is tailored to meet the needs of a school setting at higher risk than usual for disciplinary problems involving weapons and drugs. The intrusion on the students more limited expectation of privacy is reasonable. Accordingly, the search was an administrative search of the sort permissible under the Fourth Amendment. *See Earls,* 536 U.S. at 838; *Vernonia,* 515 U.S. at 664–65.

Conclusion

We have overruled appellant's only issue. Accordingly, we affirm the trial court's judgment.

All Citations

Not Reported in S.W.3d, 2003 WL 22669014

Footnotes

1 The Austin Independent School District has its own police force; Barnes was not an officer from the Austin Police Department assigned to patrol the school. The AISD police force provides security, assists school administrators in carrying out security, and serves in a law enforcement capacity.

2 The Texas Supreme Court noted that the Texas Court of Criminal Appeals used an abuse of discretion standard but "has not said whether that standard of review is different from the standard under federal law." *In re R.J. H.,* 79 S.W.3d 1, 6 (Tex.2002). In adopting the criminal standard for juvenile cases, the Texas Supreme Court said that "for purposes of this case at least we take [that standard] to be essentially identical to the federal standard." *Id.* Although appellant asserts that the challenged evidence was secured "in violation of Appellant's federal and state constitutional rights," he has not provided any citation, analysis, or argument specifically directed at the applicability of the Texas Constitution. *See Heitman v. State,* 815 S.W.2d 681, 690–91 n. 23 (Tex.Crim.App.1990) (brief asserting right under Texas constitution inadequate if fails to provide argument or authority in support of assertion). For purposes of this case, we will assume the rights under the United States and Texas Constitutions are essentially identical. *See R.J. H.,* 79 S.W.3d at 6.

3 *Cf., e.g., In re A.T.H.,* 106 S.W.3d 338, 341–42 (Tex.App.-Austin 2003, no pet.) (officer had neither reasonable suspicion nor probable cause to conduct pat-down search based on uncorroborated anonymous tip concerning "juveniles" smoking marihuana; fact that description of individual as "black male wearing Dion Sanders jersey" matched person searched insufficient corroboration standing alone).

4 Because conducting these searches was a routine part of his duties as an Austin Independent School District police officer, and because this search is an administrative search, and not one conducted pursuant to any particularized suspicion, we do not think concerns about the status of the person performing the search are implicated. *Cf. Russell v. State,* 74 S.W.3d 887, 891–92 (Tex.App.-Waco 2002, pet. ref'd) (applying three-part test to determine whether reasonable suspicion or probable cause test should apply depending on status of person conducting search as school official, school police or liaison officials, or outside police officers; search involved individual suspicion).

New York Official Reports

188 Misc.2d 48, 725 N.Y.S.2d 534, 154 Ed. Law Rep. 271, 2001 N.Y. Slip Op. 21225

The People of the State of New York, Plaintiff,

v.

Jameel Butler, Defendant.

Supreme Court, Kings County,
21225, 7677/00
April 25, 2001

CITE TITLE AS: People v Butler

HEADNOTES

Crimes
Unlawful Search and Seizure
In-School Encounter between School Safety Officer and Defendant

(1) Defendant, who was indicted for various weapons possession offenses after a search or frisk of his person in the Dean's office of a high school uncovered a loaded handgun, is not entitled to suppression of the handgun and a statement made in response to questioning by the Dean. A school safety officer initially approached defendant to ask him to remove bandanas from his head and wrist because such bandanas can be symbols of gang affiliation and bandanas worn on the head are prohibited by the Chancellor's rules. The officer then asked to see defendant's student identification card. When defendant claimed to be a student but was unable to produce the card, the officer acted reasonably and in compliance with school policy by asking defendant to accompany him to the Dean's office. The officer could not have ordered defendant to leave the building, because if defendant was in fact a student he was required to remain in the building while school was in session. Nor could the officer simply walk away and allow defendant to remain in the building, as he was unsure whether defendant was a trespasser and he had observed defendant wearing something believed to be a sign of gang affiliation.

Crimes
Unlawful Search and Seizure
In-School Encounter between School Safety Officer and Defendant

(2) Defendant, who was indicted for various weapons possession offenses after a search or frisk of his person in the Dean's office of a high school uncovered a loaded handgun, is not entitled to suppression of the handgun and a statement made in response to questioning by the Dean. Searches of students by school authorities do not require probable cause, and may be made upon 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. The Dean had reasonable cause to suspect that defendant was actually a student at another high school who had evaded the security scanners at the main entrance to the school in order to bring in a weapon with the intention of perpetrating some gang-affiliated violence, and therefore properly ordered the school safety officer to search defendant. Defendant did not know the name of a single teacher or guidance counselor at the high school; he did not have an identification card, which was required in order to enter the school at the main entrances; and he had been seen wearing bandanas which are indicia of gang affiliation.

Crimes
Unlawful Search and Seizure
In-School Encounter between School Safety Officer and Defendant

(3) Defendant, who was indicted for various weapons possession offenses after a search or frisk of his person in the Dean's office of a high school uncovered a loaded handgun, is not entitled to suppression of the handgun and a statement made in response to questioning by the Dean. A Dean interrogating a student on school grounds on a matter of school discipline--even ***49** a matter that would carry criminal sanctions--is still a private individual, and no *Miranda* warnings are required before such interrogation is conducted. Defendant had come to the Dean's office voluntarily and was not handcuffed or restrained in any way. The questioning was conducted entirely by the Dean, a private individual. Although there were school safety officers present at the time the Dean questioned defendant, there is no evidence suggesting that the Dean was acting as their agent, or in cooperation with, or under the direction of, the officers. The Dean was not acting to elicit criminality on behalf of the

police, but to investigate what appeared to be either a violation of the school rules or a breach of school security.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Criminal Law, §§ 986, 988; Searches and Seizures, §§ 26, 28, 34, 38, 40, 63.

Carmody-Wait 2d, Criminal Procedure §§ 172:63, 172:66, 172:111, 172:115, 172:131, 172:563, 172:594.

NY Jur 2d, Criminal Law, §§ 252, 257, 258, 275, 453, 460-462, 554, 645, 646; Schools, Universities, and Colleges, § 308.

ANNOTATION REFERENCES

Search conducted by school official or teacher as violation of Fourth Amendment or equivalent state constitutional provision. 31 ALR5th 229.

APPEARANCES OF COUNSEL

Barry Gene Rhodes, Brooklyn, for defendant. *Charles J. Hynes, District Attorney* of Kings County, Brooklyn (*Israel Fried* of counsel), for plaintiff.

OPINION OF THE COURT

Frank J. Barbaro, J.

Defendant was indicted on various weapons possession offenses after a search or frisk of his person inside the Dean's office of Sheepshead Bay High School uncovered a loaded handgun. Defendant subsequently moved to suppress the handgun and to suppress three statements--one of which was made in response to questioning by the High School's Dean and two of which were made in response to questioning by police and school safety officers. A *Mapp*/*Huntley* hearing was held on April 10, 2001, after which this Court granted that portion of defendant's *Huntley* motion which sought suppression of defendant's statements to the officers, but denied defendant's ***50** motions in all other respects. This opinion explains in more detail the Court's reasons for its April 10 ruling.

Findings of Fact

The only witness to testify at the April 10 hearing was Glenn Coyle, a school safety officer employed by the New York City Police Department and assigned to Sheepshead Bay High School.[1] Coyle testified that on September 12, 2000, at approximately 1:15 P.M., just after he and a fellow school safety officer, Sergeant Thompson, finished clearing out the school cafeteria, he saw defendant standing in the lobby wearing a grey bandana or headband around his head and a blue bandana around his wrist. According to Coyle, such headgear was prohibited by the Chancellor's rules, which were posted in the school cafeteria and other places, because it is sometimes a sign of gang affiliation. There were no such rules relating to wristbands or bandanas not worn on the head, but Coyle knew from his nine years on the job that such bandanas were also sometimes gang symbols. Accordingly, Coyle approached defendant and asked him to remove both the headgear and the blue bandana. Defendant complied.

Because Coyle did not recognize defendant, the officer asked whether defendant was a student. Defendant replied that he was, but claimed--plausibly, according to Coyle--that he had finished his classes for the day. Coyle then asked to see defendant's "program card"--a form of identification giving a student's name, classes and teachers but not bearing any photograph or description of the student or some other form of identification. In response, defendant stated that he was about to leave, but could not produce a program card. Defendant did not produce any other form of identification and did not give Coyle his name.

Sergeant Thompson then requested that defendant accompany them to the Dean's office, which was located nearby on the same floor, and defendant agreed to do so. While escorting defendant to the Dean's office, Coyle and Thompson encountered two other young men. One, with a bandana obscuring the lower half of his face, approached Coyle in what the officer perceived to be a threatening manner. This man was asked for his program card, and produced one bearing the name Kenmar Butler. Coyle did not return the card, but asked that ***51** student also to accompany him to the Dean's office. Although the student initially complied, he fled before reaching the Dean's office. Coyle radioed a description of the fleeing student, but made no effort to pursue him.

In a cubicle at the Dean's office, defendant was questioned by Dean Findling-- the faculty member in charge of discipline at the school--in the presence of Coyle, Sergeant Thompson and another school safety officer, Officer Frederick. Defendant claimed that he was a new student who had transferred from Madison High School, and was able to give accurate information regarding that school. However, defendant could not name any of the guidance counselors or teachers at

Sheepshead Bay High School. He was able to produce a program card bearing the name Kenmar Butler, which proved identical to the one which Coyle had confiscated from the student that had fled from him. Defendant claimed that he was Kenmar but, although defendant knew Kenmar's date of birth, he did not know other details concerning Kenmar. Defendant also claimed that he had no other identification.

At the hearing, Coyle explained that persons entering the school were required to present identification. Persons entering the school through the usual entrances must pass through security checkpoints at which they must show identification and pass through a security scanner. Although visitors to the school are often admitted, school policy requires that anyone without identification be sent to the Dean's office so that their identity may be determined. Since defendant had no identification other than the duplicate program card, the Dean asked the officers to "search" defendant, then left the cubicle to make some telephone calls.

Coyle patted down the defendant. Feeling a hard object which created a bulge in the pocket of defendant's jacket, Coyle reached into the pocket and pulled out a black handgun. Defendant was immediately handcuffed. A further search revealed that defendant had a picture identification card from Madison High School, identifying him as Jameel Butler. Defendant then asked to be let go, but he remained handcuffed.

At some point thereafter, Dean Findling re-entered the room. Walking directly up to the defendant, he said, "I'm going to ask you once and only once and I want the truth. Is it loaded?" Defendant responded, "Yes." Shortly thereafter, a regular duty officer from the 61st Precinct entered and asked where defendant had obtained the weapon, to which defendant responded that he had found it on the street and was carrying it for ***52** protection. Sergeant Thompson also asked defendant how he had entered the school building, to which defendant replied that he had come in through a side door. Coyle admitted that neither he nor anyone else ever read defendant his *Miranda* rights, but denied that they had in any way threatened or coerced the defendant.

At oral argument, defense counsel argued that defendant had essentially been arrested for failure to present proper identification and that the school safety officers acted unreasonably in requesting that he accompany them to the Dean's office rather than simply asking the defendant to leave the building. He further argued that because of the close working relationship between the Dean and the officers, the Dean was effectively an agent of the police when he questioned defendant.

The prosecution conceded that the two statements made to the police officers were in violation of the defendant's *Miranda* rights and should be suppressed, but maintained that the Dean had acted as a private party in questioning defendant. The prosecutor also refuted the defendant's assertion of a *Mapp* violation, arguing that the defendant had voluntarily accompanied the officers to the Dean's office and that the officers had acted reasonably upon suspecting that the defendant had trespassed in the school. However, like defense counsel before him, the prosecutor analyzed the facts as if this had been a street encounter, and did not discuss the legal standards applicable where the encounter takes place inside a school.

Conclusions of Law

In my view, both parties are making the mistake of analyzing this in-school encounter between a school safety officer and defendant, who professed to be a student, as the functional equivalent of an encounter between a police officer and a private citizen. Indeed, at oral argument, defense counsel went so far as to say that there were only "subtle differences" between the search and seizure standards applicable inside schools and those applicable to street encounters. This is simply not the case.

Defense counsel is, of course, correct in noting that the Fourth Amendment operates to protect students inside school premises from unreasonable searches and seizures (*New Jersey v T.L.O.,* 469 US 325; *Matter of Gregory M.,* 82 NY2d 588, 592). However, determining the reasonableness of a search or seizure involves "balancing of basic personal rights against urgent social necessities" (*Matter of Gregory M., supra,* at 592, quoting *People v Scott D.,* 34 NY2d 483, 488). Courts have ***53** recognized that "[a] school is a special kind of place in which serious and dangerous wrongdoing is intolerable" (*People v Scott D., supra,* at 486). Accordingly, in performing that balancing, the Court has held that the "prevention of the introduction of hand guns and other lethal weapons into New York City schools such as this high school is a governmental interest of the highest urgency" (*Matter of Gregory M., supra,* at 593). On the other hand, the Court has noted that "[y]oungsters in a school, for their own sake, as well as that of their age peers in the school, may not be treated with the same circumspection required outside the school or

to which self-sufficient adults are entitled" (*People v Scott D., supra,* at 486-487).

Schools have a very different relationship to their students than police officers have to the private citizens they encounter on the street. Attendance is mandatory, and those required to attend must attend "regularly as prescribed where [the student] resides or is employed, for the entire time the appropriate public schools or classes are in session and ... be subordinate and orderly while attending" (Education Law § 3210 [1] [a]). In assuming physical custody and control over its students, a school stands in loco parentis; it has the duty to "exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances." (*Mirand v City of New York,* 84 NY2d 44, 49; *Hoose v Drumm,* 281 NY 54, 57-58.) Schools have a duty to adequately supervise the students in their charge and may be held liable for foreseeable injuries proximately related to the absence of adequate supervision (*Mirand v City of New York, supra,* at 49; *see, e.g., Lawes v Board of Educ.,* 16 NY2d 302, 306). To that end, a school may discipline a student. However, such discipline is governed by myriad statutes, regulations and district policies dictating such details as the permissible disciplinary action, the due process to be afforded the student and parent, and the person authorized to impose the discipline. For example, Education Law § 3214 (3) (a) provides that only "[t]he board of education, board of trustees or sole trustee, the superintendent of schools, district superintendent of schools or principal of a school may suspend ... pupils from required attendance upon instruction," and even then under certain circumstances and after according them and their parents the due process rights set forth in that section.

(1) In light of the foregoing, this Court concludes that Officer Coyle acted entirely appropriately in questioning defendant and escorting him to the Dean's office. First, even defense ***54** counsel conceded that the school safety officers would have the right to approach someone who looked like a student and ask him for his identification card. When defendant answered Coyle's questions by professing to be a student, but could not prove it by producing a program card, Coyle acted reasonably in asking defendant to accompany him to the Dean's office (*see People v Dorner,* 116 Misc 2d 1087). Indeed, Coyle had virtually no other choice. He could not, as defense counsel suggested, simply order him to leave the building. If defendant had actually been a student who had not finished his classes for the day--and Coyle had no evidence conclusively proving the contrary--an order to leave would have exposed the school to possible civil liability for negligent supervision (*see Mirand v City of New York, supra*). Moreover, since such an order could be construed as effectively suspending defendant for the afternoon, Coyle would arguably have been acting beyond his authority and depriving defendant of his due process rights in violation of Education Law § 3214. On the other hand, Coyle could not abdicate his duties by walking away and allowing defendant to remain in the building, since Coyle was unsure whether defendant was a trespasser and had observed him wearing something which, based on his experience, he believed to be a sign of gang affiliation.

While he could have continued to question defendant, nothing in the record suggests that further questioning would have been productive. To the contrary, the evidence demonstrates that defendant's identity was not conclusively established even after additional questioning at the Dean's office. In any event, the officers acted appropriately in asking defendant to go to the Dean's office, since it was school policy to do so with anyone who could not produce proper identification.

This Court does not have to reach the issue of whether Coyle could have forced defendant to comply with his request, for this Court fully credits Coyle's testimony that defendant voluntarily consented to go to the Dean's office. Since "[c]onsent is a valid substitute for probable cause" (*see People v Hodge,* 44 NY2d 553, 559), there is no need to determine whether the officer had probable cause to detain the defendant.

However, even assuming arguendo that defendant had not consented, this Court would not find that Coyle acted unreasonably in taking defendant to the Dean's office. Coyle had at least a reasonable suspicion that defendant was either not a student and was trespassing in the building or was cutting classes. In either event, he would have been acting reasonably in detainingdefendant ***55** and taking him to the Dean's office so that his identity could be determined. In detaining a potential trespasser, Coyle would simply be performing one of the central duties of his job (*see People v Dorner, supra,* at 1089). In detaining a student suspected of cutting classes, Coyle would be enforcing Education Law § 3210 (1) (a)--a function which would be within the scope of his authority and within the traditional role of the police (*cf., Matter of Shannon B.,* 70 NY2d 458 [police acted within their authority in detaining suspected truant for the purposes of transporting her to the Board of Education for further investigation and processing]).

(2) This Court also finds that the "search" of defendant was appropriate. Even assuming this was a full-blown search, such searches of the person of students by school authorities do not require probable cause. Rather, such searches may be made upon "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" (*New Jersey v T.L.O., supra,* at 342, cited with approval in *Matter of Gregory M., supra,* at 592). Here, Dean Findling had several reasons to suspect that defendant was actually a student at another high school, who had evaded the security scanners at the main entrances to the school and had done so in order to bring a weapon into the school with the intention of perpetrating some gang-affiliated violence. First, defendant was able to answer questions regarding Madison High School, but did not know the name of a single teacher or guidance counselor at Sheepshead Bay High School.[2] Second, defendant claimed that he had no identification card, which was necessary to enter the school at the main entrances. Third, he had been seen in the hall wearing a blue bandana on his wrist--something which, according to Coyle, was an indicium of gang affiliation. Finally, as Coyle was escorting defendant to the Dean's office, he had been approached by another individual in a threatening manner.

Under these circumstances, this Court concludes that there was at least reasonable suspicion to support a search. However, the Court notes that the gun was actually detected in the ***56** course of a frisk of defendant's outer clothing. This type of limited pat down is less intrusive than a search (*see Matter of Gregory M., supra,* at 597). Especially in light of the urgent governmental interest in preventing the "introduction of hand guns and other lethal weapons into New York City schools" (*id.,* at 593), this Court would find the school authorities' actions reasonable even on something less than "reasonable suspicion."

(3) Finally, this Court concludes that the statements made to Dean Findling need not be suppressed, even though they preceded *Miranda* warnings. *Miranda* warnings are required only prior to custodial interrogation. Furthermore, the interrogation must be by a public servant engaged in law enforcement or a person acting in cooperation with, or under the direction of, or as an agent of, a law enforcement officer (*People v Jones,* 47 NY2d 528). A Dean interrogating a student on school grounds on a matter of school discipline--even a matter that would carry criminal sanctions--is still a private individual, with respect to whose questioning *Miranda* is inapplicable (*People v Irving C.,* 103 Misc 2d 980, 982; *Matter of Brendan H.,* 82 Misc 2d 1077, 1080).

The statements to Dean Findling are admissible despite the absence of *Miranda* warnings on two grounds. First, with the exception of the last statement--in which the defendant admitted that the gun was loaded--there was no custodial interrogation. Defendant had come to the Dean's office voluntarily and was not handcuffed or restrained in any way. A reasonable person in defendant's position, innocent of any wrongdoing, would have thought he would be allowed to leave the school as soon as he presented a suitable identification or as soon as his true identity was determined.

Second, the questioning was conducted entirely by Dean Findling--a private individual (*see People v Irving C., supra,* at 982; *Matter of Brendan H., supra,* at 1080). Although school security officers were present in the cubicle at the time the Dean questioned defendant, there is no evidence suggesting that the Dean was acting as their agent, or in cooperation with, or under the direction of, said officers. Rather, the Dean was acting, not to elicit evidence of criminality on behalf of the police, but to investigate what appeared to be either a violation of school rules or a breach of school security. The officers were present for his protection alone, and did not participate in the questioning in any way.

Even the Dean's last question, regarding whether the gun was loaded, was not made in cooperation with, or under the ***57** direction of, the officers. There is no evidence that anyone asked him to pose the question. Unlike post-arrest police questioning, which "undeniably is aimed at obtaining evidence leading to conviction of the subject," interrogation by school authorities is "normally investigatory for disciplinary purposes" (*Matter of Brendan H., supra,* at 1080). There is nothing in the record to suggest that the final question posed by the Dean was for any other purpose than determining facts that would aid personnel at either his high school or at Madison High School to determine the appropriate disciplinary action to take.

On the other hand, the questions posed by the police officer were aimed at obtaining evidence to be used in the criminal investigation. These statements were made after defendant was in custody and before the administration of *Miranda* warnings. Accordingly, as the prosecution concedes, these statements must be suppressed.

Conclusion

For the reasons set forth above, this Court has granted that portion of defendant's *Huntley* motion which sought suppression of defendant's statements to the officers, but has denied defendant's motions in all other respects. ***58**

Footnotes

1 There is some ambiguity in the record as to whether Coyle was a school safety officer or a school safety aide, and there was no discussion concerning the difference, if any, between the two. For purposes of this opinion, this Court has assumed that Coyle was a school safety officer.

2 This Court is unpersuaded by defense counsel's claim that no inference can be drawn from defendant's total ignorance regarding his new school because he was a recent transfer to the school. Defendant alleged that he was a student who had just finished classes. Even assuming this was the first day of school, one would reasonably expect that he would be able to name one of the teachers whose classes he had attended that day or at least the guidance counselor who had signed him into the school.

679 So.2d 316
District Court of Appeal of Florida,
Third District.

The STATE of Florida, Appellant,

v.

J.A., a juvenile, Appellee.

No. 95–2913.
|
Aug. 21, 1996.
|
Rehearing Denied Oct. 2, 1996.

Synopsis

State appealed order by Circuit Court, Dade County, Steve J. Levine, J., granting juvenile's motion to suppress physical evidence discovered during weapons search at public high school. The District Court of Appeal, Shevin, J., held that: (1) it would treat appeal as petition for writ of certiorari, and (2) public school board's policy, authorizing random, suspicionless weapons searches of public high students, was reasonable and constitutional.

Certiorari granted; order quashed; cause remanded.

Attorneys and Law Firms

***317** Robert A. Butterworth, Attorney General, and Michael J. Neimand, Assistant Attorney General, for appellant.

Bennett H. Brummer, Public Defender, and Bruce A. Rosenthal, Assistant Public Defender, for appellee.

Phyllis O. Douglas, for The School Board of Dade County, Florida as amicus curiae.

Blaire & Cole, Coral Gables, for Dade County Council of PTS–PTSA as amicus curiae.

Corse, Belle & Miller, for Florida Association of Criminal Defense Lawyers as amicus curiae.

Steven M. Potolosky and Paul M. Rashkind, Miami, for Florida Association of Criminal Defense Lawyers–Miami Chapter as amicus curiae.

Akerman, Senterfitt & Eidson, and Lida Rodriguez–Taseff, Miami, for The American Civil Liberties Union Foundation of Florida, Inc. as amicus curiae.

Before NESBITT, GREEN and SHEVIN, JJ.

Opinion

SHEVIN, Judge.

The State of Florida appeals an order granting J.A.'s motion to suppress physical evidence discovered during a weapons search at a public high school. We treat the appeal as a petition for writ of certiorari.[1] We find ***318** that the trial court's order departs from the essential requirements of law, and therefore grant certiorari and quash the order.

Responding to the growing presence of firearms and other weapons in public schools, and the dangerous and deleterious effects of these weapons on the learning environment, the Dade County School Board ["Board"] adopted a policy authorizing random searches of students in high school classrooms with hand-held metal detector wands. To carry out the policy, the Board enacted various guidelines for the search procedures. The searches are designed to deter and curtail the presence of weapons in schools.

In analyzing the central issue in this case, we are not unmindful that metal detector searches have become commonplace in everyday living. Persons who visit courthouses, or travel on airplanes are routinely screened for weapons by metal detectors. These searches are deemed constitutional. *State v. Baez,* 530 So.2d 405 (Fla. 3d DCA 1988)(airport magnetometer search constitutional); *Legal Aid Soc'y of Orange County v. Crosson,* 784 F.Supp. 1127 (S.D.N.Y.1992)(courthouse magnetometer search constitutional). The central issue in this case is whether a search conducted pursuant to the Board's policy violated J.A.'s Fourth Amendment rights.

To execute the policy, the Board hired an independent security firm to conduct the searches. The firm employees (referred to as a "search team") arrive at a randomly selected secondary school, roll dice to choose a sector of the school, and then roll the dice again to determine which classroom in the sector to search. The search team is accompanied by a school administrator. There are signs posted in the school informing students that these random searches are conducted.

When the team enters the selected classroom, a team member informs the students about the search's purpose and procedures. The students are segregated by gender and asked to remove all metal objects from their persons. The students are scanned with the wand by a team member of the same sex. If the wand indicates the presence of metal the student is asked to remove any object in that area which may be triggering the device. If the wand again alerts to the presence of metal, the area is patted down. All coats, bags and other items are also scanned with the wand. If the wand alerts, the team member looks inside the item for weapons. A student may refuse to be searched, but refusal may subject the student to discipline. If the search reveals a school policy violation, the student may suffer disciplinary action. If contraband is discovered, the school notifies the police officers who are routinely assigned to patrol school campuses.[2] The student may be arrested.

On the day J.A. was arrested, the search team selected and entered J.A.'s classroom with the assistant principal. As the team was explaining the search procedure, the assistant principal noticed that a jacket was passed to the back of the room and was placed on a shelf. A team member retrieved the jacket, scanned it, and discovered a gun. J.A. was identified as the jacket's owner. He was taken to an office where he admitted owning the jacket but denied owning the gun, and he asserted that the jacket was behind him, but he did not pass it back.

The State filed a delinquency petition against J.A. for carrying a concealed firearm, possession of a firearm on school property, and possession of a firearm by a minor. J.A. filed a motion to suppress the firearm asserting that the search was unlawful. In the order granting the motion to suppress, the trial judge found that the administrative search was a police search, that it was not based on probable cause and was, therefore, unconstitutional.

The court also found that, even if the search only required reasonable suspicion, the policy's search method was not sufficiently effective to outweigh the severe intrusion into the students' privacy interests.

We note that only three jurisdictions (New York, Pennsylvania, and Illinois) have addressed this issue. The courts have upheld, as constitutional, magnetometer searches and hand-held metal detector searches of students. ***319** *In re S.S.*, 452 Pa. Super. 15, 680 A.2d 1172 (1996)(hand-held wand search of student by police officer); *People v. Pruitt,* 278 Ill.App.3d 194, 214 Ill.Dec. 974, 662 N.E.2d 540 (1996)(magnetometer search of student by police officers), *appeal denied,* 167 Ill.2d 564, 217 Ill. Dec. 668, 667 N.E.2d 1061 (1996); *In re F.B.,* 442 Pa.Super. 216, 658 A.2d 1378 (1995)(handheld wand search of student by police officers), *appeal granted,* 542 Pa. 647, 666 A.2d 1056 (1995); *People v. Dukes,* 151 Misc.2d 295, 580 N.Y.S.2d 850 (N.Y.Crim.Ct.1992)(same). *See Thompson v. Carthage School Dist.,* 87 F.3d 979 (8th Cir. 1996)(§ 1983 damages do not lie against school for suspension based on possession of contraband discovered during hand-held metal detector search).

The case before us involves a random, suspicionless, administrative search of public high school students in "furtherance of a valid administrative purpose."[3] *State v. Nadeau,* 395 So.2d 182, 185 (Fla. 3d DCA 1980)(administrative search defined)(citing *United States v. Davis,* 482 F.2d 893 (9th Cir.1973)); *Dukes,* 580 N.Y.S.2d at 851–52. The legality of this search is governed by the United States Supreme Court's pronouncements in *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995), and *New Jersey v. T.L.O.,* 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). *T.L.O.* addressed the propriety of a search based on individualized suspicion that a student had committed a school rule violation. *Acton* addressed random suspicionless searches of student athletes to detect drug use. In student search cases, the challenge is always how to "strike the balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place?" *T.L.O.,* 469 U.S. at 340, 105 S.Ct. at 742. Although *T.L.O.* applies the Fourth Amendment's prohibition of unreasonable searches and seizures to searches conducted by public school officials, "the legality of a search of a student should depend simply on the *reasonableness,* under all the circumstances, of the search." *T.L.O.,* 469 U.S. at 341, 105 S.Ct. at 742 (emphasis added).

> [T]he ultimate measure of the constitutionality of a governmental search is 'reasonableness.' At least in a case such as this, where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted, whether a particular search meets the reasonableness standard 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'

Acton, 515 U.S. at 652-53; 115 S.Ct. at 2390 (footnote omitted) (quoting *Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602, 617, 109 S.Ct. 1402, 1413, 103 L.Ed.2d 639(1989)).

As the following analysis demonstrates, the search we review today satisfies this reasonableness standard. "The first factor to be considered is the nature of the privacy interest upon which the search here at issue intrudes." *Acton,* 515 U.S. at 654, 115 S.Ct. at 2391. Without question, students in public schools have an expectation of privacy in their persons and personal belongings. *T.L.O.,* 469 U.S. at 338, 105 S.Ct. at 740–41. However, because of the state's custodial and tutorial authority over the student, public school students are subject to a greater degree of control and administrative supervision than is permitted over a free adult. *Acton,* 515U.S. at 655, 115 S.Ct. at 2392; *Pruitt,* 214 Ill.Dec. at 976, 662 N.E.2d at 542 ("The reasonableness inquiry cannot disregard the schools' custodial and tutelary responsibility for children. The State's power over schoolchildren permits a degree of supervision and control that could not be exercised over free adults."). Therefore, "students within the school environment have a lesser expectation of privacy than members of the population generally." *T.L.O.,* 469 U.S. at 348, 105 S.Ct. at 746 (Powell, J., concurring).

The next factor we must weigh is the character of the intrusion at issue. ***320** *Acton,* 515 U.S. at 658, 115 S.Ct. at 2393. The Board has delineated search parameters in its policy to minimize the intrusion into the student's privacy. As stated above, the individuals are asked to remove all metal objects from their pockets and persons to avoid setting off the wand. If the wand detects the presence of metal the student is requested to remove any object in that area. The area is only patted down if the wand again indicates the presence of metal. The Board's search is no broader than metal detector searches upheld in other jurisdictions. *In re S.S.,* 452 Pa. Super. 15, 680 A.2d 1172, 1173, 1996 WL 392112, at *1; *Pruitt,* 214 Ill.Dec. at 978, 662 N.E.2d at 544; *In re F.B.,* 658 A.2d at 1380; *Dukes,* 580 N.Y.S.2d at 850–51. This Court finds that the Board's policy and the guidelines enacted to carry it out delineate a search that involves a *minimal intrusion* into the students' privacy.

Against the backdrop of a student's privacy interest, and the scope of the search, we must consider "the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it." *Acton,* 515 U.S. at 660, 115 S.Ct. at 2394. The interest must be one "important enough to justify the particular search at hand...." *Acton,* 515 U.S. at 661, 115 S.Ct. at 2394–95.

"Judges cannot ignore what everybody else knows: violence and the threat of violence are present in the public schools.... Schoolchildren are harming each other with regularity." *Pruitt,* 214 Ill.Dec. at 980, 662 N.E.2d at 546. The incidences of violence in our schools have reached alarming proportions. In the year prior to the Board's implementation of the search policy, Dade County Public Schools reported both homicides and aggravated batteries as well as the confiscation from students of a very high number of weapons, including handguns.

In 1985, the *T.L.O.* Court acknowledged that "in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems." *T.L.O.,* 469 U.S. at 339, 105 S.Ct. at 741. Now, eleven years after *T.L.O.,* the problem has worsened exponentially. The immediacy of the Board's concern for students' safety, and the safety of all school personnel, is certainly well justified. Despite this background of escalating violence, the Board must maintain an environment that fosters learning and growth. In keeping with that obligation, the search policy was effected to deter and curtail the presence of weapons in schools and promote a safe learning environment.

The means the Board has selected to address this severe problem is effective. The logical way to keep weapons out of school is to let the students know that they *may* be searched for weapons and that possession of weapons in a public high school is *not* permissible and will be seriously sanctioned.

Although there are alternative methods for detecting weapons (such as a magnetometer), these alternatives are attended by substantial difficulties because of Dade County's open-campus high schools. Moreover, these alternative methods are very time consuming and would disrupt an entire school, as opposed to randomly selected classrooms. The Board has chosen the method it felt would best satisfy the needs of its high schools. The Supreme Court has *never* declared that "only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." *Acton,* 515 U.S. at 663, 115 S.Ct. at 2396.

Upon balancing the students' privacy interest, the nature of the search, and the severity of the need met by the search, this Court holds that the Board's policy is both reasonable and constitutional. The administrative search that led to the

discovery of the weapon in J.A.'s jacket is constitutional. Therefore, the suppression of the weapon was error.

Since the trial court's order departs from the essential requirements of law, we grant certiorari, quash the order under review, and remand the case to the trial court for further proceedings consistent herewith.

Certiorari granted; order quashed; cause remanded.

All Citations

679 So.2d 316, 112 Ed. Law Rep. 1107, 21 Fla. L. Weekly D1901

Footnotes

1 We grant J.A.'s motion to treat the appeal as a petition for writ of certiorari. The Florida Supreme Court has not promulgated a rule permitting the State to appeal an interlocutory suppression order in a juvenile proceeding. *A.N. v. State,* 666 So.2d 928 (Fla. 3d DCA 1995). Certiorari is the only relief the State may seek in this case. *State v. M.G.,* 550 So.2d 1122 (Fla. 3d DCA), *review denied,* 551 So.2d 462 (Fla.1989). We note that Proposed Florida Rule of Appellate Procedure 9.145(c)(1)(B), if adopted, would permit an appeal such as the one the State seeks here. *Amendments to the Florida Rules of Appellate Procedure v. 4–Year Cycle,* No. 87,134 (Fla. filed Jan. 5, 1996).

2 The officers are not involved in and are not present during the random searches.

3 Because this is an administrative search, and there was no police involvement, we need not determine whether probable cause existed to search the jacket.

308 F.2d 26
United States Court of Appeals Second Circuit.

UNITED STATES of America, Appellee,

v.

Eugene JONES, Appellant.

No. 263, Docket 27157.
|
Argued Feb. 15, 1962 to a Panel.
|
Submitted to in Banc Court April 3, 1962.
|
Decided Aug. 17, 1962.

Synopsis

Defendant was convicted in the United States District Court for the Southern District of New York, Sidney Sugarman, J., sitting without jury, of having violated 21 U.S.C.A. 174, and defendant appealed. The Court of Appeals, Waterman, Circuit Judge, held that defendant did not have constructive 'possession' of narcotics, within statute providing that unexplained possession of narcotics is sufficient for conviction of violation of Narcotic Drugs Import and Export Act, where defendant took pains to find actual seller of narcotics, price and place of delivery were not even discussed with buyer until defendant spoke with seller, and after consummation of transaction, seller told buyer to purchase directly from him in future and not to deal with anyone else.

Reversed; acquittal ordered.

Moore and Smith, circuit Judges, dissented.

Attorneys and Law Firms

***28** Anthony F. Marra, New York City (Leon Polsky, New York City, of counsel), Legal Aid Society, for appellant.

Robert M. Morgenthau, U.S. Atty., S.D.N.Y. (Arthur I. Rosett, Jonathan L. Rosner, New York City, of counsel), for appellee.

Before CLARK, WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN, HAYS and MARSHALL, Circuit Judges.

Opinion

WATERMAN, Circuit Judge, with whom CLARK, FRIENDLY, KAUFMAN, HAYS and MARSHALL, Circuit Judges, concur.

The appeal, now before the in banc court, was originally argued before a panel of three judges, Judges SMITH, HAYS and MARSHALL. Inasmuch as appellant had been convicted of a substantive violation of 21 U.S.C.A. § 174, and, upon appeal, the Government had argued that the conviction was not only sustainable as a violation of that section but was also sustainable on an alternative ground under 18 U.S.C. § 2, the judges of the court unanimously voted to consider the appeal in banc in order to clear up any confusion that might exist as to our previous interpretations of these statutes in U.S. v. Santore et al., 290 F.2d 51 (2 Cir. 1960), certs. denied (D'Aria v. U.S., Lo Piccolo v. U.S., Cassella v. U.S., Santore v. U.S., Orlando v. U.S.), 365 U.S. 834, 935, 81 S.Ct. 745, 746, 749, 752, 5 L.Ed.2d 743, 744, 745, and in U.S. v. Hernandez, 290 F.2d 86 (2 Cir. 1961), and see id. at 91, 93 (Moore, J., dissenting).

No further oral argument was had, and the case was submitted to the in banc court on April 3, 1962. Chief Judge LUMBARD, deeming himself disqualified, did not participate in the final decision on the merits.

Defendant appeals from a judgment of conviction entered after the trial judge, sitting without a jury, found him guilty of a substantive violation of 21 U.S.C.A. § 174. At the conclusion of the trial defendant was acquitted on a charge of conspiring with another to violate the same section.

Pursuant to F.R.Crim.P. 23(a), 18 U.S.C., the trial judge found the following to be the evidentiary facts:

'At about 5:00 P.M. on January 10, 1961 Jacob F. Brown (Brown), then an agent for the Bureau of Narcotics, was seated in the Hollywood Bar on West 116th Street, between Lenox and Seventh Avenues, in the Borough of Manhattan, City and State of New York and Southern District of New York.

'He was then and there approached by defendant Eugene Jones (Jones) who greeted Brown and inquired as to the purpose of Brown's being in the bar. When informed by Brown that he sought to purchase heroin, Jones advised Brown that Brown would be unable to get any because the

police had arrested five ***29** persons in the bar the evening before and that no one was selling 'stuff' at that time.

'Jones then offered to introduce Brown to Jones's 'connection, who deals good stuff.'

'Brown and Jones then left the bar and walked to West 115th Street, between Lenox and Seventh Avenues, and entered 111 West 115th Street. They proceeded to the rear right of the hall where Jones knocked on a door and upon response asked for 'Big Charlie.' The door was opened by an unidentified man who stated that Charlie was not there then.

'Brown and Jones retraced their steps to the sidewalk in front of the building when Jones said 'There's Charlie now' pointing to a man nearby. Jones left Brown and engaged the indicated man in conversation, out of Brown's earshot. Jones then returned to Brown and advised Brown that he (Brown) 'would be able to get the stuff, and that the price was $150' for an ounce of heroin.

'Jones and Brown then walked to a candy store, east of the building they had entered and waited in the store. While they sat in the store Jones told Brown that 'Charlie was a dealer for himself; that he had one fellow by the name of Mickey who bagged and cut most of his stuff for him.' Jones also, pointing to a car parked outside, told Brown that it was 'Charlie's car.'

'Soon after, Charlie came to the store window and beckoned to Jones and Brown to come outside, which they did. In Jones's presence Charlie handed Brown a package containing heroin and Brown paid Charlie $150.

'Charlie then told Brown that if the latter wanted any more heroin to come back to 115th Street, 'ask for Big Charlie or for Mickey' and not to deal with anyone else. Charlie then entered the hallway of 111 West 115th Street while Brown remained with Jones.

'Brown asked Jones if Charlie would give Jones anything for the introduction to which Jones replied that he (Jones) would talk to Charlie later but asked Brown what he (Brown) was going to give Jones. They agreed that ten dollars would be fair and Brown then gave Jones that sum.'

The findings are supported by the record, and we accept them. From these facts, the trial judge concluded, 'Although the evidence otherwise fails to establish that the heroin sold as aforesaid (1) was illegally imported and (2) that Jones knew it, I find both such facts solely by virtue of Jones's unexplained constructive possession, of the said heroin.'

It is a federal offense under 21 U.S.C.A. § 174[1] to import narcotic drugs illegally ***30** or to deal in such drugs with knowledge that they have been illegally imported. The statute further provides that 'Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.' Inasmuch as the record in this case shows neither illegal importation nor actual knowledge by Jones as to the origin of the drug, the conviction appealed from stands or falls on whether Jones had or had ever had possession of the drug. Two questions are required to be resolved: First, are the evidentiary facts as found by the district judge sufficient to support the conclusion he reached therefrom that Jones had constructive possession of the narcotics? Second, if such a conclusion is not permissible and the first question is answered in the negative, may we nevertheless affirm the conviction on the theory that Jones aided and abetted Moore, who did possess the drug, in executing the transaction, and that Moore's unexplained possession is thereby attributable to Jones? We answer both questions in the negative and reverse the conviction.

(1) Constructive Possession

'Possession,' as used in 21 U.S.C.A. § 174, even though the statute is a penal one, has not been construed with undue narrowness. The term has been interpreted by the courts to encompass power to control the disposition of drugs as well as mere physical custody. Hernandez v. United States, 300 F.2d 114 (9 Cir. 1962); United States v. Hernandez, 290 F.2d 86 (2 Cir. 1961). Those who exercise dominion and control over narcotics are said to be in 'possession' under § 174, United States v. Malfi, 264 F.2d 147 (3 Cir. 1959), cert. denied, 361 U.S. 817, 80 S.Ct. 57, 4 L.Ed.2d 63 (1959); United States v. Mills, 293 F.2d 609 (3 Cir. 1961), and physical custody by an agent may be attributed to the principal. United States v. Hernandez,290 F.2d 86 (2 Cir. 1961). We have said, moreover, in United States v. Hernandez, supra, that one having a working relationship or a sufficient association with those having physical custody of the drugs so as to enable him to assure their production, without difficulty, to a customer as a matter of course may be held to have constructive possession.[2] But a casual facilitator of a sale, who knows a given principal possesses and trades in narcotics but who

lacks the working relationship with that principal that enables an assurance of delivery, may not be held to have dominion and control over the drug delivered and cannot be said to have possession of it. Ibid.; United States v. Santore, 290 F.2d 51, 76 (2 Cir. 1960); United States v. Moses, 220 F.2d 166 (3 Cir. 1955).

Turning to the case before us, the Government contends that the district judge's conclusion as to constructive possession is a finding of fact carrying presumptive weight in an appellate court. It further contends that we must draw all possible inferences from that conclusion, namely that Jones set the price, fixed the place of delivery, and otherwise controlled the dealings between Brown and Moore. We cannot agree. Constructive possession is a legal conclusion, derived from factual evidence, ***31** that one not having physical possession of a thing in fact nevertheless has possession of that thing in legal contemplation. Properly admitted evidence showing that a given defendant set the price for a batch of narcotics, had the final say as to means of transfer, or was able to assure delivery, may well be sufficient to charge the defendant with a constructive possession of the narcotics, but we may not, however, work backwards and first having taken the conclusion derive therefrom the facts needed to support it.

We believe the evidence in this case negates a conclusion that defendant Jones had dominion and control over the narcotics handed to Brown by Moore. The pains Jones took in the first instance to find Moore indicate that Jones was unable to consummate the transaction as a business dealing of his. The price and place of delivery were not even discussed with the would-be purchaser until defendant spoke with Moore. No one can say that Jones established these essential details of the affair unless he engages in speculation wholly unwarranted by the trial record. After consummation of the transaction Moore told agent Brown to purchase directly from him in the future and not to deal with anyone else. This statement by Moore negates a finding that Jones could assure, as a matter of course, delivery by Brown to a customer Jones might discover.

As far as the record discloses, defendant did nothing except to introduce a willing buyer to a willing seller and to serve as a go-between until such time as the willing seller and willing buyer were satisfied to do business with each other. Nothing in the record indicates that Jones had any independent control over the narcotics, or over Moore, or that he was able to assure to Brown that he could produce narcotics. And, unless we are to read the statutory phrase 'possession of the narcotic drug' to mean merely 'participation in a transaction involving the narcotic drug' we cannot rely on constructive possession here to affirm the conviction below.

(2) Aiding and Abetting

We now reach the question of whether, in order to convict one who, having no physical possession of narcotics, purposefully aids and abets[3] another in the sale of narcotics which he knows the other possesses, it is necessary to prove either the defendant's constructive possession of those narcotics or his knowledge of their illegal importation. That question evenly divided the Court in United States v. Santore, supra. A majority of the active judges now hold such proof is necessary.[4]

18 U.S.C. § 2 is the governing statutory provision.[5] It defines a principal for purposes of the federal criminal code, and its effect is to erase whatever distinctions may have previously existed between different classes of principals and between principals and aiders or abettors. The section does not create new substantive offenses. It merely states who the actors are that are punishable as violators of federal penal statutes. In short, if a certain knowledge or intent is required to be proven in order to convict one of violating a federal criminal statute, the proof to convict one as an aider and abettor will not be different ***32** from that necessary to convict the violator, except that aiding, abetting, commanding, inducing, or procuring the commission of the crime must be proven rather than actual commission. It has been held, therefore, that a defendant charged in an indictment as one who violated a penal statute may be convicted of having done so on proof that he aided and abetted an actual violator. E.g., United States v. Shaffer, 291 F.2d 689, 693 (7 Cir.), certs. denied, 368 U.S. 914, 915, 82 S.Ct. 192, 7 L.Ed.2d 130 (1961); Grant v. United States, 291 F.2d 746, 749 (9 Cir. 1961), cert. denied, 368 U.S. 999, 82 S.Ct. 627, 7 L.Ed.2d 537 (1962). Cf. U.S. v. Rappy, 157 F.2d 964 (2 Cir. 1946), cert. denied, 329 U.S. 806, 67 S.Ct. 501, 91 L.Ed. 688 (1947). In light of this, we cannot hold that if one element of knowledge must be established to convict a principal that knowledge need not be proven to convict an aider and abettor. As Judge Browning of the Ninth Circuit said in a recent decision dealing with this precise issue:

'The aider and abettor is made punishable as a principal, not as an offender in some special category, and the proof must encompass the same elements as would be required to convict any other principal: 'To find one guilty as a principal on the

ground that he was an aider and abettor, it must be proven that he shared in the criminal intent of the principal * * *.' Johnson v. United States, 195 F.2d 673 (8th Cir. 1952). Again, to argue that the proof of the intent necessary to make defendant an aider and abettor may be supplied by attributing possession of narcotic drugs to the defendant on the ground that he is an aider and abettor of a principal who is shown to have actual or constructive possession, is to assume the premise which one purports to prove.' Hernandez v. United States, 300 F.2d 114, 123 (9 Cir. 1962).

A problem analogous to the one before us has arisen under 18 U.S.C. § 659, relating to the theft of goods in interstate commerce. Under that statute it has been held that, absent an explanation satisfactory to the trier of fact, proof of possession of recently stolen goods is sufficient to warrant an inference that the possessor knew the goods were stolen. E.g., Wilson v. United States, 162 U.S. 613, 16 S.Ct. 895, 40 L.Ed. 1090 (1896); United States v. Minieri, 303 F.2d 550 (2 Cir. May 31, 1962). On an aiding and abetting theory, the Government sought to convict, in United States v. Carengella, 198 F.2d 3 (7 Cir.), cert. denied, 344 U.S. 881, 73 S.Ct. 179, 97 L.Ed. 682 (1952), two defendants who had collected the payoff. The court held that proof of guilty knowledge or of possession was necessary to convict under 18 U.S.C. § 2. In a similar case, Pearson v. United States, 192 F.2d 681, 694 (6 Cir. 1951), it was stated, 'Once the possession of recently stolen property is proved, the burden is on the accused to proceed with an explanation to show his innocence. But in a case where he is charged with aiding and abetting, the mere fact of aiding and abetting in the possession of property does not give rise to inferences of guilty knowledge * * *' Our treatment of the relation between 18 U.S.C. § 659 and 18 U.S.C. § 2 has been the same. See United States v. Lefkowitz, 284 F.2d 310 (2 Cir. 1960).

The analysis of the relationship between 18 U.S.C. § 2 and 18 U.S.C. § 659 is applicable to the relationship between 18 U.S.C. § 2 and 21 U.S.C.A. § 174. The Government must establish guilty knowledge on the part of the defendant to convict him of aiding and abetting the illegal sale of narcotics. It may prove this knowledge directly or it may prove it through the presumption of possession, actual or constructive, as we have defined that term in our discussion of possession earlier in this opinion. The Government cannot, however, rely on the mere fact of the defendant's knowledge that another ***33** possesses narcotics for sale, short of possession by the defendant himself, to establish the requisite scienter on the part of the defendant. An unexplained possession of narcotics is a criminal act. However, one may legally possess narcotics. Therefore proof of possession is only presumptive evidence of the commission of a crime, which the defendant may rebut by a credible explanation of his possession. Seemingly the theory behind the statute that shifts the burden of proceeding in this unusual way is that one who possesses goods, the possession of which could well be criminal, is best able to explain the source of and the reasons for his possession. This theory, however, does not permit us to charge an aider or abettor with the principal's prima facie criminal possession, for that would force the abettor into a situation that would require him to explain away not his own possession of goods but someone else's possession of them. And, in fact, inasmuch as the absent principal who possessed the narcotics might have an explanation proving that they were either legally imported of were of native origin, one charged as an aider and abettor to that principal might be convicted by his inability to rebut the presumption even though in fact the principal had not violated a penal statute at all. Hernandez v. United States, 300 F.2d 114 (9 Cir. 1962). We must keep in mind that we are dealing here with the interpretation to be placed on 18 U.S.C. § 2 and are not explaining 21 U.S.C.A. § 174. While it may be tempting to rewrite § 174, the Government's contentions as to § 2, if accepted, would affect criminal statutes not pertaining to traffic in narcotics. They would, moreover, introduce new distinctions between principals and aiders and abettors, precisely the result § 2 was designed to avoid.

The Government's final contention is that all that is required to convict one of having violated 21 U.S.C.A. § 174 is proof that he participated in a transaction with knowledge that the commodity involved therein was a narcotic. The violence this contention does to the language of the statute that explicitly requires that the violator have knowledge of the illegal importation of the narcotic, not merely a knowledge that the commodity is a narcotic, is sufficient to force a rejection of the contention.

The Government is dissatisfied with the statute as drafted, particularly with respect to the need, in order to convict a defendant, to show that he either had knowledge of illegal importation of the narcotic dealt with or that he had 'possession' of the drug. We are keenly aware of the acute national problem created by the illicit traffic in narcotics, and share with the general public a detestation of that business. Nevertheless, our personal revulsion at the activities sought to be federally proscribed here does not override our sworn duty as judges to uphold and enforce the laws of Congress

as Congress enacted them. Violation of the present federal statute is explicitly premised, apparently for constitutional purposes, on the requirement that the drugs dealt with by the defendant must have been illegally imported into the United States. The Government's dissatisfaction with that statute is misdirected when brought to the attention of the courts rather than to the attention of Congress.

We are indebted to the Legal Aid Society and to its appellate counsel for a most able presentation in appellant's behalf.

The conviction of the defendant below is reversed and his acquittal ordered.

MOORE, Circuit Judge (dissenting).

There was no legal question, important or otherwise, justifying a hearing en banc in this case. This conclusion is apparent from the result reached by the majority which is solely an interpretation of the facts which differs from that of the trial court; This is scarcely an appellate function.

The majority would recast the factual mold to have the record establish that ***34** a man named Brown met a friend named Jones and merely in response to the statement that he (Brown) wished to purchase heroin said that there was a seller named Big Charlie and that he (Jones) would introduce him. As they interpret the facts 'defendant did nothing except to introduce a willing buyer to a willing seller and to serve as a go-between, until such time as the willing seller was satisfied to do business with the willing buyer.' Were this all there were to the case, the trial judge would undoubtedly have acquitted. But in fairness to the judge and to resort to the oftused legal cliche of 'having seen and heard the witnesses,' the trial judge's findings were quite different and, in my opinion, not open to re-interpretation or speculation by us. Examining the facts as found, I observe (not find) that Jones was fir more interested in the transaction than telling brown, 'Go to Big Charlie, 111 West 115th Street.' To the contrary, he held Big Charlie out as his 'connection'; he represented that he (Big Charlie) dealt in 'good stuff'; when they went to the address it was Jones not Brown who went to Big Charlie's apartment; not finding him there but meeting him on the street, it was Jones not Brown who approached Big Charlie and engaged him in conversation; and it was Jones who, after his talk with Big Charlie, stated the price ($150) and secured Big Charlie's willingness to deliver. Jones stayed with Brown until delivery was completed; Thus, Jones's acts bring him directly within the definition given by Judge Clark (Judge Waterman concurring) in United States v. Hernandez, 2 Cir., 1961, 290 F.2d 86, 90, of a person in constructive possession, i.e.:

'Moreover, a person who is sufficiently associated with the persons having physical custody so that he is able, without difficulty, to cause the drug to be produced for a customer can also be found by a jury to have dominion and control over the drug, and therefore possession.'

The fact that with all three present Big Charlie handed the package directly to Brown and Brown paid Big Charlie $150 would be normal real-life procedure. Certainly I would not infer that Jones would have said, 'Being an innocent bystander and to avoid the appearance of being in constructive possession, Big Charlie, please deliver the package directly to Brown.' Nor is it unusual for the actual seller and possessor to attempt to by-pass the intermediary by saying, 'In the future deal with me directly.' This remark in substance has been made in many of the cases in which we have found constructive possession.

Therefore, while I can actually (not constructively) praise the excellent exposition of the law written by Judge WATERMAN, I cannot distinguish this case from the many in which we have held that there was constructive possession. All the facts logically impel an inference contrary to that reached by the majority. Jones participated actively from the moment Brown indicated his desire to the time he had arranged that Brown's desire was fulfilled; I have more than serious doubts that by this decision we 'uphold and enforce laws as Congress enacted them,' Despite the belief of the majority that they are so doing.

SMITH, Circuit Judge (dissenting).

I dissent. I would affirm the conviction here. Jones was a facilitator, with knowledge of Big Charlie's possession, actively promoting the sale by Big Charlie to Brown for Jones's gain. Jones was so far in partnership in the enterprise that Big Charlie's possession is Jones's possession for the application of the presumption of knowledge of illegal importation. See United States v. Santore, 2 Cir. 1960, 290 F.2d 51 concurring opinion at pp. 82, 83.

All Citations

308 F.2d 26

Footnotes

1 That section provides:

‘Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $80,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

‘Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant ant explains the possession to the satisfaction of the jury.’

2 Cellino v. United States, 276 F.2d 941 (9 Cir. 1960), which has been described as drawing ‘the most tenuous inference of possession which any appellate court has sanctioned’, United States v. Mills, supra, 293 F.2d at p. 611, may be rationalized in this manner. There is no evidence here, however, as there was in Cellino, that the defendant vouched for the narcotics peddler's reliability in delivering the drugs. And, in any event, since we believe our own decision in United States v. Santore, 290 F.2d 51 (2 Cir. 1960) governs the disposition of the issue of constructive possession here, we decline to follow Cellino to the extent that it is inconsistent with our present decision.

3 There can be little question but that Jones purposefully aided and abetted a violation of 21 U.S.C.A. § 174 if Moore's possession is attributable to Jones.

4 Since Jones was acquitted on the conspiracy count, we need not decide the unresolved question of whether possession by one conspirator is attributable to all. See United States v. Santore, supra; United States v. Hernandez, supra, 290 F.2d at p. 90; United States v. Monica, 295 F.2d 400, 402 (2 Cir. 1961). But see Hernandez v. United States, supra.

5 That section provides in part:

‘Principals

‘(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.’

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496 F.2d 1395
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Robert PHILLIPS and William Arnold Tolbert, Jr., Defendants-Appellants.

No. 73-1230.
|
July 15, 1974.

Synopsis

Automobile driver and passenger were convicted before the United States District Court for the Southern District of Texas, Ben C. Connally, Chief Judge, of possession of marijuana with intent to distribute and they appealed. The Court of Appeals, Godbold, Circuit Judge, held that search of defendants' automobile for aliens and seizure of marijuana from trunk thereof were not improper, and that evidence sustained determination that passenger had knowing possession of the marijuana found in trunk of the automobile which had been rented by driver.

Affirmed.

Attorneys and Law Firms

***1396** Philip A. Gillis, Detroit, Mich., for defendants-appellants.

Anthony J. P. Farris, U.S. Atty., Robert Darden, Asst. U.S. Atty., Houston, Tex., for plaintiff-appellee.

Before WISDOM, GODBOLD and INGRAHAM, Circuit Judges.

Opinion

GODBOLD, Circuit Judge:

The appellants were convicted in a nonjury trial for possession of 230 pounds of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). The contraband was discovered on May 5, 1972, in the locked trunk of an automobile rented and driven by Phillips and in which Tolbert was a passenger, and as a result of an immigration search conducted by border patrol officers at a highway checkpoint.

We know these facts about the search in question. The checkpoint was located approximately 11 miles north of Laredo, Texas, (approximately 9 miles north of the city limits), on highway 35, the main highway from Laredo north to San Antonio. As the crow flies the point was three and a half to four miles from the Rio Grande River, the international boundary. It may fairly be inferred from overall consideration of this and other cases,[1] that the government employs a checkpoint with at least some degree of regularity a few miles north of Laredo on the main highway to San Antonio.

The location at which Phillips and Tolbert were stopped was divided into primary and secondary search areas. At around 8:00 a.m. the officers on duty were conducting what they termed a 'blitz,' checking for illegal aliens by stopping every vehicle that came through and opening the trunk of some or all.[2] They referred to this time of ***1397** day as the 'changeover period' (the appellation was unexplained), and there was testimony that this was a time when many vehicles were coming through and 'we have had occasion to have other people try to bring aliens through the checkpoint at the changeover time.' Officers were working in shifts, and the 8:00 a.m. to 4:00 p.m. shift was on duty, comprising at least three officers. Stop signs were up to stop vehicles.

A search of automobiles for aliens under the circumstances of this case is valid. See United States v. DeLeon, 462 F.2d 170 (CA5, 1972), cert. denied, 414 U.S. 853, 94 S.Ct. 76, 38 L.Ed.2d 102 (1973); United States v. McDaniel, 463 F.2d 129 (CA5, 1972), cert. denied, 413 U.S. 919, 93 S.Ct. 3046, 37 L.Ed.2d 1041 (1973).[3] Once the search in the present case was begun, it was legitimate for the officers to look wherever there was room for an alien to hide, and to seize evidence of other crimes if it was in plain view. See United States v. McDaniel, supra. Thus the District Court did not err in denying appellants' motion to suppress the marijuana found in the trunk of the rented car.

We turn to the sufficiency of the evidence to establish that Tolbert knowingly possessed the marijuana.[4] Both the possession and the knowledge of possession can be proved by circumstantial evidence, e.g., Montoya v. United States, 402 F.2d 847 (CA5, 1968), and possession may be actual or constructive but in any event there must be dominion and control over the item or a power to exercise dominion and control. There are numerous caveats that go along with cases of circumstantial evidence of knowing possession. No

term is more ambiguous in common speech and in legal terminology than the word 'possession,' especially when it occurs in criminal statutory provisions, and 'it is so fraught with danger that the courts must scrutinize its use with all diligence.' Guevera v. United States, 242 F.2d 745 at 747 (CA5, 1957). 'It is easy to get the eye off the target in a case like this, to focus so precisely on the inviting bullseye of the defendant's failure to give a credible explanation of why he was on the scene and what he was doing, that the requirement of possession never gets under the gunsight, and as a consequence the defendant is subjected to the critical inferences (here, the critical consequences of possession) not because he is a non-explaining possessor but because he is an incredible non-possessor who is where the failure to give a credible explanation of why he was on the scene and what he The line between knowing possession and guilt by association can be very thin. Proof of mere proximity to contraband is not sufficient to establish actual constructive possession or the element of knowledge. United States v. Canada, 459 F.2d 687 (CA5, 1972).

Mindful of these commands that we proceed with caution,[5] we conclude that there was sufficient evidence to support a finding of knowing possession by Tolbert. There was evidence which the court was entitled to credit, to the following effect. Phillips and Tolbert had flown together from Detroit to Texas, and they had come together to Texas on this and prior occasions and had traveled about the state together. Phillips had rented the car at Harlingen, Texas, at which time the agent delivered to him an ignition key and a trunk key. There is no evidence that Tolbert ever ***1398** had a trunk key in his possession, but he was at the rental agency within Phillips when the car was rented. The two men stayed the night together in a motel. There were four or more large suitcases in the trunk, only one small suitcase inside the car. When the car was serviced by the rental agency before delivery only the spare tire was in the trunk. When told by the officers that they were checking for aliens, Tolbert inquired whether they were searching for drugs. The quantity of contraband was large, the packages numerous and sizeable, and some of them were loose in the trunk. At least one package, about 15' X 10' X 4', was removed by an agent, and at least one of the agents observed through the plastic covering leaves, stems and seeds. An agent felt one of the packages and could feel vegetable matter within. As soon as access was obtained to the trunk, there was in the rear seat area a heavy small of mothballs, whose odor is often used to mask the scent of marijuana, and there were moth flakes on the exterior of at least some of the packages.

Both appellants denied the existence of a trunk key. Before entering the trunk the agents attempted to secure a key from the rental firm owning the car, which entailed a delay of about 10 minutes. During this interim they talked separately to Tolbert and Phillips who gave conflicting explanations for their presence in the area. Tolbert stated he was in Texas because of family trouble, while Phillips said the two of them were there for business reasons.[6]

Under all of these circumstances the court could conclude that both Phillips and Tolbert had knowing possession of the marijuana.

The cases relied upon by Tolbert do not require a different result. In Montoya v. United States, 402 F.2d 847 (CA5, 1968), appellant Montoya was a passenger in the front seat of a pickup truck owned by a third person but driven by his brother-in-law. It had on the back an enclosed homemade camper with a door but without windows. Within was 539 pounds of marijuana in 25 large cloth sacks, inside of which were small plastic bags each containing a paper package of marijuana. On appeal we concluded that the jury must have totally rejected Montoya's incredible story of the events leading up to the arrest. This being so, there was no evidence of a joint undertaking other than Montoya's presence in the vehicle as a passenger. Nor was there any evidence, other than Montoya's presence, that he had any reason to enter the enclosed portion of the truck or any nexus to it or any reason to be aware of the presence of the sacks, or, if he was aware of them, any knowledge of their contents. In a later case of marijuana in a car trunk we sustained the conviction of the passenger and distinguished Montoya because of evidence, from a statement made by the passenger, that he was aware of the presence of the contraband. United States v. Canada, supra. United States v. Lowry, 456 F.2d 341 (CA5, 1972), also relied upon by appellants, is another case in which there was no basis for belief that the defendant either saw or knew of the existence of contraband in the vehicle. In Cuthbert v. United States, 278 F.2d 220 (CA5, 1960) the defendants were on a lengthy trip together, and five pounds of marijuana was purchased by one defendant (an addict) at a time the other defendants were not present and subsequently was found in his baggage. We reversed as to another defendant because there was insufficient evidence that he ever saw or took possession of any of the contraband.

In Guevera v. United States, supra, a package containing 50 marijuana cigarettes was found on the floor underneath

***1399** the front seat of Guevera's car, occupied by him as driver and another man as passenger, at a point about midway between Guevera's seat and the passenger's seat and in a position accessible to either occupant by simply lowering his hand. Police arrested Guevera but accepted the explanation of both men that the passenger was only being transported home, and released the passenger who went away not to be seen again. Conviction of Guevera was reversed on the ground of insufficient evidence of possession, there being 'no rational connection between ownership and possession of the car and possession of the cigarettes.' The court pointed out that the car had been unlocked and the cigarettes could have been placed therein by any person. The quantity was so small that one could infer the occupants had no knowledge of its presence. There was no pattern of extensive joint prior conduct. It was as reasonable to believe that the contraband belonged to the unknown passenger as to Guevera.[7] In the present case, the car was locked, the suitcases were in the trunk, the quantity of contraband very large, a key had been delivered to Phillips but both defendants denied its existence, and there was an extensive pattern of conduct indicating a joint undertaking but with the two participants giving conflicting descriptions of it. In Ledet v. United States, 297 F.2d 737 (CA5, 1962), the facts were similar to those of Guevera, plus evidence of other joint prior conduct including a lengthy trip together by the defendants, and we held the evidence sufficient, though barely so. The facts of the present case are stronger than Ledet. In United States v. Duke, 423 F.2d 387 (CA5, 1970), three men took a lengthy joint trip from the State of Washington to the Mexican border, followed by discovery near the border of a small quantity of heroin in the car, in a Winston cigarette package. We held the evidence not sufficient to support possession by two of the occupants. The third man, Sanchez, was killed in an accident after arrest and before indictments were returned. He was the only one of the three who spoke Spanish, the only one who smoked Winston cigarettes, the one who went to a bank near the border and borrowed money, the one most likely to be familiar with the area, and, additionally he was more often separate from the other two, who usually were together. We held the evidence did not exclude the reasonable possibility that Sanchez alone possessed the heroin and that its presence was unknown to the others. There are no facts in this case tending to establish exclusive possession and knowledge by Phillips except that the car was rented by him and he was the driver.

The agents' efforts to secure a key from the rental company were fruitless. They then entered the trunk by lifting the seat portion of the rear seat and, with a wrench, unscrewing and removing the back of the rear seat, which made available a structural opening into the trunk area. Through the opening an agent could see packages and two or more suitcases which blocked further view of the interior of the trunk. He lifted out at least one package, tore a corner of a package and saw marijuana within. The entry into the trunk as part of an otherwise valid border search was not impermissible. United States v. DeLeon, 462 F.2d 170 (CA5, 1972); United States v. Salinas, 439 F.2d 376 (CA5, 1971); Morales v. United States, 378 F.2d 187 (CA5, 1967).

Other points raised by appellants require no discussion.

Affirmed.

All Citations

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Footnotes

1 E.g., United States v. Maggard, 451 F.2d 502 (CA5, 1971), cert. denied, 405 U.S. 1045, 92 S.Ct. 1330, 31 L.Ed.2d 587 (1972); United States v. DeLeon, 462 F.2d 170 (CA5, 1972), cert. denied, 414 U.S. 853, 94 S.Ct. 76, 38 L.Ed.2d 102 (1973); United States v. McDaniel, 463 F.2d 129 (CA5, 1972), cert. denied, 413 U.S. 919, 93 S.Ct. 3046, 37 L.Ed.2d 1041 (1973); United States v. Wright, 476 F.2d 1027 (CA5, 1973), cert. denied, 414 U.S. 821, 94 S.Ct. 116, 38 L.Ed.2d 53 (1973).

2 At some places in their testimony officers implied they were searching the trunks of all cars. But at other places reference was made to 'waiving cars through' while the transactions involving defendants were taking place.

3 The search in this case was pre-Almeida-Sanchez, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973). The standards of that case are not retroactive. United States v. Miller, 492 F.2d 37 (CA5, 1974).

4 No contention is made that the evidence of possession was insufficient as to Phillips.

5 See also the comments of Judge Tamm in United States v. Holland, 144 U.S.App.D.C. 225, 445 F.2d 701 (1971), pointing out the unsatisfactory and confused condition of the state of the law on proof of constructive possession, e.g., 'the law of constructive possession is what we will say it is in our next opinion.' Id. at 704.

6 Absent other and sufficient indicia of possession, a less-than-credible explanation by one in the proximity of contraband is not alone a ground for conviction. Fitzpatrick v. United States, 410 F.2d 513 at 516 n. 2 (CA5, 1969). But this is not to say that a less-than-credible explanation is not part of the overall circumstantial evidence from which possession and knowledge may be inferred.

7 See e.g. United States v. Leazar, 460 F.2d 982 at 985, footnote 6 (CA9, 1972), distinguishing Guevera.

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